

CONTRACT PERFORMANCE

Contract Interpretation

Last year, two new cases further defined the issue of who should bear the risk when the government drafts its contracts carelessly. When defective drafting results in ambiguities in a contract, both parties may claim that the other side should bear the responsibility for these ambiguities. The ultimate question is whether the ambiguity was patent or latent, because a patent ambiguity creates a duty to inquire.

COFC Reinforces Bad Habits

In *J&H Reinforcing & Structural Erectors, Inc. v. United States (J&H Reinforcing)*,¹ the ambiguity involved whether a Historically Underutilized Business Zone (HUBZone) preference would apply to a contract to rehabilitate a dam in the Wayne National Forest. As this was a commercial item acquisition, section I of the solicitation contained the clause found at Federal Acquisition Regulation (FAR) section 52.212-5.² This clause incorporates several other clauses into the contract by reference.³ The FAR also cross-references two clauses that apply to all commercial item acquisitions.⁴

Another paragraph, however, cross-references twenty-eight clauses that may or may not apply, depending upon the nature of the particular commercial item acquisition. There should be a blank line before each of these twenty-eight clauses, where the contracting officer checks whether the nature of that particular acquisition requires incorporation of that clause. There should also be a note at the beginning of this listing of potentially incorporated clauses, indicating that the “Contracting Officer shall check as appropriate” those clauses that are applicable.⁵ Unfortunately, the solicitation in *J&H Reinforcing* did not contain either this note or the blank lines before each of the listed twenty-eight clauses.⁶

One of the twenty-eight clauses listed in FAR section 52.212-5(b) is FAR section 52.219-3, which sets aside procure-

ments for HUBZone Small Business Concerns. At a pre-bid meeting, in which J&H Reinforcing did not take part, a potential bidder asked whether the rehabilitation project was being set aside for HUBZone businesses. The contracting officer said that it was not being set aside. The contracting officer later amended the solicitation to reflect corrections in the drawings and specifications. In this amendment, the government also included a list of questions and answers raised during the pre-bid meeting. Unfortunately, this listing did not address whether the government was setting aside the acquisition for HUBZone businesses.⁷

Four businesses bid on the dam project. The low bidder was disqualified, and the second-lowest bidder was T-C, Inc., a non-HUBZone business. J&H Reinforcing was the third-lowest bidder. When the government awarded to T-C, Inc., J&H Reinforcing sued in the Court of Federal Claims (COFC), alleging that the government violated statutory and regulatory provisions regarding the HUBZone program by awarding to a non-HUBZone business.⁸ The court held in favor of the government, finding an ambiguity in the solicitation but also finding that the ambiguity was patent, which gave J&H Reinforcing a duty to inquire further. The court noted that one of the other clauses listed in FAR section 52.212-5(b) is FAR section 52.219-4, which gives HUBZone businesses an evaluation preference by adding ten percent to the price bid by any non-HUBZone businesses. The court found that FAR sections 52.219-3 and 52.219-4 were mutually inconsistent, resulting in a patent ambiguity.⁹

Had this been the end of the story, it may not have been too difficult to accept the court’s holding that the patent ambiguity created a duty for J&H Reinforcing to inquire further. In this case, however, J&H Reinforcing also alleged that it called the contracting officer to clarify whether the solicitation was, in fact, set aside. J&H also alleged that the contracting officer was unavailable to answer its questions, but that her representative assisted J&H Reinforcing to “bid as a HUBZone contractor.”¹⁰ In response to this argument, the court noted that FAR section 52.214-6 requires prospective bidders who need explanations to submit their inquiries in writing. It then noted that this pro-

1. 50 Fed. Cl. 570 (2001).

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.212-5 (July 2002) [hereinafter FAR]

3. *Id.*

4. *Id.* at 52.212-5(a).

5. *Id.* at 52.212-5(b).

6. *J&H Reinforcing*, 50 Fed. Cl. at 572-73.

7. *Id.* at 573.

8. *Id.* at 573-74.

9. *Id.* at 575 (reasoning that setting aside the award to only HUBZone businesses would mean that there would never be a non-HUBZone business that would get ten percent added to their price for evaluation purposes).

vision was designed to prevent the exact scenario in which J&H Reinforcing found itself—“reading the tea leaves of recalled utterances to ascertain if the contracting officer or her representatives made a statement that would bind the government.”¹¹ Because the alleged conversation between J&H Reinforcing and the contracting officer’s representative was verbal, the court ruled against J&H Reinforcing and granted the government’s motion for summary judgment.¹²

This case is also somewhat troubling because it appears that the court could have decided it on other grounds. The court hinted at various times that the contracting officer’s representative had no authority regarding this procurement.¹³ At other times, the court implied that this case really involved a failure of proof by the plaintiff.¹⁴ Yet, instead of basing its holding on either of these grounds, the court chose to reach its outcome on the basis that J&H Reinforcing failed to inquire in writing. This was a commercial item acquisition—a procurement in which one should expect less savvy contractors. The actions of government personnel contributed more to J&H Reinforcing’s situation than its telephone inquiry. Hopefully, holdings similar to *J&H Reinforcing* will not reinforce inattentive behavior by government personnel or discourage smaller contractors from participating in government procurement.

Government Stays with an “Edsall” of an Argument

Last year’s *Year in Review* reported on *Edsall Construction Co.*,¹⁵ a case in which the Armed Services Board of Contract Appeals (ASBCA) had held against the Army in its attempt to use a disclaimer to shift the responsibility for defective design specifications to a contractor.¹⁶ *Edsall* involved a Montana National Guard contract for the construction of two aircraft hangars, including steel canopy hangar doors weighing 21,000

pounds each.¹⁷ The solicitation contained detailed drawings depicting the design of the doors, which the board determined to be design specifications.¹⁸ Included in these drawings were three cables with “pick points” on the door, indicating where the cables would attach to support the doors. After the award, a subcontractor determined that the load on the doors would be too heavy for just three cables, so it proposed to use four instead. When Edsall notified the government of this proposed change, the government agreed, believing that the design change would be cost-free for the government. When Edsall later submitted a claim for the additional \$70,288.26 in costs, the government denied the claim because a door drawing contained a note that stated:

[c]anopy door details, arrangements, loads, attachments, supports, brackets, hardware, etc. must be verified by the contractor prior to bidding. Any conditions that require changes from the plans must be communicated to the architect for his approval prior to bidding and all costs of those changes must be included in the bid price.¹⁹

The board found that this single note buried in fine print on one of the detailed drawings may have been sufficient to require contractors to verify the weight of the door, but it did not adequately put the contractor on notice that the risk of any design deficiencies was being shifted to it.²⁰ The government appealed this ruling to the Court of Appeals for the Federal Circuit (CAFC).²¹ The CAFC was no more sympathetic to the government, specifically pointing out that when the government provides the contractor with design specifications and forces the contractor to build according to those specifications, it is warranting that those specifications are free of any defects.²² The court then examined the government’s disclaimer and deter-

10. *Id.* The court did not discuss what authority, if any, this individual had. *Id.* at 576-77.

11. *Id.* at 577.

12. *Id.*

13. *Id.* at 576. At times, the court refers to her as a clerk. *Id.*

14. *Id.* at 577.

15. ASBCA No. 51787, 01-2 BCA ¶ 31,425.

16. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 138.

17. ASBCA No. 51787, 01-2 BCA ¶ 31,425, at 155,176.

18. *Id.* at 155,177.

19. *Id.* at 155,177-79.

20. *Id.* at 155,181.

21. *White v. Edsall Constr. Co.*, 296 F.3d 1081 (2002).

22. *Id.* at 1084 (citing *United States v. Spearin*, 248 U.S. 132 (1918)).

mined that although “the disclaimer at issue requires the contractor to verify supports, attachments, and loads, it does not clearly alert the contractor that the design may contain substantive flaws requiring correction and approval before bidding.”²³

The government next argued that if the disclaimer was not clear, it still resulted in an ambiguity that was patent, giving Edsall a duty to inquire. The court responded without much elaboration, concluding that this case did not involve a patent ambiguity because “the design flaw was hidden.”²⁴ The court specifically held open the possibility that the government could

shift the risk of defects in design specifications to a contractor; it also stated, however, that the disclaimer must be obvious and unequivocal to shift that risk.²⁵ In both of the cases discussed here, the government’s attempts to shift the risk for its inartfully drafted solicitations appear somewhat harsh. In assigning responsibility for the risks created by contract ambiguities, it may be appropriate to modify the rule of law to consider the parties’ respective equities. Major Sharp.

23. *White*, 296 F.3d at 1084.

24. *Id.* at 1087.

25. *Id.* at 1085-87 (holding that the disclaimer must be “express and specific” rather than “general” in nature to shift liability).

Contract Changes

During the last year, the courts and boards only issued a few decisions that had any major impact on the field of contract changes; only two merit discussion. Both cases involve issues with little precedent, and which are interesting to practitioners because, if for no other reason, they may help to fill the gaps in these areas.

Impracticable Standards

Last year's *Year in Review*¹ commented on *Raytheon Co.*,² a case in which the Army's rush to get a contract into place before funds expired ultimately cost the Army millions of dollars. In *Raytheon*, the Armed Services Board of Contract Appeals (ASBCA) held that the Army knew that its technical data package (TDP) for the Chaparral missile guidance section was defective, yet failed to disclose this superior knowledge to a second-source developer. This non-disclosure of superior knowledge was a constructive change to the contract, entitling the contractor to an additional \$7.4 million in compensation.³ Raytheon also argued that its contract was commercially impracticable.⁴ When the board rejected the commercial impracticability claim,⁵ Raytheon appealed to the CAFC.⁶

The CAFC began its analysis by noting that a contract is impracticable if, due to unforeseen events, "it can be performed only at an excessive and unreasonable cost."⁷ Raytheon argued that the board erred in determining whether this standard was met by comparing the estimated cost of completion to the contract price at the time of termination. Raytheon contended that the board should have instead compared the estimated cost of completion with the original contract price.⁸

Rejecting this contention, the court specifically pointed out that Raytheon had offered no legal authority to support its con-

tion that the original contract price was the correct yardstick for determining Raytheon's damages. The court went on to hold that the board's use of the contract price at the time of termination was reasonable since the "adjusted contract price would accurately reflect the cost of performing the entire contract as adjusted, rather than as awarded."⁹ The court never explained this circular reasoning. Apparently, the government gets the benefit of any adjustments to the contract price determined under the changes clause before calculating whether the contract is commercially impracticable.

California Abandons Cardinal Changes

This past year, the California Supreme Court decided *Amelco Elec. v. City of Thousand Oaks*,¹⁰ a case involving a California state government contract that may, by analogy, impact the "cardinal change" doctrine in federal government contracts. In *Amelco*, the City of Thousand Oaks, California solicited for electrical work as part of a construction effort involving several major civic projects, including a civic center and office building, a 400-seat theater, an 1800-seat performing arts theater, and an outdoor arena. Amelco's bid of \$6,158,378 was the lowest, and the city awarded the contract to Amelco. The city subsequently issued over a thousand drawings to the various contractors working on these projects, to either clarify or change the original contract drawings. To compensate Amelco for its changed work, the city paid it \$1,009,728 over the initial contract price.¹¹

Amelco was not satisfied with this amount because it was only compensation for the additional work not contained in the initial contract. Amelco claimed that it was also entitled to an additional \$1.7 million for "the noncaptured costs of the change orders."¹² Amelco alleged that the vast number of changes made it difficult to keep track of its responsibilities and that the changes required Amelco to delay or accelerate certain tasks, or

1. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 92-93.

2. ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245.

3. *Id.* The contracting officer had already issued a final decision granting Raytheon slightly more than \$12 million. *Id.*

4. *Id.* at 154,201-02.

5. *Id.* at 154,201. The board summarily rejected the commercial impracticability argument, noting that a fifty-seven percent cost overrun did not "by itself constitute commercial impracticability." *Id.*

6. *Raytheon Co. v. White*, 305 F.3d 1354 (Fed. Cir. 2002).

7. *Id.* at 1367 (citing *Int'l Elecs. Corp. v. United States*, 227 Ct. Cl. 208 (1981)).

8. *Id.* The original contract price was \$51,758,509, the contract price at termination was \$60,374,361, and the estimated cost of completion at the time of termination was \$82,983,697. *Id.* at 1365.

9. *Id.* at 1367.

10. 38 P.3d 1120 (Cal. 2002), *reh'g denied*, 2002 Cal. LEXIS 1689 (Mar. 13, 2002).

11. *Id.* at 1122.

to shift workers between tasks to accommodate other contractors. Essentially, Amelco claimed it had to perform much more extensive managerial oversight in the contract as changed than it anticipated when it bid on the initial contract. When the city denied Amelco's claim, Amelco filed suit alleging alternatively that the city had abandoned and breached the contract.¹³

Under California's abandonment doctrine, when a construction project "become[s] materially different from the project contracted for, the entire contract . . . is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all of its work."¹⁴ The trial court ruled that Amelco had satisfactorily demonstrated that the city's project had become sufficiently different so as to be deemed abandoned. The appellate court affirmed. The California Supreme Court, however, overturned the lower courts' rulings dealing with abandonment in a five-to-one ruling, determining that the doctrine did not apply to public contracts "since such a theory is fundamentally inconsistent with the purpose of the competitive bidding statutes."¹⁵ Crucial to the court's holding was a state law that required agencies to award all contracts in excess of \$5000 to the lowest responsible bid on the basis of competitive bidding. The court

concluded that deeming a public contract to be abandoned would violate this statute because it would result in the creation of an implied contract for *quantum meruit* payment that did not result from a competitive bidding process.¹⁶

It is not clear what effect, if any, the *Amelco* ruling will have on the cardinal change doctrine in federal government contracts. Before the California Supreme Court, Amelco actually argued that the "abandonment doctrine is coextensive with the cardinal change doctrine."¹⁷ It also asked the court to consider the fact that the federal courts had never held that the cardinal change doctrine violated federal statutes and regulations governing the making of awards on a competitive basis. The court distinguished the abandonment doctrine, which would result in setting aside the entire original contract, and which would entitle the contractor to a *quantum meruit* recovery for the entire effort performed. The cardinal change doctrine, however, sets aside only that portion of the contract that one of the parties materially changes, and replaces it with an implied contract.¹⁸ Regardless of the merits of this distinction, the federal government may soon raise this sort of argument when defending against cardinal changes.¹⁹ Major Sharp.

