

CONTRACT ADMINISTRATION

Contract Interpretation

Navy's Interpretation Not Reasonable

In *Harper/Nielsen Dillingham Builders*,¹ the Armed Service Board of Contract Appeals (ASBCA) held that the Navy's interpretation of contract terminology was unreasonable and sustained an appeal on that basis.² In this case, the Navy awarded a contract to Harper/Nielsen Dillingham Builders for remodeling a hospital and constructing a parking garage.³ Harper/Nielsen subcontracted the relevant work to a fire protection subcontractor, Fireshield, Inc.⁴ Harper/Nielsen later submitted a claim on behalf of Fireshield for additional work Fireshield stated it performed as a result of the Navy's unreasonable interpretation of the contract.⁵ After the contracting officer denied the claim, Harper/Nielsen filed a timely appeal with the ASBCA.⁶

Harper/Nielsen claimed \$21,698 for installing galvanized steel fittings for the sprinkler system in a parking garage in Bremerton, Washington.⁷ Harper/Nielsen contended that the government's requirement to install galvanized steel fittings (vice less expensive painted non-galvanized steel fittings) was a constructive contract change.⁸ Conversely, the Navy argued that the contract clearly required both the piping and the fittings to be galvanized steel.⁹ Specifically, Harper/Nielsen argued that the contract referred to the words "piping" and "fittings" separately and that the contract imposed different requirements for each.¹⁰ On the other hand, the Navy argued that the "word piping can be defined as a run of pipe including fittings."¹¹ Thus, the Navy posited that where the contract required piping to be galvanized steel, the contract also required fittings to be galvanized steel.¹²

The ASBCA analyzed this dispute under the generally-accepted principles of contract interpretation.¹³ In determining whether the contract required fittings to be made of galvanized steel, the board first referred to the plain language of the contract to determine whether the contract language was ambiguous.¹⁴ The board observed that the disputed contract specification mentioned the words "piping" and "fittings" separately.¹⁵ Paragraph 2.1.1 of this specification states, "steel *piping* shall be hot dipped galvanized Schedule 40 [steel]" (emphasis added).¹⁶ This paragraph later states that "sprinkler pipe and fittings shall be steel."¹⁷ The board interpreted these two sentences to mean that while piping must be galvanized steel, the fittings may be non-galvanized steel. The board further stated that the "appellant's interpretation [was] the only reasonable interpretation."¹⁸ The board supported its argument by stating that the disputed specification does not treat the

¹ *Harper/Nielsen Dillingham Builders JV*, ASBCA Nos. 53211, 53363, 6-1 BCA ¶ 33,185.

² *Id.* at 164,495.

³ *Id.* at 164,486.

⁴ *Id.*

⁵ *Id.* at 164,493.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 164,494.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 164,494-95. It is a well-settled rule of contract interpretation that a court or board will first seek to determine the meaning of disputed terms by referring to the plain language of the contract itself. *See M.G. Constr., Inc. v. United States*, 67 Fed. Cl. 176, 181 (2005). A court or board will only resort to extrinsic evidence if it cannot determine the meaning of the disputed terms from the contract itself. *M.G. Constr.*, 67 Fed. Cl. at 181. *See also Skyline Technical Constr. Svcs.*, ASBCA No. 51076, 98-2 BCA ¶ 29,888 at 147,954.

¹⁴ *Harper/Nielsen*, 6-1 BCA ¶ 33,185 at 164,494-95.

¹⁵ *Id.*

¹⁶ *Id.* at 164,494.

¹⁷ *Id.*

¹⁸ *Id.* The Board cited an unrelated case where the definitions of "piping" and "fittings" were at issue:

words “piping” and fittings” as synonyms.¹⁹ Rather, this paragraph refers to piping and fittings as separate terms. Additionally, the board cited testimony stating that in the industry, galvanized steel piping is frequently used with non-galvanized fittings.²⁰

The ASBCA concluded that because the Navy unreasonably interpreted the contract to require the contractor to install galvanized steel fittings, the Navy thereby constructively changed the contract. Consequently, the board sustained the contractor’s claim for an equitable adjustment for that contract change.²¹

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The meaning manifested by the specifications cannot be ascertained from the dictionary technical meaning of isolated words. Such terms as “piping” and “fittings” like many words in common usage, do not have fixed single word meanings, with the result that the intended meaning in a particular instance must be arrived at from the context in which they are used.

Northwestern Indus. Piping, Inc., ASBCA No. 12676, 70-2 BCA ¶ 8551 at 39,760-61.

¹⁹ *Harper/Nielsen*, 6-1 BCA ¶ 33,185 at 164,494.

²⁰ *Id.* While the board recognizes that extrinsic evidence, such as industry standards, cannot be used for contract interpretation purposes where contract terms are clear, the board nevertheless relied on this testimony as evidence that the appellant’s (and the board’s) contract interpretation was reasonable. *Id.*

²¹ *Id.*

Changes

Government Must Compensate Contractor for Defective Design

*Lamb Engineering & Construction Company*¹ contains an excellent discussion of the theory that defective specifications are a form of constructive change. In this case, the Armed Services Board of Contract Appeals (ASBCA) considered a series of appeals concerning a construction contract to modify twenty-eight ammunition storage facilities called “igloos.”² While the board considered five appeals arising from this construction contract, this article focuses only on the appeal involving the installation of fiberglass plastic (FRP) ductwork. The board sustained the ductwork appeal holding that the government had constructively changed the contract by requiring the contractor to follow defective specifications.³

In 1998, the Army and Air Force National Guard Bureau, U.S. Property and Fiscal Officer for Arizona (the government) awarded the subject contract to Lamb.⁴ The contract required Lamb to install eighteen-inch FRP ductwork as a component of the igloos’ heating, ventilating, and air conditioning systems.⁵ The contract further required Lamb to install the ductwork according to the manufacturer’s instructions.⁶ These manufacturer’s instructions stated that the contractor should first dig a trench, and then place “backfill” (such as pea gravel or sand) into the trench.⁷ Next, the contractor should place the ductwork into the trench and finally, the contractor should place more backfill around and over the ductwork.⁸ The instructions also stated that the contractor should compact the backfill around and over the duct by hand to a density of 90%-95%.⁹ The instructions explained that the trench, the backfill, and the hand compaction were necessary to ensure that the ductwork did not collapse under the weight of the backfill.¹⁰

On or about 5 January 1999, the government discovered that the underground ductwork had broken in various places at seven igloos, to include at the duct connections.¹¹ Consequently, the government directed Lamb to repair the damaged ducts.¹² Specifically, the government instructed Lamb to remove the backfill encasing the failed ductwork, to place pea gravel as backfill under, over, and around the ductwork, and then to place flexible connectors at the duct connections.¹³ Lamb complied with these instructions and incurred additional costs.¹⁴

On 1 November 2000, Lamb submitted a claim to the contracting officer for the additional work it performed in remedying the damaged FRP ductwork.¹⁵ Lamb argued that the ductwork failed because the government’s design specifications were defective.¹⁶ Consequently, Lamb argued that because of the government’s faulty design, Lamb performed additional work and incurred additional costs associated with the ductwork failure.¹⁷ Lamb stated its additional costs included removing the backfill around the failed ducts, replacing the damaged ducts, installing flexible connectors at the ductwork joints, and placing pea gravel backfill under and over the re-installed ductwork.¹⁸ Lamb maintained that the

¹ ASBCA Nos. 53304, 53356, 53357, 53358, 53359, 6-1 BCA ¶ 33,178.

² *Id.* at 164,388.

³ *Id.* at 164,424.

⁴ *Id.* at 164,397.

⁵ *Id.* at 164,404.

⁶ *Id.* at 164,396.

⁷ *Id.* at 164,405.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 164,409.

¹² *Id.*

¹³ *Id.* at 164,410.

¹⁴ *Id.*

¹⁵ *Id.* at 164,413.

¹⁶ *Id.*

¹⁷ *Id.* at 164,423.

¹⁸ *Id.* The Board concluded that a “contributing cause” for the FRP ductwork failure was the contract requirement for flexible duct and inflexible steel connections. *Id.* In reaching this conclusion, the Board relied upon testimony that the contract’s requirement for flexible ductwork and rigid steel

government's defective specifications constituted a constructive change to the contract for which Lamb was entitled compensation.¹⁹ The contracting officer denied this claim and then Lamb filed a timely appeal.²⁰

Conversely, the government contended that the ductwork failed because of Lamb's faulty workmanship.²¹ Specifically, the government argued that if Lamb had complied with the specifications, then the FRP ductwork would have functioned properly. For example, Lamb did not place the backfill in the trench prior to installing the ductwork, as the contract required.²² Additionally, Lamb did not compact the backfill to 90-95% density, as the contract required.²³ Thus, the government reasoned that Lamb's failure to follow the contract's specifications—not faulty design—caused the ductwork's failure.²⁴

The ASBCA analyzed this claim as a constructive change.²⁵ The board stated, "a constructive change occurs where a contractor performs work beyond the contract requirements without a formal order under the Changes provision of the contract, due either to an informal order from, or through the fault of the government."²⁶ When a contractor performs additional work due to a constructive change, the contractor may file a claim under the Contract Disputes Act (CDA) for compensation.²⁷ The ASBCA has recognized a variety of types of constructive changes, to include defective specifications.²⁸

If the government's design specifications are defective, then the government bears the risk that the project will fail as a result of its defective specifications.²⁹ Accordingly, the ASBCA recognizes that the government has an implied warranty for its specifications and thus, when a contractor complies with defective government specifications and the project is unsuccessful because of those specifications, the government must compensate the contractor for any additional work it performs to ensure the project succeeds.³⁰ The ASBCA views defective specifications as a constructive change for which the contractor is entitled to compensation.³¹

In this case, the ASBCA found that the ductwork failed partly because the specifications were defective and partly because the contractor did not fully comply with the contract requirements.³² Regarding government fault, the Board found that the specifications were defective in three respects. First, the government's design required rigid steel connections at the ductwork joints.³³ The board relied upon testimony that such rigid connections would likely cause the flexible ductwork to flatten and break under the load of the backfill. Second, the government's design was based on the erroneous assumption that

connections prevented the ductwork from deflecting and flattening without incurring structural damage. *Id.* The Board was persuaded that the connections should have been flexible. *Id.*

¹⁹ *Id.* at 164,413.

²⁰ *Id.*

²¹ *Id.* at 164,423.

²² *Id.* at 164,409.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 164,417.

²⁶ *Id.*

²⁷ *Id.* See also the Contract Disputes Act, 41 U.S.C.S. §§ 601-13 (LEXIS 2006).

²⁸ See Raytheon Serv. Co., ASBCA No. 36139, 92-1 BCA ¶ 24,696 (stating that the government's contract misinterpretation is a constructive change); Stanwick Corp., ASBCA 16113, 72-1 BCA ¶ 9285 (stating the government's failure to disclose vital information is a constructive change); Trepte Constr. Co., ASBCA No. 38555, 90-1 BCA ¶ 22,595 (stating that constructive acceleration is a constructive change).

²⁹ *Lamb Eng'g*, 6-1 BCA ¶ 33,178 at 164,417. In an unrelated case, the ASBCA explained the theory of defective specifications by stating:

When the government provides specifications for a contractor to use in contract performance, it impliedly warrants that the contractor can successfully perform based upon those specifications and that a satisfactory product will result. Where successful performance based on the specifications is determined to be impossible, or even commercially impracticable, the contractor is entitled to recover its added performance costs for the constructive change.

Cable & Computer Tech., Inc., ASBCA Nos. 47420, 48846, 03-1 BCA ¶ 32,237, at 159,408.

³⁰ *Lamb Eng'g*, 6-1 BCA ¶ 33,178 at 164,417.

³¹ *Id.*

³² *Id.* at 164,423.

