

## CONTRACT ADMINISTRATION

### Contract Interpretation

#### *“Zone of Reasonableness” Concept Surfaces Again*

Although the courts and boards did not articulate a new methodology for interpreting ambiguous contract terms in 2005, it is always worthwhile to review a case that thoroughly reviews basic contract interpretation concepts. This year’s case is *M.G. Construction Inc., v. United States*.<sup>1</sup> Citing *NVT Tech., Inc.*,<sup>2</sup> last year’s seminal contract interpretation case, the Court of Federal Claims (COFC) outlined the process for determining the parties’ intent by reviewing the court’s need to conclude if a parties’ interpretation falls within the “zone of reasonableness.”<sup>3</sup> This zone of reasonableness test helps courts resolve an ambiguity if a clause supports more than one interpretation.<sup>4</sup>

At the center of *M.G. Construction* is a dispute between M.G. Construction and the Air Force. M.G. Construction submitted a claim arguing that, in accordance with the contract, it was entitled to more money for the work performed as per its roofing removal and restoration contract at Francis E. Warren Air Force Base in Cheyenne, Wyoming.<sup>5</sup> The Air Force denied the claim, reasoning that M.G. Construction was only entitled to compensation in accordance with Contract Line Item Number (CLIN) 0001AC, Removal of BURS.<sup>6</sup> Both parties agree that M.G. Construction removed 243,100 square feet of surface gravel, and that M.G. Construction was paid \$0.80 per square foot.<sup>7</sup> M.G. Construction, however, argues it should also be paid under CLIN 001AA, removal of aggregate surfacing, and should be paid \$2.30 per square foot.<sup>8</sup> Therefore, according to M.G. Construction, the Air Force owes an additional \$364,650.<sup>9</sup>

There are no facts in controversy in this case. Rather, the litigation is a consequence of different interpretations of the contract. Accordingly, the COFC considered the respective arguments and looked for the “zone of reasonableness” as a means of resolving the disputed meaning of the contract. The court started with the plain language of the contract and stated that it “will give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning . . . [and will] interpret the contract in a manner that gives meaning to all of [the contract] provisions and makes sense.”<sup>10</sup> The COFC also noted that “if an ambiguous [contract instrument] can only be understood upon consideration of the surrounding circumstances, extrinsic evidence will be allowed to interpret the [contract’s] language.”<sup>11</sup>

Putting itself in the shoes of a reasonable and prudent contractor, the COFC noted that M.G. Construction’s claim seeks payment equal to \$2.30 per square foot and that M.G. Construction’s bid does not include this price anywhere.<sup>12</sup> The court also noted that the Air Force ordered the work under CLIN 0001AC even though the Air Force never placed an order under CLIN 0001AA. Therefore, the COFC considered it odd that M.G. Construction believed it was entitled to compensation under CLIN 001AA.<sup>13</sup> In addition, the court held that the BURS work (CLIN 0001AC) necessarily involved

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<sup>1</sup> 67 Fed. Cl. 176 (2005).

<sup>2</sup> 370 F.3d 1153 (Fed. Cir. 2004).

<sup>3</sup> *M.G. Const.*, 67 Fed. Cl. at 183.

<sup>4</sup> *NVT*, 370 F.3d at 1159.

<sup>5</sup> *M.G. Const.*, 67 Fed. Cl. at 177. In its bid, M.G. priced Contract Line Item Number (CLIN) 0001AA, removal of aggregate surfacing, at \$1.50 per square foot. The Air Force estimated 200 square feet of this service would be ordered. For CLIN 0001AC, removal of BURS (5-ply max and 2-inch insulation), M.G. bid \$0.80 per square foot. The Air Force estimated approximately 23,333 square feet of this would be ordered. On CLIN 0001AH, removal of underlayment/vapor barrier, M.G. bid \$15.00 per square foot. *Id.* at 178.

<sup>6</sup> *Id.* at 179.

<sup>7</sup> The Air Force paid this amount in accordance with CLIN 0001AC. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> M.G.’s total claim, \$2.30 per square foot, is calculated by adding CLIN 0001AA and CLIN 0001AC. *Id.* at 179.

<sup>10</sup> *Id.* at 181.

<sup>11</sup> *Id.* at 182.

<sup>12</sup> *Id.* at 183.

<sup>13</sup> *Id.* at 186.

some removal of the aggregate surface. The separate CLIN (0001AA) for removal of aggregate surfaces was included in the contract to allow the Air Force maximum flexibility when placing orders for various types of roofing work.<sup>14</sup>

The COFC concluded that both interpretations do not fall within the “zone of reasonableness.” The court ruled in the Air Force’s favor, finding that the government’s interpretation of the various and interdependent contract clauses was reasonable.<sup>15</sup> After advising M.G. Construction that it cannot perform the work and then attempt to renegotiate the contract, the COFC noted that M.G. Construction had a duty to clarify any patent ambiguities before it submitted its bid.<sup>16</sup>

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## Contract Changes

### *Review of Superior Knowledge Claims: Government Should Always Consider Sharing Information with Contractors*

*The Federal Group Inc. v. United States*<sup>17</sup> provides a good review of the superior knowledge theory. In this case, Federal Group Inc. contracted with the Office of Personnel Management (OPM) to construct, operate and maintain a training facility.<sup>18</sup> Federal Group lost money on this contract.<sup>19</sup> As a result, Federal Group sued the OPM alleging that the OPM violated the superior knowledge doctrine by failing to project attendance accurately, and not advising all offerors that the federal government was sending fewer of its employees to federal training centers.<sup>20</sup> Federal Group based its opinion on the government’s initiative to reduce the federal workforce, its decision to compete federal training courses amongst commercial vendors, and OPM’s alleged failure to disclose relevant and accurate information.<sup>21</sup>

The COFC responded to the government’s motion for summary judgment by dividing it into two parts. In its first ruling, the COFC determined that the OPM did not fail to disclose that the federal government’s enrollment in training programs was declining because the Federal Workforce Restructuring Act was public knowledge. In delineating the superior knowledge doctrine, the court said:

a contracting agency has a duty to disclose to a contractor otherwise unavailable information of novel matter vital to the performance of the contract where (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.<sup>22</sup>

The court also stated that the government does not have a duty to volunteer information if the contractor can reasonably be expected to seek and obtain the facts elsewhere.<sup>23</sup> Regarding the decrease in the number of people attending federal training programs, the COFC observed that the government’s legislative and regulatory activities were public knowledge, and everyone has a duty to be aware of U.S. statutes at large.<sup>24</sup> The Court concluded that everyone, not just the government, was aware of the government’s movement toward a smaller government workforce and a more competitive Federal training environment.<sup>25</sup> Because Federal Group had easy access to government programs, the court concluded that

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<sup>14</sup> *Id.* at 185.

<sup>15</sup> *Id.* at 187.

<sup>16</sup> *Id.* at 186.

<sup>17</sup> 67 Fed. Cl. 87 (2005).

<sup>18</sup> *Id.* at 90.

<sup>19</sup> *Id.* at 94.

<sup>20</sup> *Id.* at 90.

<sup>21</sup> *Id.* at 100.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 101.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

the OPM did not have superior knowledge of an issue that was novel to the performance of this contract. Therefore, the court granted the government's motion for summary judgment.<sup>26</sup>

The court ruled differently on the second superior knowledge issue.<sup>27</sup> In regards to Federal Group's claim that the OPM did not share its specific knowledge of attendance problems at federal training centers, the court denied the government's motion for summary judgment. Noting that Federal Group produced government memoranda that demonstrated the OPM may have known of a decline in attendance at federal training centers before this contract was awarded, the court ruled that this aspect of Federal Group's superior knowledge claim was a matter best left for trial.<sup>28</sup>

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## **Inspection, Acceptance and Warranty**

### *Quality Assurance in the DFARS*

The Department of Defense (DOD) proposed a rule to update and streamline government contract quality assurance requirements as part of the Defense Financial Acquisition Regulation Supplement (DFARS) Transformation initiative.<sup>29</sup> The proposed rule adds that the head of the contracting office will only use warranties when the benefits are expected to outweigh the cost.<sup>30</sup> The proposed rule also deletes text concerning definitions, technical requirements matters, and material inspection and receiving reports.<sup>31</sup> Language concerning contracting office responsibilities, quality evaluation data, and quality inspection approval stamps has been shifted to the Procedures, Guidance and Information (PGI) section, the DFARS companion resource of discretionary guidance.<sup>32</sup>

### *Final Rule on Government Source Inspection Requirements*

The DOD issued a final rule eliminating quality assurance at source for most contracts or delivery orders under \$250,000.<sup>33</sup> The rule contains some exceptions such as any inspection mandated by regulation; required by a Memorandum of Agreement (MOA); or conducted pursuant to a contracting officer's determination that technical requirements are significant or the product has critical characteristics, specific identified features, or specific acquisition concerns.<sup>34</sup> The DOD also added language exempting quality assurance at source for contracts below the simplified acquisitions subject to the above exceptions.<sup>35</sup>

### *Proposed Rule on Notification Requirements for Critical Safety Items*

The DOD proposed a new rule to add a contract clause requiring contractors to promptly notify contracting officers of any nonconformance or deficiency that may have a safety impact.<sup>36</sup> The new rule encompasses replenishment parts identified as critical safety items; systems and subsystems; and services for upkeep of those systems, such as repair and maintenance support.<sup>37</sup> A contractor must notify the Administrative Contracting Officer and the Procuring Contracting

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<sup>26</sup> *Id.* at 106.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 102.

<sup>29</sup> Defense Federal Acquisition Regulation Supplement; Quality Assurance, 70 Fed. Reg. 29,710 (May 24, 2005) (to be codified at 48 C.F.R. pt. 246).

<sup>30</sup> *Id.* at 29,711.

<sup>31</sup> *Id.* at 29,710.

<sup>32</sup> *Id.*

<sup>33</sup> Defense Federal Acquisition Regulation Supplement; Government Source Inspection Requirements, 70 Fed. Reg. 8,539 (Feb. 22, 2005) (to be codified at 48 C.F.R. pt. 246).

<sup>34</sup> *Id.* at 8,543.

<sup>35</sup> *Id.*

<sup>36</sup> Defense Federal Acquisition Regulation Supplement; Notification Requirements for Critical Safety Items, 70 Fed. Reg. 44,077 (Aug. 1, 2005) (to be codified at 48 C.F.R. pt. 246 and 252).

<sup>37</sup> *Id.* at 44,078.

Officer within seventy-two hours of receiving credible information about nonconformance and deficiencies that may cause serious damage to applicable systems or an unacceptable risk of personal injury or loss of life.<sup>38</sup> The rule makes it clear that this notification, however, will not be considered either an admission of responsibility or a release of liability.<sup>39</sup>

### *Tracking Surveillance*

Because of past problems with inadequate surveillance in a DOD IG report<sup>40</sup> and general concerns about DOD's increasing reliance on service contracts, the GAO studied the quality assurance surveillance on DOD service contracts.<sup>41</sup> The GAO found that twenty-five out of the twenty-six contracts with insufficient surveillance were contracts for services using the General Services Administration (GSA) Multiple Award Schedule (MAS) program.<sup>42</sup> The GAO also discovered that thirteen surveillance personnel assigned quality assurance responsibilities over a contract had not completed required training prior to their assignment.<sup>43</sup> The GAO noted that it appeared that more importance was given to the contract award than to the surveillance of the contract.<sup>44</sup> Although the DOD had made some efforts to improve this area, the GAO recommended better training of personnel; more timely assignment of personnel no later than contract award; better practices to ensure accountability; better data collection; and more guidance on surveillance on services procured from other agencies' contracts.<sup>45</sup>

### *The Air Force's Assurances of Quality*

Partially as a reaction to the DOD IG and GAO reports, the Air Force issued a Mandatory Procedure (MP) on quality assurance programs for performance-based services acquisitions.<sup>46</sup> The MP requires training for quality assurance personnel prior to contract award and creates the role of a Quality Assurance Program Coordinator who will oversee the drafting of requirements and the training of applicable personnel.<sup>47</sup>

### *Latent Defect but Leaky Proof*

In *Northrop Grumman Corporation*,<sup>48</sup> the Armed Services Board of Contract Appeals (ASBCA) limited the Navy's recovery on a latent defect theory based on evidentiary issues.<sup>49</sup> The contract involved the production and delivery of TR-343 transducers, which is an element of the sonar for a surface ship antisubmarine warfare combat system.<sup>50</sup> The Navy discovered leakage problems and conducted extensive testing which concluded that cold temperatures and problems with

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> U.S. DEP'T OF DEF. OFF. OF THE INSPECTOR GEN., REP. NO. D-2004-015, ACQUISITION: CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE, AND MANAGEMENT SUPPORT SERVICES (2003).

<sup>41</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-274, OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS (2005). The GAO focused on the issue of the oversight being performed by the contractor. *Id.* at 1.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.* The GAO reviewed ninety total contracts. Sixteen out of the twenty-six contracts with insufficient surveillance were Army contracts. *Id.* at 8.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 16. The Army concurred with four recommendations and partially concurred with the accountability recommendation indicating that it would attempt to include surveillance duties in the contracting officer's representative's annual performance evaluation. *Id.* at 31.