12. *Id.* at 1123.

13. *Id.*

14. *Id.* at 1127.

15. *Id.* The court also remanded to the trial court on the issue of damages for breach of contract. *Id.* at 1133.

16. *Id.* at 1127 (citing CAL. PUB. CONTRACT CODE § 20162 (West 2001)).

17. *Id.* at 1126.

18. *Id.*

19. One factor that may affect the viability of such an argument in a federal contract dispute is the availability of an alternate remedy. In federal government contracts, courts and boards are reluctant to find the existence of a breach. In *Amelco*, the California state courts appeared to be less averse to finding a breach. *See id.*

Inspection, Acceptance, and Warranties

There She Blows: Government Over-Testing of Pipeline Irrelevant in the Face of Bilateral Modification

As a general rule, courts and boards usually presume that contractually-specified inspections or tests are reasonable unless they conflict with other contract requirements.¹

In *Blake Construction Co.*,² the Armed Services Board of Contract Appeals (ASBCA) recently held that when the government writes contract specifications requiring stringent testing, it has a right to enforce these provisions, even when the testing standards significantly exceed the intended use of the product. The Navy awarded Blake Construction (Blake) a \$14 million contract to construct a Landing Craft Air Cushion Complex at Camp Pendleton, California. The contract required Blake to construct an underground, double-wall fuel pipeline.³ The contract also required Blake to certify that the system conformed to testing requirements before testing, and required Blake to repair any leaks or other deficiencies that resulted from faulty workmanship or materials.⁴

After the contract award, Blake subcontracted with T.F. Austin Plumbing Co. (Austin) to install the pipeline.⁵ Before it buried the pipeline, Blake was aware that the contracting officer contemplated some additional changes and testing. Nevertheless, Blake buried the pipeline.⁶ Shortly thereafter, Blake held discussions with the government, and the parties agreed to a bilateral modification that increased the contract performance price by \$716,792 and required Blake to conduct hydrostatic testing of the pipeline at 225 pounds per square inch (psi). The modification indicated that it was a “complete and equitable adjustment” and an “accord and satisfaction,” releasing the government from further liability for any and all costs arising out of or incidental to the work.⁷

Needless to say, the pipeline failed to meet the new standards. At the hearing, one witness observed that water was shooting out of the ground sending “a heck of a shock both ways.”⁸ After Blake made additional repairs, the government permitted Blake to test the carrier piping at only 100 psi. The carrier piping passed the new, less stringent test; however, Blake discovered that the hydrostatic tests significantly damaged the containment pipe. Since locating the leaks was difficult, Blake had to dig up approximately eighty percent of the underground pipe system, much of which had been paved over.⁹ After spending a considerable amount of time and money, Blake was able to repair the pipeline. Several months later, Blake submitted a claim to the government seeking an equitable adjustment of \$250,656. The contracting officer denied the claim, and Blake appealed the claim to the ASBCA.¹⁰

At the hearing, Blake’s expert witness testified that the new hydrostatic test requirements were unreasonable for the pipeline’s intended use. The witness also testified that construction activity by other contractors in the area resulted in underground vibrations, and these vibrations may have damaged the pipe and joints sufficiently to cause the leaks. In response, the government’s expert witness testified that the test failures likely resulted from poor workmanship by Blake’s subcontractor, Austin, and that the vast majority of construction activity in the vicinity of the pipeline involved Blake’s personnel.¹¹

The board held Blake to the terms of the bilateral modification. Specifically, the board observed that the modification required Blake to provide a pipeline that could withstand pressures up to 225 psi, regardless of the pipeline’s intended use. Because Blake agreed to this requirement, and because the requirement was unambiguous, Blake was foreclosed from recovery under the doctrine of accord and satisfaction.¹²

1. See Gen. Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.

2. ASBCA Nos. 52305, 52475, 02-1 BCA ¶ 31,765.

3. *Id.* at 156,882.

4. *Id.* at 156,882-83. Although the pipeline system was initially to have operated at a pressure of fifty pounds per square inch (psi), the original solicitation required that the components of the pipeline be able to withstand 275 psi, and required hydrostatic testing of the pipeline at 225 psi before acceptance. For reasons not stated in the opinion, the government issued an amendment to the solicitation before the award. The amendment deleted the requirement for hydrostatic tests from one portion of the contract, and reduced the test in another section of the contract from 225 psi to sixty-five psi. *Id.*

5. *Id.* at 156,883.

6. *Id.* at 156,884-85.

7. *Id.* at 156,885.

8. *Id.*

9. *Id.*

10. *Id.* at 156,886.

11. *Id.*

Leave Me Out of This: Manufacturer's Warranty Does Not Bind the Prime

The Court of Federal Claims (COFC) recently ruled that a manufacturer's warranty is just that—a manufacturer's warranty, and not a construction contractor's warranty. In *Lee Lewis Construction*,¹³ the U.S. Postal Service (USPS) awarded Lee Lewis Construction (Lewis) a contract to roof a mail facility in Midland, Texas. The contract contained a provision requiring the contractor to furnish the USPS a ten-year manufacturer's materials warranty for the roof. Lewis complied, and before the warranty expired, the roof began to leak. The manufacturer's successor, HPG International (HPG), agreed to repair the roof, but before HPG completed the work, a hailstorm destroyed most of the unrepaired roof. Since the roof was not

warranted against hail damage, HPG refused to repair the hail-damaged portions of the roof. The USPS's contracting officer then dragged Lewis into the dispute and ordered Lewis to pay repair costs.¹⁴ Lewis then sued at the COFC, seeking relief from the contracting officer's decision.¹⁵

The issue before the COFC was whether a manufacturer's warranty bound the prime contractor after the government accepted the work.¹⁶ The COFC's conclusion was a resounding "no." The COFC looked to the plain and ordinary wording of the warranty clause and concluded that the contractor did exactly what the contract called for—secure a manufacturer's warranty for the USPS. The COFC concluded that the warranty did not legally bind the prime contractor.¹⁷ As such, the COFC denied the USPS's counterclaim against Lewis.¹⁸ Major Dorn.

12. *Id.* at 156,887. The board discounted Blake's argument that other contractors caused the damage because Blake and his subcontractors were responsible for most of the construction activity in the area. Absent contemporaneous evidence to the contrary, the board was unwilling to entertain an argument that the pipeline failure was the result of anything but poor workmanship. *Id.* at 156,887-88.

13. 54 Fed. Cl. 88 (2002).

14. *Id.* at 89.

15. *Id.* at 89-90. Lewis filed suit before the COFC seeking relief from the decision of the contracting officer and a declaration that Lewis owed no money to the USPS. The USPS then filed a counterclaim for \$697,450, the amount specified in the contracting officer's final decision, claiming breach of warranty, and in the alternative, a decision that latent defects caused the material failure of the roof. *Id.* at 89.

16. *Id.* at 90. The parties originally agreed to limit their summary judgment motions to the issue of breach of warranty; however, both parties addressed the latent defects issue in their respective motions for summary judgment. Specifically, the USPS alleged that the roofing material used on the facility contained a latent defect and that Lewis was liable for the replacement cost of the roof. Lewis argued that the defects were not latent because the USPS had knowledge of the risks associated with the roofing material. *Id.* Given that the parties' proposed findings of uncontroverted facts failed to provide a detailed treatment of the facts relevant to a determination of the existence of latent defects, the court deferred a decision on the issue until after further proceedings. *Id.* at 93.

17. *Id.* at 91.

18. *Id.* at 93.

Government-Furnished Property

Fair Treatment Does Not Mean the Same Treatment

In *Bath Iron Works Corp.*,¹ two industry teams, the Blue Team and the Gold Team, were competing in the final phase of the Navy's DD(X) surface combatant program. The request for proposals (RFP) required each team to conduct at-sea tests of their design models.² The RFP stated that it was the responsibility of each offeror to acquire appropriate test platforms and, in response to a pre-solicitation question, the Navy advised the offerors that "[t]he government does not intend to provide the platform for at-sea testing."³ At the protest hearing, the contracting officer testified that he did not intend to preclude the use of a government-owned platform, but wanted to advise the offerors that the program office would not provide test resources as government-furnished property (GFP).⁴ The Blue Team asked the Navy to provide a decommissioned DD-963-Class destroyer that it could use as its test platform due to its similarity to the proposed hull, but the Navy advised the Blue Team that no DD 963 was available.⁵ The Gold Team, however, was able to obtain a DD 963, which it used to conduct its at-sea tests.⁶

After award to the Gold Team, the Blue Team filed a General Accounting Office (GAO) protest alleging that "the Navy failed to conduct the competition on a common basis when it denied the Blue Team the use of a decommissioned DD 963 . . . for at-sea testing while at the same time accepting for purposes of the evaluation the Gold Team's proposed use of a decommissioned DD-963-Class destroyer."⁷ The GAO denied the protest for lack of prejudice.⁸ Specifically, the GAO found that the use of a decommissioned DD-963 did not result in a strength for the Gold Team and would not have changed the evaluation of the

Blue Team.⁹ The GAO also concluded that the "Blue Team's failure to pursue [the] denial of the use of a decommissioned DD 963" as evidence that the Blue Team did not view its use as a "significant consideration."¹⁰

Recovery Denied for Contractor's Failure to Notify Agency of GFP Shortage

Government-furnished property claims are rarely denied because a contractor failed to notify the government of defects or shortages in the GFP. This is because of the difficulty of proving that the government suffered prejudice. In *Franklin Pavkov Construction Co.*,¹¹ however, the Court of Appeals for the Federal Circuit (CAFC) affirmed the decision of the Armed Services Board of Contract Appeals,¹² denying Pavkov's appeal on this basis. In *Pavkov*, the Air Force agreed to provide various items of GFP, including eighty-seven stair nosings that the contractor would use to install several staircases. The Air Force kept the GFP in a fenced location that it maintained. Although representatives of the Air Force and the contractor met to inventory the GFP, the contractor's representative had to depart before inventorying the stair nosings. Six months later, the contractor notified the Air Force that only ten stair nosings were in the fenced area. To avoid delaying the project, Pavkov purchased substitute materials and later submitted a claim for the additional costs.¹³

The CAFC applied the delivery standard of the Uniform Commercial Code and held that the Air Force met its obligation by tendering delivery to Pavkov. This tender imposed a duty on Pavkov to inspect the property and either promptly reject or accept it. Since Pavkov did not promptly reject the GFP, it was deemed to have accepted it at the time of the inventory.¹⁴ Not-

1. Comp. Gen. B-290470, B-290470.2, Aug. 19, 2002, 2002 CPD ¶ 133.

2. *Id.* at 2.

3. *Id.* at 7.

4. *Id.*

5. *Id.* at 8-9.

6. *Id.* at 10.

7. *Id.* at 11.

8. *Id.*

9. *Id.* at 11-12.

10. *Id.* at 19.

11. 279 F.3d 989 (2002).

12. See *Franklin Pavkov Constr. Co.*, ASBCA No. 50828, 00-2 BCA ¶ 31,000, at 153,597.

13. *Franklin Pavkov Constr.*, 279 F.3d at 992.

14. *Id.* at 998.

ing that the applicable GFP clause required the contractor to provide notice “within a reasonable time,”¹⁵ the court found that

the six-month delay was not reasonable and denied the appeal.¹⁶ Lieutenant Colonel Tomanelli.

15. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.245-4(a)(1) (July 2002).

16. *Franklin Pavkov Constr.*, 279 F.3d at 998.

Pricing of Adjustments

*“Don’t Ask Me Why! That’s Just the Way It Is!”
The CAFC Remands an Eichleay Claim to the ASBCA for
Originally Failing to Explain Its Rationale in Denying Any
Eichleay Damages*

In 1992, Charles G. Williams Construction, Inc. (CGW) contracted with the U.S. Army to improve and repair the Fitzsimmons Army Medical Center in two phases.¹ As a result of differing site conditions, drawing defects, and continued government occupancy of the work area during Phase I, the parties negotiated various price adjustments and contract extensions through numerous bilateral modifications. CGW reserved its right, however, to seek impact damages later and to include delay costs under the Eichleay formula.² The government subsequently terminated the second phase of the work for convenience. After settlement negotiations stalled, CGW appealed the deemed denial of additional price adjustment claims and its termination settlement proposal to the Armed Services Board of Contract Appeals (ASBCA).³

Concerning CGW’s claim for extended and unabsorbed overhead, the board found:

CGW claims \$98,642 for 330 days of “extended overhead/unabsorbed overhead” allegedly incurred as a result of the drawing defects, differing site conditions and Government occupancy of the work area. The claimed amount is an “Eichleay” calculation. The [Defense Contract Audit Agency] auditor found that the overhead for the entire period of extended contract performance was “fully absorbed by the basic contract, contract modifications, and other projects.” He further found that [the appellant] used both variable and fixed overhead expenses in computing the average daily overhead rate.

On this evidence, CGW’s Eichleay claim is not proven.⁴

The board stated this conclusion as a finding of fact, but did not provide any further analysis in the decision portion of its opinion.⁵

In the subsequent appeal, the Court of Appeals for the Federal Circuit (CAFC) vacated and remanded that portion of the ASBCA decision concerning the Eichleay claim because the board failed to explain its reasoning adequately.⁶ The court noted that Eichleay damages concern the recovery of home office overhead costs during government-caused delays of construction work.⁷ The court also cited the two prerequisites for recovery of Eichleay damages as “(1) that the contractor be on standby; and (2) that the contractor be unable to take on other work.”⁸ Specifically, the board noted:

The proper standby test focuses on the delay or suspension of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform. . . . The second prong—the contractor’s inability to take on outside work—requires “the government to demonstrate that it was not impractical for the contractor to take on replacement work and thus avoid the loss. . . .” If both of these requirements are satisfied, the contractor has shown that it had unabsorbed general overhead for which it is entitled to Eichleay damages.⁹

The court found that “the Board did not mention, let alone discuss, either of these [prerequisites].”¹⁰ The court also criticized the board for merely noting the Defense Contract Audit Agency (DCAA) auditor’s finding without applying its own analysis:

1. Charles G. Williams Constr., Inc., ASBCA No. 49,775, 00-2 BCA ¶ 31,047.

2. *Id.* at 153,321. The *Eichleay* formula is used for calculating a contractor’s overhead that was not allocated as a contract cost because of alleged government caused delay and usually referred to as “unabsorbed overhead.” *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688.