³³ *Id.*

the backfill and soil surrounding the ductwork would not shift.³⁴ The backfill and soil did shift around the ductwork, and that shifting also likely contributed to the ductwork failure. Third, regarding installing the ductwork and the compaction requirements, the government did not tailor the manufacturer's instructions for this particular project.³⁵ The Board implies that the manufacturer's generic installation instructions did not adequately guide the contractor in this project.³⁶

Regarding contractor fault, the Board concluded that Lamb's performance also contributed to the ductwork failure.³⁷ First, Lamb did not compact the backfill under and around the FRP ductwork as the contract required.³⁸ Second, Lamb did not place the ductwork in trenches as the contract required.³⁹ Rather, Lamb installed the ductwork and then placed backfill under and around the ductwork, without digging a trench.⁴⁰

After considering all the evidence, the Board found that the government's defective specifications were partially responsible for the FRP ductwork failure resulting in the contractor's additional work to remedy the ductwork.⁴¹ The Board concluded that the contractor was entitled to an equitable adjustment to the extent that the defective specifications caused the contractor to incur additional costs.⁴²

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³⁴ *Id.*

³⁵ *Id.* at 164,424.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Contract Disputes Act (CDA) Litigation

The New Civilian Boards of Contract Appeal (CBCA)

The long rumored consolidation of the CBCA came to fruition with the passing of the National Defense Authorization Act for Fiscal Year 2006 (2006 NDAA).¹ All boards of contract appeals for civilian agencies, except the boards of the U.S. Postal Service and the Tennessee Valley Authority, will be consolidated into the new Civilian Board of Contract Appeals (CBCA), which will stand up effective 8 January 2007.² The Honorable Stephen M. Daniels, present Chairman of the General Services Administration Board of Contract Appeals, will become the Chairman of the new Board which will maintain its offices at 1800 M Street, Washington, D.C.³

Judges at the board will be selected and appointed to serve in the same manner as administrative judges appointed pursuant to section 3105 of Title 5, with the additional requirement that they have at least five years of public contract law experience.⁴ The 2006 NDAA addressed the previous concerns about a consolidated board's inability to have jurisdiction over non-CDA cases⁵ by including a clause allowing additional jurisdiction "over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act exercised jurisdiction before the effective date of this section."⁶ Furthermore, the CBCA can "assume any other function performed by such a board before such effective date on behalf of such agencies" which allows the CBCA to continue to hear non-CDA disputes.⁷

Cases now pending before those agency boards soon to be consolidated into the CBCA will continue before the CBCA and any orders previously issued will be stay in effect until modified, terminate, superseded, or revoked by the CBCA.⁸ While information concerning the interim rules is still scant, the Honorable Judge Daniels indicated that there will be greater emphasis on electronic filings, to the extent that the budget will allow. Information on the new Board may be found at their new webpage: www.cbca.gsa.gov.⁹

Contractors Are Expected to Know the FAR!

Contractors are expected to know the *Federal Acquisition Regulation (FAR)*! A recent Armed Services Board of Contract Appeals (ASBCA) case involving a Navy demolition contract served notice on contractors that they have to know the *FAR* too.¹⁰ The Navy issued a solicitation in 2002 limited to 8(a) companies for the demolition of a number of buildings at the Great Lakes Training Center.¹¹ The contract did not include *FAR part 52.219-14*,¹² nor was it expressly incorporated

¹ National Defense Authorization Act for Fiscal Year 2006, Public L. No. 109-163, 119 Stat. 136 (Jan. 7, 2006).

² *Id.* See also Board of Contract Appeals: The Establishment of the Civilian Board of Contract Appeals and the Termination of the Boards of Contract Appeals of the General Services Administration and the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs, 71 Fed. Reg. 65,825 (Nov. 9, 2006). While the NDAA stated that consolidation would be effective one year from the signing of the Act, that would be 6 January 2007, however that date is a Saturday. The first business day is 8 January, 2007.

³ 71 Fed. Reg. at 65,825.

⁴ *Id.*

⁵ Major Andrew S. Kantner, et. al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 93 [hereinafter *2005 Year in Review*].

⁶ National Defense Authorization Act for Fiscal Year 2006, Public L. No. 109-163, 119 Stat. 136.

⁷ *Id.*

⁸ *Id.* (c)(2)(b).

⁹ 71 Fed. Reg. at 65,825.

¹⁰ Sarang-Nat'l, ASBCA No. 54992, 06-2 BCA ¶ 33,347.

¹¹ *Id.*

¹² *Id.* at 165,352. FAR part 52.219-14, Limitations on Subcontracting, states:

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

(1) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

as required by *FAR part 19.508(e)*.¹³ *FAR part 52.219-14* requires the prime contractor to perform at least fifteen percent of the cost of general construction contracts, and at least twenty-five percent of the cost of construction contracts performed by a special trade.¹⁴ While the solicitation did not specifically state that the work to be performed was special trade it did note that the North American Industry Classification System (NAICS) code for the acquisition was “235940.”¹⁵ NAICS code 235940 identifies “wrecking and demolition contractors” as “special trade contractors.”¹⁶

Sarang is a certified 8(a) company that entered into a joint venture with national Wrecking Company to bid on the contract.¹⁷ The companies planned to have the joint venture perform at least fifteen percent of the contract “pursuant to the requirements of *FAR part 52.219-14*.”¹⁸ In drafting their joint venture agreement the companies relied, in part, on an amendment to the solicitation issued by the Navy which stated that the “[p]rime must meet the Limitations in Subcontracting clause (*FAR part 52.219-14*) and be able to perform at least 15% of the cost of the contract.”¹⁹

In April of that year, the Navy awarded the contract to the Sarang/National Venture.²⁰ After being awarded the contract the members of the joint venture disagreed as to the amount of work required to be done through a joint venture.²¹ National wanted to act as a subcontractor to the joint venture and perform eighty-five percent of the work, leaving fifteen percent for the joint venture.²² Sarang, however, believed the joint venture was required under *FAR part 52.219-14*, to perform twenty-five percent of the contract.²³ Once the government learned of the disagreement the contracting officer issued a unilateral modification clarifying that *FAR part 52.219-14* applied and that the joint venture must perform at least twenty-five percent of the work in accordance with the NAICS code that made demolition a specialty trade code.²⁴

In January 2004, National challenged the modification on behalf of the joint venture by filing a claim.²⁵ When the contracting officer failed to respond to National’s challenge, National appealed to the ASBCA claiming the joint venture had the contractual right to expect the prime to perform fifteen percent of the contract work.²⁶

National claimed that its contractual right arose from the January 2003 amendment to the solicitation that specifically stated that the prime contractor must be able to perform at least 15% of the contract and the Small Business Association’s approval letter of their joint venture agreement.²⁷ The ASBCA rejected this argument because, while the January 2003

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies)*. The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) *General construction*. The concern will perform at least 15 percent of the cost of the contract, not including the costs of materials, with its own employees.

(4) *Construction by special trade contractors*. **The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.**

(emphasis added).

¹³ Sarang-Nat’l, ASBCA No. 54992, 06-2 BCA ¶ 33,347 at 165,353. The opinion mistakenly cites FAR 15.508(e). FAR 19.508(e) states that the contracting officer shall insert FAR 52.219-14 in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed \$100,000. U.S. GEN. SVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 19.508(e) (July 2006) [hereinafter FAR].

¹⁴ *Id.* at pt. 52.219-14.

¹⁵ Sarang-Nat’l, ASBCA No. 54992, 06-2 BCA ¶ 33,347 at 165,353.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 165,354.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 165,355.

²⁵ *Id.*

²⁶ *Id.* at 165,356.

²⁷ *Id.*

amendment stated the prime must perform at least fifteen percent of the work, the amendment also incorporated *FAR 52.219-14*.²⁸ The Board stated that even given the Navy's mistakes and the SBA approval letter, Sarang and National "should have known better."²⁹ Due care required the joint venture to be familiar with the *FAR* and if it had, it would have been clear that the contractor was considered a special trade contractor and therefore required to perform at least twenty-five percent of the contract.³⁰

Payment to the Wrong Bank Is No Payment at All

And you thought you were the only one who had problems with Bank of America! In *S.A.S. Bianchi*,³¹ the ASBCA held that the government failed to make proper progress payments to the appellant because the government's electronic transfer of funds went to the wrong bank, after being duly notified by appellant that payments should be made to a different bank.³²

The Bank of America, making payments to the appellant on behalf of the government, sent the payment to the appellant's "old" bank.³³ The "old" bank and appellant were having a dispute surrounding the appellant's line of credit³⁴ and the appellant directed the government to make its payments to a separate Italian bank.³⁵ The Corps of Engineers contracted with Bianchi for construction work in Livorno Italy.³⁶ The contract contained a local clause that mandated that the contract "be construed and interpreted in accordance with the substantive laws of the United States of America."³⁷

In May 1999, in order to ensure the successful transfer of funds to its new bank, Bianchi spoke with both the government and the government's bank, Bank of America.³⁸ That month the Bank of America successfully transferred Bianchi's payment to Bianchi's new bank.³⁹ In June 1999 Bianchi again spoke with both the government and the Bank of America to ensure the government's next payment went to the correct bank.⁴⁰ Despite Bianchi's efforts, the government's written instructions directing the payment to the correct bank, and the correct transfer the month before, Bank of America sent the payment to "old" bank.⁴¹

Bianchi attempted to work through the situation for two years with the government.⁴² The Bank of America contacted Bianchi's first bank in an attempt to have the funds returned but the bank refused because of its "unsettled relationship" with the Bianchi.⁴³ Relying on the interpretation of an Italian law by an Italian attorney that the Bank of America consulted, the government concluded that Bianchi's claim was against its first bank, not the government.⁴⁴

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 165,357.

³¹ ASBCA No. 53800, 05-2 BCA ¶ 33,089.

³² *Id.*

³³ *Id.* at 164,017.

³⁴ *Id.* at 164,021.

³⁵ *Id.* at 164,018.

³⁶ *Id.* at 164,017.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 164,018.

⁴⁰ *Id.*

⁴¹ *Id.* The government initially admonished Bianchi that it needed "sufficient advance notice to ensure that such changes are passed on to and are understood by our agent" concluding that the government had already legally made its payment to an open account of Appellant's. *Id.* at 164,019. The government soon after admitted in internal documents that it made the erroneous payment due to administrative error on behalf of its bank, not government error. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 164,021. They contended that any additional payment by the Government would result in an unjust enrichment. *Id.*

The ASBCA disagreed “with both the government’s legal argument and certain of its critical factual underpinnings.”⁴⁵ The government attempted to deny that it paid the amount to an improper recipient because the ban was an “unauthorized creditor” since it was the named recipient in the contract and that the government was “never notified” that the bank was no longer authorized to receive funds for Bianchi.⁴⁶ Bianchi notified the government of the change, providing routing codes to make the payments to the correct bank, on at least three occasions.⁴⁷ It is different if the payment had gone awry, but “were made in accordance with an established course of dealing.”⁴⁸ Here the payment went awry because the Bank of America (and therefore the government) failed to abide by a course of dealing it acknowledged and consented to when it made payment to the new bank in May of 1999.⁴⁹ Therefore, the government’s payment to the “old” bank did not discharge its debt.⁵⁰

After Appellant Testifies Is Too Late to Amend Your Answer

It is a rare case that covers both the areas of Competition and the Contract Disputes Act, but *Turner Construction Company v. General Services Administration (GSA)*⁵¹ does. The GSA contracted with Turner to build the Federal Building and Courthouse in Islip, New York.⁵² While the case before the board revolved around remission of liquidated damages, equitable adjustment, and rescission or reformation and restitution based upon superior knowledge,⁵³ the Board’s review in October 2005 revolved around the government’s request to amend its answer.⁵⁴

The government moved to amend its answer after Turner’s purchasing manager testified at trial about the company’s “GSA Strategy.”⁵⁵ The strategy amounted to locking its subcontractors into a low price and ensuring that the subcontractors would not give any Turner competitors a lower price for the same services.⁵⁶ The purpose, according to the program manager, was to provide them “protection with our competition” and give them an advantage over their competitors.⁵⁷ After the program manager testified at trial the government wanted to amend its answer to allege unenforceability due to fraudulent inducement, false certification, invalidity due to fraud, and excuse due to prior breach (violation of the False Claims Act & of the Anti-Kickback Act).⁵⁸ Turner argued that granting the motion would be severely prejudicial to them because the government brought the motion in the middle of trial that was anticipated to last seven months.⁵⁹ While the government’s motion followed testimony at the trial, the government had information about the bidding practices as early as nineteen months earlier.⁶⁰

The board denied the government’s motion stating that it did not have jurisdiction over the new affirmative defenses⁶¹ and, if it did, granting the motion would be unduly prejudicial to the appellant.⁶² The government then, unsuccessfully

⁴⁵ *Id.* at 164,025.

⁴⁶ *Id.* at 164,023.

⁴⁷ *Id.* at 164,025.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 164,025-26. The Board did not, however, find the government liable for recovery of third party legal expenses incurred by Bianchi.