<sup>46</sup> Mandatory Procedure; Quality Assurance, MP 5346.103 (Aug. 2005). The Air Force MP program tracks the DFARS Transformation goal of dividing guidance into mandatory and informational sections.

<sup>47</sup> *Id.*

<sup>48</sup> ASBCA Nos. 52178, et. al, 04-2 BCA ¶ 32,804.

<sup>49</sup> *Id.* at 162,256.

<sup>50</sup> *Id.* at 162,229. Part of the transducer is a tube housing which covers a ceramic stack and the electronics of the sonar. *Id.*

surface preparation prior to painting were significant factors in the failures.<sup>51</sup> The Navy issued warranty claims on some items; for other items, the Navy claimed latent defects in order to revoke the acceptance of those items.<sup>52</sup>

The ASBCA reviewed the expert testimony and found that defects related to improper surface preparation prior to painting were latent defects.<sup>53</sup> The ASBCA limited recovery to 2,550 out of nearly 10,000 total tubes because the testing was only performed on specimens from a specific range of serial numbers.<sup>54</sup> The ASBCA denied a broad warranty claim based on one hundred thirty-five faulty transducers because the Navy could not prove that all products were defective. The board refused to rule that a defect in one transducer meant that there were defects in all of the delivered products.<sup>55</sup> Thus, the ASBCA did not require the contractor to correct all the delivered transducers.<sup>56</sup> The ASBCA limited remedies based on the Inspection clause to transportation costs, retesting costs, and reasonable remanufacture of those transducers which were remanufactured.<sup>57</sup> Finally, the ASBCA rejected the contractor's claim for over-inspection since contractor failed to prove loss of productivity.<sup>58</sup>

#### *Base Closure Brouhaha*

The ASBCA, in *Brooke Enterprises*,<sup>59</sup> held that the Army and Air Force Exchange Service (AAFES) was liable for the wrongful transfer of allegedly "abandoned" mobile storage units related to a base closure in Augsburg, Germany.<sup>60</sup> The AAFES awarded a concessionaire contract for mini-warehouse storage services, including one at Quartermaster Kaserne, Augsburg Exchange, Germany.<sup>61</sup> The contract contained a clause that granted the AAFES the right to remove property and store it at the company's expense.<sup>62</sup>

The Army designated Augsburg for closure and return to Germany in March, 1998.<sup>63</sup> Although the AAFES informed the concessionaire of its contractual duty to remove its property, the AAFES failed to provide the company a phase-out plan required by the contract.<sup>64</sup> Although the base closure officer (BCO) extended the deadline for property removal, the BCO decided to sell the property to another individual three days before the deadline.<sup>65</sup> The BCO also failed to notify the concessionaire by registered mail of his intent to dispose the abandoned property.<sup>66</sup> The ASBCA held that the concessionaire should receive \$46,800 plus Contract Disputes Act (CDA) interest for the improper disposal of its property.<sup>67</sup>

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<sup>51</sup> *Id.* at 162,238.

<sup>52</sup> *Id.* at 162,249.

<sup>53</sup> *Id.* at 162,251.

<sup>54</sup> *Id.* at 162,252.

<sup>55</sup> *Id.* at 162,254.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 162,255.

<sup>58</sup> *Id.* at 162,256.

<sup>59</sup> ASBCA No. 53993, 04-2 BCA ¶ 32,785.

<sup>60</sup> *Id.* at 162,152.

<sup>61</sup> *Id.* at 162,145.

<sup>62</sup> *Id.* at 162,146.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 162,251.

<sup>65</sup> *Id.* at 162,152.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 162,151-52.

## Value Engineering Change Provision

### *Company Pursuing a Claim under a Value Engineering Change Provision Has Burden of Proving Its Claim*

In *Applied Companies*,<sup>68</sup> the ASBCA ruled that Applied failed to establish a government cost savings and therefore did not establish entitlement. On 29 August 1985, the Army awarded two contracts to Applied, requiring Applied to produce horizontal air conditioning units.<sup>69</sup> The contracts included a value engineering clause<sup>70</sup> enticing contractors with a fifty percent share of any realized savings.<sup>71</sup> Pursuant to this clause, Applied submitted plans to help the Army save money while using these horizontal air conditioners.<sup>72</sup> Although these plans did save money with the 36K BTU/HR air conditioner model,<sup>73</sup> the plans did not help the government save money with other air conditioner models.<sup>74</sup>

Although it lacked technical and cost data to establish entitlement, Applied argued it should collect under the Value Engineering Change Provision (VECP) clause because the VECP program, as submitted, could be applied to any air conditioning unit. Applied asserted that the government has the burden of demonstrating why the claimant should not share in any cost savings as claimed versus the contractor having to prove “the dollar amount of future cost reductions.”<sup>75</sup> The government responded that Applied only submitted a VECP plan for the 36K BTU/HR unit and did not do any design work for other air conditioning models.<sup>76</sup> Accordingly, the government reasoned that Applied was not entitled to a percentage of future savings regarding the other air conditioning units.<sup>77</sup>

The ASBCA agreed with the government. It noted that before the government can calculate an amount due under a VECP clause, the contractor is “required to submit to the [contracting officer] the savings amount and technical basis for each [claim] asserted.”<sup>78</sup> In addition to explaining this burden, the ASBCA observed that “the facts are clear—[Applied] did not follow through with technical and cost details necessary to apply the VECP to other [air conditioning] configurations.”<sup>79</sup> Because of this, the Board rejected Applied’s claim for increased payments pursuant to the VECP program.

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## Terminations for Default

### *Contracting Officer Representative’s Casual Comment Did Not Extend Performance Period*

In *NECCO, Inc. v. General Services Administration*,<sup>80</sup> the GSA competitively issued a task order to a contractor to replace the roof of a federal building, under a multiple award term contract for construction work. Under the task order, the contractor was to complete the work by the end of the calendar year 2003. While discussing the project with the contractor prior to the preconstruction conference, the Contracting Officer’s Representative (COR) noted the possibility of construction difficulties in winter months and speculated that the GSA might choose to delay the project until the spring.<sup>81</sup> At the

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<sup>68</sup> ASBCA No. 50593, 2005 ASBCA LEXIS 55 (Jun. 13, 2005).

<sup>69</sup> *Applied Cos.*, 99-2 BCA ¶ 30,554, at 150,879.

<sup>70</sup> U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.248-1 (July 2005) [hereinafter FAR].

<sup>71</sup> *Applied Cos.*, 99-2 BCA ¶ 30,554, at 150,880.

<sup>72</sup> *Id.* at 163,475.

<sup>73</sup> *Applied Cos.*, 2005 ASBCA LEXIS 55, at \*6.

<sup>74</sup> *Id.* at \*4.

<sup>75</sup> *Id.* at \*2.

<sup>76</sup> *Id.* at \*3.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*7.

<sup>79</sup> *Id.* at \*10. In an unrelated case, the Court of Federal Claims (COFC) discusses the jurisdiction of a court or board to review VECP claims. In *George Sollitt Constr. Co.*, the COFC explains that courts and boards have jurisdiction to “review whether [a government’s refusal to pay a VECP claim] was contrary to law or an abuse of discretion” and clarified that courts and boards do not have the jurisdiction “to review [the merits of] a contracting officer’s discretionary decision to accept a VECP.” 64 Fed. Cl. 229 (2005).

<sup>80</sup> GSBGA No. 16354, 05-1 BCA ¶ 32,902.

<sup>81</sup> *Id.* at 162,998.

subsequent preconstruction meeting, the parties, including Palmieri Roofing, the subcontractor who would actually perform the roofing work, settled on a start date of mid-October 2003 with completion anticipated four to six weeks later.<sup>82</sup>

At some later date, Palmieri informed the contractor that he had won a larger roofing job and would not be able to perform the GSA's project before winter after all.<sup>83</sup> Through a series of e-mail messages, the GSA insisted that the project completion date would not be extended,<sup>84</sup> while the contractor attempted to rely on the oral "offer" of a spring start date allegedly made by the COR prior to the preconstruction conference.<sup>85</sup> The contractor made similar arguments in response to the subsequent cure notice,<sup>86</sup> and also offered to immediately fix the leaks in the roof at no charge in exchange for being allowed to perform the roof replacement in the spring,<sup>87</sup> but was unable to locate any roofers who were available to perform the work before spring.<sup>88</sup> The contracting officer terminated the task order for default on 3 November 2003.<sup>89</sup>

The General Services Administration Board of Contract Appeals (GSBCA) agreed that the contractor clearly failed to give reasonable assurances in response to the cure notice, and that the contracting officer justifiably determined that there was no reasonable likelihood that the contractor would perform the work in the time required.<sup>90</sup> The contractor argued that he was not in default because he accepted the COR's "offer" to complete the project in the spring. To prevail on that theory, the board explained, the contractor would need to show that the COR had the authority to postpone the project until the spring, that the COR actually made that offer, and that the offer was binding.<sup>91</sup> The board was not convinced that the COR's letter of authority granted such that authority, but did not have to resolve that issue because the evidence did not demonstrate that any such "offer" had been made or accepted.<sup>92</sup> The board further found that the contracting officer properly exercised her discretion in terminating the order.<sup>93</sup> Among the factors that the contracting officer considered in making her decision to terminate was her concern for the integrity of the procurement process, in that materially altering the terms to allow for a spring completion date would be unfair to the unsuccessful offerors who had not been given an opportunity to compete for a later completion date.<sup>94</sup> The GSBCA denied the appeal.

#### *Terminating for Cause without a Cure Notice—Same Rules as for T4D*

The GSBCA recently looked at whether a cure notice was required before a contracting officer could properly terminate a commercial item task order for cause. In *Geo-Marine, Inc. v. General Services Administration*,<sup>95</sup> the GSA, on behalf of the Air Force, placed an order under an indefinite quantity, multiple award Federal Supply Schedule contract for commercial services to operate and expand the Avian Hazard Advisory System (AHAS), an advisory system that processes radar and weather data to alert pilots to potentially hazardous bird activity.<sup>96</sup> In June 2003, several members of Geo-Marine's technical staff assigned to the AHAS project suddenly left the company, resulting in significant problems in the operation of the system.<sup>97</sup> Almost immediately, the system suffered various failures, including the complete shutdown of the system.<sup>98</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 162,998-99.

<sup>85</sup> *Id.* at 162,999.

<sup>86</sup> *Id.* at 163,000.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* The contractor's surety performed the takeover contract following the termination—using Palmieri Roofing, in the spring. *Id.*

<sup>90</sup> *Id.* at 163,001.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 163,002.

<sup>93</sup> *Id.* at 163,003.

<sup>94</sup> *Id.*

<sup>95</sup> GSBCA No. 16247, 05-1 BCA ¶ 33,048.

<sup>96</sup> *Id.* at 163,826.

<sup>97</sup> *Id.* at 163,826-27. Apparently, the first significant problem was that the none of the Geo-Marine's remaining employees could continue to operate the system because they didn't have the password for the system. The COR was able to obtain the password and provide it to Geo-Marine. *Id.* at 163,826.

<sup>98</sup> *Id.* at 163,827.

One of the former employees returned to the company one evening and restored the system as a courtesy to the Air Force, but system failures and several other problems persisted over the next couple of weeks, resulting in pilots not being able to access required current data.<sup>99</sup> In July, the contracting officer sent the COR to visit the contractor's facility to assess the operation of the system and determine whether the system tasks were being completed. When the COR determined that the contractor was not operating the system in accordance with the task order, the contracting officer terminated the task order for "default" without a cure notice.<sup>100</sup>

In its motion for summary judgment, Geo-Marine argued that the termination for cause should be converted to a termination for convenience because the contracting officer had failed to issue a cure notice before terminating the task order.<sup>101</sup> Acknowledging the similarity between terminations for cause and terminations for default, the GSBCA analyzed the issue using termination for default precedent. For both terminations for default and terminations for cause, cure notices are not required when the contractor fails to deliver on time.<sup>102</sup> Looking at prior decisions in which contracts were terminated for default for failure to perform on time, the board observed that "whether a contractor had achieved substantial completion was held to depend not only upon the quantity and nature of the defaults, but also upon the nature of the services to be provided."<sup>103</sup> The board examined decisions that had upheld terminations for default without cure notices where the services were of critical nature, such as railroad services in a terminal in which explosives were shipped and received,<sup>104</sup> guard services at a military range where the government stored explosives and classified materials,<sup>105</sup> ambulance services,<sup>106</sup> and lifeguard services.<sup>107</sup> Reviewing the facts in the instant case, the board held that Geo-Marine had failed to establish as a matter of law, as required for purpose of summary judgment, that it substantially complied with the contract and that a cure notice was required "taking into account the nature of the defaults and the nature of the services required."<sup>108</sup>

The GSBCA also considered the case in light of the common law doctrine of anticipatory repudiation. A cure notice is not required in cases of repudiation "because sending such a notice would constitute a useless, futile act."<sup>109</sup> Although Geo-Marine had not expressed an intent not to perform, the board held that there was a "genuine dispute" as to whether Geo-Marine continued to have any employees capable of maintaining and operating the system, and thus a genuine dispute over whether Geo-Marine's assurances of continued performance were accurate.<sup>110</sup> The board therefore held that Geo-Marine had not established as a matter of law that its actions did not amount to anticipatory repudiation, and denied its motion for summary judgment.<sup>111</sup>

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<sup>99</sup> *Id.* at 163,827-28.