3. *See* Charles G. Williams, Inc., ASBCA No. 49,775, 00-2 BCA ¶ 31,047.

4. *Id.* at 153,321.

5. *See id.*

6. *See* Charles G. Williams Construction, Inc. v. White, 271 F.3d 1055 (Fed. Cir. 2001).

7. *Id.* at 1056.

8. *Id.* at 1058 (quoting *Interstate Gen. Gov’t Contractors, Inc. v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993)).

9. *Charles G. Williams Constr.*, 271 F.3d at 1058 (quoting *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1381 (Fed. Cir. 1998); *Interstate Gen. Gov’t Contractors*, 12 F.3d at 1056).

10. *Charles G. Williams Constr.*, 271 F.3d at 1058.

The Board's function in this case was itself to determine whether Williams had established its case for Eichleay damages, not to determine whether the auditor's "finding" that Williams had not done so was supported by the record. The Board was entitled to give the auditor's evidence and testimony, like that of any other evidence, whatever weight it concluded it should have. Under the Contract Disputes Act, however, it is the function and responsibility of the Board, and not of the auditor, to decide the question of entitlement.¹¹

On remand, the board provided additional findings specifically on the standby prerequisites for an Eichleay claim.¹² The board ultimately decided that CGW failed to prove the standby prerequisite, and because of this initial failure of proof, did not need to address the second prerequisite of whether CGW was unable to take on other work.¹³

Another Example of the Difficulty in Proving Damages Without Using an Actual Damages Approach

Last year's Year in Review¹⁴ discussed the 2001 ASBCA decision in NavCom Defense Electronics, Inc.,¹⁵ a case which "serves as a reminder of just how difficult it is for contractors to demonstrate that they are entitled to a jury verdict method of proof."¹⁶ This year, in Propellex Corp.,¹⁷ the ASBCA reminded a contractor of just how difficult it is to prove damages using the modified total cost method.¹⁸ Propellex had two contracts for the production of MK 45 primers "used for the propelling charge of the 5-inch 54 caliber gun."¹⁹ The government rejected four lots of Propellex primers for exceeding the maximum moisture content. Eventually, the government accepted the rejected lots with price reductions.²⁰ Propellex claimed, however, that the government moisture content testing was flawed, and it incurred \$1,790,065 in additional costs due to production delays and investigation costs for a non-existent moisture contamination problem.²¹ Propellex used the total cost method in calculating its claim for increased costs.²² It later adjusted its \$1,790,065 claim to "\$1,356,580 on a modified total cost basis."²³

11. *Id.* at 1059 (citing the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000)).

12. *See* Charles G. Williams Construction, Inc., ASBCA No. 49,775, 02-1 BCA ¶ 31,833.

13. *Id.* at 157,278.

14. Major John J. Siemietkowski, et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002 [hereinafter *2001 Year in Review*].

15. ASBCA Nos. 50,767, 52,292-98, 01-2 BCA ¶ 31,546.

16. *2001 Year in Review*, *supra* note 14, at 62.

17. ASBCA No. 50,203, 02-1 BCA ¶ 31,721.

18. Last year's *Year in Review* also reported on a contractor's successful use of a modified total cost method approach. *See 2001 Year in Review*, *supra* note 14, at 62; *Baldi Brothers Contractors v. United States*, 50 Fed. Cl. 74 (2001).

19. *Propellex*, 02-1 BCA ¶ 31,721, at 156,717.

20. *Id.* at 156,722.

21. *Id.* at 156,726.

22. As last year's *Year in Review* stated:

There are actually four methods of proving damages: (1) the actual cost method where the contractor submits actual cost data to demonstrate its additional costs associated with a change; (2) the estimated cost method where the contractor does not have actual cost data and submits estimates of those costs instead; (3) the total cost method where the contractor submits all costs—not just those associated with the change—and asserts the government is liable for the total cost incurred by the contractor; and (4) the jury verdict where the contractor submits competent evidence of its damages, but the government counters with conflicting evidence which questions the accuracy of the contractor's computations.

2001 Year in Review, *supra* note 14, at 62 n.788 (citing *Delco Elecs. Corp. v. United States*, 17 Cl. Ct. 302, 321-24 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990)).

23. *Propellex*, 02-1 BCA ¶ 31,721, at 156,727.

Propellex prevailed on the entitlement portion of its claim because the board determined that the government had not established “that it conducted the [moisture testing] in accordance with the contract testing requirements.”²⁴ The board also found, however, that Propellex was only entitled to \$6921 for consultant fees and costs related to its moisture contamination investigation and \$25,497 for attorney fees in preparing its claim.²⁵ In using the modified total cost method to deny the remainder of the claim, the board noted that claimants must prove four elements, established in *Servidone Construction Corp. v. United States*,²⁶ to recover under the total cost method:

To recover under the total cost method of quantifying an equitable adjustment, the contractor has the burden of establishing the following elements: (1) the impracticability of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs.²⁷

The board held that “Propellex failed to establish two of the four required elements of proof of a modified total cost recovery.”²⁸ Specifically, Propellex failed to establish the first element, the impracticability of proving actual costs directly, because it failed to prove that it could not segregate and estimate its costs for the black powder moisture investigation.²⁹ Interestingly, the Board used Propellex’s ability to approximate excess costs that were not due to the government’s flawed moisture testing as evidence that Propellex presumably could have proved its actual losses directly.³⁰ The board also found that Propellex failed to establish the fourth required element in proving its lack of responsibility for the added costs. The board stated that “[t]he most serious failure of Propellex’s modified total cost proof is that it did not exclude from the claim amounts, costs . . . not attributable to black powder moisture investigation, including the costs” that were associated with specific non-moisture related corrections and testing.³¹ Major Kuhn.

24. *Id.* at 156,729.

25. *Id.* at 156,731.

26. 931 F.2d 860 (Fed. Cir. 1991).

27. *Propellex*, 02-1 BCA ¶ 31,721, at 156,729.

28. *Id.* at 156,730.

29. *Id.*

30. These unrelated excess costs formed part of Propellex’s modifications to its initial total cost method calculation that resulted in a modified total cost method calculation. *Id.*

31. *Id.*

Value Engineering Change Proposals

Last year, the courts announced two noteworthy decisions in the rarely reported area of Value Engineering Change Proposals (VECPs). Both cases dealt with the government's attempts to avoid paying contractors for incurred savings. Although the government prevailed in one decision, the long-term effect of these cases may be to produce an environment in which contractors will distrust the government's "assurance" that it will share any savings resulting from contractor-suggested changes.

What's Our Advantage in Acting Like This?

In *Vantage Assocs., Inc. v. England*,¹ the Court of Appeals for the Federal Circuit (CAFC) overturned an Armed Services Board of Contract Appeals (ASBCA) decision² that held that the government correctly rejected a VECP because the contract at issue was already closed by the time the contractor submitted it. The Navy awarded Vantage a contract on 30 September 1991 to produce several different "underwater marking devices used by dolphins in the government's Marine Mammal System."³ One of these devices contained a glass-filled polyethylene substance manufactured by a different company. The contract contained the FAR Value Engineering Clause.⁴ Vantage completed delivery of all but one of the items required under this contract on or before 22 September 1993. The one missing item was a five-dollar spare part that the government never noticed was missing and for which Vantage never submitted an invoice.⁵

Without notifying Vantage, the government closed out the contract on 31 August 1995. On 18 January 1996, Vantage notified the government that it had found a substitute material that could be used in lieu of the glass-filled polyethylene material and which it felt would achieve a 90% cost reduction for the government.⁶ On 28 January 1997, the government advertised a follow-on contract for the underwater marking devices that identified Vantage's substitute material. On 4 March 1997,

Vantage told the government that it wished to submit a VECP; the government responded that Vantage would need to submit the information required by FAR section 52.248-1(c). Vantage submitted a VECP on 1 May 1997. The government awarded Vantage the follow-on contract for the marking devices on 20 August 1997.⁷

Thereafter, the contracting officer determined that there was no open contract when Vantage submitted the VECP and rejected it. The opinion does not explain the logic behind this decision; the contracting officer may have reasoned that the contractor's entitlement to compensation for the proposed change was governed by the Value Engineering Clause, and that this clause ceased to apply upon contract termination or close-out. Vantage appealed this determination to the ASBCA. The board ruled in favor of the government, finding that the government's closure of the contract on its books on 31 August 1995 was conclusive. The board reasoned that the outstanding part of the contract was *de minimis* in value, and that nearly four years had elapsed "between what amounted to contract completion on 22 September 1993 and the submission of the VECP on 1 May 1997."⁸ In its ruling, the board distinguished an earlier board decision in which there were significant quantities of undelivered items.⁹

On appeal, the CAFC first analyzed the FAR provision governing contract completion.¹⁰ This provision requires: (1) that the contractor deliver and the government inspect and accept all supplies; or (2) that the government notify the contractor that it considers the contract to have been completed. The CAFC noted that neither of these conditions had been met; therefore, it held that Vantage's initial contract with the government was still open when Vantage submitted its VECP.¹¹ Perhaps the Navy took a "penny-wise, pound foolish" approach to the value engineering process in this case. One policy behind making payments under the Value Engineering Clause is to encourage other contractors to make VECPs, thus saving the government money in the long run. Given that policy, it is unclear why the government would not want to make every effort to pay con-

1. No. 01-1073, 2001 U.S. App. LEXIS 23566 (Fed. Cir. Oct. 9, 2001).

2. See *Vantage Assocs., Inc.*, ASBCA No. 51418, 00-2 BCA ¶ 31,141.

3. *Vantage Assocs.*, 2001 U.S. App. LEXIS 23566, at *1.

4. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.248-1 (July 2002).

5. *Id.*

6. *Id.*

7. *Vantage Assocs.*, 00-2 BCA ¶ 31,141, at 153,793.

8. *Id.* at 153,794.

9. *Id.*

10. See FAR, *supra* note 4, at 4.804-4.

11. *Vantage Assocs.*, 2001 U.S. App. LEXIS 23566, at *10-11. The court remanded the case to the board for further consideration of Vantage's VECP. *Id.*

tractors like Vantage, particularly when no clear legal authority indicated that the contract was closed.

Contractor Is Up-the-Creek for Failing to Comply With the Value Engineering Clause Requirements

Another noteworthy case dealing with a VECP is *C.A. Rasmussen, Inc. v. United States*.¹² On 11 June 1997, the Corps of Engineers awarded Rasmussen a contract for the improvement of a creek channel to provide better flood protection. The Statement of Work included a requirement to construct a stone protection channel using stone excavated from the channel bed.¹³ By October 1997, Rasmussen had excavated 60,000 cubic meters of material from the channel bed. This yielded a total of less than 3000 cubic meters of stone suitable for use in building the protection channel. Although the parties estimated that Rasmussen would need a total of 9100 cubic meters of stone to build the protection channel, it would have to excavate and sort through an additional 183,000 cubic meters of material to yield the amount of stone needed.¹⁴

Continuing to excavate and sort through the remaining channel bed material would have cost the government sixteen dollars per cubic meter. Realizing that it would be less expensive to import the stone, Rasmussen met with the contracting officer on 27 October 1997 and proposed to import the stone from a local river. The government accepted Rasmussen's proposal and paid Rasmussen an additional \$467,760 to compensate it for the cost of importing the stone. Subsequently, Rasmussen submitted a claim for an additional \$1,632,184, which representing its share of the savings that the government incurred as a result of "value engineering services" associated with recommending the stone importation.¹⁵ The parties engaged in settlement discussions, without success. Ultimately, the court determined that there was a deemed denial of Rasmussen's claim.¹⁶

At trial, the government asserted that VECPs had to be submitted in writing, and that Rasmussen's oral proposal was insufficient. The government alternatively argued that Rasmussen failed to comply with the requirements of the Value Engineering Clause in the contract.¹⁷ The clause required Rasmussen's VECP to include such things as a description of the difference between the existing contract requirements and proposed contract requirements, an estimate of the costs the government would incur in implementing the VECP, an estimate of the cost savings, and an indication of when the VECP must be accepted by the government to maximize the cost savings.¹⁸ The court found that Rasmussen had complied with none of these requirements.¹⁹

Rasmussen argued that the court should not strictly construe the regulatory requirements, and that its failure to include this information should not be fatal to its claim.²⁰ Rasmussen cited two prior board decisions that held that the failure to comply with the value engineering regulations was not fatal to recovery. The court distinguished these prior decisions on the basis that their only deficiency was the failure to label the VECP as a VECP, and granted the government's motion for summary judgment.²¹

The *Rasmussen* result, by giving the contractor only the additional costs it incurred to import the stone, actually gave the government a windfall because the government obtained the full benefit of Rasmussen's cost reduction suggestions. In *Rasmussen*, the government, and later the court, chose to interpret the FAR strictly to the immediate detriment of the contractor. None of the technical deficiencies, however, appears to have prejudiced the government. Absent prejudice, a broader interpretation of the FAR provisions would encourage future contractors to submit VECPs and would not unfairly harm the government.

12. 52 Fed. Cl. 345 (2002).

13. *Id.* at 346-47.

14. *Id.* at 348-49.

15. *Id.* at 348-50. Rasmussen apparently calculated the savings by multiplying the remaining volume of channel bed material by the unit cost of sixteen dollars, and then subtracting the \$467,760 added cost to import the material instead. The court, however, did not discuss this calculation. *Id.*

16. *Id.* at 348.

17. *Id.*; see FAR, *supra* note 4, at 52.248-3.

18. *Rasmussen*, 52 Fed. Cl. at 347 (discussing the requirements of the FAR Value Engineering Clause); see FAR, *supra* note 4, at 52.248-3(c).

19. *Rasmussen*, at Fed. Cl. at 351.

20. *Id.* at 350.

21. *Id.* (citing McDonnell Douglas Astronautics Co., ASBCA No. 19971, 76-2 BCA ¶ 12,117; Syro Steel Co., ASBCA No. 12530, 69-2 BCA ¶ 8046).

Removal of DFARS Clauses

Before 1 October 2001, the Department of Defense (DOD) had a specific supplemental clause that required contractors to submit VECPs in the format prescribed by *MIL-STD-973*.²²

That standard was cancelled in 2000, and on 1 October 2001, the DOD updated the Defense Federal Acquisition Regulations (DFARS) by deleting the supplemental VECP clause as well as the provision in the DFARS prescribing its use.²³ Major Sharp.