⁵¹ GSBCA Nos. 15502, 16055, 16551, 5-02 BCA ¶ 33,118.

⁵² *Id.* at 164,117.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 164,118. Turner referred to this process as closing. “Close” meant that Turner and the subcontractor committed to each other to “protect Turner from the market.” *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 164,119-20.

⁵⁹ *Id.* at 164,121.

⁶⁰ *Id.* The Government did not refute the Appellant’s claim that Appellant turned over the GSA Strategy to the Government as early as 3 November 2003. *Id.*

⁶¹ *Id.* at 164,123.

⁶² *Id.* at 164,124.

moved for a six month suspension to the trial.⁶³ The board refused since trial had been ongoing for four months and was expected to last for three more months.⁶⁴ I guess that is why they call the process before trial “discovery.”

Defective Certification Can Be Cured

In a dispute that has worked its way through the courts up and back down again, the ASBCA this past year denied a government motion to dismiss *Swanson Group, Inc.* for lack of jurisdiction.⁶⁵ The dispute between Swanson and the Navy revolved around a termination for convenience settlement, but the appeal is significant to us because of issues of certification, assignment of claims, and statute of limitations on a claim.⁶⁶

The cases arise from claim for termination expenses previously awarded and remanded in ASBCA case.⁶⁷ The ASBCA awarded appellant \$278,076.25 in termination settlement costs but on appeal, the Court of Appeals for the Federal Circuit (CAFC) remanded the case for dismissal based upon lack of jurisdiction.⁶⁸ According to the CAFC, the appellant failed to present a “claim” to the contracting officer within the meaning of the Contract Disputes Act.⁶⁹ The CAFC stated that “[t]he fact that the board lacked jurisdiction over Swanson’s previous appeal does not, however, bar Swanson from submitting a termination settlement proposal to the contracting officer” at this time.⁷⁰

On 17 March 2004, following the board’s dismissal of Swanson’s earlier appeal, Swanson filed a “termination cost settlement” with the Navy’s termination contracting officer (TCO) asking for a final decision if the government decided not to pay the amount as determined by the previously dismissed appeal.⁷¹ The letter included a certification signed by Mr. Swanson stating “[a]s the President and Chief Executive Officer I am authorized to provide this certification. . . . I certify that the claim in this matter is made in good faith . . . and that the certifying information provided in ASBCA opinions as attached at TAB A are accurate as provided by the Armed Services Board of Contract Appeals.”⁷²

The termination contracting officer rejected appellant’s request on 27 May 2004 stating that the appellant’s claim was untimely.⁷³ Since the Court of Appeals established the date of contract termination as 17 November 1997, appellant had six years from that date to file its claim.⁷⁴ Appellant missed that six year requirement by approximately five months.⁷⁵ The Navy TCO went on to say that “[t]his is not a final decision. . . .”⁷⁶ After receiving the contracting officer’s letter rejecting its claim, appellant again contacted the TCO to acknowledge receipt of the rejection letter and requesting a final decision.⁷⁷ In her response, the TCO stated that her earlier letter rejecting the claim stood unchanged and that there would be no further action taken.⁷⁸ Swanson appealed to the board thirty days later.⁷⁹

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Swanson Group, Inc.*, ASBCA No. 54863, 05-2 BCA ¶ 33,108. For prior history *see Swanson Group, Inc.*, ASBCA No. 52109, 02-1 BCA ¶ 31,836, *modified on reconsid.* 02-2 BCA ¶ 31906 (awarding appellant \$278,076.25), *England v. Swanson Group, Inc.*, 353 F.3d 1375 (Fed Cir. 2004) (remanding the appeal for dismissal), *Swanson Group, Inc.*, ASBCA No. 52109, 04-1 BCA ¶ 32,603 (dismissing the appeal).

⁶⁶ *Swanson Group*, 05-2 BCA ¶ 33,108.

⁶⁷ *See Swanson Group, Inc.*, ASBCA No. 52109, 02-2 BCA ¶ 31,906, and *Swanson Group*, 353 F.3d 1375.

⁶⁸ *Swanson Group*, 353 F.3d 1375.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1380.

⁷¹ *Swanson Group*, 05-2 BCA ¶ 33,108, at 164,087.

⁷² *Id.* at 164,088.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

The government moved for summary judgment claiming that Swanson did not properly certify its claim because Mr. Swanson lacked standing.⁸⁰ The ASBCA disagreed, reiterating its stance that an incomplete or defective certification does not deprive the board of jurisdiction over the appeal and can be corrected.⁸¹ While the certification submitted did not meet the statutory certification language, the certification could be, and was, corrected.⁸² The Navy also claimed that 28 U.S.C. § 2501 barred Swanson because it failed to file its claim within six years of accrual.⁸³ The board again disagreed, stating that the appeal is not barred by the passage of time pursuant to 28 U.S.C. § 2501 but was governed by the Contract Disputes Act's statutory limitations for filing of appeals.⁸⁴ The Board determined that Swanson's right to appeal was not barred as a matter of law, by failing to submit a timely termination proposal.⁸⁵ Finally, the board stated that there were genuine issues of material fact concerning Swanson's request for extension to submit its termination settlement proposal and therefore denied the government's summary judgment motion.⁸⁶

Dispute over a Transportation Contract, See the Transportation Act not the CDA

In an extremely interesting case, the ASBCA determined that the Transportation Act or Interstate Commerce Act (ICA) was the correct venue for implied-in-fact contracts concerning government bill of ladings and transportation services.⁸⁷ The appellant appealed the denial of its claim for \$30,825.00 the basis of which was AIT's providing flatbed trucks to Johnson Controls World Services a contractor working for Fort Lee.⁸⁸ Johnson Controls had a contract to perform public works and logistical functions at Fort Lee, Virginia. As part of the logistical functions Johnson Controls provided installations transportation services, among other things.⁸⁹ These transportation services included freight and household goods movements which required them to maintain the official tender of freight services files of approved carriers and to assign freight shipments only to Military Traffic Management Command or Army Material command approved carriers and to prepare government bill of ladings (GBLs).⁹⁰ Johnson Controls contacted the appellant to request trucks to transport material from Fort Lee to Jacksonville, Florida, however they did so without first getting approval from the Army.⁹¹ Appellant alleges that government employees with actual authority gave express authorization to Johnson Controls to use the appellant and that the appellant loaded and dispatched thirteen trucks.⁹² The government contended that if the trucks were loaded and dispatched they were not processed through the Global Freight Management system.⁹³

The board, relying on *Inter-Costal Xpress, Inc. v. United States*,⁹⁴ determined that it did not have jurisdiction to hear appellant's case regardless of the alleged theory because the Transportation Act Transportation Act is the proper venue.⁹⁵ Therefore, the Board dismissed the appeal for lack of subject matter jurisdiction.⁹⁶

⁸⁰ *Id.* at 164,088-89. The government claimed that Johnny Swanson, III, lacked standing to bring the appeal because of a violation of the Assignment of Claims Act. The complaint alleged that the Appellant's included "The Swanson Group, Inc. and/or Johnny Swanson, III." Appellant alleged that Johnny Swanson, III, was an appellant as a result of a November 1993 assignment of Swanson Groups' rights to revenue under the claim. *Id.* at 164,088.

⁸¹ The Swanson Group, Inc., ASBCA No. 54863, 05-2 B.C.A. ¶ 33,108 (citing IMS P.C. Envtl. Eng'g, ASBCA No. 53158, 01-2 BCA ¶ 31,422, at 155,163).

⁸² *Id.* The Board also addressed a matter not formerly asserted by the government, but its supporting documentation with its motion suggested the appeal was not filed within ninety days of the government's 27 May 2004 letter, therefore failing to meet its 90-day statutory period for filing an appeal. In putting this theory to rest the Board stated that the government's denial letter of 27 May failed to notify Appellant of its ninety day appellate rights. Swanson's appeal does not concern the 27 May letter, but focuses on the subsequent letter. *Id.*

⁸³ *Id.* at 164,089.

⁸⁴ *Id.*

⁸⁵ *Id.* at 164,090.

⁸⁶ *Id.*

⁸⁷ AIT Worldwide Logistics, Inc., ASBCA No. 54763, 06-1 BCA ¶ 33,267.

⁸⁸ *Id.* at 164,856.

⁸⁹ *Id.*

⁹⁰ *Id.* at 164,857.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 296 F.3d 1014 (Fed. Cir. 1995).

⁹⁵ *AIT Worldwide Logistics, Inc.*, 06-1 BCA ¶ 33,267 at 164,860.

⁹⁶ *Id.*

“Hey Judge, you got it wrong” Is Not a Successful Grounds for Reconsideration

A couple of cases decided within the past year reminded appellants that requests for reconsideration before boards of contract appeals must amount to something more than alleging that the board got it wrong the first time.⁹⁷ Both case requested reconsideration of the board with no new evidence.⁹⁸

In *Charitable Bingo*,⁹⁹ the board denied appellant’s claim for breach of contract in the government’s termination for convenience of its contract to manage bingo operations for several installations’ Morale, Welfare, and Recreation offices.¹⁰⁰ Charitable Bingo requested reconsideration alleging the board “misconstrued or mischaracterized the documents underlying” its determination that the termination contracting officer’s decision to terminate was from her independent judgment.¹⁰¹ Charitable Bingo also claimed that the Board’s conclusion that the government did not breach its duties of good faith “rested upon a misinterpretation of the Continuity of Service clause.”¹⁰²

The Board rejected the appellant’s first argument because it was not based upon newly discovered evidence and did not cause the Board to alter its original findings.¹⁰³ The Board reminded Charitable Bingo that disagreement with the weight the Board gave evidence “is not grounds for reconsideration.”¹⁰⁴ The Board also rejected the appellant’s claim of bad faith while correcting appellant’s misperception that the Continuity of Service Clause was the “legal underpinning” of the Board’s decision.¹⁰⁵ Finally, in denying appellant’s challenge of costs and pre-termination profit, the Board stated “Appellant’s preference for its expert’s testimony is not sufficient” and therefore denied the motion for reconsideration.¹⁰⁶

In *Collazo Contractors, Inc.*,¹⁰⁷ the appellant filed a motion for reconsideration on six items claimed in its original appeal.¹⁰⁸ In its request for reconsideration Collazo alleged four grounds for reconsideration: (1) The board abused its discretion in allowing a government expert to testify to his conclusions that were not in his original report.¹⁰⁹ While appellant originally objected to this testimony, it later withdrew its objection as long as it would be able to have appellant’s expert respond to the government expert’s conclusions;¹¹⁰ (2) The board committed clear error; (3) That the board incorrectly found appellant voluntarily submitted the test results for approval; and (4) The board erred in placing the burden on the appellant to change the test methodology.¹¹¹

In a curt decision, the board denied Collazo’s request based upon “largely . . . improper reargument.”¹¹² In response to appellant’s first ground (abuse of discretion) the board pointed out that while appellant originally objected to this testimony,

⁹⁷ See *Charitable Bingo Assocs., Inc., d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249,53470, 05-2 BCA ¶ 33,088, and *Collazo Contractors, Inc.*, ASBCA No. 53925, 06-1 BCA ¶ 33,212.

⁹⁸ *Id.*

⁹⁹ *Charitable Bingo Assocs., Inc.*, 05-01 BCA ¶ 32,863. The board held the government’s right to terminate for convenience was near “at will” barring bad faith. The board stated that the evidence did not support a claim that termination contracting officer did not exercise her independent judgment in terminating the contracts. The board denied most of the Appellant’s appeal but did view the \$15,600 in termination settlement costs as that was the amount not challenged by DCAA as a stipulated entitlement agreement. *Id.*

¹⁰⁰ *Id.* at 162,840.

¹⁰¹ *Charitable Bingo Assocs., Inc.*, 05-2 BCA ¶ 33,088 at 164,014.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Grumman Aerospace*, ASBCA Nos. 46834,48006,51526, 03-2 BCA ¶ 32,289 at 159,770).

¹⁰⁵ *Id.* at 164,015. The board stated that its original decision was based upon both the TERMINATION FOR CONVENIENCE clause and the NONMONOPOLISTIC clause of the contract. *Id.*

¹⁰⁶ *Id.* at 164,016.

¹⁰⁷ ASBCA No. 53925, 06-1 BCA ¶ 33,212 at 164,594.