<sup>100</sup> *Id.* at 163,828. The termination notice erroneously referred to termination for "default" and cited the clause at FAR 52.249-8, which was not contained in the contract. Instead, the contract contained the termination for cause clause contained within FAR 52.212-4. *Id.*

<sup>101</sup> *Id.* at 163,829.

<sup>102</sup> The court noted that the termination for cause clause, unlike the termination for default clause, does not mention any requirement for issuing a cure notice. However, the regulation applicable to commercial items does require a cure notice unless the termination is for late delivery, although it does not specify the length of the cure period. *Id.* (citing 48 CFR 12.403(c)). See FAR, *supra* note 70, at 12.403(c)(1).

<sup>103</sup> *Geo-Marine, Inc.*, 05-1 BCA ¶ 33,048 at 163,829.

<sup>104</sup> *Atlantic Terminal Co.*, ASBCA 13269, 69-2 BCA ¶ 7852.

<sup>105</sup> *Sentry Corp.*, ASBCA 29308, 84-3 BCA ¶ 7852.

<sup>106</sup> *Pulley Ambulance*, VABCA 1954, 84-3 BCA ¶ 17,655.

<sup>107</sup> *Building Maint. Specialist, Inc.*, ASBCA 25552, 85-2 BCA ¶ 18,300.

<sup>108</sup> *Geo-Marine, Inc.*, 05-1 BCA ¶ 33,048 at 163,831.

<sup>109</sup> *Id.* (citing *Polyurethane Products Corp.*, ASBCA 42251, 96-1 BCA ¶ 28,154; *Therm-Air Mfg. Co.*, NASA BCA 1280-21, 82-2 BCA ¶ 15,881).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The board noted, however, that when the case is ultimately considered on the merits, the Government will have the burden of establishing that the termination was proper. *Id.*

*When Amputating a Portion of a Contract, Be Careful with the Scalpel*

In *Plum Run, Inc.*,<sup>112</sup> the Navy contracted for base maintenance services at the U.S. Naval Base at Guantanamo Bay, Cuba (GITMO). Within that contract, five of the twenty-two CLINs pertained to family housing maintenance services, and each of those CLINs was further subdivided into numerous subCLINs.<sup>113</sup> One particular subCLIN provided for “Change of Occupancy Maintenance” (COM) services, which consisted of inspecting, cleaning, repairs, and other maintenance of family quarters during the period between occupants.<sup>114</sup> During the first six months of performance under the contract, until the contracting officer partially terminated the contract for default, the contractor was routinely late in performing the COM. During that period, the contractor provided COM services on two hundred nine quarters, and was late an average of six days on most of them.<sup>115</sup> The untimely performance of the COM services was a particular concern as a morale issue, in part because it further delayed reunification of family members with their sponsors, given GITMO’s remote location and the absence of commercial accommodations.<sup>116</sup>

Three months into the contract, the Navy issued a cure notice, noting that the contractor’s “failure to perform the housing maintenance functions which includes Housing Change of Occupancy Maintenance (COM) has caused inconvenience as well as financial hardship to the residents of the Base.”<sup>117</sup> The cure notice contained a two-page list of performance deficiencies pertaining to the COM services, and was followed later by a show cause notice.

Ultimately, the contracting officer partially terminated the base maintenance contract for default “due to unsatisfactory performance for the services related to the housing maintenance function” of the base maintenance contract.<sup>118</sup> The terminated portion of the contract included all five of the family housing maintenance CLINs and their combined twenty-five subCLINs. According to the contracting officer, the contractor was also deficient in performing other significant portions of the family housing maintenance services, and that therefore the family housing maintenance portion of the contract, in its entirety, was the appropriate portion of the contract to terminate.<sup>119</sup>

The contractor alleged various reasons for the delays in performing the COM services, including an issue over the number coats of varnish required and the number of days required to allow each coat to dry, alleged instances of insufficient government inspectors to conduct inspections of the work, and a payment issue allegedly affecting the contractor’s cash flow.<sup>120</sup> The ASBCA was not persuaded that any of those issues excused the contractor’s untimely performance of the COM services, and upheld the Navy’s termination of the COM subCLIN.<sup>121</sup> The board, however, held that the Navy had failed to prove that there was a substantial failure to perform the other housing maintenance CLINs and subCLINs.<sup>122</sup> Stating that it was “confronted with the question whether the government may terminate all of the subCLINs relating to family housing because of the failure to perform [the COM subCLIN],”<sup>123</sup> the board concluded, without discussion, that “on the facts of this appeal with their focus on the COMs,” the government had not proven that the COM subCLIN “was not severable and thus it

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<sup>112</sup> ASBCA Nos. 46091, 49203, 05-1 BCA ¶ 32,977.

<sup>113</sup> *Id.* at 163,359. The five basic CLINs dealing with family housing maintenance services were: 0002 Service Calls; 0003 Maintenance, Inspection, and Repair of A/C; 0009 Perform Housing Maintenance; 0016 Interior & Exterior Painting; and 0021 Housing Maintenance. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 163,361. The contractor was late on performing COM services in 177 of the 209 quarters. *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 163,363 (emphasis added).

<sup>118</sup> *Id.* at 163,364.

<sup>119</sup> *Id.* The board’s opinion did not detail the performance deficiencies relating to the non-COM CLINs and subCLINs nor indicate how much detail, if any, on that was provided to the board. Obviously, given the result, the board believed it was provided with insufficient proof that the contractor substantially failed to perform those other CLINs and subCLINs. *Id.*

<sup>120</sup> *Id.* at 163,363.

<sup>121</sup> *Id.* at 163,366.

<sup>122</sup> *Id.* at 163,365.

<sup>123</sup> *Id.*

was entitled to terminate 24 other subCLINs.”<sup>124</sup> Therefore, the board converted the termination for default on the other subCLINs to a termination for convenience.<sup>125</sup>

*“Well-Nigh Irrefragable Proof,” We Hardly Knew Ye*

For years, contractors alleging bad faith by the government needed “well-nigh irrefragable proof” to overcome the strong presumption that government officials acted in good faith.<sup>126</sup> Three years ago, the Court of Appeals for the Federal Circuit (CAFC), recognizing that in some cases the standard had been described instead as “clear evidence to the contrary,” suggested that the use of these “two different but nevertheless similar descriptions of the evidence needed to overcome this presumption may have led to some confusion.”<sup>127</sup> Of the three more traditional standards of proof used in law,<sup>128</sup> the CAFC concluded that “clear and convincing” most approximated the “well-nigh irrefragable proof” standard.<sup>129</sup> Signaling the possible end of this term in government contract law, the Federal Circuit ultimately held that the contractor in that case had failed to meet the “‘clear and convincing’ or ‘highly probable’ (formerly described as ‘well-nigh irrefragable’) threshold.”<sup>130</sup>

This year, the term “well-nigh irrefragable proof” was officially “given its last rites.”<sup>131</sup> More significantly, the COFC recently found that the standard of proof—whatever it may be called—and even the presumption of good faith itself, were inapplicable in a case in which a contractor alleged bad faith on the part of the Air Force. In *Tecom, Inc. v. United States*,<sup>132</sup> the Air Force had awarded a contract to Tecom to provide vehicle maintenance services for a fleet of five hundred thirty-six vehicles at an Air Force base. Under the contract, Tecom was to provide regularly scheduled inspections and maintenance, and ensure that a certain percentage of each type of vehicle was in working order at all times. To account for any backlog of vehicles requiring service that Tecom might inherit from the incumbent contractor, the contract provided that the Air Force, the incumbent contractor, and Tecom would jointly assess the condition of all vehicles during the transition period, and that Tecom would be specially compensated if more than three hundred fifty-five labor hours were required to eliminate the backlog.<sup>133</sup>

A joint inspection of two hundred thirteen of the five hundred sixty-three vehicles revealed that approximately sixty-five percent of the vehicles were in such poor condition that they should be dead-lined for safety defects alone, and that an estimated 7,500 to 10,000 labor hours would be required to bring the entire fleet up to the minimum serviceability standards.<sup>134</sup> The Air Force apparently had insufficient funds for this purpose, so Tecom’s subcontractor, Fleetpro, recorded the inspection results of the two hundred thirteen vehicles into the Air Force’s electronic vehicle management database with a code designation indicating “maintenance delayed due to lack of funds.”<sup>135</sup>

The Air Force ordered the inspections to cease and directed Fleetpro to delete the inspection results from the system and not comply with the contract requirement to produce monthly database reports.<sup>136</sup> The Contracting Officer “apparently told Tecom that if Fleetpro did not cease complaining about the condition of the vehicle fleet, the Air Force would ‘write

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<sup>124</sup> *Id.* (citing *Technocratia*, ASBCA Nos. 44134 et al., 94-2 BCA ¶ 26,606, at 132,370; *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026, at 90,471 and cases cited, *aff’d on the basis of the Board’s opinion*, 795 F.2d 1019 (Fed. Cir. 1986)).

<sup>125</sup> *Id.* at 163,366.

<sup>126</sup> “In fact, for almost 50 years this court and its predecessor have repeated that we are ‘loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.’” *Am-Pro Protective Agency, Inc., v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (quoting *Schaefer v. United States*, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (Ct. Cl. 1980)) (citing *Grover v. United States*, 200 Ct. Cl. 337, 344 (1973); *Kalvar Corp. Inc., v. United States*, 543 F.2d 1298, 1302, 211 Ct. Cl. 192 (1976); *Tornello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756, 770 (Ct. Cl. 1982); *T&M Distributions, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999)).

<sup>127</sup> *Am-Pro Protective Agency, Inc., v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

<sup>128</sup> Those three standards of proof, of course, are “beyond a reasonable doubt,” “clear and convincing,” and “preponderance of the evidence.” *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1243.

<sup>131</sup> *H&S Mfg. v. United States*, 66 Fed. Cl. 301, 311 n.19 (citing *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 766 n.36 (2005)).

<sup>132</sup> 66 Fed. Cl. 736 (2005).

<sup>133</sup> *Id.* at 740.

<sup>134</sup> *Id.* at 741.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

[Contract Discrepancy Reports] to kill Fleetpro.”<sup>137</sup> Later, when Fleetpro developed its own program to track vehicle maintenance, the Air Force ordered Fleetpro to shut that program down.<sup>138</sup> Ultimately, over the course of five months of regularly scheduled maintenance services, Fleetpro was able to bring the fleet up to the required serviceability standards.<sup>139</sup> However, Tecom alleged that throughout that period, the Air Force chastised Tecom for asking to be compensated for the backlog,<sup>140</sup> conducted “over-inspection of Fleetpro’s work” to intimidate Fleetpro,<sup>141</sup> threatened to “kill Fleetpro with [Contract Discrepancy Reports],”<sup>142</sup> and pressured Tecom to terminate its subcontract with Fleetpro under the threat of terminating Tecom for default based on Fleetpro’s performance.<sup>143</sup> In response, Tecom terminated its subcontract with Fleetpro.

The court was unimpressed with the Air Force’s arguments regarding the interpretation of relevant contract provisions and terms such as “required maintenance backlog” and “vehicle assessment,” and granted Tecom’s motion for summary judgment on its breach of contract claim, finding that the Air Force breached the contract by failing to pay Tecom the promised extra compensation for the work backlog inherited from the previous contractor.<sup>144</sup> On a separate claim for equitable adjustment, Tecom argued that because the initial condition of the vehicle fleet was substantially worse than had been represented in the contract, the government had “violated the warranty of suitability covering Government-furnished property.”<sup>145</sup> The court questioned the applicability of this particular theory because the “property” in this case—the vehicle fleet—was not furnished by the Government as equipment for Tecom to use. Still, the court found merit in the claim for an equitable adjustment in general because “[t]o be able to *maintain* a fleet at the levels and rates required presupposes that the fleet meets those standards to begin with. . . .”<sup>146</sup> Accordingly, the court denied the government’s motion for summary judgment on this claim, but noted that Tecom would already be fully compensated for this under the breach of contract claim.<sup>147</sup>

The Air Force had not terminated Tecom’s contract for default. However, Tecom made a separate “wrongful termination” claim alleging that the Air Force improperly pressured Tecom by threatening to terminate Tecom’s contract for default unless Tecom terminated its subcontractor.<sup>148</sup> The Air Force did not dispute that allegation, but responded that its dissatisfaction with Fleetpro’s work was justified and well-documented.<sup>149</sup> On this claim, the court granted the government’s motion for summary judgment. The court explained that if the Air Force had followed through with its threat to issue a cure notice and ultimately terminate Tecom’s contract for default, as it had a right to do, then Tecom could have challenged that action.<sup>150</sup> But that did not happen, and the Air Force had not actually ordered Tecom to terminate its subcontractor. “Instead,” reasoned the court, “Tecom is essentially arguing a wrongful constructive termination of its subcontractor, but provides no authority for such an action.”<sup>151</sup>

The most noteworthy, and largest, portion of the court’s fifty-page opinion was the court’s extensive historical analysis of the presumptions of regularity and good faith with respect to the conduct of government officials. The court deemed it necessary to examine these presumptions before deciding on Tecom’s remaining two claims in this case: (1) the Air Force’s alleged breach of its implied duty of cooperation, and (2) the Air Force’s alleged breach of its implied duty not to

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 742.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 747.