22. See U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 252.248-7000 (May 1994) [hereinafter DFARS].

23. See 66 Fed. Reg. 49,865 (Oct. 1, 2001) (deleting DFARS, *supra* note 22, at 252.248-7000).

Terminations for Default

The Latest A-12 Wranglings: Honey, This Letter from the Collection Agency Says We Owe \$2.3 Billion

Last year's *Year in Review*¹ reported that the Court of Federal Claims (COFC), on remand from the Court of Appeals for the Federal Circuit (CAFC), dismissed the plaintiffs' complaint in the longstanding, multi-billion dollar A-12 litigation, *McDonnell Douglas Corp. v. United States*.² That decision, rendered on 31 August 2001, apparently left the Boeing Corp. (the successor to McDonnell Douglas) and General Dynamics Corp. billions of dollars in debt to the Navy.³ Although the plaintiffs appealed that decision to the CAFC,⁴ the parties spent most of the year in settlement talks.⁵

On 30 August 2002, the Navy Comptroller, Dionel M. Aviles, demanded that General Dynamics and Boeing pay the Navy \$2.3 billion dollars, or the Navy would "refer the matter to the Defense Finance and Accounting Service for collection."⁶ In response, General Dynamics called the letter "an unseemly negotiating tactic, and an apparent effort to gain advantage during settlement talks."⁷ According to the Navy,

the contractors owe a little over \$1.3 billion in principal and \$1 billion in interest. As of 30 September 2002, \$191,804 in interest accrued each day. The letter concluded on a somewhat conciliatory note, stating that the Navy "fully support[s]" settlement discussions.⁸

Re-establishing a Delivery Schedule After Government Waiver: There's a Right Way and A Wrong Way

Generally, the government has the right to terminate a contract immediately upon a contractor's failure to deliver or perform on time.⁹ When the government disregards the delivery schedule and encourages or condones continued performance, however, it waives the right to terminate, unless it re-establishes a delivery or performance schedule.¹⁰ The government can re-impose the schedule either bilaterally or unilaterally.¹¹ Three boards of contract appeals recently considered variations on this scenario of failure to perform, waiver, and attempted re-establishment.¹²

In *Beta Engineering, Inc.*,¹³ the Defense Supply Center Philadelphia (DSCP) contracted with Beta Engineering, Inc. (Beta Engineering) to supply lock-release levers¹⁴ for aircraft

1. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2001, at 64-65 [hereinafter *2001 Year in Review*].

2. 50 Fed. Cl. 311, 314 (2001).

3. Interestingly, an "industry official, who asked not to be named" told *Aerospace Daily* that "the judge never set an amount, nor did he make a ruling that anybody owed anyone any money." Nick Jonson, *Navy A-12 Compensation Demands Still Under Appeal*, AEROSPACE DAILY, Sept. 9, 2002, at 4, LEXIS, Aerospace Daily File.

4. *Outlook for Issues Affecting Federal Procurement in 2002*, 77 BNA FED. CONT. REP. 5 (Feb. 5, 2002) at 146 (stating that the plaintiffs filed an appeal notice on 30 November 2001 and that the government filed a notice of cross appeal on 14 December 2001).

5. See *Navy Rejects Settlement in A-12 Case, Demands \$2.3B Payment by Sept. 30*, 78 BNA FED. CONT. REP. 9, Sept. 10, 2002, at 298; *Navy Demands \$2.3 Billion from Boeing and General Dynamics in A-12 Dispute*, 44 GOV'T CONTRACTOR 33, ¶ 344 (Sept. 11, 2002).

6. Letter from The Comptroller of the Navy, Office of the Assistant Secretary of the Navy (Financial Management and Comptroller), to Michael J. Mancuso, Senior Vice President and Chief Financial Officer, General Dynamics (30 Aug. 2002), available at http://www.generaldynamics.com/news/press_releases/2002/Navy_A-12_Letter.pdf [hereinafter Aviles Letter].

7. Press Release, General Dynamics, General Dynamics Receives Payment Demand in A-12 Case: Demand Jumps the Gun on Settlement Talks and Appellate Litigation (Sept. 3, 2002), available at http://www.generaldynamics.com/news/press_releases/2002/News%20Release%20%20Tuesday,%20September%203,%202002.htm.

8. Aviles Letter, *supra* note 6.

9. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.249-8(a)(1)(i) (July 2002) [hereinafter FAR].

10. Waiver occurs if: (1) the government fails to terminate a contract within a reasonable period of time after the default; and (2) the contractor relies on the failure to terminate by continued performance, with the government's knowledge or consent. *Devito v. United States*, 413 F.2d 1147, 1153-54 (Ct. Cl. 1969).

11. See, e.g., *Beta Engineering, Inc.*, ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879, at 157,505 ("To reestablish a delivery schedule, the government could either (a) reach an agreement with the contractor on a new delivery schedule, or (b) unilaterally establish a reasonable new delivery schedule."); *Sermor, Inc.*, ASBCA No. 30576, 94-1 BCA ¶ 26,302, at 130,828.

12. *Beta Engineering, Inc.*, 02-2 BCA ¶ 31,879; *Rowe, Inc.*, GSBCA No. 14211, 01-2 BCA ¶ 31,630; *Kadri Int'l Co.*, AGBCA No. 2000-170-1, 02-1 BCA ¶ 31,791.

13. ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879.

14. The "lock-release lever is also known as a belt-feed lever. It is the part of the ammunition feeding mechanism that fits into the cartridge of the M-2 .50-caliber aircraft machine gun." *Id.* at 157,495.

machine guns.¹⁵ The contract required Beta Engineering to deliver first-article test samples (FATS) on a specified date.¹⁶ A clause in the contract provided that if the contractor failed to deliver any FATS on time, “the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause.”¹⁷ The levers had to pass a detailed preliminary inspection before first article testing.¹⁸

Although Beta Engineering failed to meet the FATS submission deadline, 30 April 2001, the government procurement contracting officer (PCO) did not terminate the contract or notify Beta Engineering that it was delinquent.¹⁹ After 30 April 2001, the PCO even authorized the contractor to use a different grade of steel and allowed the contractor to conduct a preliminary inspection. The Armed Services Board of Contract Appeals (ASBCA) found that these government acts and failures to act “disestablished 30 April 2001 as the deadline for submission of FATS.”²⁰ On 17 May 2001, the contractor, with a government representative present, conducted a preliminary inspection. The inspection was not completed successfully. After the failed inspection, the contractor proposed a new date for a second FATS preliminary inspection. The PCO, however, took no action to reestablish a new FATS due date and failed to respond to the contractor’s offer to submit new FATS, leaving Beta Engineering “in limbo.”²¹ The PCO terminated the contract on 15 August 2001.²²

Citing an earlier decision, the board stated, “[w]e have held that a termination for default for failure to deliver a first article was improper where ‘there was no enforceable first article

delivery schedule in place at the time the government terminated the contract for default.’”²³ The board found that after Beta Engineering missed the FATS deadline, not only did the government fail to terminate the contract, but the government encouraged further performance by approving the lower-grade steel and by proceeding with preliminary inspections. The government thereby waived the FATS delivery due date. By leaving Beta Engineering in limbo about whether and when it could submit a second set of FATS, the government left itself “without an enforceable FATS delivery schedule.”²⁴ The government, therefore, improperly terminated the contract for default.²⁵

In *Rowe, Inc.*,²⁶ the General Services Administration (GSA) also faced missed delivery dates. After allowing the contractor, Rowe, to miss two delivery dates, however, the GSA contracting officer (CO) properly set a new deadline. When Rowe missed the new delivery date, the government was in a position to properly terminate the contract for default.²⁷

The GSA awarded Rowe a contract for, among other items, “modified type IX vans with cut-off cabs.”²⁸ The order required shipment by 27 August 1996.²⁹ A government inspection of Rowe’s facility on 20 August 1996 revealed that Rowe had not received the chassis for the vans and would not meet the 27 August deadline. On 17 September 1996, the CO sent a “cure letter,” demanding an explanation for the delay, a new shipment date, and consideration for the delay.³⁰ In two letters dated 4 October and 8 November 1996, Rowe indicated it could have the vehicles ready within fourteen days of receipt of the chassis

15. *Id.* at 157,495.

16. *Id.* There was some confusion over what that date was, but the board found that “both parties considered 30 April 2001 to be the deadline.” *Id.* at 157,499.

17. *Id.* at 157,496 (referencing FAR, *supra* note 9, at 52.209-4(d)).

18. *Id.* at 157,500.

19. *Id.* at 157,499.

20. *Id.* at 157,500.

21. *Id.* at 157,502.

22. *Id.* at 157,503.

23. *Id.* at 157,504 (quoting *Aviation Technology, Inc.*, ASBCA No. 48063, 00-2 BAC ¶31,046, at 153,315).

24. *Id.* at 157,505.

25. *Id.*

26. GSBCA No. 14211, 01-2 BCA ¶ 31,630.

27. *Id.* at 156,263.

28. *Id.*

29. *Id.*

30. *Id.* at 156,265.

and that it expected to receive the chassis on 7 December 1996. The CO then issued a unilateral modification “establishing a new shipment date of December 26, 1996.”³¹ When Rowe missed this new deadline, the parties exchanged letters, the government changed COs, and on 6 February 1997, the new CO issued a show cause letter.³² Although the letter stated that the GSA was considering a default termination, it did not set a new delivery date.³³ In response, Rowe stated that it had received the chassis, but for the first time, Rowe alleged confusion over the specifications.³⁴ In a 4 April 1997 letter, after several exchanges concerning the technical specifications, the CO demanded a new production schedule from Rowe.³⁵ On 17 April 1997, although Rowe had requested approximately seventy additional days, the CO “unilaterally established a new completion date of May 14, 1997.”³⁶ When Rowe failed to deliver the vehicles by 14 May 1997, the CO terminated the order.³⁷

The General Services Board of Contract Appeals (GSBCA), determined that although the GSA had “overlooked Rowe’s failure to meet two previously established delivery dates,” it “established a new delivery date of May 14, 1997, and terminated [the order] immediately when Rowe failed to” deliver.³⁸ The critical issue, therefore, was whether the new, unilaterally-imposed, delivery date was reasonable.³⁹ The board made an “objective determination [from] the standpoint of the performance capabilities of the contractor at the time the notice [was] given.”⁴⁰ The board found that the new date was “reasonable”

for various reasons. First, Rowe had stated on two occasions that it could provide the vehicles fifteen days after receiving the chassis; the CO had given Rowe twenty-seven days from the date of the final (17 April) letter. Second, Rowe did not object to the new date. Finally, the record indicated that other contractors could have met the new delivery schedule. Thus, the GSBCA found the CO had established a reasonable schedule.⁴¹ Rejecting Rowe’s defenses to the termination,⁴² the board denied the appeal.⁴³

COFC OKs Monday-Morning Justification for Default Termination

In *Glazer Construction Co. v. United States*,⁴⁴ (*Glazer*) the COFC upheld a termination for default based on Davis-Bacon Act⁴⁵ (DBA) violations committed before, but discovered after, the government issued a default termination notice. In *Glazer*, in January 1998, the Department of Veterans Affairs (VA) terminated Glazer Construction’s contract to renovate and alter a portion of a Veterans Hospital for “failure to complete the contract on time.”⁴⁶ Glazer timely challenged the default termination decision, alleging that the VA abused its discretion.⁴⁷ In January 2002, the Department of Labor (DOL) notified Glazer Construction that it had committed DBA violations while working on the VA contract.⁴⁸ Glazer never challenged the DOL’s allegations.⁴⁹ The government filed a motion for sum-

31. *Id.* at 156,266.

32. *Id.* at 156,266-67.

33. *Id.* at 156,267.

34. *Id.* at 156,268.

35. *Id.* at 156,270.

36. *Id.* at 156,271.

37. *Id.* at 156,272.

38. *Id.* at 156,273.

39. *Id.* Last year’s *Year in Review* discussed this issue in the context of the A-12 litigation. See 2001 *Year in Review*, *supra* note 1, at 64-65.

40. *Rowe, Inc.*, 01-2 BCA ¶31,630, at 156,273.

41. *Id.* at 156,274.

42. The board rejected Rowe’s claims that contract ambiguities, defective specifications, and government-caused delay resulted in excusable delay on the part of Rowe. *Id.* at 156,274-76. The board also rejected Rowe’s arguments that the “termination was improper due to various procedural defects.” *Id.* at 156,276-77.

43. *Id.* at 156,277.

44. 52 Fed. Cl. 513 (2002).

45. 40 U.S.C. § 276(a)-(a)(7) (2000).

46. *Glazer Constr.*, 52 Fed. Cl. at 516.

47. *Id.* at 523.

mary judgment to dismiss Glazer's challenge of the termination.⁵⁰

The VA asserted that Glazer Construction's DBA violations "committed during contract performance, although . . . discovered after the termination for default was issued," justified the termination decision.⁵¹ In response, Glazer argued that because the CO's final decision did not rely on the DBA violations, the court did not have jurisdiction "to determine whether the Davis-Bacon Act . . . violations warranted a termination of the contract."⁵² Glazer argued that, in the absence of a cure notice covering the DBA violations, the government could not rely on "newly discovered evidence" to justify the termination.⁵³

The COFC rejected both arguments. Generally, the court cited the CAFC for the proposition that it would sustain "a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason."⁵⁴ The court found that Glazer's jurisdiction argument overlooked numerous decisions allowing the government to justify a default termination on facts "not known to the government at the time of default, without mention of a contracting officer's final decision on the newly discovered evidence."⁵⁵

Nor did the absence of a cure notice prevent the government from relying on the DBA violations as a basis for the termination. Because the "post-hoc justification" was incurable, Glazer Construction could not have been prejudiced by the lack

of a cure notice.⁵⁶ A cure notice, issued after termination, would be "futile" because the contractor, "barred from the contract site," would have "no means to cure the defect."⁵⁷ Thus, having determined that Glazer Construction committed DBA violations, and concluding that clauses in the contract allowed the government to terminate the contractor for default for DBA violations,⁵⁸ the COFC granted the government's motion for summary judgment.⁵⁹

ASBCA Overturns Default Termination Based on Contractor's Reasonable Response to Cure Notice & CO's Failure to Communicate

Although *Ryste & Ricas, Inc.*⁶⁰ did not break new legal ground, administrative contracting officers (ACOs) (and attorneys advising ACOs) should heed the decision's lessons. *Ryste & Ricas* involved the default termination of a \$1.7 million repair and renovation contract. The contractor had to complete work "not later than 300 days after"⁶¹ the date of the notice to proceed, 29 October 1997. The original completion date was 18 August 1998.⁶²

In the course of the contract's performance, the parties signed four bilateral modifications. Although each modification increased the total cost of the contract, none included time extensions. The contractor requested time extensions for two of the modifications.⁶³ Rather than flatly deny the requests for more time, the CO stated on one occasion that the request "will

48. *Id.* at 518. The government also alleged that Glazer committed Buy America Act violations. In a separate proceeding, discussed in the case, the contractor was disbarred on this ground. *Id.* at 520-23. Because the court found the DBA violations adequate to justify the termination, it did not determine whether the Buy America Act would also have been sufficient grounds. *Id.* at 531.