¹⁰⁸ *Id.* Collazo sought a 148-page contract extension and an equitable adjustment concerning its contract to clean and line water mains at the Naval Inventory Control Point in Mechanicsburg, Pennsylvania. The board determined that appellant was entitled to six day extension of time along with that appropriate contract price adjustment however denied claims concerning delays and costs resulting from the installation, remobilization, reinstallation, and removal of a temporary water bypass system required when the contractor cleaned and mortared the existing water lines. *Id.* at 164,594-95.

¹⁰⁹ *Collazo Contractors, Inc.*, 06-1 BCA ¶ 33,212 at 164,595.

¹¹⁰ *Id.*

¹¹¹ *Id.* The appellant failed to explain this contention or how it believed the board erred. *Id.*

¹¹² *Id.* at 164,595-96.

it later withdrew its objection as long as it would be able to have appellant's expert respond to the government expert's conclusions.¹¹³ Since the appellant was given an opportunity to have its expert responds to the government's expert, appellant was not prejudiced.¹¹⁴ The second grounds for reconsideration were not proper as it was the "crux of the appeal" that was fully considered and rejected initially.¹¹⁵ The board rejected appellant's third contention that the original decision incorrectly found that Collazo voluntarily submitted its test results because appellant did not provide any evidence upon which to make such a determination.¹¹⁶ Finally, the board rejected appellant's theory that the board erred in placing the burden on Collazo to change the test methodology used.¹¹⁷ Again, the appellant provided no explanation.¹¹⁸

Quick Fire Not an Option When QuickHire System Fails

In an appeal over a termination for default (T4D) and recprocurement costs, the Department of Transportation Board of Contract Appeals (DOT BCA) determined that the ordering agency could not T4D Monster Government Solutions and recoup recprocurement costs because the government failed to first refer the matter to the GSA Contracting Officer for determination.¹¹⁹ The U.S. Customs Service, now known as the United States Customs and Border Protection (CBP) and falling under the Department of Homeland Security, contracted with Monster using the GSA Federal Supply Schedule for its QuickHire system.¹²⁰ On 13 July 2004, the CBP placed an order that included a myriad of line items for other agencies that, like the CBP, had become part of the Department of Homeland Security.¹²¹ The contract permitted the CBP to terminate the contract for default, but also contained a clause requiring the ordering activity to refer such termination cases to the GSA Contracting Officer when the contractor asserts its failure to perform was excusable.¹²² In those cases, the GSA Contracting Officer determines whether the failure is excusable.¹²³ Ultimately, the GSA Contracting Officer's decision may then be appealed.¹²⁴

Approximately five months after placing its order, the CBP experienced "system failures" with QuickHire.¹²⁵ Monster alleged that the significant increase in customer usage caused the system failures.¹²⁶ Even though the CBP understood the problem, they issued a cure notice and finally terminated the order for cause.¹²⁷ Monster appealed the termination and the CBP counter claimed for \$1.2 million for the assessed recprocurement costs and another \$1.2 million for breach of implied warranty.¹²⁸ Monster argued that the board lacked jurisdiction because the CBP failed to refer the matter to the GSA

¹¹³ *Id.*

¹¹⁴ *Id.* at 164,595.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Monster Gov't Solutions, Inc., v. United States Dep't of Homeland Security*, DOT BCA No. 4532 - 4552, 06-2 BCA ¶ 33,236.

¹²⁰ *Id.* QuickHire is an internet system that allows employers to describe and post openings, sorts and ranks applications as well as other tasks normally performed by a human resource department. *Id.* at 164,697.

¹²¹ *Id.*

¹²² *Id.* at 165,698. The clause, I-FSS-249-B, provided

Any ordering office may, with respect to any one or more delivery orders placed by it under the contract, exercise, the same right of termination, acceptance of inferior articles or services, and assessment of excess costs as might the Contracting Officer, except that when failure to deliver articles or services is alleged by the contractor to be excusable, the determination of whether the failure is excusable shall be made only by the Contracting Officer of the General Services Administration, to whom such allegation shall be referred by the ordering office and from whose determination an appeal may be taken as provided in the clause of this contract entitled "Disputes."

Id.

¹²³ *Id.* at 164,698.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 164,698-99.

¹²⁸ *Id.* at 164,699.

contracting officer for a ruling on Monster's alleged excusable delay.¹²⁹ The CBP claimed that Monster never claimed the system failure was excusable delay and therefore, the CBP contracting officer had the authority to terminate and the DOT BCA now had jurisdiction.¹³⁰

Reminding us that the contracting officer's decision under the CDA is "the very linchpin and necessary prerequisite for the board's jurisdiction" and absent a valid decision there can be no appeal, the DOT BCA dismissed the appeals without prejudice for lack of jurisdiction.¹³¹ Here, Monster alleged its failure was due to the increased volume, which could potentially excuse the default.¹³² The contract required CBP to first refer the failure to the GSA contracting officer which they did not do.¹³³ Since the GSA contracting officer was not the terminating contract officer, there was no valid termination, ergo no valid appeal.¹³⁴

The DOT BCA upheld its previous dismissal in the request for reconsideration.¹³⁵ The DOT BCA refreshed the CBP's recollection that a motion for reconsideration "must be based upon newly discovered evidence or legal error by the board" and not a regurgitation of the previous claims and argument.¹³⁶ The CBP argued the board's previous decision was arbitrary and capricious because it failed to make binding findings.¹³⁷ The CBP pointed to a footnote in the original decision that noted the facts set out below were "solely for the purpose of resolving" the motion and not binding.¹³⁸ The DOT BCA stated the purpose of the footnote was to inform the parties that the facts set forth were for the purpose of determining jurisdiction and not the merits of the appeal.¹³⁹ The board went on to say that the federal circuit could still apply the statutory standard of appeal to the factual underpinning of the board's decision.¹⁴⁰

No Unabsorbed Overhead for You!

In a quantum case the ASBCA ruled that Applied Companies was not entitled to unabsorbed overhead in its damages surrounding a termination for convenience case.¹⁴¹ On entitlement the ASBCA found that the government negligently prepared its estimate for a RFP for the purchase of metal cylinders for two types of refrigerants.¹⁴² In the entitlement case the ASBCA granted Applied's motion for summary judgment for the unabsorbed overhead and for breach of contract and lost profits, observing that breach damages may include anticipatory damages¹⁴³ but also granted a government summary judgment motion on a claim for lost profits on the option year.¹⁴⁴ The government then appealed to the federal circuit, which affirmed the ASBCA's decision on entitlement, but notified the bBoard that the government's negligence did not entitle

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Monster Gov't Solutions, Inc., v. United States Dep't of Homeland Security*, DOT BCA No. 4532, 06-2 BCA ¶ 33,312.

¹³⁶ *Id.* at 165,155. *See also* *Charitable Bingo Assocs., Inc., d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249,53470, 05-2 BCA ¶ 33088, and *Collazo Contractors, Inc.*, ASBCA No. 53925, 06-1 BCA ¶ 33,212.

¹³⁷ *Id.* at 165,155.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Applied Companies., Inc.*, ASBCA No. 54506, 06-1 BCA ¶ 33,269.

¹⁴² *Applied Companies, Inc.*, ASBCA Nos. 50749,50896, 51662, 01-1 BCA ¶ 31,325. *See also* *Applied Companies*, 06-1 BCA ¶ 33,269. Several months before the government awarded the one year contract with one option year, it learned that the requirement would be "substantially lower" than the government estimate. However, the government did not inform Applied, the awardee, of the decrease in the estimated annual quantities until two months after award and five months after it determined the original estimate was incorrect. Shortly thereafter Applied submitted revised pricing to which the government did not agree. A month after Applied missed the delivery date the government issued a show cause notice, and eventually terminated for convenience. In its termination settlement proposal Applied included \$1,115,509 in unabsorbed overhead. After the contracting officer denied the request for unabsorbed overhead and unilaterally determined \$295,253 was the proper amount, Applied appealed to the ASBCA. *Id.* at 164,877.

¹⁴³ *Id.* at 164,876.

¹⁴⁴ *Id.* at 164,877.

Applied to anticipatory damages.¹⁴⁵ The federal circuit went on to state that if Applied never delivered any cylinders, “as appears to be the case,” then the appellant “is limited to recourse under the Termination for Convenience of the Government Clause of the contract.”¹⁴⁶

Applied claimed that the government committed a material breach of the warranty and is liable for damages therefore, the ASBCA “has the power and duty to render a jury verdict.”¹⁴⁷ They also claimed that their failure to meet the specific requisite of the Eichleay formula was not fatal, because the termination for convenience principles were inappropriate in this case and the alleged windfall would not occur if it recovered unabsorbed burden claimed.¹⁴⁸ The government, on the other hand claimed that the unabsorbed overhead cannot be recovered without proof of delay, which Applied did not allege.¹⁴⁹

In deciding the appeal, the ASBCA found no deliveries were made, thereby limiting the recovery to the termination for convenience of the Government Clause of the contract in accordance with the federal circuit’s decision.¹⁵⁰ The ASBCA noted that while the federal circuit had held that unabsorbed overhead is recoverable under the Termination for Convenience Clause, the burden of proof is on the contractor to prove a period of government-caused delay occurred.¹⁵¹ While the ASBCA stated that unabsorbed overhead may be recovered only under the Eichleay formula, and a strict prerequisite for application of Eichleay is government-caused delay, Applied did not even contend it and, therefore, denied the appeal.¹⁵²

Lobbying Not Reimbursable under EAJA

In *Marshall Associated Contractors, Inc.*,¹⁵³ the Department of the Interior Board of Contract Appeals (IBCA) ruled the reimbursement rate for Equal Access to Justice Act (EAJA) is based upon when the appellant appealed, not when the case is heard.¹⁵⁴ In an appeal that has seemingly gone forever, the IBCA determined fees allowable under the EAJA for an appeal originally filed in December 1984.¹⁵⁵ The case involved a Bureau of Reclamation (BOR) contract to supply sand and coarse aggregate for construction of the Upper Stillwater Dam near Duchesne, Utah.¹⁵⁶

The contract in this case called for Marshall Associated Contractors, Inc. to provide the coarse aggregate from an area designated by the BOR, however the BOR’s own tests showed the designated site contained “extremely hard and abrasive materials, . . . clearly incapable of meeting the contract’s specifications.”¹⁵⁷ While appellant attempted to meet its requirements under the contract, the company ultimately failed and went bankrupt.¹⁵⁸ The BOR subsequently terminated the contract for default.¹⁵⁹ The parties originally agreed to convert the termination for default into a termination for convenience and pay Marshall \$3.3 million, however the “BOR headquarters rejected the agreement based upon erroneous information provided by its Denver laboratories,” forcing Marshall to file its appeal on 26 December 1984.¹⁶⁰

¹⁴⁵ *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 128 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 981 (2003).

¹⁴⁶ *Id.*

¹⁴⁷ *Applied Companies*, 06-1 BCA ¶ 33,269 at 164,879-80.

¹⁴⁸ *Id.* at 164,880.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 164,879-80.

¹⁵¹ *Id.* at 164,880. *See also* *Nicon, Inc. v. United States*, 331 F.3d 878 (Fed. Cir. 2003).

¹⁵² *Applied Companies*, 06-1 BCA ¶ 33,269 at 164,882.

¹⁵³ IBCA Nos. 4397F, 4398F, 4400, 06-2 BCA ¶ 33,295.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 165,100. The basis of the appeal was the BOR’s misrepresentation as to the stone located in the area. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 165,100-01. The contracting officer and Marshall reached agreement which the BOR viewed as only “proposed” and claimed the contracting officer exceeded his authority. Marshall filed a complaint with the Board claiming that agreement had been achieved, however the Board determined the contracting officer did not have the authority. *Id.* at 165,101.