<sup>141</sup> *Id.* at 742.

<sup>142</sup> *Id.* at 747.

<sup>143</sup> *Id.* at 742.

<sup>144</sup> *Id.* at 757.

<sup>145</sup> *Id.* at 774.

<sup>146</sup> *Id.* at 775.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 775-76.

<sup>150</sup> *Id.* at 776.

<sup>151</sup> *Id.*

hinder contract performance. The presumptions of regularity and good faith, though sometimes used interchangeably,<sup>152</sup> are “conceptually distinct, as regularity assumes that duties were performed, while good faith characterizes the manner in which these duties are presumed to have been performed.”<sup>153</sup> The court painstakingly traced the development of both presumptions and the burden of proof needed to overcome the presumptions, and found it inconsistent and flawed, primarily through the misapplication of precedent.

The court explained, for example, that the “well-nigh irrefragable proof” standard enunciated in *Knotts v. United States*,<sup>154</sup> and even that case’s threshold assumption that there is a presumption of good faith, was not supported by valid precedent.<sup>155</sup> Citing approvingly the Federal Circuit’s 2002 decision in *Am-Pro Protective Agency, Inc. v. United States*,<sup>156</sup> the court concurred that a strong presumption of good faith exists “when a government official is accused of fraud or quasi-criminal wrongdoing in the exercise of his official duties,”<sup>157</sup> but was unwilling to recognize a strong presumption of good faith under other, more ordinary circumstances.<sup>158</sup> Accordingly, the court stated, if the alleged bad faith of a government official acting “under a duty to employ discretion, granted formally by law, regulation, or contract . . . does not sink to the level of fraud or quasi-criminal wrongdoing, clear and convincing evidence is not needed to rebut the presumption.”<sup>159</sup> Moreover, the court continued, if the alleged bad faith actions of the government official “are not formal, discretionary decisions, but instead the actions that might be taken by any party to a contract,” then there is no presumption of good faith at all.<sup>160</sup>

The court stated that the aspects of good faith and fair dealing at issue in this case—the implied duties of cooperation and to not hinder contract performance—do not require proof of bad faith, and that therefore “[t]he presumption of good faith conduct of government officials has no relevance.”<sup>161</sup> The court identified plenty of evidence to support Tecom’s claim that the Air Force had not reasonably cooperated with Tecom and had hindered contract performance,<sup>162</sup> and opined that “[t]hese facts might well demonstrate bad faith, and an actual intent to injure the contractor—perhaps even irrefragably.”<sup>163</sup> Still, the court found “just enough reasonable inferences that can be drawn in the Air Force’s favor to allow it to survive Tecom’s motion for summary judgment on these claims.”<sup>164</sup>

The court’s narrowing of the applicability of a strong presumption of good faith, and of the standard of proof needed to rebut it where the presumption applies, is at distinct odds with the court’s reliance on a broader reading of *Am-Pro* in another termination case last October. In *Rice Systems v. United States*,<sup>165</sup> the Air Force had terminated for convenience a contract for the development of a “Precision Orbital Microaccelerometer” after the contractor was unable to provide suitable replacements for key personnel it had proposed.<sup>166</sup> The contractor proposed its president, Dr. Colleen Fitzpatrick, as a replacement for the single most key position, but the Air Force assessed Dr. Fitzpatrick’s credentials as being inferior to that of the person originally proposed for the position and did not consider her a suitable replacement.<sup>167</sup> Upon the termination of

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<sup>152</sup> *Id.* at 757 (citing *Pauley Petroleum Inc. v. United States*, 219 Ct. Cl. 24, 52 (1979); *Alaska Airlines v. Johnson*, 8 F.3d 791, 796 (Fed. Cir. 1993)).

<sup>153</sup> *Id.* at 764.

<sup>154</sup> *Knotts v. United States*, 128 Ct. Cl. 489 (1954).

<sup>155</sup> After a lengthy discussion of the precedent, *Tecom*, 66 Fed. Cl. at 758-67, the court concluded: “It can be seen, then, that the line of cases that *Knotts* relied upon contained no general requirement of a heightened standard of proof, and almost never mentioned any presumption of good faith.” *Id.* at 767.

<sup>156</sup> *Am-Pro Protective Agency, Inc., v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

<sup>157</sup> *Tecom*, 66 Fed. Cl. at 769.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 771.

<sup>162</sup> The court cited the efforts of the Air Force to prevent and eliminate records of needed repairs that had been identified; the degree of inspection to which Fleetpro was subjected; the statements by Air Force employees that indicated that they would “kill” Fleetpro with Contract Deficiency Reports because of Fleetpro’s request for payment for the backlog labor; and other indications that the Air Force failed hindered and failed to reasonably cooperate with the contractor. *Id.* at 772-73.

<sup>163</sup> *Id.* at 773.

<sup>164</sup> *Id.*

<sup>165</sup> 62 Fed. Cl. 608 (2004).

<sup>166</sup> *Id.* at 616.

<sup>167</sup> *Id.* at 614.

the contract, Dr. Fitzpatrick alleged that the decision to discontinue the contract was based upon gender discrimination. The Air Force conducted an independent review of the allegation and found it to be without merit.<sup>168</sup> The COFC agreed, and granted summary judgment for the Air Force.<sup>169</sup>

In addressing the contractor's allegation that the contract was terminated in bad faith as a result of discrimination, the court recited a litany of cases recognizing the strong presumption of good faith and the heavy burden of proof required to rebut it, relying most heavily on *Am-Pro* for the general proposition that allegations of bad faith by a government official requires "clear and convincing evidence," formerly articulated as "well-nigh irrefragably proof."<sup>170</sup> The court concluded that the contractor had "not offered clear and convincing evidence sufficient to overcome the presumption that the government officials acted in [good] faith . . . ."<sup>171</sup> On a similar, but equally meritless allegation of discrimination based upon national origin, the court found that the record "does not contain any evidence, let alone clear and convincing evidence" that another proposed key personnel replacement had been rejected on the basis of national origin.<sup>172</sup>

From its analysis and choice of words in this case, it is clear that the COFC did not see the Federal Circuit's *Am-Pro* decision as having narrowed the applicability of either the presumption of good faith or the heightened burden of proof. That makes the COFC's recent decision in *Tecom*, decided just eight months later, all the more noteworthy. It remains to be seen whether the Federal Circuit, in future cases, will continue to broadly apply the presumption of good faith and its corresponding burden of "clear and convincing evidence" as the COFC did in *Rice*, or will adopt the significantly narrower interpretation of its *Am-Pro* decision as the COFC more recently did in *Tecom*.

#### *Even Without a Presumption, Government Acted In Good Faith in Its Inspections*

A few weeks after *Tecom* was decided, the COFC considered a termination for default case in which the contractor alleged that the government breached its duty of good faith and to not hinder performance of a contract by conducting unreasonable inspections and failing to cooperate. In *H&S Mfg., Inc. v. United States*,<sup>173</sup> the contractor was frequently behind schedule in his production and delivery of Aircrewman survival vests, and the Defense Logistics Agency, Defense Supply Center, Philadelphia (DSCP) rejected several lots for deficiencies revealed during inspections. The court found that the inspections, while thorough, did not hinder production and were distinguishable from prior cases in which government inspections were found to have been unreasonable.<sup>174</sup> The court found that the rejection of some of the lots was not pretextual, and that DSCP did not keep the contractor in the dark about the standards of acceptability.<sup>175</sup> In fact, the court noted, the inspectors had also assisted the contractor by alerting him to defects that were not counted as deficiencies.<sup>176</sup> The court found that the contractor's default was due to his own failure to deliver acceptable vests in compliance with the delivery schedule.<sup>177</sup> Without articulating any presumption of good faith,<sup>178</sup> the court held that the contractor had failed to prove by a preponderance of the evidence that DSCP had breached its duty of good faith, failed to cooperate, or had hindered the contractor's performance,<sup>179</sup> and therefore upheld the termination for default.

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<sup>168</sup> *Id.* at 617.

<sup>169</sup> *Id.* at 634.

<sup>170</sup> *Id.* at 620-22.

<sup>171</sup> *Id.* at 634.

<sup>172</sup> *Id.* at 631.

<sup>173</sup> 66 Fed. Cl. 301 (2005).

<sup>174</sup> *Id.* at 311-12 (discussing *WRB Corp. v. United States*, 183 Ct. Cl. 409, 509 (1968); *Roberts v. United States*, 357 F.2d 938, 941, 174 Ct. Cl. 940 (Ct. Cl. 1966); *Adams v. United States*, 358 F.2d 86, 175 Ct. Cl. 288 (Ct. Cl. 1966); *H.W. Zweig Co. v. United States*, 92 Ct. Cl. 472 (1941)).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 314.

<sup>178</sup> In a footnote, the court, citing *Tecom*, did note that "[t]he Government's long touted desideratum that 'irrefragable proof' is needed to demonstrate the absence of good faith in the administration of government contracts has been given its last rites." *Id.* at 311 n.19. But the court was conspicuously silent as to whether there was any presumption of good faith applicable in this case, and as to what level of proof would be required to overcome that presumption if it exists.

<sup>179</sup> *Id.* at 312,314.

In *Trinity Installers, Inc.*,<sup>180</sup> the Forest Service sent the contractor several notices of non-compliance in the course of the contractor's roof-replacement work for various deficiencies in the workmanship.<sup>181</sup> Less than one week after the contractor was notified that it was failing to sufficiently protect the building from rain, heavy rains caused water damage to the building interior and contents.<sup>182</sup> After more notices of non-compliance citing several other deficiencies, and the passing of the date scheduled for contract completion with only seventy percent of the work completed, the contracting officer issued a cure notice.<sup>183</sup> The cure notice stated that the contractor's failure to complete the work on time or to protect the property from water damage was deemed a "condition endangering performance of the contract,"<sup>184</sup> and that the contract might be terminated unless the contractor cures the condition within ten days of receipt of the cure notice.<sup>185</sup> Thirteen days after the contracting officer issued the cure notice, the contractor reported that the work was complete.<sup>186</sup> However, the work was actually found to be only ninety-two percent complete at that time.<sup>187</sup> When the contracting officer inspected the work three days later, she found that the workmanship was "unprofessional" and that the work did not meet the contract specifications or the contract's intent of providing a water-tight roof.<sup>188</sup> The next day, the contracting officer terminated the contract for cause,<sup>189</sup> indicating that the government intended to reprocur the remaining work.

Apparently, the contracting officer did not act quickly enough for the Department of Agriculture Board of Contract Appeals (AGBCA), which converted the termination for cause into a termination for convenience. The board stated that the termination decision was based on quality of the work rather than timeliness.<sup>190</sup> Although acknowledging "the well settled principle that a termination for default may be sustained on grounds other than those cited by the [contracting officer] in the termination notice,"<sup>191</sup> the board nonetheless decided that timeliness was an invalid ground for termination because the contracting officer had waived that ground by failing to terminate "promptly after the ten-day cure period had elapsed."<sup>192</sup> The board also found it significant that the government apparently did not actually reprocur the work as originally intended,<sup>193</sup> as this shows that the Forest Service "found the facility usable as constructed by Appellant and without reprocurring to correct deficiencies or to complete the work."<sup>194</sup> The board faulted the government for failing to provide a

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<sup>180</sup> AGBCA No. 2004-139-1, 05-1 BCA ¶ 32,868.

<sup>181</sup> *Id.* at 162,882.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 162,882-83.

<sup>184</sup> *Id.* at 162,883.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* The contract was fashioned as a commercial items contract, although the work required was construction and the contract was administered as a construction contract. *Id.* at 162,884.

<sup>190</sup> *Id.* at 162,885. However, the board's findings of fact suggest that untimeliness was at least incorporated by reference in the termination notice. The cure notice was based in part on the contractor's "failure to complete the contract within [the] contract time . . ." *Id.* at 162,883. The termination decision "referenced the October 21, 2003 cure notice, stating it had outlined the reasons the Government was then considering terminating the contractor's right to proceed under the contract for cause." *Id.*

<sup>191</sup> *Id.* at 162,885.

<sup>192</sup> *Id.* It should be noted that the waiver doctrine is generally inapplicable to construction contracts, because the contractor gets paid for work performed subsequent to the completion date and therefore does not suffer forfeiture. *Nisei Constr. Co., Inc.*, ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448. The AGBCA in *Trinity Installers* made a vague reference to the "forfeiture situation" but does not explain how the contractor would suffer forfeiture. *Trinity Installers, Inc.*, 05-1 BCA ¶ 32,868, at 162,885.