49. *Id.* at 520.

50. *Id.* at 523-24.

51. *Id.* at 525.

52. *Id.* at 526.

53. *Id.*

54. *Id.* at 526 (quoting *Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994) (quoting *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985))).

55. *Id.* at 527-28 (citing *Kelso*, 16 F.3d at 1175; *Joseph Morton*, 757 F.2d at 1275; *Daff v. United States*, 31 Fed. Cl. 682 (1994), *aff'd on other grounds*, 78 F.3d 1566 (Fed. Cir. 1996); *Balimoy Mfg. Co. of Venice*, ASBCA No. 47,006, 95-2 BCA ¶ 27,854; *Quality Granite Constr. Co.*, ASBCA No. 43,846, 93-3 BCA ¶ 26,073.)

56. *Id.* at 530.

57. *Id.*

58. *Id.* at 526.

59. *Id.* at 531.

60. ASBCA No. 51841, 02-2 BCA ¶ 31,883.

61. *Id.* at 157,512-13.

62. *Id.* at 157,514.

not be granted at this time, but in the event that additional time is needed to complete the contract it will be considered and a modification prepared at that time.”⁶⁴ The CO’s own analysis indicated that the modifications merited time increases, but fewer days than the contractor requested.⁶⁵

In June, the CO provided a cure notice to the contractor for “failure to adhere to the progress schedule.” In response, the contractor requested sixty days for the change orders that it had already issued, and forty-five days for rain delays.⁶⁶ The CO again equivocated, stating that “we would visit time extensions when we got closer to the end of the project.”⁶⁷ The CO did not tell the contractor that he considered 105 days unreasonable. Meanwhile, the contractor believed that the schedule adding 105 days was in effect because “[n]o one said anything otherwise.”⁶⁸ The board noted that there were no indications that the CO told the contractor “that they differed so greatly in the proper length of the time extension[s].”⁶⁹ In addition, the government failed to produce evidence showing that the CO “analyzed progress problems against a specified completion date.”⁷⁰

On 4 August 1998, the CO issued a second cure notice, predominantly focusing on the failures of two subcontractors. On 12 August 1998, the contractor replied, indicating that it had fixed the problems with both subcontractors.⁷¹ Nonetheless, on 14 August 1998, the CO terminated the contract for default.⁷²

The board provided several reasons for finding that the CO abused his discretion. First, the CO did not provide any time extensions for any of the four modifications and did not “even adequately consider whether time extensions were appropriate.”⁷³ Second, the contractor reasonably replied to the government’s August cure notice, addressing each area of concern. Third, the CO did not analyze progress problems “against a specified completion date.”⁷⁴ Finally, the CO failed to set a final completion date or tell the appellant that their views about time extensions varied so greatly.⁷⁵

Similar considerations convinced the ASBCA to overturn a default termination in *Bison Trucking & Equipment Co.*⁷⁶ In *Bison Trucking*, the CO terminated a contract for erosion repair for default before the contract’s completion date.⁷⁷ As in *Ryste & Ricas, Inc.*,⁷⁸ the board found “no evidence that the contracting officer did the required analysis of the time and work necessary to complete the contract.”⁷⁹ These cases should remind ACOs to analyze and document work and time remaining until completion carefully, before they terminate a contract on the

63. *Id.* at 157,514-15.

64. *Id.* at 157,514.

65. *Id.* For Modification P00002, the contractor requested thirty-three extra days. Before termination, the CO believed the contractor should have received four to five days. After termination, the CO raised the figure to five to ten days. *Id.*

66. *Id.* at 157,515.

67. *Id.* at 157,515-16.

68. *Id.*

69. *Id.* at 157,514.

70. *Id.* at 157,517.

71. *Id.* at 157,516-17.

72. *Id.* at 157,517.

73. *Id.* at 157,518.

74. *Id.*

75. *Id.*

76. ASBCA No. 53390, 01-2 BCA ¶31,654.

77. *Id.* at 156,385.

78. ASBCA No. 51841, 02-2 BCA ¶31,883.

79. *Bison Trucking*, 01-2 BCA ¶31,654, at 156,385. In *Bison Trucking*, the government also never responded to the contractor’s reasonable request “for the location the Government would accept for a test boring.” *Id.*

grounds that the contractor will be unable to complete the work before the scheduled completion date.

Withholding Payment Under Contract Specifications Cannot Exceed the Amount Allowed Under the FAR

In *All-State Construction, Inc.*,⁸⁰ the government awarded All-State Construction, Inc. (All-State), a contract to construct a hazardous waste facility.⁸¹ The government made periodic progress payments under the FAR payments clause in the contract. During performance, All-State fell behind schedule. As a result, the CO informed All-State that he was recommending a default termination. Soon thereafter, the CO refused payment of an invoice. The amount retained on that invoice, coupled with amounts previously retained by the government, constituted thirty-eight percent of All-State's "otherwise undisputed earned amount for completed work."⁸² The CO withheld that amount to cover liquidated damages and reprocurement costs if the contract was later terminated for default. Not long after the CO refused payment of the invoice, the government terminated the contract for default.⁸³

All-State moved for a summary judgment, seeking to convert the default termination into one for convenience. All-State alleged that retaining thirty-eight percent of its earned progress payments was a material breach of the contract.⁸⁴ The All-State contract incorporated the FAR Payments Clause for Fixed Price Construction Contracts, which provides that "if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved."⁸⁵ The government, however, relied on a clause in the contract that provided:

The obligation of the Government to make any of the payments required under any of

the provisions of this contract shall in the discretion of the Officer in Charge of Construction, be subject to . . . [a]ny claims which the Government may have against the Contractor under or in connection with this contract.⁸⁶

The ASBCA held that the government could not interpret this contract provision as allowing retention "in excess of the express limit in the FAR Payments clause."⁸⁷ Nor could the government rely on the right to common law set-off. By placing the FAR payments clause in the contract, the government limited its common law rights to those specified in the FAR clause. Therefore, the government had breached the contract, relieving All-State of its obligation to perform. All-State was not in default and the board converted the termination to one for the convenience of the government.⁸⁸

When Congress Changes the Rules, Is That Repudiation or an Immediate Breach?

In the context of federal housing loans, the Supreme Court answered that question in *Franconia Associates v. United States*.⁸⁹ The answer—repudiation—determined the timeliness of Tucker Act claims.⁹⁰

Pursuant to a federal program, the Farmers Home Administration (FmHA) gave the petitioners low-interest mortgage loans in exchange for their agreement to use the mortgaged properties for low and middle-income housing, and to adhere to other restrictions "during the life of the loan."⁹¹ The loans' promissory notes allowed the borrowers to prepay the loans at any time, relieving them of the program's restrictions on the use of the mortgaged properties.⁹² After the petitioners entered into these loans, Congress passed the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).⁹³ The ELIHPA

80. ASBCA No. 50586, 02-1 BCA ¶ 31,794.

81. *Id.* at 157,019.

82. *Id.* at 157,020.

83. *Id.* The CO stated that "'it is not prudent at this time to make further payments to you until we are sure that sufficient funds are available in the contract to cover the costs of reprocurement and the assessment of liquidated damages if the contract is terminated for default.'" *Id.*

84. *Id.* at 157,019.

85. FAR, *supra* note 9, at 52.232-5.

86. *All-State Constr.*, 02-1 BCA ¶ 31,794 at 157,020.

87. *Id.* at 157,021.

88. *Id.*

89. 536 U.S. 129 (2002).

90. 28 U.S.C. § 1491 (2000).

91. *Franconia*, 536 U.S. at 140.

imposed permanent restraints on prepayment of FmHA loans. Over nine years later, in 1997, the petitioners filed suit, alleging that the ELIHPA “effected . . . a repudiation of their contracts.”⁹⁴ The CAFC affirmed the COFC’s dismissal on timeliness grounds. The lower courts reasoned that 28 U.S.C. § 2501 requires plaintiffs to file all Tucker Act claims within six years of the date the claims “first accrued,” and that the petitioners’ claims first accrued upon enactment of the ELIHPA.⁹⁵ According to the CAFC, “passage of the ELIHPA constituted an immediate breach” of the loan agreements and “therefore triggered the running of the limitations period.”⁹⁶ Because the plaintiffs filed their suit over nine years after the ELIHPA’s enactment, the claims were untimely. The Supreme Court disagreed, finding that the passage of the ELIHPA served as “a repudiation of the parties’ bargain, not a present breach of the loan agreements.”⁹⁷

The lower courts determined that the only government performance required was “to keep its promise to allow borrowers an unfettered prepayment right.”⁹⁸ Viewed in that manner, the government’s “continuing duty was breached . . . immediately upon enactment of the ELIHPA because, by its terms, the ELIHPA took away the borrowers’ unfettered right of prepayment.”⁹⁹

The Supreme Court saw things differently, concluding that the government’s promised performance was “an obligation to accept prepayment.”¹⁰⁰ Thus, the time for government performance arose only when a borrower attempted to prepay a mortgage loan. The ELIHPA renounced the government’s

contractual duty to accept prepayment “before the time fixed . . . for performance.”¹⁰¹ The ELIHPA, therefore, effected a repudiation, not an immediate breach. A present breach would occur if a petitioner treated ELIHPA as a breach by filing suit before the performance period or when the government refused a prepayment.¹⁰²

Two “practical considerations” buttressed the Court’s conclusion. First, adopting the government’s view of section 2501 would “seriously distort the repudiation doctrine” in Tucker Act suits.¹⁰³ The government’s approach would take away the very flexibility that the repudiation doctrine intends to bestow on aggrieved plaintiffs—the flexibility to sue immediately or wait until the performance date.¹⁰⁴ Second, the government’s interpretation “would surely proliferate litigation” by forcing plaintiffs to choose between suing soon after repudiation or “forever relinquishing their claims.”¹⁰⁵

Finally, the government argued that the repudiation doctrine could not apply to congressional acts because Congress was not free to change its mind later and perform its contractual duties. The Court rejected this argument as well. Just as Congress passed a law renouncing its contractual duties, it could also pass a subsequent statute before the time for performance, retracting the earlier renouncement.¹⁰⁶

Reversing the lower court judgment, the Court concluded that “each petitioner’s claim is timely if filed within six years of a wrongly rejected tender of payment.”¹⁰⁷

92. *Id.*

93. Pub. L. No. 100-242, 101 Stat. 1877 (codified as amended at 42 U.S.C. § 1472(c) (2000)).

94. *Franconia*, 536 U.S. at 140.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 143 (quoting *Franconia Assocs. v. United States*, 240 F.3d 1358, 1363 (Fed. Cir. 2001)).

99. *Id.* (quoting *Franconia*, 240 F.3d at 1364).

100. *Id.* at 146.

101. *Id.* at 147.

102. *Id.*

103. *Id.* at 148.

104. *Id.* at 149.

105. *Id.*

106. *Id.* at 149-50.

107. *Id.* at 150.

The “Fulford Doctrine” allows a contractor to challenge a default termination as part of a timely appeal from the assessment of excess procurement costs, even if the appeal is filed more than a year after termination.¹⁰⁸ The doctrine originated in a 1955, pre-Contract Disputes Act (CDA) ASBCA decision.¹⁰⁹ Applying the *Fulford* Doctrine often contradicts the literal time limitations set by the CDA,¹¹⁰ which requires contractors to file an appeal of a default termination to an agency board of contract appeals within ninety days,¹¹¹ or to the COFC within twelve months.¹¹²

The GSBCA recently re-validated the *Fulford* Doctrine in *Deep Joint Venture*.¹¹³ The GSA signed a lease with Deep Joint Venture on 31 August 1993.¹¹⁴ Because the contractor failed to make satisfactory progress in the contracted building construction, the CO terminated the contract for default on 12 December 1994.¹¹⁵ Between 27 July 1997 and 7 January 1998, the government sent Deep Joint Venture three demand letters for excess procurement costs. Deep Joint Venture then timely appealed the CO’s assessment of excess procurement costs, and concurrently challenged the underlying default termination.¹¹⁶

The GSA urged the board to “revisit and overrule past decisions adopting and adhering to” the *Fulford* Doctrine.¹¹⁷ The

board declined to break from its precedent, observing that the COFC and most of the other boards of contract appeals that have considered the issue after CDA passage have adopted this doctrine.¹¹⁸ The court also reasoned that the rationale underlying the doctrine—“preservation of principles of judicial economy”—remained sound under the CDA.¹¹⁹ Finally, the doctrine does not actually violate “jurisdictional time limitations,” but instead recognizes that the default clause allows a contractor to raise an excusability defense when the CO assesses excess costs.¹²⁰ Therefore, the board concluded,

While we would not permit a contractor solely to seek, more than ninety days after receiving a default termination decision, a conversion of the default termination to one for the convenience of the Government, or to seek to recover convenience termination costs once the decision is final, we do permit the contractor to challenge the propriety of the termination action in defending against an assessment of excess costs of procurement.¹²¹

Lieutenant Colonel Benjamin.

108. See *Deep Joint Venture*, GSBCA No. 14511, 02-2 BCA ¶ 31,914. The doctrine does not allow two bites at the apple, however; the parties need not litigate the merits of a default termination twice. See *Phoenix Petroleum Comp.*, ASBCA No. 45414, 02-1 BCA ¶ 31,835 (holding that the appellant had a full hearing on the merits of a default termination appeal; therefore, the *Fulford* Doctrine did not require reinstatement of an appeal that had been dismissed with prejudice).