During its appeal Marshall continued to aggressively pursue the convenience termination. The company spent significant amounts traveling to meet “with Senators, Congressmen, the Secretary of BOR, and the Solicitor’s office in Washington.”¹⁶¹ After thirteen years of wrangling, the Board granted Marshall’s summary judgment motion on the merits.¹⁶² After the Board granted Marshall’s motion to convert the T4D to a termination for convenience (T4C), the Board remanded the matter for settlement.¹⁶³

While the both parties negotiated for nearly four years and reached “considerable agreement on costs” they could not reach agreement for costs associated with Marshall’s attempts to get other governmental officials to intervene or the appropriate hourly rate for attorney’s fees.¹⁶⁴ Marshall sought over \$1.8 million in attorney’s fees and expenses under the EAJA.¹⁶⁵ The government, on the other hand, contended that only \$962,093 in attorney’s fees and expenses were allowable because the remaining fees were spent “principally or entirely on appellant’s lobbying efforts.”¹⁶⁶ Marshall claimed the hourly rate per hour should be \$125, the EAJA rate as amended by the 29 March 1996 Contract with America Advancement Act.¹⁶⁷ The government believed the “old” rate of \$75 per hour applied.¹⁶⁸

The Board reminded all that the EAJA is not “a blanket cost reimbursement statute” and therefore it must be construed strictly, preventing courts and boards from granting “equity.”¹⁶⁹ The goal is to allow prevailing parties to recover “fees and expenses in connection with a proceeding.”¹⁷⁰ Since Marshall’s attempts to have other governmental officials intervene on its behalf with the BOR and sign the termination for convenience compromise, the costs were not “in connection with a proceeding.”¹⁷¹ The IBCA also determined that the EAJA statute was clear that that the new rate applied to “adversary adjudications commenced on or after the enactment” of the Act.¹⁷² Since Marshall’s action commenced before the date of enactment of the new rate, the Board awarded Marshall attorney fees only at the old rate.¹⁷³

No Money to Pay Back Wages, No Interest on Your Award

In an “interest”ing case before the Court of Federal Claims (COFC), the COFC affirmed a DOT BCA appeal disallowing CDA interest in an appeal concerning wage rate determinations.¹⁷⁴ The basis of the case revolved around back wages to be paid to Richlin’s security guards guarding Immigration and Naturalization Service offices.¹⁷⁵ By mutual mistake, the guards were misclassified and therefore paid under a lower wage classification scheme of the Service Contract Act.¹⁷⁶

In 1995 the Department of Labor determined that employees were entitled to back wages.¹⁷⁷ Richlin filed an appeal with DOT BCA requesting reformation of the contract after the contracting officer denied Richlin’s claim.¹⁷⁸ The board granted in

¹⁶¹ *Id.* at 165,101.

¹⁶² *Id.* at 165,102. During those years the appellant believed it had reached agreement with BOR on a termination for convenience settlement, filed another complaint, had its appeal removed for the Board’s docket and restored on the docket, had a claim filed against it for surety, had its appeal dismissed sua sponte by the Board and redocketed after a successful request for reconsideration. *Id.* 165,101-02.

¹⁶³ *Id.* at 165,102.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Marshall claimed \$1,266,422 in attorney’s fees and \$616,083 in expenses. *See* Equal Access to Justice Act, 5 U.S.C.S. § 504 (LEXIS 2006).

¹⁶⁶ *Id.*

¹⁶⁷ Pub. L. No. 104-121, § 231(6)(1), 110 Stat. 857 (1996).

¹⁶⁸ *Marshall Associated Contractors*, 06-2 BCA ¶ 33,295 at 165,102.

¹⁶⁹ *Id.* at 165,103.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 165,104.

¹⁷² *Id.* at 165,164.

¹⁷³ *Id.*

¹⁷⁴ *Richlin Security Serv. Co. v. Chertoff*, 437 F.3d 1296 (Jan. 31, 2006).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1297.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1298.

part and denied in part the request stating that while reformation was the proper remedy, the DOT BCA was not going to specify the terms until the back wage liability was formalized by the DOL.¹⁷⁹ Through a mutual agreement with the DOL, Richlin formalized its liability acknowledging that its employees were entitled to \$636,818.72 in back wages that were to be paid into an escrow account administered by Richlin's counsel.¹⁸⁰ Richlin then went back to the DOT BCA to complete the reformation, but the board denied the request because the agreement was not "the equivalent of Richlin actually discharging its back wage liability to some or all of its employees."¹⁸¹ The COFC reversed and remanded stating that there was no dispute that Richlin owed its employees.¹⁸² The only reason Richlin had not paid them was because it did not have the money to do so before being paid by the INS.¹⁸³

The case returned to the COFC when the DOT BCA only awarded Richlin the amount of back wages listed in the agreement with the DOL and no amount for "additional labor costs" or interest on the back wage liability.¹⁸⁴ This time, the COFC agreed with the board differentiating this case from most other quantum awards.¹⁸⁵ As the DOT BCA put it, "there is nothing upon which interest could accrue" since the amount due from INS was not Richlin's but its employees.¹⁸⁶ Before denying the Richlin's claim, the COFC gave a good review of when interest is allowed¹⁸⁷ and that the waiver must be strictly construed.¹⁸⁸ The court went on to state that Congress had hoped to address fully compensating contractors for their costs incurred when the contractor had to continue performance, despite a dispute.¹⁸⁹ The court looked to the Senate Report which specifically addressed the cost of money to finance the additional work.¹⁹⁰ In Richlin's case, the contractor did not incur a cost of money because Richlin could not, and did not, pay its employees the back wages out of its own funds.¹⁹¹ Therefore, since Richlin was merely a conduit for paying these employees it was not entitled to interest.¹⁹²

Lieutenant Colonel Ralph J. Tremaglio, III

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* The DOT BCA was concerned that due to the time lag between performance and payment of back wages, not all employees would be found to be paid. Therefore, the money remained in escrow. Any excess money due to the failure to locate individuals entitled would be remitted to DOL. *Id.*

¹⁸¹ *Id.* (quoting *In re Richlin Sec. Serv. Co.*, 99-1 DOT BCA ¶ 30,219).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* See also *In re Richlin Sec. Serv. Co.*, DOT BCA, 03-02 BCA ¶ 32,301.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (quoting *In re Richlin Sec. Serv. Co.*, 03-02 BCA ¶ 32,301).

¹⁸⁷ *Id.* Interest is recoverable only with an express waiver of sovereign immunity. *Id.* (citing *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986)).

¹⁸⁸ *In re Richlin Sec. Serv. Co.*, 437 F.3d at 1299.

¹⁸⁹ *Id.* at 1301.

¹⁹⁰ *Id.* (quoting S. Rep. No. 118, 954th Cong. 2d Sess. 32 (1978)).

¹⁹¹ *Id.* at 1301-02.

¹⁹² *Id.* at 1302.

Terminations for Default

Stopping Performance Over Slow Payments Can Get You Canned Immediately, Even If You Are a Small Business

In an Armed Service Board of Contract Appeals (ASBCA) case this year, *A-Greater New Jersey Movers, Inc.*,¹ the government awarded a requirements contract for baggage moving services to be performed in and around Fort Dix, New Jersey. Within the first few months, the government experienced a few problems with the contractor's performance,² while the contractor experienced problems getting paid from the Defense Finance Accounting Service. The payment problems were caused by a number of factors, not the least of which were the contractor's invoicing errors.³ After three months of performance, the government met with the contractor to discuss the payment problems, and offered to release the contractor from the contract, which the contractor declined. Less than two months later, because of the payment delays, the contractor put the government on "a month trial."⁴ The contractor notified the government that it was stopping performance, that it would not show up to conduct the scheduled pick-ups and deliveries, and that it was holding and would not release to service members any of the in-bound or out-bound shipments that were in its possession.⁵ The contracting officer terminated the contract for default for the contractor's failure to provide the services, and for its failure to provide a quality control plan and evidence of insurance as required by the contract and requested by the contracting officer.⁶

Among the contractor's arguments on appeal was that its failure to submit the required documents could not be a sufficient basis for termination for default.⁷ The board found that providing a quality control plan and evidence of insurance are "significant requirements of the contract" such that failure to provide them would support a termination for default relating to "any of the other provisions of the contract."⁸ This basis for termination requires a cure notice,⁹ which the government did not provide.¹⁰ However, in this case, the contractor's words and actions with respect to the work stoppage constituted an unequivocal repudiation of the contract, which gives the government the right to terminate the contract for default without the use of a cure notice.¹¹

The contractor's remaining arguments related to alleged government acts or omissions in dealing with the invoices and ultimately the delay in payment which allegedly "forced the company to abandon the contract."¹² The board held that none of these matters excused the contractor's failure to perform. When the government fails to timely pay invoices, the

¹ ASBCA No. 54745, 06-1 BCA ¶ 33,179.

² "Instances of poor performance and misconduct led the government to request a copy of appellant's quality control plan in an effort to prevent future problems from arising." *Id.* at 164,431. The contractor also failed to provide a quality control plan and proof of insurance as required by the contract. *Id.*

³ *Id.* at 164,430. The contractor's invoicing errors included improperly invoicing for household goods versus unaccompanied baggage, mistakes in listing the weight of the goods shipped, invoicing for unallowable charges, invoicing after each shipment instead of monthly, and other errors or irregularities. However, a DFAS-initiated investigation to prevent double billing under this contract apparently also contributed to the payment delays. *Id.* Also, the contractor apparently alleged in the appeal that government's "unauthorized changes to the invoices" and failure to timely notify the contractor of changes to invoices led to delay in payment. *Id.* at 164,433.

⁴ *Id.* at 164,431.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 164,432.

⁸ *Id.* This ground for termination of default is often referred to as an "(a)(1)(iii)" termination, based on the default clause for fixed-price supply and service contracts, which provides:

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract . . . ; or

(iii) Perform any of the other provisions of this contract

U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.249-8 [hereinafter FAR]. To use this ground for termination, the "other provision" of the contract that the contractor failed to perform must be a "material" or "significant" requirement. *A-Greater New Jersey Movers*, 06-1 BCA ¶ 33,179 at 164,432 (citing Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981).

⁹ The cure notice requirement for an "(a)(1)(iii)" termination is found in the termination clause. FAR, *supra* note 8, at pt. 52.249-8(2).

¹⁰ *A-Greater New Jersey Movers*, 06-1 BCA ¶ 33,179 at 164,432.

¹¹ *Id.*

¹² *Id.* at 164,433.

contractor's remedy is Prompt Payment Act interest, not work stoppage. The board noted that while financial incapability is generally not an excuse for a contractor's default, it is possible for late payments caused by the government to excuse a default that was "beyond [the contractor's] control and without its fault or negligence,"¹³ but only if the late payments "rendered the contractor financially incapable of continuing performance, are the primary or controlling cause of appellant's default, or are a material rather than insubstantial or immaterial breach of the contract."¹⁴

The board found that in this case, the payment problems were partially the fault of the contractor, and that it had failed to prove that the government's actions caused the contractor's failure to perform.¹⁵ The fact that the contractor here was a small business did not change the analysis: "The Board does not accord special treatment in determining whether the burden of proof has been met to a contractor because of its status as a small business."¹⁶

Proper Withholding of Liquidated Damages Does Not Excuse Default

The ASBCA also decided another case this year in which a contractor stopped work because of money reasons. In *All-State Construction, Inc.*,¹⁷ the contractor was continuously behind schedule in its construction of a hazardous waste storage facility. Each time the government accepted a revised completion date from the contractor, it expressly did so without waiving its right to assess liquidated damages.¹⁸ Two months before the last revised completion date, when the construction was still only twenty-nine percent complete, the government issued a change order for a fire suppression system which allowed no time extension.¹⁹

One month before the completion date, it was apparent that the construction would not be complete by the new date, and the government issued a show cause notice for failure to make progress.²⁰ The contractor responded to the show cause notice, alleging various excusable delays, and submitted an invoice for a portion of work that had been completed.²¹ The contracting officer returned the invoice without payment because "[t]he amount to be retained for liquidated damages exceeds the amount of the invoice."²² A few days later, the contractor stopped work on the project altogether.²³ After some unsuccessful attempts by the government and the contractor (and its surety) to work out a solution for completion of the work, the contractor was ultimately unwilling and perhaps financially unable to resume work on the project, and the contract was terminated for default.²⁴

The contractor appealed to the ASBCA, and in 2002 the board granted summary judgment for the contractor, finding that the government breached the contract by retaining thirty-eight percent of the amount that the contractor had otherwise earned because the contract payment clause limited the retention of progress payments to ten percent of the amount earned.²⁵ In

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ASBCA No. 50586, 06-2 BCA ¶ 33,344.

¹⁸ *Id.* at 165,337.

¹⁹ *Id.* at 165,338. The change order allowed for no time extension because the contractor "could have performed the changed work without impacting its critical path to completion of the work." *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 165,339.

²³ *Id.*

²⁴ *Id.* at 165,340.