<sup>193</sup> The board inferred from incomplete information that the Government did not reprocur the work:

The record contains no evidence that the Government has reprocur contract work. In a letter to the Board dated June 29, 2004, Government counsel stated that "the budget process has hindered the reconstruction of the roof." The Government's brief originally stated that the building "has not been and cannot be occupied until the job is redone, probably by removing the roof constructed by Appellant and installing a new one." The record, however, contains no evidence of any evaluation of work completed; the extent to which it was or was not acceptable; work necessary to correct the defective work nor an estimate of the cost of corrective work. A subsequent letter to the Board dated November 9, 2004, states that the building is in use as a machine shop and storage facility.

*Trinity Installers, Inc.*, 05-1 BCA ¶ 32,868, at 162,883-84.

<sup>194</sup> *Id.* at 162,886.

sufficiently detailed comparison of the work defects to the contract requirements and for choosing not to supplement the record with testimony or affidavits.<sup>195</sup> The board, however, did acknowledge that it was a “close case,” stating:

It is close on the ‘waiver’ question because of the relatively short amount of time the contractor was allowed to work after the end of the cure period. It is close on the question whether the work was non-conforming, or merely mediocre. Were the facility not capable of being used or had the [Forest Service] found it necessary to correct Appellant’s work, we may well have decided this appeal differently. The Government had the burden to tip the balance of the evidentiary scales. It failed to do so.<sup>196</sup>

Judge Vergilio dissented from the opinion of the board, providing further details from the record demonstrating that the contractor failed to comply with the terms and conditions of the contract. In his opinion, the termination for cause was fully supported by the record, and that given the defects in the work, he would “not conclude without more that the project was substantially complete.”<sup>197</sup>

A few months after the *Trinity* decision, the same board sustained another contractor appeal of a termination for default in *Omni Development Corp.*<sup>198</sup> In that case, the Forest Service had contracted with Omni to lease a building to the Forest Service—a building which was not yet in existence, but which Omni would first need to construct. On 6 June 1997, the contracting officer issued a cure notice citing the fact that the contractor had not submitted final construction drawings, had not secured financing for the project, and had not secured a building permit for the project. The cure notice went on to state that these failures to progress created serious doubt as to whether the contractor would be able to construct the building by the target date of 31 December 1997.<sup>199</sup> When the contractor failed to provide evidence that any of those deficiencies were cured, or any evidence that it could accomplish the project in time, the contracting officer terminated the contract for default.<sup>200</sup>

The AGBCA explained that the contracting officer “had legitimate concerns, however, having legitimate concerns is not the test for justifying a termination.”<sup>201</sup> Instead, the test is “whether there was no reasonable likelihood of completion.”<sup>202</sup> In the board’s view, “the Appellant *could have* started the remaining construction considerably later than July 5, 1997, and still likely have met the due date.”<sup>203</sup> The board found that the contracting officer’s conclusion to the contrary was unreasonable.<sup>204</sup> According to the board, the contractor inability to secure financing, obtain a building permit, or close on the land within the cure period could not sustain a default termination because the cure period was an “artificial after-the-fact” deadline not specified in the contract.<sup>205</sup> In arriving at damages for the breach of the lease contract, the board factored in the “reversionary value” of the building, or “the equity Omni would have owned at the end of the lease.”<sup>206</sup>

Judge Vergilio again dissented from the board’s decision, both on the default termination and on the award of reversionary damages. In his view, the contracting officer was justified in terminating for default because the contractor had failed to provide assurances of his ability to complete construction in time to permit occupancy.<sup>207</sup> The test, he noted, is not whether the board majority would have terminated under these circumstances, but whether the contracting officer had a reasonable belief that there was no reasonable likelihood the contractor could have timely completed performance.<sup>208</sup> Judge

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 162,890.

<sup>198</sup> AGBCA Nos. 97-203-1, 98-182-1, 05-1 BCA ¶ 32,982.

<sup>199</sup> *Id.* at 163,409-10.

<sup>200</sup> *Id.* at 163,413.

<sup>201</sup> *Id.* at 163,432.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 163,434 (emphasis added).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 163,440.

<sup>206</sup> *Id.* at 163,442.

<sup>207</sup> *Id.* at 163,453.

<sup>208</sup> *Id.*

Vergilio believed that the contracting officer's conclusion was reasonable.<sup>209</sup> He also objected to the use of reversionary value as a measure of damages, noting that "[t]he value of the building at the commencement and conclusion of the lease term is not relevant to the terms and conditions of the lease contract."<sup>210</sup> He further opined:

The majority is innovative in awarding the lessor a reversionary value (the projected price that the building would sell for in 2007 less the projected cost to sell the building, adjusted to a present value) as breach damages for a building never constructed. Such a conclusion is inconsistent with the contract and case law for several readily apparent reasons. I need not address the speculative nature of the awarded reversionary value and the underlying bases for valuing the unconstructed building, on an undeveloped piece of property, with imaginary tenants at conjectured rental rates, which separately supports why recovery of a reversionary value is inappropriate.<sup>211</sup>

Major Michael L. Norris

## Terminations for Convenience

### *Implied-in-Fact Contract Doesn't Always Contain Implied T4C Clause*

In *Advanced Team Concepts, Inc. v. United States*,<sup>212</sup> the vendor provided training classes to Immigration and Naturalization Service (INS) personnel without a written contract. The director of the INS training facility would circulate the class schedule to the vendors, who would reserve instructors for the scheduled dates.<sup>213</sup> After conducting the training, the vendors would submit an invoice for payment to the director, who would then complete a Standard Form 182<sup>214</sup> to request payment for the services.<sup>215</sup> The director was not a warranted contracting officer, but discussed the use of this procedure for these small purchases with her supervisor and a procurement officer, and was authorized to proceed in this manner for a number of years.<sup>216</sup>

In 2000, the director circulated the 2001 schedule to the vendor, who scheduled its instructors for the class dates. When the director retired later in 2002, the new director cancelled the vendor's participation in the 2001 classes and instead obtained the services of the retired director, his predecessor, to provide the training.<sup>217</sup> The following year, the new director circulated the tentative 2002 class schedule to the vendor but informed him that the courses were being assessed and might change, and that he would contact the vendor later with regard to the 2002 schedule.<sup>218</sup> Thereafter, the new director informed the vendor that he would not need the vendor's services for 2002.<sup>219</sup>

The COFC found that the directors, while not contracting officers, had implied authority to bind the government to a contract because "scheduling, hiring and paying invoices for [the] courses were central to the Director's duties."<sup>220</sup> The court further found offer and acceptance for the 2001 classes when the former director circulated the 2001 schedule to the vendor and the vendor reserved instructors for those dates.<sup>221</sup> Accordingly, there was an implied-in-fact contract for the 2001 classes, which the new director breached by canceling the vendor's participation.<sup>222</sup> The court found no implied-in-fact

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 163,454.

<sup>211</sup> *Id.* at 163,465.

<sup>212</sup> 2005 U.S. Claims LEXIS 283 (Sept. 28, 2005).

<sup>213</sup> *Id.* at \*3.

<sup>214</sup> U.S. Off. of Personnel Mgt., SF-182, Request, Authorization, Agreement and Certificate of Training (12 Dec. 1979).

<sup>215</sup> *Advanced Team Concepts*, 2005 U.S. Claims LEXIS 283, at \*3-4.

<sup>216</sup> *Id.* at \*3.

<sup>217</sup> *Id.* at \*13.

<sup>218</sup> *Id.* at \*5.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at \*9.

<sup>221</sup> *Id.* at \*11.

<sup>222</sup> *Id.*

contract for the 2002 classes, because the uncertainty expressed by the new director when circulating the 2002 class schedule created a lack of mutual intent to contract.<sup>223</sup>

The government argued that if an implied-in-fact contract exists, a termination for convenience clause must be read into that implied contract under the *Christian* doctrine.<sup>224</sup> While recognizing that the government has the right to terminate any contract for its convenience absent bad faith,<sup>225</sup> the court found that the *Christian* doctrine did not apply in this case because the termination “was not for the government’s benefit but for that of a former employee.”<sup>226</sup> Citing the Ethics in Government Act<sup>227</sup> and the CICA,<sup>228</sup> the court reasoned that by terminating the implied-in-fact contract with the vendor and giving the job to the former director, the government in bad faith “did what presumptively government contract policy seeks to prevent; favoring contractors who have an ‘in,’ or inside knowledge not available to the general public.”<sup>229</sup>

*Services Offered As an “Inseparable Whole” Can Be Separated In Partial T4C*

In *Individual Development Associates, Inc.*,<sup>230</sup> a contractor’s proposal to provide educational services had the following notation on the bottom of each page: “All items under [the Schedule] are offered as an inseparable whole and cannot be divided in any way.”<sup>231</sup> The contractor’s proposal, containing that “inseparable whole” language, was incorporated into the contract.<sup>232</sup> Subsequently, the government partially terminated the contract for convenience of the government by terminating one CLIN in its entirety.<sup>233</sup>

On appeal, the contractor argued that the “inseparable whole” language incorporated into the contract, supported by “subject to the terms of this contract” language of the termination for convenience paragraph of the clause at FAR 52.212-4,<sup>234</sup> precludes the government from terminating any CLIN (or a part of any CLIN) unless all the CLINs are terminated.<sup>235</sup> The ASBCA disagreed, holding that the “inseparable whole” language applied only to offer and acceptance, and not to termination.<sup>236</sup> Noting that the contractor’s interpretation “would read out of the contract the government’s right to partially terminate the contract for its convenience,”<sup>237</sup> the ASBCA held that the government had a right to partially terminate the contract because there was no clear language in the contract modifying the termination clause.<sup>238</sup>

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<sup>223</sup> *Id.*

<sup>224</sup> *G.L. Christian & Assoc. v. United States*, 160 Ct. Cl. 1, 15 (1963).

<sup>225</sup> *Advanced Team Concepts*, 2005 U.S. Claims LEXIS 283, at \*13.

<sup>226</sup> *Id.* at \*14.

<sup>227</sup> The Ethics in Government Act, Pub. L. No. 95-521, § 1, 92 Stat. 1824 (1978).

<sup>228</sup> The Competition in Contracting Act, 41 U.S.C.S. § 253 (LEXIS 2005).

<sup>229</sup> *Advanced Team Concepts*, 2005 U.S. Claims LEXIS 283, at \*13.

<sup>230</sup> ASBCA No. 53910, 04-2 BCA ¶ 32,740.

<sup>231</sup> *Id.* at 161,922.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 161,923. Under the terminated CLIN, the contractor taught American English to students at the Amphibious Warfare School. Under a separate CLIN that was not terminated, the contractor provided educational services at the Command and Control System School. The contract contained at least one more CLIN pertaining to advance courses for noncommissioned officers. *Id.* at 161,922.

<sup>234</sup> Paragraph (l) of the clause at FAR 52.212-4, Contract Terms and Conditions—Commercial Items, provides, in relevant part:

(l) Termination for the Government’s convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. . . . Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.

FAR, *supra* note 70, at 52.212-4(l).

<sup>235</sup> *Individual Dev. Assocs.*, 04-2 BCA ¶ 32,740, at 161,924.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

The contractor also maintained that because the partial termination created increased performance costs, he was entitled to an equitable adjustment.<sup>239</sup> The board rejected that argument as well, distinguishing the commercial termination clause used in this contract,<sup>240</sup> which does not provide for an equitable adjustment, from the non-commercial termination for convenience clause at FAR 52.249-2,<sup>241</sup> which does permit an equitable adjustment if a partial termination causes increased costs in the continued work. The board explained that the cost principles applicable to FAR part 49 are apparently not applicable to commercial contracts.<sup>242</sup> The board also noted, however, that the commercial termination for convenience clause does permit recovery of “reasonable charges” resulting from the termination, but expressed no opinion as to whether that would cover increased costs in the non-terminated portion of the work.<sup>243</sup>

*Upon T4C of a Cost-Share Contract, Contractor Only Gets a Share of Its Costs*

In *Jacobs Engineering Group, Inc. v. United States*,<sup>244</sup> the COFC held that upon the termination of a cost-share contract for the convenience of the government, the contractor is not entitled to recover one hundred percent of his costs, but instead must bear his allotted share of the costs. In *Jacobs*, the Department of Energy (DOE) entered into a cost-share contract with the contractor for the development of a gasifier.<sup>245</sup> During the design phase, the parties found that the costs of development would be significantly greater than anticipated, and the DOE ultimately terminated the contract for convenience because the project could not be funded.<sup>246</sup> In its termination settlement proposal and subsequent appeal, the contractor sought one hundred percent of its costs incurred in the performance of the contract, arguing that the cost-sharing provision under which he bore twenty percent of the costs did not apply in the event of termination.<sup>247</sup>

Noting that the contract’s termination for convenience clause provided for “*all costs reimbursable under this contract*, not previously paid, for the performance of this contract, before the effective date of the termination,”<sup>248</sup> the court found that the clause did not invalidate the cost-sharing agreement, but instead “seeks to fashion a remedy for the contractor in conjunction with the cost-sharing provisions.”<sup>249</sup> The court further found that FAR part 31, referenced in the termination clause, also “recognizes that a contractor cannot recover costs not contemplated by the contract.”<sup>250</sup> Consistent with the cost-sharing provisions, the court held that the contractor was entitled to only eighty percent of his allowable incurred costs upon the termination for convenience.<sup>251</sup>

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<sup>239</sup> *Id.* at 161,925.