109. *Fulford Mfg., Inc.*, ASBCA Nos. 2143, 2144, 1955 ASBCA LEXIS 970 (May 20, 1955).

110. 41 U.S.C. §§ 601-613 (2000).

111. *Id.* § 606.

112. *Id.* § 609(a)(3).

113. GSBCA No. 14511, 02-2 BCA ¶ 31,914.

114. *Id.* at 157,669.

115. *Id.* at 157,673.

116. *Id.* at 157,674.

117. *Id.*

118. *Id.* at 157,675.

119. *Id.* More specifically, the board stated:

It makes little sense to require a contractor who does not want to contest the validity of a termination action in the absence of the assessment of excess procurement costs to challenge the default action immediately in order to preserve its ability to defend against a later contracting officer decision to seek reimbursement of costs.

Id.

120. *Id.*

121. *Id.* The board then proceeded to consider and reject Deep Joint Ventures’ seven grounds for summary relief. *Id.* at 157,676-82.

Terminations for Convenience

Definitional Housekeeping—Finalized

Effective 29 July 2002, the Federal Acquisition Regulation (FAR) Councils finalized a rule discussed in last year's *Year In Review*,¹ moving the definitions of "continued portion of the contract," "partial terminations," and "terminated portion of the contract" from FAR section 49.001 to FAR section 2.101.² The rule also replaces the abbreviated definition of "termination for convenience" in FAR section 17.103³ with a fuller definition at FAR section 2.101: the "exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest."⁴ As proposed, the final rule moves the remainder of FAR section 17.103, explaining the distinction between cancellation and termination for convenience, to the newly created FAR section 17.104(d). As proposed, the final rule adds a definition of "termination for default": the "exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual provisions."⁵ As the FAR Councils intended, these amendments do not appear to "change the meaning of any FAR text or clause."⁶

The T4C Clause: A Clause with "Ancient Lineage," A Clause Not Easily Ignored

In *Dart Advantage Warehousing, Inc. v. United States*,⁷ The Court of Federal Claims (COFC) vigilantly protected the government's ability to rely on a termination for convenience clause in the face of a termination on notice clause. On 6 Sep-

tember 1996, the U.S. Postal Service (USPS) awarded Dart Advantage Warehousing, Inc. (Dart) a two-year contract for warehousing services, with four two-year renewal options. On 25 September 1998, the USPS exercised the first two-year renewal in a modification. The modification also included a termination on notice clause, which provided:

This contract may be terminated in whole or in part by either the Postal Service contracting officer or the contractor upon 180 days written notice. In the event of such termination, neither party will be liable for any costs, except for payment in accordance with the payment provisions of the contract for the actual services rendered prior to the effective date of the termination.⁸

On 26 August 1999, the USPS terminated the contract for default.⁹ The COFC determined that the default termination was improper.¹⁰

The contract's default termination clause provided that an improper default termination would be converted to one for convenience. The convenience termination clause in the contract authorized the USPS to terminate the contract whenever the contracting officer (CO) "determines that termination is in the interest of the Postal Service."¹¹ Dart argued, however, that the termination on notice clause modified the convenience termination clause¹² and that the government was obligated to give Dart 180 days written notice before terminating the contract or pay damages.¹³

1. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2001, at 71 [hereinafter *2001 Year in Review*].

2. Federal Acquisition Regulation; Definition of "Claim" and Terms Relating to Termination, 67 Fed. Reg. 43,513 (June 27, 2002) (to be codified at 48 C.F.R. pts. 2, 17, 31, 33, 49, and 52).

3. Termination for convenience refers to the "procedure which may apply to any Government contract, including multi-year contracts." GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 17.103 (July 2002) [hereinafter FAR].

4. 67 Fed. Reg. at 43,514.

5. *Id.*

6. *Id.* at 43,513.

7. 52 Fed. Cl. 694 (2002).

8. *Id.* at 696.

9. *Id.* at 697.

10. *Id.* at 702-03.

11. *Id.* at 703.

12. *Id.*

13. *Id.* at 706.

The court sought to reconcile the termination for convenience clause and the termination on notice clause by finding an “interpretation which harmonize[d] and [gave] meaning to all parts” of the contract.¹⁴ The court determined that the two clauses were “different and independent ways to terminate a contract, [and] the two clauses [had] different purposes and provide[d] different rights and obligations.”¹⁵ Thus, the court would not render either clause meaningless.

The COFC also reviewed the long history of the government’s right to immediately terminate a contractor for convenience.¹⁶ In particular, the COFC noted the “Christian Doctrine,” whereby the convenience termination clause is “read into” a contract as a matter of law, even when omitted. The COFC determined that a “clause with such ancient lineage, reflecting deeply ingrained public procurement policy . . . , applied to contracts with the force and effect of law even when omitted, [and] should not be materially modified or summarily rendered meaningless without good cause, which plaintiff has not supplied.”¹⁷ The court concluded that the termination on notice clause did not modify the termination for convenience clause, and that the latter clause would govern the measure of damages.¹⁸

*DOTBCA Treats Government’s Breach as Constructive T4C,
Despite Contractor’s Bankruptcy*

In *Carter Industries*,¹⁹ the Department of Transportation Board of Contract Appeals (DOTBCA) determined the measure of damages when the Department of Justice, Bureau of Prisons (FBOP) breached a contract while the contractor was in bankruptcy proceedings. In a prior proceeding, the board had determined that the FBOP had breached the contract by improperly refusing tender of goods. At the time the government breached the contract, Carter Industries (Carter) was

undergoing bankruptcy proceedings. In the earlier proceeding, the board remanded the case to the parties to determine the amount of damages for the government’s anticipatory breach.²⁰

Carter claimed breach damages, including anticipatory profits. In response, the government argued that the anticipatory breach should be treated as a constructive termination for convenience. It reasoned that anticipatory profits are not available under the termination for convenience clause. Carter contended that the Bankruptcy Act²¹ stay would have prevented any termination at the time the breach occurred; therefore, the “constructive termination for convenience defense is unavailable.”²²

After reviewing the most typical circumstances in which courts and boards have treated government breaches as convenience terminations, the board summarized the applicable law as follows: “[W]here at the time of breach the Government could have exercised its right to terminate the contract for the convenience of the Government, a contractor’s damages will be limited to those that it would have received under the provisions of the Termination for Convenience clause.”²³ The Bankruptcy Act stay prohibits the government from terminating the contract of a “debtor in possession” for default, absent permission from a bankruptcy court. Extending this reasoning, Carter asserted, the “FBOP could not have terminated the contract for convenience” without the permission of the bankruptcy court.²⁴ Therefore, the right to a convenience termination “was technically not available to the FBOP.”²⁵

The board found it unnecessary to decide whether the bankruptcy court would have had to approve a convenience termination. Regardless of the need for bankruptcy court approval, the board found that “if the contract contains the Termination for Convenience clause, the damages recoverable by a contractor in a breach of contract case are limited by the terms of that

14. *Id.*

15. *Id.*

16. *Id.* at 708.

17. *Id.* at 709 (discussing *GL. Christian & Assoc. v. United States*, 312 F.2d 418 (1963), *cert. denied*, 375 U.S. 954 (1963), *reh’g denied*, 376 U.S. 929, 377 U.S. 1010 (1964)).

18. *Id.* at 710.

19. DOTBCA No. 4108, 02-1 BCA ¶ 31,738.

20. *Id.* at 156,784.

21. *See* 11 U.S.C. §§ 101, 106, 362, 1101-1114 (2000).

22. *Carter Industries*, 02-1 BCA ¶ 31,738, at 156,784.

23. *Id.* at 156,786.

24. *Id.*

25. *Id.*

clause.”²⁶ The board limited recovery to the amount Carter “would have otherwise received had the contract been terminated for convenience on the day the contract ended.”²⁷

New Venture Not Precluded from Recovering Lost Profits upon Government Breach

In *Energy Capital Corp. v. United States*,²⁸ the Court of Appeals for the Federal Circuit (CAFC) rejected the government’s invitation to establish a per se bar to lost profits for new ventures. Energy Capital Corp. negotiated an agreement with the Department of Housing and Urban Development (HUD) to finance energy improvements in HUD properties. Under the Affordable Housing Energy Loan Program (AHELP), Energy Capital “could originate loans to owners of HUD properties for three years, or until a cap of \$200 million in loan originations was reached.”²⁹

The agreement allowed Energy Capital’s loans to take the senior mortgage position, ahead of loans secured by first mortgages, so long as the first mortgagee consented. Energy Capital would obtain its capital from the Federal National Mortgage Association (Fannie Mae). Energy Capital would loan money at the Treasury rate plus 3.87% and repay Fannie Mae at the Treasury rate plus 1.87%. The remaining two percent would be Energy Capital’s profit.³⁰ As a result of an article in the *Wall Street Journal*, the government terminated the agreement. The AHELP agreement did not contain a termination for convenience clause.³¹

At the COFC, the government conceded liability for breach of contract; the parties proceeded to trial to contest the amount of the damages. Energy Capital sought lost profits.³² At trial, the COFC found that Energy Capital established the three elements needed to demonstrate entitlement to lost profits—causation, foreseeability, and reasonable certainty. On appeal, the government did not challenge any of the COFC’s findings of fact.³³ Instead, the government urged the court to “adopt a per se rule that lost profits may never be recovered for a new business venture that was not performed.”³⁴ The government argued that because neither Energy Capital nor any other party had ever performed this venture, the award of lost profits “was speculative and erroneous as a matter of law.”³⁵

The circuit court disagreed and restated the traditional elements a plaintiff must prove to recover lost profits:

- (1) the loss was the proximate result of the breach;
- (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and
- (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.³⁶

The CAFC recognized that determining the amount of a new venture’s lost profits is difficult, but not legally impermissible.³⁷ The court also rejected, in turn, the government’s subordinate arguments that it should bar the award of lost profits as a matter of law: that no other contractor performed the contract after HUD terminated Energy Capital (so as to establish infor-

26. *Id.* Although this statement, standing alone, appears quite broad, earlier portions of the board’s decision appear to limit this holding. For instance, the board seemed to recognize that had the government acted in bad faith, the constructive convenience termination device would be unavailable, even if the termination for convenience clause was in the contract. Earlier in the opinion, the board recognized that the “constructive convenience termination principle was unavailable where the Government had acted in bad faith.” *Id.* at 156,786 (discussing *Torncello v. United States*, 231 Ct. Cl. 20 (1982)).

27. *Id.* Interestingly, the board stated, “Since the FBOP could have invoked the provisions of the Termination for Convenience clause, appellant’s recovery is limited.” *Id.* The preceding paragraph of the decision, however, explicitly leaves open whether FBOP could have properly terminated the contract. *Id.* at 156,785.

28. 302 F. 3d 1314 (Fed. Cir. 2002).

29. *Id.* at 1317.

30. *Id.* at 1318.

31. The article alleged that Energy Capital received the contract in return for significant fundraising for President Clinton. Three days later, the *Wall Street Journal* admitted that “no one has said that HUD officials knew” about the fundraising efforts. *Id.* at 1319.

32. *Id.*

33. *Id.* at 1320.

34. *Id.* at 1324.

35. *Id.* at 1325.

36. *Id.* 1324-25 (referencing *Chain Belt Co. v. United States*, 115 F. Supp. 701, 714 (Ct. Cl. 1953); RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981)).

37. *Id.* at 1326-27.

mation to determine damages); that no third party had ever performed this type of contract;³⁸ and that the lower court “erred as a matter of law by engaging in ‘rampant’ and ‘unsupported’ speculation” in determining that Energy Capital “would have realized profits.”³⁹ The CAFC affirmed the lower court’s award of lost profits.⁴⁰

ASBCA Resolves a Potpourri of Pecuniary Problems Resulting from Partial T4C

In *Information Systems & Networks Corp.*,⁴¹ the Air Force issued a \$3 million delivery order (DO) to Information Systems & Networks Corporation (ISN) to “provide services, labor, tools, materials, personnel, and equipment to successfully implement . . . network and video teleconferencing hardware components.”⁴² A key factual issue was whether the DO was an incrementally funded order covering thirteen locations, as ISN asserted, or a fixed-price order for services at four locations, as the Air Force contended. The board definitively sided with ISN on this issue.⁴³ The Air Force partially terminated the DO for convenience, essentially leaving work on only four sites. ISN and the government disagreed about several elements of recovery for the partially terminated order.⁴⁴

As a threshold matter, the Air Force contended that the FAR limited ISN’s recovery to “the dollar amount remaining on [the]

delivery order.”⁴⁵ ISN asserted that its claims for “lost volume discounts, restocking charges, and early termination” of a lease “all represent constructive changes,” and therefore “the general rule” limiting recovery to the contract price does not control.⁴⁶ The board agreed with ISN, finding it inappropriate to adhere strictly to the contract price in light of “unpriced changes” and “other modifications.”⁴⁷ The board used ISN’s proposal price for the DO, over \$6 million, as the payment limit. Because ISN sought significantly less than \$6 million, the “contract price” was not a factor in limiting recovery.⁴⁸

ISN sought to recover lost volume discounts.⁴⁹ When the Air Force reduced the DO from thirteen sites to four, ISN reduced its orders from suppliers. The suppliers then charged ISN to recoup their volume discounts and for restocking.⁵⁰ The Air Force, asserting that the initial DO only covered four sites, argued that the decision to buy supplies for thirteen sites was a voluntary act by ISN. Because the board decided that the DO included all thirteen sites, it also determined that ordering supplies for all thirteen was not a voluntary act.⁵¹ The board then recognized that FAR section 49.104⁵² required the contractor to “perform the continued portion of the contract and [to] submit promptly any request for an equitable adjustment . . . supported by evidence of any increase in the cost, if the termination is partial.”⁵³ ISN, therefore, could recover its “increased cost of performing nonterminated work which arose from the convenience

38. *Id.* at 1326.

39. *Id.* at 1328.

40. *Id.* at 1334. The circuit court rejected the COFC’s use of a risk-free discount rate to calculate the value of the AHELP project and remanded the case to the COFC to determine final damages based upon a risk-adjusted discount rate. *Id.*

41. ASBCA No. 46119, 02-2 BCA ¶ 31,952.

42. *Id.* at 157,858. The delivery order was part of a larger contract for “Internetted Warfighting Analysis Capability” (IWAC). *Id.* at 157,852. The Air Force District of Washington (AFDW) contracted with the Small Business Administration (SBA) to provide “all labor, tools, supervision, and other services necessary to design, install, certify, and manage the integration of 7CG computers, computer system, and networks.” *Id.* at 157,851. The SBA simultaneously contracted with ISN to perform the work. *Id.*

43. *Id.* at 157,875-76.