²⁵ *All-State Constr., Inc.*, ASBCA No. 50586, 02-1 BCA ¶ 31,794. The payment clause provided:

(e) *Retainage.* If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds. Also, on completion and acceptance of each separate building,

2003, the federal circuit reversed and remanded the case, holding that the *FAR* retention provision giving the government the right to retain up to ten percent of progress payments until satisfactory progress is made is different from, and does not trump, the government's common law "setoff" right to reduce contract payments by the amount of the contractor's debt to the government.²⁶ In this case, the government was not retaining a portion of the funds as an incentive for the contractor to complete the work or to protect the government against a potential default, as contemplated by the retention provision, but was "permanently and absolutely" keeping the funds to offset a current payable debt of the contractor.²⁷ The court concluded that the government properly executed the offset, even though the government had not formally terminated the contract for convenience yet.²⁸

On remand to the ASBCA this year, the board found the termination for default to be otherwise proper. The board pointed to the contract's Disputes clause, which required the contractor to "proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract. . . ."²⁹ By completely stopping work in response to what the contractor alleged was a wrongful retention of liquidated damages, the contractor breached its obligation under the Disputes clause to continue performance pending resolution of the dispute.³⁰ This, the board explained, gave the government the common law right to terminate the contract:

A failure to proceed pursuant to paragraph (i) of the Disputes clause is a material breach for which summary termination is proper under the government's common law rights reserved in paragraph (d) of the Default clause whenever it occurs and without regard to the specified completion date of the contract.³¹

While the issue of the *amount* of a contractor's payment that the government can retain for liquidated damages had been resolved by the Federal Circuit, the contractor argued to the board that *any* assessment of any liquidated damages in this case was wrongful because "(i) the government waived the contract completion date by issuing the . . . change order, (ii) the government failed to establish a new date based on the time required perform the change order, and (iii) there was consequently no valid completion date for which liquidated damages could be assessed."³² This wrongful retention of liquidated damages, the contractor argued, caused its work stoppage, excusing the default.³³

Noting that "[o]nly wrongful retentions are excusable causes of default,"³⁴ the ASBCA found that the retention of liquidated damages was not wrongful because the contract contained a provision that specifically rendered the government's obligation to make payments subject to "[a]ny claims which the Government may have against the contractor under or in connection with this contract."³⁵ Here, the government had a claim—albeit a disputed one—against the contractor for the amount retained, so the government could properly retain that amount under the terms of the contract.

public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

FAR, *supra* note 8, at pt. 52.232-5(e).

²⁶ *Johnson v. All-State Constr.*, 329 F.3d 848 (Fed. Cir. 2003).

²⁷ *Id.* at 855.

²⁸ *Id.*

²⁹ *All-State Constr., Inc.*, 06-2 BCA ¶ 33,344 at 165,341 (*FAR*, *supra* note 8, at pt. 52.233-1(i)).

³⁰ *Id.*

³¹ *Id.* at 165,341-42 (internal citation omitted).

³² *Id.* at 165,342.

³³ *Id.* If, as the contractor argued, there was no established completion date at the time of termination, this would presumably make it improper to rely, as the contracting officer did in this case, on the ground of "failure to make progress so as to endanger performance," which requires the contracting officer to have a reasonable belief that there is no reasonable likelihood that the contractor can complete the project within the time remaining for contract performance. *See, e.g., Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). The board did not mention this issue, upholding the termination for default on the alternate ground of the contractor's breach of the Disputes clause obligation.

³⁴ *All-State Constr., Inc.*, 06-2 BCA ¶ 33,344 at 165,342.

³⁵ *Id.*

The ASBCA recently upheld a termination for cause for a contractor's failure to provide flu vaccine after the FDA banned all shipments of a particular vaccine to the United States due to safety concerns and there were no alternative sources of supply from whom the contractor could obtain a comparable vaccine. In *General Injectables & Vaccines, Inc.*,³⁶ the contractor was to provide "Fluvirin® injectable flu vaccine to DoD employees for the 2004-2005 flu season."³⁷ However, before the contractor could deliver any vaccine, the manufacturer of the vaccine notified the U.S. Food and Drug Administration (FDA) that it had discovered contamination in some of its vaccine lots and that it was therefore unable to release any of the vaccine to the United States until both UK and US authorities deemed it safe.³⁸ The FDA inspected the manufacturer's facilities,³⁹ as did the British equivalent of the FDA;⁴⁰ the British authorities suspended the manufacturer's license to operate for three months,⁴¹ and the FDA banned all shipments of Fluvirin® to the United States.⁴² There was only one other manufacturer of an injectable flu vaccine, which could not produce enough of its vaccine to fulfill the demand for that flu season.⁴³ The worldwide flu vaccine shortage left the contractor with no alternative sources of supply and unable to deliver the vaccine required by the contract, so the government terminated the contract for cause.⁴⁴

On appeal, the contractor argued that there was no default because its obligation to deliver the vaccine was expressly conditioned upon the "availability of the flu vaccine, and the release of the vaccine by both the manufacturer of the product and the FDA."⁴⁵ The contractor similarly argued that its failure to deliver was excused because the FDA refused to approve the vaccine.⁴⁶ The board rejected these arguments. Stating a long-standing "general principle of law,"⁴⁷ the board held that "a party may not use the non-performance of a condition precedent when that party . . . is responsible for the non-performance of the condition."⁴⁸ Here, the contractor's supplier, by producing vaccine that was found to be contaminated, caused the FDA and its British counterpart to withhold approval of the vaccine and caused the unavailability of the vaccine.⁴⁹

The contractor argued, however, that it was not responsible for the manufacturer's inability to release the vaccine, because the manufacturer was not its subcontractor.⁵⁰ The board disagreed, finding that the manufacturer was a "subcontractor" as that term is defined under the contract's clause at *FAR part 52.219-9, Small Business Subcontracting Plan*.⁵¹ Even if that clause were not in the contract, the board opined that the manufacturer would still be deemed a "subcontractor" under *FAR part 44.101*, which defines the term as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor."⁵² The board noted that it has "generally held a

³⁶ ASBCA No. 54930, 06-2 BCA ¶ 33,401.

³⁷ *Id.* at 165,587 (quoting the solicitation). The contract also noted that the manufacturing and packaging of the vaccine would be done by "Chiron Vaccines, Liverpool, England," the manufacturer of the Fluvirin®. *Id.* at 165,588.

³⁸ *Id.*

³⁹ *Id.* at 165,589.

⁴⁰ *Id.* at 165,588. The British equivalent of the FDA is the Medicines and Healthcare Products Regulatory Agency (MHRA). *Id.*

⁴¹ *Id.*

⁴² *Id.* at 165,589

⁴³ *Id.* at 165,588. The only other manufacturer was Aventis, which produced the Fluzone® vaccine. *Id.*

⁴⁴ *Id.* at 165,589.

⁴⁵ *Id.* at 165,590. General Injectable's solicitation response sheet had stated that it "[m]ay have to alter delivery schedule outlined in bid due to releases of vaccine," and a solicitation modification specifically stated that delivery was "[d]ependent upon FDA release of vaccine." *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* (citing *District of Columbia v. Camden Iron Works*, 181 U.S. 453, 461-62 (1901)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 165,592. The Small Business Subcontracting Plan clause defines "subcontract" as "any agreement (other than on involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract." FAR, *supra* note 8, at pt. 52.219-9(b). The contractor argued that it had requested a waiver of the requirement to submit a small business contracting plan, and that it had not submitted the plan, but failed to demonstrate to the board that the clause had been waived. *General Injectables*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,591.

⁵² *General Injectables*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,592 (quoting FAR, *supra* note 8, at pt. 44.101).

contractor responsible for the actions of its subcontractors and suppliers.”⁵³ Because the manufacturer’s failures were the contractor’s failures,⁵⁴ the board held that the contractor’s failure to deliver was not excusable.⁵⁵

The board also denied the contractor’s request for summary judgment on the issue of reprourement costs, finding that it lacked jurisdiction over that issue because the government had not issued a demand for reprourement costs.⁵⁶

Finally, the board stated that to prove that a termination for default is proper, it is generally “enough for the government to show that the contractor’s supplier failed to deliver the necessary material.”⁵⁷ While this was a commercial items contract and therefore involved a termination for cause rather than for default, the board stated, without further elaboration, that “the principles that apply under the *FAR* clauses that govern termination for default apply with equal force under the terminations for cause provision in this ‘Commercial Items’ contract.”⁵⁸ The termination for cause provision of the clause at *FAR part 52.212-4, Contract Terms and Conditions—Commercial Items*, provides in relevant part: “The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance.”⁵⁹ Unlike its termination for default counterpart at *FAR part 52.249-8*, the commercial items clause does not specifically address the issue of excusable delay. However, the holding in this case is consistent with the termination for default clause, which provides:

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.⁶⁰

Under that termination for default clause, the fact that the supplies are not obtainable from other sources is not enough to excuse a contractor’s performance; the cause of the default must also have been beyond the control and without the fault or negligence of either the contractor *or the subcontractor*. Applying these principles to the termination for cause provision applicable to commercial items leads to the result in this case.

Lieutenant Colonel Michael L. Norris

⁵³ *Id.* at 165,591

⁵⁴ *Id.*

⁵⁵ *Id.* at 165,593.

⁵⁶ *Id.* Because there was no injectable flu vaccine available to reprocore, hence the contractor’s inability to deliver it under the contract, the government instead procured a non-injectable product called FluMist®. *Id.* at 165,588. The issue of whether that was an acceptable substitute would be “properly raised in a future reprocorement appeal (if any).” *Id.* at 165,593.

⁵⁷ *Id.* at 165,593 (citing H.C. Mach. Co., ASBCA No. 32932, 89-1 BCA ¶ 21,247).

⁵⁸ *Id.*

⁵⁹ FAR, *supra* note 8, at pt. 52.212-4(m).

⁶⁰ *Id.* at pt. 52.249-8(d).

Terminations for Convenience

Agriculture Board of Contract Appeals (AGBCA) Denies Use of Constructive Termination for Convenience to Avoid Breach Damages in an ID/IQ

In *Ardco, Inc.*,¹ the AGBCA, in deciding a Forest Service motion for partial summary judgment, held that a contractor can recover anticipatory profits for work it would have been given under an indefinite delivery, indefinite quantity (ID/IQ) contract had the government not hindered the contractor's ability to perform. In *Ardco*, the U.S. Forest Service awarded multiple ID/IQs based upon geographical locations for the services of aircraft to assist in fighting fires.² Under the contract, the contractor was paid a daily amount for keeping an aircraft and crew available for the exclusive use of the government, and a separate amount for flight hours ordered.³ The contract contained no guaranteed minimum number of flight hours, and contained no assurance that the contractor would receive any flight hours.⁴ A few months after the start of the contract, the aircraft became inoperable after being struck by a forklift driven by a Forest Service employee.⁵ After the accident, the Forest Service did not terminate the contract. The Forest Service continued to pay the contractor the daily rate of \$3,177 for having the aircraft on standby for exclusive use of the government, but ordered flight hours for that geographical area from another contractor,⁶ presumably one whose aircraft had not been crashed into with a forklift.

The contractor sought profits for flight hours it believed it would have received had the Forest Service not interfered with its ability to perform by rendering its aircraft inoperable.⁷ In its motion for summary judgment on that issue, the Forest Service argued that it could have terminated the flight hours portion of the contract for convenience, which precludes recovery of anticipated profits.⁸ The board rejected the application of the theory of constructive termination for convenience in this case, finding no precedent for applying constructive termination for convenience to a case such as this.⁹ The board noted that the termination for convenience (T4C) clause was developed to render a government cancellation of a contract, which would be a breach in common law, a non-breach by providing the government with a contractual right to end the contract.¹⁰ In the absence of a breach, the contractor is not entitled to anticipatory profits. In this case, however, the government breached the contract by hindering the contractor's ability to perform.¹¹ The board was unaware of any case in which constructive termination for convenience was applied to "act as a shield for limiting breach damages, caused by an event not associated with any attempt to cancel."¹²

While generally acknowledging that there are factual differences between this case and cases involving alleged government breach of requirements contracts, the board noted a similarity: "The cases show that anticipatory profits are available as a remedy when the Government takes work that is earmarked for the claimant contractor and diverts it to another source."¹³ In the board's view, the fact that this was an ID/IQ contract in which the government had no obligation to order any flight hours from the contractor did not preclude the recovery of anticipatory profits:

The [Forest Service] contends that the Appellant cannot recover anticipatory profits because the contract had no set guarantee. We reject the argument that Appellant is not entitled to profits because the contract was of an indefinite quantity. Clearly, if no work had been performed, then the [Forest Service] would have a legitimate issue that the contractor should not be paid for work that was not required. However, that

¹ ASBCA No. 2003-183-1, 06-2 BCA ¶ 33,352.