<sup>240</sup> See FAR, *supra* note 70, at 52.212-4(l).

<sup>241</sup> *Id.* at 52.249-2.

<sup>242</sup> *Individual Dev. Assocs.*, 04-2 BCA ¶ 32,740, at 161,925.

<sup>243</sup> *Id.*

<sup>244</sup> 63 Fed. Cl. 451 (2005).

<sup>245</sup> *Id.* at 453. Beyond being a good word to use at cocktail parties, “gasification” is “a means of converting coal to electricity and fuel, as an alternative source of energy.” *Id.*

<sup>246</sup> *Id.* at 454.

<sup>247</sup> *Id.* at 455. In its argument, the contractor relied in part on the terms of the contract’s “Project Continuance” clause, which allowed the contractor to withdraw from continuing the project at a certain point in time under certain conditions, and which provided that if the contractor did withdraw he would bear 20 percent of the costs incurred. The contractor argued that applying the cost-sharing arrangement after termination would render the Project Continuous clause superfluous. *Id.* at 458.

<sup>248</sup> FAR, *supra* note 70, at 52.249-6(h)(1) (emphasis added).

<sup>249</sup> *Jacobs Eng’g Group*, 63 Fed. Cl. at 457.

<sup>250</sup> *Id.* at 457-58. Specifically, FAR 31.201-2(a) states: “A cost is allowable only when the cost complies with all of the following requirements: . . . (4) Terms of the contract.” FAR, *supra* note 70, at 31.201-2(a).

<sup>251</sup> *Jacobs Eng’g Group*, 63 Fed. Cl. at 457.

*No Termination Costs If ID/IQ Contract Minimum Was Satisfied*

In *International Data Products Corporation v. United States*,<sup>252</sup> the contractor provided computer systems and related services to the Air Force under an ID/IQ contract awarded under section 8(a) of the Small Business Act.<sup>253</sup> When the contractor entered into an agreement to sell its company to a non-8(a) concern, the Air Force terminated the contract for convenience.<sup>254</sup> At that point in time, the Air Force had purchased over \$35 million in goods and services under the contract, far in excess of the contract's \$100,000 minimum quantity.<sup>255</sup> The contractor filed a claim for approximately \$1.7 million in termination costs, and the contracting officer issued a final decision denying any termination costs.<sup>256</sup> The COFC granted summary judgment for the government on this issue, holding that once the government had met its obligation to purchase the guaranteed minimum quantity under the ID/IQ contract, it had no further obligation to pay contractor settlement costs.<sup>257</sup>

The termination clause in the contract provided that "[i]n no event shall the sum of the termination amounts payable and any amounts paid for items delivered under the contract exceed the total contract price."<sup>258</sup> The "total contract price," the court held, was the guaranteed minimum quantity plus the value of any purchases the government made in excess of that minimum.<sup>259</sup> "Thus, by placing orders that met and exceeded the minimum value, the Government has already paid [the contractor] the 'total contract price.'"<sup>260</sup> The court rejected the contractor's argument that the "total contract price" was the stated total estimated quantity of \$100 million, finding that the contractor assumed the risk that the government would not order more than the minimum quantity.<sup>261</sup>

The court ruled against the government, however, on the unrelated issue of whether the government could continue to require the contractor to fulfill his obligations for warranty services and software upgrades that the government had already paid for under the contract. The court found that the statute which required the government to terminate the contract upon the contractor's agreement to relinquish ownership of its section 8(a) concern does not permit a partial termination, even though the government would suffer a loss as a result.<sup>262</sup> The court explained:

Congress weighed the inconvenience and expense of termination to the Government against the goals of the 8(a) program and concluded that the exceptions to termination should be made only when the agency's objectives would be "severely impaired." Congress determined that not every loss or inconvenience to the agency would prevent termination of the contract. It is not up to the Court or the contracting officer to strike a different balance from that set forth in the statute.<sup>263</sup>

*Government Breached Your T4C Settlement Agreement? No Attorney Fees for You!*

Recently, the GSBCA held that attorney fees incurred by a contractor to defend third party suits resulting from the government's breach of a settlement agreement are not recoverable. In *Gildersleeve Electric, Inc. v. General Services Administration*,<sup>264</sup> the GSA terminated for convenience a contract for reconfiguring a parking lot. The termination settlement agreement provided, in part, that money due the contractor would be withheld for purposes of resolving any disputes with the subcontractors, to correct any deficiencies in the work, and to pay the subcontractor "any and all monies due for work on this

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<sup>252</sup> 64 Fed. Cl. 642 (2005).

<sup>253</sup> 15 U.S.C.S. § 637(a) (LEXIS 2005).

<sup>254</sup> *Int'l Data Prods.*, 64 Fed. Cl. at 644.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 647.

<sup>258</sup> *Id.* at 645.

<sup>259</sup> *Id.* at 647.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 648.

<sup>262</sup> *Id.* at 650 (citing 15 U.S.C.S. § 637(a)(21)(A)).

<sup>263</sup> *Id.*

<sup>264</sup> GSBCA No. 16404, 05-2 BCA ¶ 33,011.

project.”<sup>265</sup> A couple of months later, the subcontractor sued the contractor for payment under the subcontract.<sup>266</sup> The contractor contacted the GSA’s contracting officer and requested that she pay the subcontractor, but the contracting officer refused, maintaining that the contractor was responsible for paying the subcontractor for work performed prior to the settlement agreement.<sup>267</sup> In its appeal to the GSBICA, the contractor alleged that the government breached the parties’ termination settlement agreement by failing to pay the subcontractor, and that as a result of this breach the contractor incurred legal fees defending against the lawsuit that was successfully brought by the subcontractor.<sup>268</sup>

The GSBICA granted summary relief on this issue for the government. The board explained that attorney fees are generally not compensable as breach damages absent some statutory authority.<sup>269</sup> Citing *Liles Construction Co. v. United States*,<sup>270</sup> the board noted a “rare exception to this rule . . . when there is a clear breach of the Government’s contractual duties during performance of the contract, entitling the contractor to an equitable adjustment to fully compensate for the consequences of the Government’s breach, including the expenses of litigation with third parties.”<sup>271</sup> However, that exception did not apply to this case because the contractor was alleging a breach of a settlement agreement, rather than a breach of the contract.<sup>272</sup> Therefore, the board held, even if the government breached the termination settlement and the contractor becomes entitled to breach damages, those damages would still not include attorney fees.<sup>273</sup>

Major Michael L. Norris

## Contract Disputes Act (CDA) Litigation

### *Proposal to Combine Boards of Contract Appeal*

The on-going discussion about potentially combining the boards of contract appeals continues.<sup>274</sup> The boards of contract appeals would be combined to form two Boards of Contract Appeals: the Civilian Board of Contract Appeals and the Defense Board of Contract Appeals.<sup>275</sup> A main point of contention for those opposing the consolidation is the elimination of a forum for cases that are not specifically covered by the CDA.<sup>276</sup>

Additionally, this proposal contemplates rating the judges.<sup>277</sup> The Boards of Contract Appeals (BCA) Bar Association wants the government to slow this runaway train.<sup>278</sup> The BCA Bar Association recommends the creation of a “Blue Ribbon Panel” that would invite the views of the procurement community and preserve the role of the BCAs in CDA disputes as well as in non-CDA dispute resolution, such as Native American self-determination contracts and non-appropriated fund contracts.<sup>279</sup>

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<sup>265</sup> *Id.* at 163,597.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 163,598.

<sup>269</sup> *Id.*

<sup>270</sup> 455 F.2d 527 (Ct. Cl. 1972).

<sup>271</sup> *Gildersleeve Elec., Inc.*, 05-2 BCA ¶ 33,011, at 163,599.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (2005) [hereinafter BCA Proposal]. The proposed Authorization Act renames the General Services Board of Contract Appeals to the Civilian Board of Contract Appeals and Armed Services Board of Contract Appeals into the Defense Board of Contract Appeals.

<sup>275</sup> *Id.*

<sup>276</sup> Letter from Board of Contract Appeals Bar Association, to the Honorable John Warner, Susan Collins, Carl Levin, and Joseph Lieberman (June 28, 2005); Letter from The Senior Executive Association, to the Honorable John Warner and Carl Levin (June 3, 2005).

<sup>277</sup> BCA Proposal, *supra* note 274.

<sup>278</sup> The Board of Contract Appeals Bar Association is made up of members from the three major components of the federal procurement community: Boards of Contract Appeals judges, federal government attorneys, and private sector government contracting practitioners

<sup>279</sup> Letter from Board of Contract Appeals Bar Association, to the Honorable John Warner, Susan Collins, Carl Levin, and Joseph Lieberman, (June 28, 2005).

The Senior Executives Association (SEA) also opposes the bill.<sup>280</sup> It does not believe the bill will streamline the repetitive functions of the BCAs. The SEA also seized on the fact that the bill, as passed in HR 1815, would eliminate jurisdiction over non-CDA cases as well as contracts issued by the Iraq Coalition Provisional Authority and certain NATO contracts. The SEA letter also questioned the rating of judges.<sup>281</sup> As the letter points out, the House bill does not specifically authorize rating the judges, but provides “for authority for ‘regulations’ to be promulgated and envisions reductions in force through the use of performance appraisals.”<sup>282</sup> It is uncertain what the ratings would be based upon. As the letter also points out, setting performance for pay standards would impact the impartiality of the boards that now exists.<sup>283</sup>

### *NAFI Jurisdiction or Not, Part I*

The debate concerning the jurisdiction over Nonappropriated Funds Instrumentalities (NAFI) contracts continues to make our yearly review. You may recall *Pacrim Pizza Co. v. Pirie*,<sup>284</sup> where the CAFC decided it did not have jurisdiction to decide the dispute involving a NAFI contract.<sup>285</sup> This year’s NAFI contract dispute (really from Summer 2004) comes from the COFC. In *Sodexo Marriott Management, Inc.* (hereinafter “Marriott”), the COFC ruled that the non-appropriated funds doctrine bars the COFC from having jurisdiction over Marriott’s claim.<sup>286</sup>

On 14 September 1999, prior to the *Pacrim Pizza* decision, Marriott filed a complaint to the COFC alleging the Marine Corps Recruit Depot Morale, Welfare and Recreation Center (“MWR”) breached its contract or, in the alternative, took the fixtures that Marriott installed in the building without just compensation.<sup>287</sup> The dispute arose out of a MWR food service contract with Marriott for services on Parris Island, South Carolina.<sup>288</sup>

In 1996, the parties bilaterally terminated the contract.<sup>289</sup> In 1998, Marriott filed a certified claim for \$127,576.15, for the cost of the installing fixtures in the food court building.<sup>290</sup> On 21 February 2001, the Court granted the government’s motion dismissing the plaintiff’s claim.<sup>291</sup> The following year, in 2002, the CAFC decided *Pacrim Pizza*,<sup>292</sup> ruling that while the CAFC had jurisdiction over appeals from agency boards of contract appeals when the CDA applied, the CDA limited the court’s jurisdiction to NAFI contracts of the Armed Forces Exchanges.<sup>293</sup> Under *Pacrim Pizza*, the Federal Circuit determined that a local MWR entity with supervision and contracting structures separate and distinct from an exchange is not a covered activity which excluded the MWR entity from the CDA.<sup>294</sup>

Ultimately, as Joe Buck<sup>295</sup> would say, Marriott struck out looking. The COFC reminded Marriott that the Supreme Court overruled and replaced the *Chevron* rule with a strict rule requiring retroactive application.<sup>296</sup> Now, all civil cases are open to direct review, regardless of whether the events predate or postdate the announcement of a rule.<sup>297</sup>

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<sup>280</sup> Letter from The Senior Executive Association, to the Honorable John Warner and Carl Levin (June 3, 2005).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> 304 F.3d 1291 (Fed. Cir. 2002).

<sup>285</sup> *Id.*

<sup>286</sup> *Sodexo Marriott Mgmt., Inc., f/k/a Marriott Mgmt. Servs. v. United States*, 61 Fed. Cl. 229, 231 (July 2, 2004).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 230.

<sup>289</sup> *Id.* at 231.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 230.

<sup>292</sup> *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291 (Fed. Cir. 2002).

<sup>293</sup> *Marriott*, 61 Fed. Cl., at 230. See also, *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291 (Fed. Cir. 2002). The Federal Circuit stated that a NAFI “may be covered entity under the Contracts Disputes Act if it is closely affiliated with a post exchange and meets a three-part test.” *Pacrim* at 1293

<sup>294</sup> *Pacrim Pizza*, 304 F.3d at 1292-1294.

<sup>295</sup> Fox national baseball announcer.

<sup>296</sup> *Marriott*, 61 Fed. Cl. at 236. See also *James B. Beam Distilling Co. v. Georgia*, 50 U.S. 529 (1991) and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). Pursuant to *Pacrim Pizza* the government moved to dismiss Marriott’s surviving claim. Marriott, in turn, asserted that the Federal Circuit got

Next, Marriott argued that CAFC erroneously decided *Pacrim Pizza* because the court did not have an adequate factual record showing the nature of the MWR and the Marine Corps community services.<sup>298</sup> The court determined that the nonappropriated funds doctrine bars it from exercising jurisdiction and, based upon the findings in the controlling case of *Pacrim Pizza*, the Court of Federal Claims must apply that standard retroactively.<sup>299</sup>

The court granted the government's motion dismissing the plaintiff's case.<sup>300</sup> It appeared the debate over NAFI jurisdiction was settled, the CDA did not apply, and the federal courts did not have jurisdiction to decide disputes involving a NAFI contract unless the dispute arose out of an exchange contract. But wait, it is not over!