44. *Id.* at 157,867-68.

45. *Id.* at 157,873.

46. *Id.*

47. *Id.*

48. *Id.* at 157,875-76.

49. *Id.* at 157,876.

50. *Id.* at 157,868.

51. *Id.* at 157,876.

52. FAR, *supra* note 3, at 49.104.

53. *Info. Sys. & Networks*, 2002-2 BCA ¶ 31,952, at 157,876.

termination, i.e., lost volume discounts and vendor restocking charges.”⁵⁴

The Air Force also contested ISN’s recovery of lease costs for a one-year lease that ISN entered into with U.S. Sprint for communication circuits.⁵⁵ According to the board, rental costs for unexpired leases are allowable convenience termination costs if the lease was reasonably necessary to perform the terminated contract, and upon termination, the contractor takes reasonable efforts to mitigate the costs of such leases. Because ISN’s lease costs did not result from negligent or willful failure to prevent such costs, they were recoverable expenses.⁵⁶

At termination, ISN was storing certain equipment that ISN had attempted to deliver to the government. The government failed to tell ISN what to do with the equipment.⁵⁷ Referencing FAR section 52.249-2, the court noted, the convenience termination clause excludes “destroyed, lost, stolen, or damaged” property from the amount payable to a terminated contractor.⁵⁸ Because the stored equipment did not fall into any of these categories, ISN was able to recover the value of the stored equipment from the Air Force “pending further delivery instruction.”⁵⁹

Finally, because the ISN had charged the Air Force a twelve-percent “handling fee” on major equipment under the thirteen-site DO, the profit rate for only four locations would have to be higher. The Air Force challenged this additional mark-up.⁶⁰ Again, the board sided with ISN. Because ISN could spread its overhead costs for equipment to only four sites instead of thirteen, the board determined that the proper rate would be the “overhead rate the contractor would have quoted upon the

‘quantity as terminated,’” rather than the “original quantity.”⁶¹ The board allowed ISN to seek recovery for the increased mark up.⁶²

Well-Nigh Irrefragable Standard Is Well-Nigh History

In the humdrum world of evidentiary standards, every law student learns about three traditional standards of proof: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. But in the world of government contracting, practitioners have been treated to (some would say, subjected to) the “well-nigh irrefragable” standard. Specifically, a contractor can overcome the strong presumption that government officials act in good faith only with “well-nigh irrefragable proof of the contrary.”⁶³

Most often, courts apply the standard to contractors that allege bad faith as a defense to a termination.⁶⁴ In *Am-Pro Protective Services, Inc. v. United States*,⁶⁵ the CAFC may have sounded the standard’s death-knell in the context of a contractor’s allegation of duress. In *Am-Pro Protective Services*, the Department of State (DOS) awarded the appellant a contract for security guard services in June 1989. Two years into performance, Am-Pro Protective Services Inc. (Am-Pro) filed a claim for additional compensation for “breaker hours.”⁶⁶ The CO denied the claim in May 1991. In November 1991, Am-Pro sent the DOS a letter withdrawing the claim and agreed not to appeal the CO’s final decision.⁶⁷ In May 1998, Am-Pro filed another claim for the same “breaker hours,” and attached a letter alleging that it had submitted the November 1991 withdrawal under duress.⁶⁸ Am-Pro later submitted an affidavit

54. *Id.*

55. *Id.*

56. *Id.* at 157,876-77.

57. *Id.* at 157,877.

58. *Id.* (citing FAR, *supra* note 3, at 52.249-2(g)).

59. *Id.*

60. *Id.* at 157,877-78.

61. *Id.* at 157,878 (citing Fairchild Stratos Corp., ASBCA No. 9169, 67-1 BCA ¶ 6225).

62. *Id.*

63. See, e.g., *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (citing *T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982); *Schaefer v. United States*, 633 F.2d 945, 948-49 (Ct. Cl. 1980); *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976); *Grover v. United States*, 200 Ct. Cl. 337, 344 (1973)).

64. See, e.g., *Kalvar*, 543 F.2d at 1302; *Torncello*, 681 F.2d at 770.

65. 281 F.3d 1234 (Fed. Cir. 2002).

66. *Id.* at 1236-37. Breaker hours were the “hours for lunch breaks and the two fifteen-minute breaks that Am-Pro was required to provide each guard.” *Id.* at 1236.

67. *Id.* at 1237.

alleging that in November 1991, “the CO threatened to adversely impact its ability to contract with other agencies of government” if Am-Pro appealed the CO’s final decision.⁶⁹

A new CO refused to consider the second claim. Am-Pro then filed suit in the COFC. The COFC dismissed the suit because “Am-Pro had failed to contest the CO’s 1992 final decision within the one-year limitations period set forth in the Contract Disputes Act.”⁷⁰ In the U.S. Court of Appeals for the Federal Circuit (CAFC), Am-Pro argued that because its failure to file on time resulted from duress, the court should equitably toll the limitations period and find Am-Pro’s release invalid.⁷¹ The CAFC affirmed the COFC’s decision that Am-Pro’s argument could not survive the government’s motion for summary judgment.⁷²

The CAFC judged Am-Pro’s allegation against the “high burden of proof necessary to overcome the presumption of good faith”⁷³ and used the case as an opportunity to clarify the “confusion” surrounding the standard necessary to prove government bad faith.⁷⁴ The CAFC found that of the three standards of proof recognized by courts, “preponderance of the evidence,” “clear and convincing,” and “beyond a reasonable doubt,” “clear and convincing” most appropriately describes the burden of proof applicable to the presumption of the government’s good faith.⁷⁵ The court later stated that the clear and convincing standard “most closely approximates . . . ‘well-nigh

irrefragable.”⁷⁶ After providing various courts’ formulas and a dictionary definition of “irrefragable,”⁷⁷ the CAFC concluded that “showing a government official acted in bad faith is intended to be very difficult, and that something stronger than a preponderance of evidence is necessary.”⁷⁸

Regardless of the court’s phrasing, it held that Am-Pro failed to create a “genuine issue of material fact about whether its inaction and its release resulted from duress by the government.”⁷⁹ That is, the CAFC determined that “a reasonable fact finder could not find, by clear and convincing evidence, that the CO did not act in good faith.”⁸⁰ The court reasoned that Am-Pro’s only evidence was an “utterly uncorroborated” affidavit, lacking any suggestion that the government had a “specific intent to injure.”⁸¹ Moreover, Am-Pro prepared the affidavit six years after the government made the alleged threats, and there was ample evidence that Am-Pro’s attorneys participated in preparing it.⁸²

Is “well-nigh irrefragable” a relic of history? The CAFC seems to think so. Summing up the issue of good faith, the court wrote that “Am-Pro’s belated assertions, with no corroborating evidence, therefore fall short of the clear and convincing or highly probable (*formerly* described as well-nigh irrefragable) threshold.”⁸³

68. *Id.* at 1238.

69. *Id.* at 1237.

70. *Id.* at 1238.

71. *Id.*

72. *Id.* at 1243.

73. *Id.* at 1238.

74. *Id.* at 1239-40.

75. *Id.* at 1239.

76. *Id.* at 1239-40.

77. The word “irrefragable” means “[i]ncapable of being refuted or controverted.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 692 (New College ed. 1976).

78. *Am-Pro*, 281 F.3d at 1240.

79. *Id.* at 1240-41.

80. *Id.* at 1241.

81. *Id.* at 1241-42.

82. *Id.*

83. *Id.* at 1243 (emphasis added).

Moving Office Violated Implied Covenant of Good Faith and Fair Dealing

The COFC, without referring to “well-nigh irrefragable” or “clear and convincing,” found that the government acted in bad faith in *Hubbard v. United States*.⁸⁴ In 1984, Hubbard contracted with the U.S. Navy Exchange (Exchange) to build a mini storage facility at Lemoore Naval Air Station (NAS) in California.⁸⁵ Hubbard agreed to return 17.5% of the gross revenue to the Navy Exchange. As part of the consideration from the Navy, the Navy “provided a rental office and check in/check out area near the site of the storage units, known as the Rent All Center.⁸⁶ Nine years later, in 1993, over Hubbard’s vigorous objections, the Commander of NAS Lemoore moved the Rent All Center from its initial location near the storage facility to a more distant off-site location.⁸⁷

Hubbard alleged that the move violated a requirement of the contract or breached the implied covenant of good faith and fair dealing. Although the COFC found that the office’s location was not a contract term, the Navy had to “act reasonably . . . not to impair the ability of Mr. Hubbard to earn a fair return on his investment.”⁸⁸ The commander provided two reasons for mov-

ing the Rent All Center. First, it was an eyesore. Second, he was concerned about the welfare of the Exchange workers. Finding the commander’s testimony “simply not credible,” the COFC rejected the commander’s two stated reasons as “at best, pretexts.”⁸⁹ The commander even admitted that he would have kept the Rent All Center in the same place had Mr. Hubbard increased the Exchange’s share of the revenue. The court concluded with these harsh comments:

This suggests that employee welfare and base aesthetics were important only so far as they would permit Captain Gorthy to extract more revenue from Mr. Hubbard. While the court can in some respects only hazard a guess as to Captain Gorthy’s motives for the move, it is clear to the court that the stated reasons for the move were pretextual, and that the move was engineered in bad faith, without regard, indeed, with deliberate and bad faith disregard, for the legitimate business interests of Mr. Hubbard.⁹⁰

Lieutenant Colonel Benjamin.

84. 52 Fed. Cl. 192 (2002).

85. *Id.* at 193.

86. *Id.* at 193-94.

87. *Id.* at 194.

88. *Id.* at 195.

89. *Id.* at 196.

90. *Id.*

Contract Disputes Act (CDA) Litigation

Jurisdiction

The Appeal of Uranium

Last year's Year in Review reported that in *Florida Power & Light Co. v. United States*,¹ the Court of Federal Claims (COFC) found that the transfer of enriched uranium from the Department of Energy (DOE) to private utility companies was not subject to the Contract Disputes Act (CDA)² as a purchase or sale of property, but was subject to the Tucker Act³ as a provision of services by the DOE.⁴ This distinction is important because, as the last Year in Review reported, the CDA, "unlike the Tucker Act, allows for interest on a claim calculated from the date on which the claim was filed with the contracting officer until the date of judgment."⁵ On appeal, the U.S. Court of Appeals for the Federal Circuit (CAFC) upheld the COFC's determination that the CDA did not apply to the uranium transfer.⁶ Specifically, the CAFC held:

In light of the pricing mechanism, the transaction is best characterized as a service provided by the government (the provision of a

set amount of enrichment service for a particular price) rather than as a purchase or sale of personal property (the provision of a set amount of enriched uranium for a particular price).⁷

CAFC Reversal—District Court Stay Tolded the Statutory Time Period for Filing COFC Appeal

A contractor must file its appeal of a contracting officer's final decision with the COFC or the ASBCA before the statutory deadline expires or risk dismissal for lack of jurisdiction.⁸ One recent case, however, demonstrates that there are exceptions to the rule. As last year's Year in Review reported, in *International Air Response v. United States*,⁹ the COFC granted a government motion to dismiss because the contractor did not file its appeal until nineteen months after the final decision.¹⁰ The contractor argued that an Arizona district court stay tolled the deadline.¹¹ The COFC held that "nothing in the All Writs Act gave the district court power to derogate from the jurisdiction of the Court of Federal Claims, or otherwise to affect the CDA's limitations provisions."¹²

1. 49 Fed. Cl. 656 (2001).

2. 41 U.S.C. §§ 601-613 (2000). The CDA applies to contracts entered into by an executive agency for:

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

Id. § 602(a).

3. 28 U.S.C. § 1491 (2000).

4. Major John J. Siemietkowski, et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAWYER, Jan./Feb. 2002, at 71 [hereinafter *2001 Year in Review*].

5. *Id.* (citing 41 U.S.C. § 611).

6. *Florida Power & Light Co. v. United States*, 2002 U.S. App. LEXIS 20858 (Fed. Cir. Oct. 4, 2002).

7. *Id.* at *23.

8. The deadline for an appeal to the COFC is twelve months. 41 U.S.C. § 609(a) (2000). The deadline for an appeal to the ASBCA (or any Board of Contract Appeals) is ninety days. 41 U.S.C. § 606.

9. 49 Fed. Cl. 509 (2001).

10. *2001 Year in Review*, *supra* note 4, at 73.

11. *Int'l Air Response*, 49 Fed. Cl. at 511.

12. *Id.* at 512. The All Writs Act is codified at 28 U.S.C. § 1651 (2000).

The CAFC held, however, that tolling the one-year appeal period was appropriate because the government contracting activity did not appeal the district court's stay order.¹³ Specifically, the CAFC determined that the "government was barred by the doctrine of res judicata from relitigating the issue of the Arizona district court's authority under the All Writs Act to issue the stay order."¹⁴ Accordingly, the CAFC determined that the government was foreclosed from its collateral attack on the stay order, but ultimately did not decide whether the district court originally had authority to issue the stay order.¹⁵

Well-Nigh Irrefragable Proof Equals Clear and Convincing Proof

In *Am-Pro Protective Agency, Inc. v. United States*,¹⁶ the CAFC affirmed a COFC dismissal for untimeliness where the contractor, Am-Pro, waited six years to file its appeal. Am-Pro alleged that the contracting officer had threatened to cancel the contract, refuse to exercise subsequent options, and prevent other contract awards if Am-Pro appealed her final decision.¹⁷ The CAFC held that Am-Pro failed to overcome the strong presumption that the contracting officer acted in good faith in denying the claim.¹⁸ While noting that the CAFC and its predecessors had "used the 'well-nigh irrefragable' language to describe the quality of evidence required to overcome the good faith presumption," the court also noted that prior decisions had also used the phrase "clear evidence."¹⁹ From the three generally recognizable standards of proof courts most commonly used,²⁰ the CAFC held that the "clear and convincing" standard most closely approximated the somewhat archaic "well-nigh irrefragable" standard of proof language. Using the clear and convincing proof standard, the CAFC found that Am-Pro failed

to rebut the presumption of good faith, primarily because Am-Pro waited six years after the alleged threats to make any complaint of wrongdoing.²¹

Late Is Late, Especially with Return Receipt Evidence

In *Policy Analysis Co. v. United States*,²² the contracting officer mailed a certified letter dated 27 April 1999, terminating a purchase order for default, and received a return receipt dated 30 April 1999. The contractor, Policy Analysis Co. (PAC), used the services of a commercial mail drop named Press Building Mailbox Company to receive the termination notice. More than one year later, on 2 May 2000, PAC appealed its termination to the COFC.²³ PAC alleged that it had never received the termination notice sent by certified mail, but rather learned of the termination through an employee of the contracting activity, and subsequently received a facsimile copy of the 27 April termination notice on 10 May 1999.²⁴ The COFC, however, held that the commercial mail drop acted as PAC's agent to receive mail, and that the return receipt evidenced receipt of the termination notification on 30 April 1999. Accordingly, PAC was late in filing its appeal.²⁵

The GSBCA Examines a Postmark

After failing to get an adequate declaration from the pro se appellant in *Betty Hamlin v. General Services Administration*,²⁶ the General Services Board of Contract Appeals (GSBCA) examined the postmark on the notice of appeal to determine when it was mailed. The GSBCA received the appeal notice on 29 April 2002, which was beyond the ninety-day time period to

13. *Int'l Air Response v. United States*, 302 F.3d 1363 (Fed. Cir. 2002).