² *Id.* at 165,380.

³ *Id.* at 165,381.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 165,382.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 165,383.

¹³ *Id.*

is not the fact here. Here the [Forest Service] had the flights performed by someone else. The Appellant lost the benefit of its bargain, and we can establish what that benefit would have been.¹⁴

Judge Vergilio's separate concurring opinion specifically acknowledged the important distinction between the contract in this case and a requirements contract, in which the government is obligated to use the contractor for any services it may require.¹⁵ Still, he too opined that the contractor was not necessarily precluded from recovering anticipatory profits. Although the government had no obligation to use the contractor for any flight hours it needed, the contractor "cannot be foreclosed from demonstrating with reasonable certainty that it would have been selected."¹⁶ The number of flight hours the contractor would have received under the contract had the government not damaged its aircraft, and the resulting amount of damages to which the contractor is entitled, is a factual matter that will require further information on how the contracting officer went about selecting aircraft to receive flight hours.¹⁷

The board seemed to view it as important that the Forest Service had not terminated the contract for convenience at any point during the contract period.¹⁸ However, it is not clear whether that makes any difference—that is, whether the board would have precluded recovery of anticipatory profits if the government *had* timely terminated the contract for convenience.¹⁹ The contractor was in no worse position as a result of the government's failure to terminate the contract, and in fact continued to get paid \$3,177 per day under the contract for the stand-by time even though its aircraft was inoperable.²⁰ If timely termination would have made a difference in the contractor's recovery, then this case might represent a situation where contracting officers should consider terminating an ID/IQ contract for convenience, rather than simply refraining from placing additional orders until the contract term expires, when the government does not intend to place additional orders with the contractor.

Cost-Share Contractor Does Not Share Costs Under Standard T4C Clause

Upon the termination of a cost share contract for the convenience of the government, the contractor is entitled to recover all of its costs, rather than its allotted share, under the termination for convenience clause, according to the Federal Circuit in *Jacobs Engineering Group, Inc. v. United States*.²¹ In *Jacobs*, the Department of Energy (DOE) entered into a cost-share contract with the contractor for the development of a gasification improvement facility.²² Under the contract, the government would reimburse the contractor for eighty percent of its costs, while the contractor would bear twenty percent of the costs, and the contractor would receive patent rights for the technology it planned to develop.²³ Similarly, if there were a cost overrun, or if the contractor chose to discontinue performance after Phase I, the contractor would bear twenty percent of the costs.²⁴ The contract contained the standard termination for convenience clause at *FAR part 52.249-6, Termination (Cost-*

¹⁴ *Id.* at 165,384.

¹⁵ *Id.* at 165,385.

¹⁶ *Id.* at 165,386.

¹⁷ *Id.*

¹⁸ *Id.* at 165,383. In his separate concurring opinion, Judge Vergilio also viewed it as important, noting that he "would prohibit the Government from retroactively invoking the termination for convenience clause" because the government, by not terminating the contract, continued to receive the contract benefit of being able to exercise an option and of being able to utilize the contractor's services if the contractor had completed repairs during the base year. *Id.* at 165,385.

¹⁹ Judge Vergilio's concurring opinion noted this issue:

Given the existing material facts (with no actual or constructive termination for convenience), one need not here resolve the question of whether the issuance of a termination for convenience at the time of the accident would have altered the damages recoverable by a contractor, particularly one claiming Government breach of contract.

Id. at 165,385.

²⁰ *Id.* at 165,381. The opinion does not explain how the contractor was able to perform the stand-by portion of the contract with an inoperable aircraft. The contract contained a clause entitled "Substitution of Aircraft and Pilots." *Id.* at 165,385. The opinion does not reveal the substance of the clause, but the contractor was apparently not prohibited from providing a substitute aircraft with which to perform the stand-by services and any flight hours the government might require while the damaged aircraft was being repaired.

²¹ 434 F.3d 1378 (Fed. Cir. 2006).

²² *Id.* at 1379. "Gasification" is "a means of converting coal to electricity and fuel, as an alternative source of energy." *Jacobs Eng'g Group, Inc. v. United States*, 63 Fed. Cl. 451, 453 (2005).

²³ *Jacobs*, 434 F.3d at 1379.

²⁴ *Id.* at 1381.

Reimbursement), which required the government to pay, upon termination by the government, “all costs reimbursable under this contract.”²⁵

During the design phase of the contract, the parties found that the costs of development would be significantly greater than anticipated, and the DOE ultimately terminated the contract for convenience because it did not have sufficient funds for the project.²⁶ In its termination settlement proposal and subsequent appeal to the COFC last year, 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.²⁷ Consistent with the cost-sharing provisions, the COFC then held that the contractor was entitled to only eighty percent of his allowable incurred costs.²⁸ The COFC explained that the termination clause required the government to pay “*all costs reimbursable under this contract*,”²⁹ and that under this cost-sharing contract only eighty percent of the contractor’s costs were reimbursable.³⁰ In that decision, the COFC 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.”³¹ 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.”³²

This year, the federal circuit reversed the COFC’s decision. The federal circuit noted that “[t]hroughout the contract, when the parties intended the 80 percent—20 percent division of costs to cover particular situations, they explicitly so provided.”³³ The termination clause, in contrast, did not mention the cost-sharing but instead required the government upon termination to pay “[a]ll costs reimbursable under this contract.”³⁴ The court viewed the term “all costs reimbursable” as defining “the type or kind of costs for which the contract provides reimbursement and not the amount of such costs.”³⁵ The court did not explain how it viewed the follow-on words “under this contract,” or why the phrase taken together did not refer to the costs that were both of the correct type and which were allowable under the terms of this particular contract. However, given the explicit references to the cost-sharing percentages elsewhere in the contract, the court stated:

In these circumstances, it seems most unlikely that if the parties had intended the termination clause to limit the contractor to 80 percent of the termination costs, they would not have said so instead of providing that the government would pay “[a]ll costs reimbursable” under the contract. We cannot read the latter phrase covering “all” reimbursable costs to mean 80 percent of such costs. In any event, to the extent there is an ambiguity on the point, it must be resolved in favor of Jacobs, the non-drafter of the contract.³⁶

The court also noted that the contractor’s motivation for agreeing to bear a percentage of the costs was to ultimately benefit from the patent rights in the technology that it hoped to develop under the contract.³⁷ The termination of the contract for the convenience of the government deprived the contractor of the opportunity to realize that benefit, so apply the cost-share percentages to the amount that the contractor is reimbursed would seem unfair to the court.³⁸

²⁵ U.S. GEN. SVS. ADMIN. ET AL., *FEDERAL ACQUISITION REG.* pt. 52.249-6 [hereinafter *FAR*].

²⁶ *Jacobs*, 434 F.3d at 1379.

²⁷ *Jacobs Eng’g Group*, 63 Fed. Cl. at 455. In its argument before COFC, the contractor relied in part on the terms of the contract’s “Project Continuance” clause, which allowed the contractor to discontinue the project in the event that it could not find subcontractors to help bear its twenty percent share of the costs, or if it were not granted an advanced patent waiver by the government. The clause provided that if the contractor did withdraw, he would bear twenty 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.

²⁸ *Id.* at 457.

²⁹ *Id.* (quoting *FAR*, *supra* note 25, at pt. 52.249-6(h)(1)) (emphasis provided by the court).

³⁰ *Id.*

³¹ *Id.*

³² *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 25, at pt. 31.201-2(a).

³³ *Jacobs*, 434 F.3d at 1381.

³⁴ *Id.* at 1380.

³⁵ *Id.* The court cited examples of the types of costs that were reimbursable, such as completed work, and types of costs that are not, such as entertainment costs.

³⁶ *Id.* at 1381.

³⁷ *Id.*

³⁸ *Id.* The court also cited *FAR* part 16.303(b), which states that “[a] cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits.” *Id.* (quoting *FAR*, *supra* note 25, at pt. 16.303(b)).

Contractor Provided Services after Termination, But Could Not Provide COFC with a Workable Theory of Recovery

In *International Data Products Corp. v. United States*,³⁹ 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.⁴⁰ When the contractor subsequently entered into an agreement to sell its stock to a non-8(a) concern, the Air Force terminated the contract for convenience.⁴¹ 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.⁴² Notwithstanding the termination of the contract, the government insisted that the contractor continue to fulfill its contract obligations for warranty services and software upgrades that accompanied the products purchased prior to the contract termination, for the reason that those services had already been bought and paid for prior to the contract termination.⁴³

The contractor believed it was not required to continue performing the warranty services after the termination, for the reason that the contract no longer existed.⁴⁴ However, it continued to provide the warranty services over its objection because the Air Force threatened that failure to meet the warranty obligations could negatively impact the contractor's ability to receive future contracts and could result in debarment.⁴⁵ After several months of performing the warranty services and unsuccessfully requesting that the government terminate that obligation,⁴⁶ the contractor discontinued providing the services, and requested a contracting officer's final decision on the matter.⁴⁷ The contractor ultimately filed a claim at COFC for approximately \$1.7 million in termination costs, which included \$440,990 for providing the warranty services and software upgrades after the contract had been termination.⁴⁸

In last year's proceedings, the COFC granted summary judgment for the government on the issue of termination settlement costs, 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.⁴⁹ The court, however, also granted summary judgment for the contractor on the issue of whether government could continue to require the contractor to provide the software upgrades and warranty services that accompanied the products already purchased under the contract. The court found that the statute which required the government to terminate the contract for convenience 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.⁵⁰ 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.⁵¹

Accordingly, the COFC held that the contractor was not required to continue to perform the warranty and upgrade services after the contract was terminated.⁵²

³⁹ 70 Fed. Cl. 386 (2006).

⁴⁰ 15 U.S.C.S. § 637(a) (LEXIS 2006).

⁴¹ *Int'l Data Prods.*, 70 Fed. Cl. at 391.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 392.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 393.

⁴⁸ *Id.*

⁴⁹ *Int'l Data Prods.*, 64 Fed. Cl. 642, 647 (2005).

⁵⁰ *Id.* at 650 (citing 15 U.S.C. § 637(a)(21)(A)) (2005).

⁵¹ *Id.* at 651.

⁵² *Id.*

In the subsequent trial on quantum this fiscal year, the contractor sought damages for the warranty services it provided after the contract was terminated. The COFC found that the services were not provided under the terms of an express contract, because no such contract existed after the termination.⁵³ In a footnote, the court noted that even if the services had been provided pursuant to the contract, the cost of the services were included as part of the unit prices of the products purchased and already paid for by the government.⁵⁴ The court also rejected the contractor's implicit argument that the services were provided pursuant to an implied-in-fact contract. An implied-in-fact contract requires, among other things, a mutual intent to contract, or "a meeting of the minds."⁵⁵ Although the contractor may have hoped to be compensated for the post-termination services, neither party had agreed, or even believed, that the government would pay the contractor any additional amounts for these services.⁵⁶

There being no express or implied-in-fact contract at the time the services were performed, the court held that the contractor could not recover under any breach of contract theory.⁵⁷ With no contract, the services could not be viewed as a cardinal change to the contract that would entitle the contractor to breach damages.⁵⁸ Similarly, the services could not be viewed as a constructive change to a contract which would entitle the contractor to an equitable adjustment, because no contract existed.⁵⁹

This left the contractor with only a claim for recovery in *quantum meruit* under a contract implied in law. "A contract implied in law," the court explained, "is one in which there is no actual agreement between the parties, but the law imposes a duty in order to prevent injustice."⁶⁰ It is also one over which the COFC lacks jurisdiction.⁶¹ Therefore, there was no theory under which the contractor could recover at the COFC.

Notification of Board's Conversion of T4D to T4C Starts the Termination Settlement Proposal Clock

Early this fiscal year, the Armed Services Board of Contract Appeals (ASBCA) held that a contractor's receipt of the board's decision converting a termination for default to a termination for convenience is the "effective date of termination" for purposes of the one-year time limit for submitting a termination settlement proposal. In *Ryste & Ricas, Inc.*,⁶² the ASBCA had earlier converted the termination of an Army building renovation contract for default to a termination for convenience.⁶³ Notice of that decision was delivered to the contractor's attorney on 8 June 2002.⁶⁴ Over a year later, the contractor submitted a termination settlement proposal.⁶⁵ The contracting officer never responded to the settlement proposal,⁶⁶ and the contractor appealed to the ASBCA.