### *Jurisdiction over NAFIs. . . Parties Can Agree to Give Boards Jurisdiction, Part II*

In the category of "watch out what you ask for you might just get it," a NAFI contract before the Department of Transportation Board of Contracting Appeals (DOTBCA) had a different result concerning the jurisdictional issue. The DOTBCA ruled that it could resolve a dispute arising out of a NAFI contract due to the specific agreement by the parties that the Board would resolve disputes.<sup>301</sup> The contract erroneously included the Disputes Clause stating that the CDA applied.<sup>302</sup>

In that case, Federal Prison Industries (UNICOR) contracted with Logan to provide drawer slides for use in the furniture created by federal inmates.<sup>303</sup> Ultimately, UNICOR terminated the contract for default for failing to provide drawer slides that meet the American National Standard for Office Furniture (ANSI/BIFMA) standards as required under the contract.<sup>304</sup> Logan appealed the termination for default and the government moved to dismiss for lack of jurisdiction.

UNICOR is a NAFI and since Logan's contract was based upon the CDA, there was no waiver of sovereign immunity under the CDA.<sup>305</sup> Accordingly, the DOTBCA was without jurisdiction.<sup>306</sup> The DOTBCA concluded that the differences between the jurisdiction in COFC and the jurisdiction exercised in the board permitted the DOTBCA to exercise jurisdiction where COFC could not.<sup>307</sup> The board agreed with the government that it did not have jurisdiction under the Tucker Act or the CDA, but notes that its jurisdiction is not limited by either.<sup>308</sup> The board reasoned that the CDA does not "remove or limit the Boards authority over non-CDA appeals."<sup>309</sup> The board pointed to its charter that granted the authority to exercise jurisdiction over appeals from contracting officer decisions relating to contracts when the agency consents in the contract to the board's jurisdiction.<sup>310</sup> While this contract incorrectly stated it was governed by the CDA, the parties agreed to the board's jurisdiction by including the disputes clause in the contract.<sup>311</sup>

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it all wrong in *Pacrim Pizza*. *Id.* at 230-231. In an effort to save its case, Marriott filed motions to transfer and a motion to reinstate the previously dismissed claim on equitable grounds in the case that the Court dismisses the remaining count for lack of jurisdiction. *Id.* at 230. Marriott acknowledged the *Pacrim Pizza* decision but asserted that the decision in should not be retroactively applied based upon the three-part test set forth in *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), which was (1) whether the decision announces a new principle of law; (2) whether the retrospective operation will further or retard" the operation of the legal principle at issue; and (3) whether making the rule retroactive would be inequitable. *Marriott*, 61 Fed. Cl. at 236.

<sup>297</sup> *Id.* See James B. Beam Distilling Co. v. Georgia, 50 U.S. 529 (1991) and Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993).

<sup>298</sup> *Marriott*, 61 Fed. Cl. at 233-234.

<sup>299</sup> *Id.* at 231.

<sup>300</sup> *Id.*

<sup>301</sup> Logan Machinists, Inc., DOTBCA No. 4184, 05-1 BCA ¶ 32,894.

<sup>302</sup> *Id.* at 162,960.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 162,961.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 162,964-65.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 162,964.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 162,965.

*Say What? A New Equation for Lack of a Certification*

In perplexing dicta, the COFC determined in *Engineered Demolition v. United States*<sup>312</sup> that no certification equals “a defect in the certification,” and a defect in the certification equals “a defective certification.”<sup>313</sup> This is even more confusing given the court’s determination that the two claims filed by Engineered, totaling \$107,987, were separate claims and that there was no certification requirement.<sup>314</sup>

The Army Corps of Engineers contracted with Engineered for the removal, transportation and disposal of radiologically contaminated soil stored at the Hazelwood Interim Storage Site located in northern St. Louis County, Missouri.<sup>315</sup> During negotiations, Engineered suggested, and the Corps did not dispute, that one hundred twenty-five railcars would be necessary for the transportation of the contaminated soil.<sup>316</sup> Based upon that estimate, Engineered entered into a subcontract for railcars to transport the soil to a low-level nuclear waste disposal site in Utah.<sup>317</sup> The subcontractor relied upon the Corps’ survey and Engineered’s estimate to order one hundred twenty-five railroad cars.<sup>318</sup> After the Corps awarded the contract, the contracting officer’s representative changed the finish grade elevation to make the finish grade higher than specified in the contract.<sup>319</sup> As a result, the total amount of soil removed was 1,402 cubic yards less than originally estimated.<sup>320</sup>

Engineered originally requested an equitable adjustment for unabsorbed overhead in the amount of \$161,729.16, claiming \$62,427.10 in unrecouped overhead for differing site condition; \$38,940 on behalf of its subcontractor for railcars for unused railcars; and \$6,619.80 for Engineered’s markup on the unused railcars.<sup>321</sup> Engineered’s complaint requested two claims: one on its own behalf for \$69,047, and a sponsored claim on behalf of a sub-contractor for \$38,940.<sup>322</sup>

The government filed a motion to dismiss for lack of subject matter jurisdiction because the contractor failed to certify the claim which totaled over \$100,000. The government argued that there is a distinction between failing to submit a certification and submitting a defective certification.<sup>323</sup> The government implied that failure to submit a certification is a jurisdictional bar, while a defective certification is fixable.<sup>324</sup> Therefore, the court lacked jurisdiction over the claims because Engineered failed to properly certify its claim, which exceeded the \$100,000 threshold.<sup>325</sup> Engineered argued that no certification was necessary because the two claims were separate and each was under the \$100,000 threshold.<sup>326</sup>

In denying the Corps’ motion to dismiss for lack of subject matter jurisdiction, the COFC found that while the cumulative total of the defendant’s two claims was greater than \$100,000, the claims arose separately, albeit from the same contract.<sup>327</sup> The Court found that even if the claims were combined for purposes of the CDA, the Court would deny the

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<sup>312</sup> *Engineered Demolition, Inc. v. United States*, 60 Fed. Cl. 822 (2004).

<sup>313</sup> *Id.* at 829-31.

<sup>314</sup> *Id.* at 831.

<sup>315</sup> *Id.* at 823.

<sup>316</sup> *Id.* at 824.

<sup>317</sup> *Id.* at 824.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 824.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 824-25. When Engineered filed its complaint with the court on 26 September 2003, it split its claim into two parts: \$69,047 (\$62,427.10 + 6,619.80 = \$69,046.90) for its overhead, and \$38,940 on behalf of its subcontractor.

<sup>322</sup> *Id.* Engineered’s first claim, for \$69,047 was for an equitable adjustment claim for under-absorbed overhead associated with a shortfall in the quantity of contaminated soil to be removed which it claimed was caused by the Corps of Engineer’s decision to change the final elevation of the finish grade. The claim on behalf of its subcontractor related to excess costs associated with the number of railcars ordered for the project, but not used because the government changed the final elevation of the finish grade. *Id.*

<sup>323</sup> *Id.* at 824.

<sup>324</sup> *Id.* at 827.

<sup>325</sup> *Id.* at 824.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 831.

government's motion since the only consequence of a defective certification would be that the Court required Engineered to certify the claims before the Court issued its decision.<sup>328</sup> Furthermore, the court held that no certification was required because each claim was separate, having arose out of different factual predicates, and each were under \$100,000.<sup>329</sup>

In dicta, the court stated that the failure to provide a certification where a claimant mistakenly, but reasonably, believed multiple claims each under \$100,000 that cumulatively totaled over \$100,000 were not jurisdictionally barred.<sup>330</sup> The court interpreted the language of 41 U.S.C. Section 605(c)(6)<sup>331</sup> as ambiguous and "the last sentence of the definition of 'defective certification' in FAR § 33.201 as overbroad and invalid."<sup>332</sup> In coming to its conclusion that, in this case, the failure to submit a certification was not a jurisdictional bar, even if the claims were to be considered one, the court looked at the legislative materials in the 1992 amendments to the CDA.<sup>333</sup>

In determining that Engineered's claims were separate claims, the court stated that "more than one claim might arise from a single government contract."<sup>334</sup> The question is whether each factual predicate is separate and apart from the other and supports a separate claim.<sup>335</sup> Since the claims were separate and independent in nature, and less than \$100,000, no certification was required.<sup>336</sup>

### *Are We Still Messing with Jurisdiction?*

The COFC recently decided that the statute of limitations for the Tucker Act is not concerned about where you file your suit, just as long as you file it within the six years of the claim accruing.<sup>337</sup> In *Stockton East Water District v. United States*, the COFC denied the government's motion to dismiss for lack of jurisdiction even though it took the plaintiffs ten years to file its claim in the COFC.<sup>338</sup> The case revolved around a dispute between the Bureau of Reclamation and several water districts over the operation and maintenance of water facilities within the San Joaquin Valley, California, which was originally filed in the U.S. District Court within the statute of limitations, but much later refiled in the COFC.<sup>339</sup>

The appellants originally filed their complaint in the U.S. District Court for the Eastern District of California on 1 October 1993.<sup>340</sup> In February of 1994, that court dismissed the first four claims and stated, in part, that the government's

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<sup>328</sup> *Id.* at 830-31.

<sup>329</sup> *Id.* at 831.

<sup>330</sup> *Id.*

<sup>331</sup> Title 41, section 605(c)(6) of the U.S. Code states:

The contracting officer shall have no obligation to render a final decision on any claim of more than \$ 100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected. 41 U.S.C.S. § 605(c)(6) (LEXIS 2005)

<sup>332</sup> *Engineered Demolition*, 60 Fed. Cl. at 830.

<sup>333</sup> *Id.* at 827. The fundamental purpose of the certification is to have the contractor submit an accurate appraisal of its damages and to thereby encourage settlements. *See also* *Medina Construction Limited v. United States*, 43 Fed. Cl. 537 (1999). The court pointed to Judge Loren A. Smith's (Chief Judge of the U.S. Claims Court in 1992) testimony before Congress, whereby he pointed out that the "certification requirement 'hurt real people, especially small business who are less able to deal with the intricacies and complexities of Federal procurement law.'" *Id.*

<sup>334</sup> *Id.* at 831.

<sup>335</sup> *Id.* at 831.

<sup>336</sup> *Id.*

<sup>337</sup> *Stockton East Water District v. United States*, 62 Fed. Cl. 379 (2004).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 382.

<sup>340</sup> *Id.* at 383. Appellants claimed five areas of relief:

- (1) impairment of "vested rights under ... water contract in violation of the Fifth amendment due process clause,
- (2) violation of the National Environmental policy Act for failure to prepare and environmental impact statement;
- (3) violation of the CVPIA, section 3410 ;
- (4) arbitrary and capricious action by the Government;
- and (5) violation of the Fifth Amendment's taking clause.

*Id.*

motion to dismiss the claim of a violation of the Fifth Amendment's taking clause was granted without prejudice, allowing the appellant ten days to amend and bring the claim at the COFC.<sup>341</sup> Rather than avail themselves of the COFC, the appellants filed an amended complaint before the district court and concurrently with the California Resources Control Board (SWRCB).<sup>342</sup>

The Federal judge issued a summary judgment ruling in 1996; however he issued a stay, "pending the outcome of the SWRCB proceeding to determine state water rights issues."<sup>343</sup> While the court held that the plaintiffs "do not, by virtue of their contracts with [Reclamation], hold prior appropriative or senior water rights that would require the Secretary to appropriate their water before appropriating the 800,000 acre feet of water for fishery and wildlife purposes," it would not rule on whether the plaintiffs had prior water rights under the Watershed Protection Act.<sup>344</sup> The court again ruled that the contracts were ambiguous as to abrogation of the sovereign power to legislate, like it had in its original Dismissal Order.<sup>345</sup> Later in 1996 the federal court withdrew its ruling of the government's motion for partial judgment concerning the plaintiff's water right claim under the California Water Code.<sup>346</sup> Then in 1997, the court took up the state law issue.<sup>347</sup> There the court agreed with the SWRCB that all of the plaintiff's claims under the California Water Code<sup>348</sup> should be referred to the SWRCB.<sup>349</sup>

Seven years later, the appellants filed a motion asking permission to transfer the complaint, which was granted.<sup>350</sup> The Plaintiff's amended Federal Claims Court complaint sought relief for a takings and a breach of contract.<sup>351</sup> The court ultimately did not agree with the government's assertion that the court lacked subject matter jurisdiction because the complaint was time-barred.<sup>352</sup> The government's position was that the claims must have accrued no earlier than 20 April 1998, six years before the plaintiffs filed in the Court of Claims.<sup>353</sup> The plaintiffs, on the other hand, believed the appropriate filing date was the 1993 date of the original complaint and not the 2004 filing with the U.S. Court of Claims.<sup>354</sup> The court sided with the plaintiffs, holding that the statute did not expressly define "filed" or require that the claim be filed with the COFC.<sup>355</sup> The court instead looked to the statute authorizing the transfer of the case from Federal Court to the U.S. Court of Federal Claims: Title 28 United States Code, Section 1631 which states that "the action shall proceed as if it had been filed in . . . [the transferee court] on the date upon which it was actually filed in . . . [the transferor court]."<sup>356</sup>

#### *Riley & Ephriam Constr. Co. & the Court of Federal Claims; Forget About It!*

Last year's *Year in Review* reported the *Riley* case for "the proposition that it is a good idea to regularly check your mailbox."<sup>357</sup> Well, as the boys from the movie *Goodfellas* would say, "Forget about It!" This year's episode of *Riley &*

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<sup>341</sup> *Id.* at 384.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 385.