14. *Id.* at 1368.

15. *Id.*

16. 281 F.3d 1234 (Fed. Cir. 2002).

17. *Id.* at 1237.

18. *Id.* at 1238-39.

19. *Id.* at 1239 (citing *Librach v. United States*, 147 Ct. Cl. 605 (1959); *George v. United States*, 166 Ct. Cl. 527, 531 (1964)).

20. "Courts generally recognize three standards of proof: 'preponderance of the evidence,' 'clear and convincing,' and 'beyond a reasonable doubt.'" *Id.* (citing *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993)).

21. *Id.* at 1242.

22. 50 Fed. Cl. 626 (2001).

23. *Id.* at 627.

24. *Id.* at 628.

25. *Id.* at 631.

26. GSBCA No. 15,856, 02-2 BCA ¶ 31,934.

file an appeal after receipt of the contracting officer's final decision 18 January 2002.²⁷ Because the postmark's date was not clear, the GSBCA enlarged the postmark and modified the shading to conclude that the appellant had mailed its notice on 17 April 2002. Accordingly, the GSBCA determined that the appellant had filed the notice within ninety days.²⁸

It Still Takes Two to Reconsider

Last year's Year in Review discussed Propulsion Controls Engineering,²⁹ where the ASBCA refused to extend the ninety-day deadline for filing an appeal when the contractor alleged that the contracting officer's reconsideration extended the deadline.³⁰ The ASBCA found no evidence of reconsideration by the contracting officer. The contracting officer merely declined to rescind her original decision after the contractor's attorney presented additional issues and requested rescission of the contracting officer's decision.³¹ In *Damson Builders Inc.*,³² the ASBCA continued to apply a strict standard to allegations of contracting officer reconsideration. *Damson Builders* submitted a letter on 25 March 1999, stating that it did not accept the contracting officer's 9 March 1999 final decision and asked that the letter serve as "our notice of claim dispute."³³ *Damson Builders* did not send the letter to the contracting officer, however, but to another government employee.

Over a year later, on 5 October 2000, *Damson Builders* notified the contracting officer that it had not sent its 25 March 1999 letter to the ASBCA, in the belief that its earlier submission would suffice. *Damson Builders* also requested that the

contracting officer review the 9 March 1999 final decision. On 16 November 2000, the contracting officer notified *Damson Builders* that he would not review the final decision because *Damson Builders* had not presented any additional information for reconsideration.³⁴ On appeal, the ASBCA granted the government's motion to dismiss because the contracting officer's "actions could not have been reasonably construed to mean that the contracting officer had reconsidered his final decision."³⁵

Last year's Year in Review warned that "a contracting officer may take actions that can be construed as reconsidering a claim which could inadvertently extend the filing deadline."³⁶ In *DK & R Co.*,³⁷ a contracting officer fell into this trap when she concluded her final decision with the following: "If you wish to further discuss this issue, I can be reached at [her telephone number]."³⁸ She also subsequently arranged a meeting between the appellant and the acquisition executive.³⁹ Based on this activity and her concluding remarks in the final decision, the ASBCA concluded that the "appellant reasonably and objectively could have concluded that the [contracting officer] was reconsidering her decision and thus it was not final."⁴⁰

Is the Contractor Premature with Its Appeal or Has There Been a Deemed Denial?

As some contractors discover that they may be at risk for dismissal of their appeals for filing late, other contractors risk dismissal for appealing prematurely, before the contracting officer issues a final decision. In *Fru-Con Construction Corp.*,⁴¹ the ASBCA allowed a protestor to continue with its appeal after the

27. *Id.* at 157,761.

28. *Id.* at 157,762. The GSBCA rules allow the date for filing a notice of appeal to occur on the earlier of its receipt at the board or on the date that is mailed. 48 C.F.R. § 6101.1(b)(5)(i) (2002).

29. ASBCA No. 53,307, 01-2 BCA ¶ 31,494.

30. *See 2001 Year in Review, supra* note 4, at 73.

31. *Propulsion Controls Eng'g*, 01-2 BCA ¶ 31,494, at 155,508.

32. ASBCA No. 53,172, 01-2 BCA ¶ 31,618.

33. *Id.* at 156,214.

34. *Id.*

35. *Id.* at 156,215.

36. *See 2001 Year in Review, supra* note 4, at 73-74.

37. ASBCA No. 53,451, 02-1 BCA ¶ 31,769.

38. *Id.* at 156,902.

39. *Id.*

40. *Id.* at 156,903.

41. ASBCA No. 53,544, 02-1 BCA ¶ 31,729.

contracting officer notified the parties that she would issue her final decision within thirteen months.⁴² The board held that the appeal was not premature because such an unreasonably long period of time was a constructive denial of the protestor's claim.⁴³

*“Do You Choose Curtain Number One or Two?
The Government Wins Either Way!”*

*The ASBCA Treats a Motion to Dismiss for Lack of Subject
Matter Jurisdiction as a Motion for Summary Judgment and
Dismisses a Vietnam-Era Appeal.*

On 23 August 2002, the ASBCA issued a summary judgment, dismissing the appeal in Thai Hai,⁴⁴ ending a thirty-five-year contract dispute saga. On 22 February 2001, Mr. Thai Hai submitted a claim for over \$2 million for “back rent, rent due under the lease, the value of the warehouse property, allegedly destroyed due to the Army’s negligence; and accrued interest” for warehouse property in Vietnam that the appellant had allegedly leased to the Army during the Vietnam War.⁴⁵ Before the ASBCA, the government filed a motion to dismiss Mr. Hai’s appeal for lack of subject-matter jurisdiction because no contracting officer had ever signed the alleged lease document.⁴⁶ Because the parties presented and disputed facts that were outside the scope of the initial pleadings, the board determined that a summary judgment would be more appropriate. Accordingly, the ASBCA found that there was never any mutuality of intent to lease the property from the appellant in his individual capacity because the dealings with Mr. Hai had been in his capacity

as an agent for the alleged owner. The board also found no evidence of an unambiguous offer and acceptance because the Army believed that the South Vietnamese government had control over the property and allowed the Army to occupy it rent-free.⁴⁷

Remedies and Defenses

Don’t Save Affirmative Defenses for a Rainy Day!

The ASBCA dealt the Air Force a hard blow in Phoenix Management, Inc.⁴⁸ when it barred the Air Force from asserting an affirmative defense in its brief without having first raised that defense in its answer. Phoenix Management, Inc. (PMI) provided airfield management services at Randolph Air Force Base, Texas, under a firm fixed-price contract awarded on 25 February 1997. During the option period for fiscal years (FY) 2000 and 2001, PMI was subject to a revised wage determination through the incorporation of a collective bargaining agreement (CBA).⁴⁹ The contracting officer had originally non-concurred with the inclusion of two management positions within the CBA, but the revised wage determination had not addressed this concern.⁵⁰ In a letter dated 20 October 1999, PMI submitted a request for equitable adjustment for the increased costs associated with the revised wage determination. The contracting officer denied the request as it related to the two management positions, however, because he “considered these positions as exempt salaried personnel.”⁵¹

42. *Id.* at 156,757. Under the CDA, there is a three-step analysis before a contractor may pursue an appeal of a deemed denial of its claim:

A contracting officer shall, within sixty days of receipt of a submitted certified claim over \$100,000 . . . issue a decision; or . . . notify the contractor of the time within which a decision will be issued. . . . The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor. . . . Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim.

41 U.S.C. §§ 605(c) (2000).

43. *Fru-Con Constr.*, 02-1 BCA ¶ 31,729, at 156,757; *see also* *Midwest Props., LLC*, Nos. 15,822, 15,844, 2002 GSBGA LEXIS 160 (Aug. 1, 2002). The GSBGA held that *Midwest Properties, LLC* was immediately entitled to appeal the contracting officer’s letter even though it did not meet the final decision requirements. The board found that the letter was “in essence” a final decision because the letter unequivocally provided the contracting officer’s position without any suggestion that he was not open to negotiations. *Id.*

44. ASBCA No. 53,375, 02-2 BCA ¶ 31,971.

45. *Id.* at 157,919.

46. *Id.* at 157,920.

47. *Id.* “Although the Federal Rules of Civil Procedure do not apply to the Board as an administrative tribunal, [the Board] can look to them for guidance, particularly in areas our rules do not specifically address.” *Id.* at 157,920 (citing *Dennis Anderson Constr. Corp.*, ASBCA Nos. 48,780, 49,261, 96-1 BCA ¶ 28,076, at 140,188). The board looked to Federal Rule of Civil Procedure 12(b) to determine that it should treat the government’s motion as a motion for summary judgment when “matters outside the pleadings are presented and not excluded by the tribunal.” *Id.*

48. ASBCA No. 53,409, 02-1 BCA ¶ 31,704.

49. *Id.* at 156,587.

50. *Id.* at 156,587-88.

On 7 June 2001, the parties executed a bilateral modification that provided for the wage adjustment and a release for the revised wage determination for FY 2001, but not for FY 2000.⁵² After a final agency decision denying the remainder of PMI's claim and subsequent appeal to ASBCA, the Air Force's brief eventually argued that PMI released any remaining FY 2001 claims for the wage determination through the modification. Unfortunately for the Air Force, the board granted PMI's motion to strike the defense because "'any affirmative defenses available' must be pled in the answer."⁵³ Accordingly, the ASBCA "disregard[ed] the release in modification P00015 in evaluating entitlement for FY 2001"⁵⁴ and found that PMI was entitled to full recovery of the FY 2001 costs for complying with the wage determination.⁵⁵

There Is Some Rotten Lumber in Panama—or Maybe Not

In 1997, the U.S. Army awarded Delta Construction International, Inc. (Delta) an indefinite-delivery, indefinite-quantity contract for replacing rotten lumber at various U.S. facilities in Panama, with a guaranteed minimum of \$200,000 for the nine-month base and the two option years.⁵⁶ The contract also required Delta "to possess sufficient capability to accomplish a daily rate of work in monetary value of a minimum of \$3000 when single or multiple delivery orders have been issued and accepted."⁵⁷ In January 1999, Delta submitted a claim for \$125,965.46, which represented the difference between the amount of work ordered during the base and first option periods and the guaranteed \$200,000 minimum. The contracting officer denied the claim but acknowledged that the government had failed to order the guaranteed minimum and provided an \$11,216 adjustment.⁵⁸ The contracting officer explained his reasoning in his final decision:

[T]he Government did not order the guarantee minimum, nevertheless, the contractor is not entitled to be put in a better position than it would have been if it had performed and had to bear the expense of full performance. It is my decision that the contractor is entitled to recover a reasonable profit which it would have earned had he performed, based on the guarantee minimum, the overhead costs incurred on the guarantee minimum, and any reasonable, allocable, and allowable cost incurred based on the guarantee minimum.⁵⁹

Upon appeal to the ASBCA, the board held that "Delta is entitled to recover the difference between \$200,000 and the \$86,323.07 in orders performed, or \$113,676.93."⁶⁰ Relying on *Maxima Corp. v. United States*,⁶¹ the board found that Delta's contract required it to maintain a minimum capability in return for the minimum guaranteed amount.⁶² The CAFC, however, vacated and remanded the case to the ASBCA because the board used "an impermissible basis for calculating damages."⁶³ The CAFC specifically held that the board's impermissible damages calculation would have

put the contractor in a more favorable position than it would have been in if the government had performed rather than breached its contractual commitment. The proper basis for damages in this case is the loss the contractor suffered as a result of the government's breach, not the total amount it would have received without the breach.⁶⁴

51. *Id.* at 157,588.

52. *Id.*

53. *Id.* at 156,589.

54. *Id.*

55. *Id.* at 156,591.

56. *White v. Delta Constr. Int'l, Inc.*, 285 F.3d 1040 (Fed. Cir. 2002).

57. *Id.* at 1042 (citing to the contract requirements).

58. *Id.*

59. *Id.*

60. *Delta Constr. Int'l, Inc.*, ASBCA No. 52,162, 01-1 BCA ¶ 31,195. The ASBCA similarly held that the contractor was entitled to the difference between the guaranteed minimum and the amount actually ordered in a Navy IDIQ contract. *Mid-Eastern Indus. Inc.*, ASBCA No. 53,016, 02-1 BCA ¶ 31,657.

61. 847 F.2d 1549 (Fed. Cir. 1988).

62. *See Delta Constr. Int'l*, 01-1 BCA ¶ 31,195, at 154,028.

63. *Delta Constr. Int'l*, 285 F.3d at 1040.

The CAFC also distinguished its *Maxima*⁶⁵ decision by noting that the issue on appeal only involved whether the government could retroactively terminate a contract for convenience. The CAFC acknowledged that the contractor in *Maxima* would retain the difference between the guaranteed minimum and the

amount the government actually ordered because the court did not address this basis of payment issue, but addressed the improper retroactive termination for convenience method of recapturing the erroneous payment.⁶⁶ Major Kuhn.

64. *Id.*

65. *Maxima Corp.*, 847 F.2d at 1549.

66. *Delta Constr. Int'l*, 285 F.3d at 1044.