<sup>344</sup> *Id.* at 386.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 387.

<sup>347</sup> *Id.*

<sup>348</sup> *Stockton*, 62 Fed. Cl. at 387; Cal. Water Code § 11460 (2005).

<sup>349</sup> *Stockton*, 62 Fed. Cl. at 387.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 388. 28 U.S.C. § 2501 stating that claims under the jurisdiction of the United States Court of Claims are barred unless the petition is filed within six years after the claim accrues. 28 U.S.C.S. § 2501 (LEXIS 2005).

<sup>353</sup> *Stockton*, 62 Fed. Cl. at 388.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 389

<sup>356</sup> *Id.* (quoting § 1631).

<sup>357</sup> See Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 108 [hereinafter *2004 Year in Review*].

*Ephriam Construction Company v. United States*<sup>358</sup> (hereinafter *Riley*) saw the CAFC do a one-eighty. In *Riley*, the Court of Appeals for the Federal Circuit reversed the COFC's dismissal of a complaint filed more than one year after the receipt of the contracting officer's final decision.<sup>359</sup> The contracting officer issued a final decision on 27 November 2001, sending one copy the contractor via certified mail and the other to the contractor's attorney via fax.<sup>360</sup> The contractor failed to pick up the certified letter that was sent to its P.O. Box and *Riley's* attorney claimed that he never received the faxed final decision.<sup>361</sup> The contracting officer resent the final decision to the contractor's attorney, which he received and signed for on 30 January 2002.<sup>362</sup> On 24 January 2003, *Riley* filed an appeal with the Court of Federal Claims.<sup>363</sup>

While the COFC determined that *Riley* was barred by the statute of limitations,<sup>364</sup> the Federal Circuit did not see it the same way.<sup>365</sup> The contracting officer's statement that the fax went through, and a substantiating document that showed a 2.6 minute call to *Riley's* attorney's fax machine were not the "objective indicia of receipt" required by the CDA.<sup>366</sup> Since the government failed to produce the requisite evidence of receipt for either final decision sent on 27 November 2001, the clock did not start running until the contractor's attorney received the final decision on 30 January 2002. The Federal Circuit also disagreed with the finding that the contractor implicitly consented to allow the Post Office employees to accept mail on its behalf, or that a Post Office box rental was analogous to a customer of a commercial mail handler or private mailbox service that has the authority to sign for its customers.<sup>367</sup> The moral of this story is: save those fax confirmation sheets, because someday they may just save you!

### *Are You Going to Believe My Stamp or Theirs!*

The other delivery case, involving the U.S. Postal Service, has nothing to do with a final decision and everything to do with a notice of appeal. In *Premier Consulting & Management Services*,<sup>368</sup> the contractor claimed it dropped its notice of appeal off at the local post office on the last day of the ASBCA appeal period.<sup>369</sup> The case required the board to decide between the date that appeared on the U.S. Postal Service cancellation stamp and the date that appeared on the postage meter stamp from the Plaintiff's place of business.<sup>370</sup> While the envelope contained a postage meter stamp dated the 90<sup>th</sup> day, the U.S. Postal Service's cancellation stamp was dated the 91<sup>st</sup> day.<sup>371</sup> The ASBCA denied the government's motion to dismiss, noting that under the ASBCA rules,<sup>372</sup> a notice of appeal is considered filed when the contractor transfers custody to the Postal Service and that the contractor has the burden of proof as to when custody was transferred.<sup>373</sup> The board depended upon the uncontroverted sworn statement of the contractor employee who claimed that she dropped the envelope containing the notice of appeal at the post office on the 90<sup>th</sup> day.<sup>374</sup>

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<sup>358</sup> *Riley & Ephriam Constr. Co., Inc. v. United States*, 408 F.3d 1369 (May 18, 2005).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 1371.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Riley & Ephriam Constr. Co. v. United States*, 61 Fed. Cl. 405 (2005),

<sup>365</sup> *Riley & Ephriam Constr. Co., Inc. v. United States*, 408 F.3d 1369, 1370 (May 18, 2005).

<sup>366</sup> *Id.* at 1372.

<sup>367</sup> *Id.* at 1373-74

<sup>368</sup> *Premier Consulting & Mgmt. Servs.*, ASBCA No. 54691, 05-1 BCA ¶ 32,949

<sup>369</sup> *Id.* at 163,256.

<sup>370</sup> *Id.* at 163,257.

<sup>371</sup> *Id.* at 163,256.

<sup>372</sup> ASBCA Rule 1(a) states that a "[n]otice of appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken." U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. App. A (July 2004).

<sup>373</sup> *Premier Consulting*, ASBCA No. 54691, 05-1 BCA ¶ 32,949, 163,256-163,257.

<sup>374</sup> *Id.*

In a somewhat embarrassing case for the government counsel, the GSBCA determined it did not have the authority to impose monetary sanctions against the GSA.<sup>375</sup> In *A&B Limited Partnership*,<sup>376</sup> the contractor won its appeal and EAJA fees, but the government did not pay the judgment.<sup>377</sup> The government counsel on the case failed to return calls to attempt to rectify the situation, and the agency general counsel failed to respond to written requests for the same.<sup>378</sup> While dismissing the appellant's request for monetary sanctions, the GSBCA clearly believed that the government's repeated failures to respond to appellant's requests for assistance were inappropriate.<sup>379</sup> The GSBCA raised serious concerns about the government's failure to adhere to the CDA's prompt payment requirements.<sup>380</sup> The Board went on to note that the government's delay cost taxpayer's money in the form of interest.<sup>381</sup> While the Board could, and did, admonish the government counsel, it did not have the inherent authority to impose a sanction on the government for uncooperative behavior.<sup>382</sup>

Lieutenant Colonel Ralph J. Tremaglio, III

## **Nonappropriated Fund Contracting**

### *The Year of New Regulations*

As part of the continuing effort to coordinate regulations in response to the still relatively new Installation Management Agency's (IMA) presence, the past year saw the Army update its two primary regulations controlling nonappropriated fund instrumentalities. *Army Regulation 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities*, was updated twice—first on 1 December 2004, and then again on 15 August 2005. One of the most significant changes was an increase to the threshold for MWR minor construction projects to \$750,000.<sup>383</sup> Another significant change was the elimination of the potential use of appropriated funds for golf courses at remote and isolated sites and at base realignment and closure sites.<sup>384</sup> A third significant change was the authorization for appropriated funds to be used for utility services consumed by MWR programs, with the exception of golf courses within the United States.<sup>385</sup>

*Army Regulation 215-4, Nonappropriated Fund Contracting*, was also revised on 11 March 2005. The substantial changes in this revision included modifying the policy regarding requests for exceptions or clarifications. The new requirement is that requests for exceptions or clarifications to the policy must to be sent through the requestor's supporting regional IMA office to the Army Community and Family Support Center (USACFSC).<sup>386</sup> The new regulation also provides the IMA regional directors authority for management and oversight of the NAF contracting activities<sup>387</sup> and specifies that IMA regional directors / garrison commanders are delegated the authority to issue NAF contracting officer warrants within established thresholds.<sup>388</sup> The new regulation also increases ordering officer authority to \$25,000.<sup>389</sup>

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<sup>375</sup> GSBCA, 05-1 BCA ¶ 32,832

<sup>376</sup> *Id.* at 162,446.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 11-29b(13) (15 Aug. 2005).

<sup>384</sup> *Id.* paras. 4-4a, 4-5a, and app. D, nn.1 and 3.

<sup>385</sup> *Id.* app. D, para. 7.

<sup>386</sup> U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING para. 1-7 (11 March 2005).

<sup>387</sup> *Id.* para. 1-11.

<sup>388</sup> *Id.* para. 1-15.

<sup>389</sup> *Id.* para. 1-17b(2)(c).

In addition, the new regulation increases the competition threshold from \$2,500 to \$5,000;<sup>390</sup> establishes policies on the use of a simplified acquisition threshold for purchases not exceeding \$100,000 (\$250,000 for commercial items),<sup>391</sup> and incorporates text regarding policies for construction and architect-engineering contracts.<sup>392</sup> This revision also updated the contract clauses to be used in NAF contracts.<sup>393</sup>

The new regulation expands the requirements for legal review to twenty-seven different areas.<sup>394</sup> As a result of this change, administrative law attorneys and contract law attorneys can expect to see more NAF contract actions to review.

In addition to the regulatory updates, in response to reports that “the Military Services may be using 10 U.S.C. 2492 to enter into agreements with DoD NAFIs to provide goods and services that are not within the authorized activities of or of direct benefit to exchanges and morale, welfare, and recreation programs,” the Under Secretary of Defense for Personnel and Readiness, Dr. David Chu, published a memorandum reminding defense agencies that DOD NAFIs may “not enter into contracts or agreements with DoD elements or other Federal Departments, Agencies or instrumentalities for the provision of goods and services that will result in the loss of jobs created pursuant to the Randolph-Sheppard Act (RSA), Javits-Wagner O’Day (JWOD), or small business programs.”<sup>395</sup>

#### *And B-I-N-G-O Was His Name-Oh! ASBCA Denies a Breach of Contract Claim*

In a case of widespread significance across the DOD NAFI community, *Charitable Bingo Associations, Inc. d/b/a Mr. Bingo, Inc. (Charitable Bingo)*,<sup>396</sup> the ASBCA denied a contractor’s claim for breach of contract on the grounds that the government possesses broad rights to terminate contracts, and barring bad faith or a clear abuse of discretion, the board would not overturn a contracting officer’s decision to terminate a contract for the convenience of the government.<sup>397</sup> The contractor argued that the Termination Contracting Officer did not exercise independent judgment in terminating a bingo services contract, but rather was acting on orders from her superiors.<sup>398</sup> The board held that since the contracting officer in good faith exercised her independent judgment in terminating the contract, it would not overturn that decision.<sup>399</sup>

In this case, the contractor was operating bingo games for installation NAFIs at Forts Gordon, Stewart, and Knox. After reviewing bingo operations across the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs, Mr. Patrick Henry, issued an action memorandum prohibiting contractor-operated bingo programs in Army MWR programs.<sup>400</sup> Five weeks later, the Charitable Bingo contract was terminated for the convenience of the government.<sup>401</sup> The ASBCA found that, despite a recent Department of Army policy barring civilian contractors from operating NAFI bingo games on Army installations, the contracting officer credibly testified that she considered alternatives to a termination for convenience in the face of the memorandum.<sup>402</sup> The Board felt this testimony was sufficient to show that she made an independent determination to terminate the contract.<sup>403</sup>

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<sup>390</sup> *Id.* para 2-12.

<sup>391</sup> *Id.* ch. 3.

<sup>392</sup> *Id.* paras. 8-1 and 8-2.

<sup>393</sup> *Id.* at app. B.

<sup>394</sup> *Id.* at para. 1-22.

<sup>395</sup> Memorandum, Under Secretary of Defense for Personnel and Readiness, to Secretaries of the Military Departments, subject: Limitations on Use of Contract and Other Agreements with DoD Nonappropriated fund Instrumentalities (NAFIs) Pursuant to 10 U.S.C. § 2492 (29 Dec. 2004).

<sup>396</sup> *Charitable Bingo Associates, Inc. d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863. (Sept. 29, 2005).

<sup>397</sup> Upon request for reconsideration, the ASBCA again denied contractor’s claims. *Id.*

<sup>398</sup> *Id.* at 162,847.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 162,840.

<sup>401</sup> *Id.* at 162,841.

<sup>402</sup> *Id.* at 162,847.

<sup>403</sup> *Id.* at 162,842.

The board held that the government's broad right to terminate contracts is nearly "at-will" and, barring bad faith or a clear abuse of discretion., the board would not overturn the contracting officer's decision to terminate a contract for the convenience of the government.<sup>404</sup> Given the Termination Contracting Officer's testimony in this case that, prior to issuing the termination for convenience notice, she considered both ignoring the memorandum and terminating the contractor for default for other issues related to the contract, the board held that the evidence did not support the contractor's argument that the Termination Contracting Officer failed to exercise independent judgment.<sup>405</sup>

The lesson to be learned from this case appears to be that contracting officers whose hands appear to be tied by higher authority must still make independent judgments and determinations on how to handle contract terminations. If they do so, the board appears willing to allow their "independent" judgment to stand.

Major Michael S. Devine

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<sup>404</sup> *Id.* at 162,847.

<sup>405</sup> *Id.*