The contractor argued that the settlement proposal, though submitted after 9 June 2003, was not late because the clock should not start until one hundred and twenty days from the date of the decision the date at which the board's decision could

⁵³ *Int'l Data Prods.*, 70 Fed. Cl. at 399.

⁵⁴ *Id.* at 399 n.11. The contractor argued that it still hadn't been "fully" compensated for the services because it had based its pricing on an expectation that all four of the contract's option periods would be exercised. The court rejected this argument, noting that the government had no obligation to exercise any options, and if the warranty services had been priced "based upon the assumption that all four option periods would be exercised, it did so at its own risk." *Id.*

⁵⁵ *Id.* at 400.

⁵⁶ *Id.* at 402.

⁵⁷ *Id.* at 404.

⁵⁸ *Id.* at 403.

⁵⁹ *Id.*

⁶⁰ *Id.* at 404.

⁶¹ *Id.*

⁶² ASBCA No. 54514, 06-1 BCA ¶ 33,124.

⁶³ *Ryste & Ricas, Inc.*, ASBCA No. 51841, 02-2 BCA ¶ 31,883.

⁶⁴ *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 164,145.

⁶⁵ *Id.* The actual date that the contractor submitted the termination settlement proposal was at issue in its appeal, but was unnecessary to resolve given the board's decision that any submission after 9 June 2003 was too late. *Id.* at 165,148.

⁶⁶ *Id.* at 165,146.

no longer be appealed to the federal circuit.⁶⁷ The board rejected that argument, holding that no such tolling provision applied to the procedure for submitting termination for convenience settlement proposals.⁶⁸ The contract's Termination for Convenience clause gave the contractor one year from the effective date of termination, unless extended by the contracting officer, to submit its termination settlement proposal.⁶⁹ If the contractor fails to submit a settlement proposal within that time, the contracting officer "may determine . . . the amount, if any, due the Contractor because of the termination,"⁷⁰ and that determination may not be appealed.⁷¹ Because the contractor failed to submit its settlement proposal within one year of being notified of the termination for convenience, the board denied the contractor's appeal.⁷²

Lieutenant Colonel Michael L. Norris

⁶⁷ *Id.* at 165,147. The board does not detail the contractor's argument in this regard, but makes reference to the contractor's reliance upon cases such as *Melkonyan v. Sullivan*, 501 U.S. 89 (1991), which was decided under the Equal Access to Justice Act (EAJA). The EAJA defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C.S § 2412 (d)(2)(G) (LEXIS 2006).

⁶⁸ *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 165,147.

⁶⁹ FAR, *supra* note 25, at pt. 52.249-2(e).

⁷⁰ *Id.*

⁷¹ *Id.* at pt. 52.249-2(j). In this case, rather than determining the amount due the contractor, the contracting officer refused to take any action at all on the late settlement proposal. *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 164,145. This inaction by the contracting officer is deemed to be a decision:

Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act.

41 U.S.C.S. § 605 (LEXIS 2006). However, this operation of law does nothing for a contractor who fails to submit his settlement proposal within the one-year period, because in that event "there is no right of appeal." FAR, *supra* note 25, at pt. 52.249-2(j).

⁷² *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 164,148.

Inspection, Acceptance, and Warranty

IAW Transformed!

The Department of Defense (DoD) issued a final rule on quality assurance as part of the *Defense Federal Acquisition Regulation Supplement (DFARS)* transformation.¹ The final rule updates requirements for warranties and contract quality assurance; removes unnecessary text on technical requirements matters, responsibilities of contract administration offices, and material inspection and receiving reports; and moves guidance on the preparation of quality assurance instructions, quality inspection approval stamps and quality evaluation data to the Procedures, Guidance, and Information supplement.²

Audit of Quality Assurance

The DoD Inspector General (IG) published a report on the adequacy of contract surveillance for service contracts.³ The DoD IG concluded that the government “could not be assure[d] that it received the best value when contracting for services,”⁴ particularly in the area of cost-reimbursement and time-and-materials contracts.

The DoD IG reviewed service contracts due to the ‘impressive growth’ of DoD contracts in this area. In Fiscal Year (FY) 2004, fifty-five percent of DoD spending for goods and services was for service contracts.⁵ The report noted that the cost of services alone increased one hundred and six percent between FY 1998 and FY 2004.⁶

The report reviewed twenty-three contracts, valued at \$ 670.4 million.⁷ Eighty-seven percent of the contracts did not have adequate quality assurance surveillance plans.⁸ The report noted four different incorrect rationales by agencies for not preparing a quality assurance plan as required by the *Federal Acquisition Regulation (FAR)*.⁹ The DoD IG lauded three contracts for its detailed quality assurance surveillance plan.¹⁰

Fifty-two percent of the audited contracts contained insufficient reviews of contract vouchers.¹¹ The report cited, as an example, reviews by technical monitors who were focused more on analyzing performance than scrubbing costs while looking at the vouchers.¹² The report praised four U.S. Army Corps of Engineers Iraqi Captured Enemy Ammunition contracts in Iraq in which program officials conducted a comprehensive review of all contractor vouchers while in a war zone.¹³

Fifty-seven percent of the contracts contained vouchers for provisional payments that were approved by non-Defense Contract Audit Agency (DCAA) officials.¹⁴ Only twenty-two percent used performance-based contracting standards.¹⁵ Forty-three percent of the contracts did not have adequately documented past performance records.¹⁶

¹ Defense Federal Acquisition Regulation Supplement; Quality Assurance, 71 Fed. Reg. 27,646 (May 12, 2006) (to be codified at 48 C.F.R. pts. 246).

² *Id.*

³ U.S. DEP'T OF DEF. OFF. OF THE INSPECTOR GEN., REP. NO. D-2006-010, CONTRACT SURVEILLANCE FOR SERVICE CONTRACTS (28 Oct. 2005).

⁴ *Id.* at i.

⁵ *Id.* at 1.

⁶ The DoD spent \$61.9 billion in 1993 and \$ 230.7 billion in 2004. *Id.*

⁷ *Id.*

⁸ *Id.* at 4. Six of these contracts had surveillance plans but were not adequately documented as required by the FAR. *Id.* at 11.

⁹ *Id.* at 19. The rationales included “not required at contract award,” “not required for commercials services,” “not conducive to time-and-materials,” and “not required for non-performance-based contracts.” *Id.*

¹⁰ *Id.* at 12. The contracts were in the Electronic Systems Center at Hanscom Air Force Base, Massachusetts; the Aeronautical Systems Center, Wright-Patterson Air Force Base, Ohio; and the Naval Air Systems Command, Patuxent River, Maryland. *Id.*

¹¹ *Id.* at 4. The DoD IG noted cursory or nonexistent voucher reviews for contracts in which either DCAA was provisionally approving interim vouchers or approved direct billing for the contractors. *Id.* at 13.

¹² The contract in question was from the Defense Information Technology Contracting Organization. *Id.* at 14.

¹³ *Id.* at 16.

¹⁴ *Id.* at 4. Under *DFARS 242.803(b)*, DCAA has the assigned responsibility for receiving and approving interim vouchers for provisional payment. *Id.* at 17.

¹⁵ *Id.*

The DoD partially concurred with the DoD IG's recommendation for officials to coordinate with DCAA for all service contracts, indicating that this coordination should be only when required by the complexity of the contract.¹⁷ The DoD also partially concurred with the IG's recommendation to coordinate with DCAA for voucher reviews, stating that guidance will be forthcoming.¹⁸ Finally, the DoD partially concurred with the last recommendation to clearly define roles and responsibilities in section G of contracts, stating that such detail should only be in contracts where deviation from the standard requirements is necessary.¹⁹

"In the Process" Is Not a Plan

In *Marine Industries NW*,²⁰ the Government Accountability Office (GAO) denied a protest of an offeror who failed to submit a brief description of the company's quality assurance plan for certifying completed work rendering the offer technically unacceptable.²¹ The Navy's Fleet and Industrial Supply Center in Puget Sound issued a Request for Proposals for up to four fixed price, indefinite-delivery / indefinite-quantity contracts for repair services on Navy vessels.²² Marine Industries submitted an offer which stated that it was "in the process of implementing a Quality Assurance Plan."²³ Because the Navy felt that such an implementation could take years and asking for more detail would constitute discussions, the Navy eliminated Marine Industries from the competition.²⁴

The GAO agreed with the Navy that Marine Industries' offer contained no information which would lead the Navy to assume that Marine Industries had a quality assurance plan in place, as the company alleged in its protest.²⁵ The GAO also dismissed Marine's argument that past performance submission, which showed prior quality performance, should have established the existence of the company's quality assurance plan.²⁶

Strict Compliance Flushed Down the Drain

In *Bath Iron Works Corp.*,²⁷ the Armed Services Board of Contract Appeals (ASBCA) awarded a contractor damages to recover its costs in replacing damaged piping despite the Navy's Insurance clause.²⁸ The dispute involved a fixed-price incentive fee contract to construct six DDG 51 Class Guided Missile Destroyers, including the DDG 90 involved in the dispute.²⁹ The Insurance clause in question excluded coverage "for the inspection, repair, replacement, or renewal of any defects themselves in the vessel . . . due to . . . defective workmanship."³⁰

On 6 September 2002, the supervisor of operating engineers for Bath Iron Works flushed the DDG 90's fuel oil and transfer piping with "tidal" Keenebec River water without notice to the Navy and without knowledge that river or salt water could damage stainless steel.³¹ In order to repair the resulting damage, Bath Iron Works spent \$388,966 in material costs and

¹⁶ *Id.*

¹⁷ *Id.* at 26.

¹⁸ *Id.* at 27.

¹⁹ *Id.* at 28.

²⁰ Comp. Gen. B-297207, Dec. 2, 2005, 2005 CPD ¶ 217.

²¹ *Id.* at 2.

²² *Id.* at 1.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ Marine Industries contended that the language used in the offer should have led the Navy to assume that the company was updating an existing quality assurance plan. *Id.* at 3.

²⁶ *Id.*

²⁷ ASBCA 54544, 06-1 BCA ¶ 33,158.

²⁸ NAVSEA 5252.228-9105 INSURANCE-PROPERTY LOSS OR DAMAGE-LIABILITY TO THIRD PERSONS (FT) (Jan 1990) (Modified, July 1997).

²⁹ *Bath Iron Works Corp.*, 06-1 BCA ¶ 33,158 at 164,296.

³⁰ *Id.* at 164,305.

³¹ *Id.* at 164,299.

16,893 in labor hours, which the ASBCA found to be reasonable.³² The contacting officer denied Bath Iron Works' claim, finding that the knowing deviation from the contract's requirements to flush the piping with either fuel or fresh water precluded payment of the claim.³³

Bath Iron Works argued that the insurance clause incorporated an "all risks" clause which shielded claims for damage from any fortuitous events causing vessel damage during construction. This clause, based on the Navy's past practices, would allow payment for the claim as long as the damage results from a number of causes, only one of which is an excluded risk.³⁴ The government argued that the Insurance clause was on point because the damage was deliberate and that strict compliance excluded any entitlement for the costs incurred by Bath Iron Works.³⁵

The ASBCA found that the Insurance clause excluded damage for defective work, but would allow payment for repairing or replacing the resulting damage from a casualty or disastrous occurrence.³⁶ The board found that the damage was the result of an accident, and could not fall into the rubric of "defective workmanship."³⁷ In addition, the board found that the Navy in the past had allowed recovery for loss or damage resulting from defective work or negligent actions.³⁸ Also, as Bath Iron Works argued, risk insurance law would allow coverage for a casualty with more than one cause, other than the excluded risk of defective workmanship in this case.³⁹ The board found that strict compliance was not applicable since the Navy deviated from the contract by allowing a fresh water flush and had allowed Bath Iron Works to use a fresh water flush on DDGs under several contracts between 1998 and 2002.⁴⁰

The ASBCA awarded Bath Iron Works \$1,130,314.05 for the costs of the repair less the amount used for the "defects themselves," or re-performance of the test flush with the proper water; some undocumented attorney's fees; and the Insurance clause deductible.⁴¹

Major Andrew S. Kantner

³² *Id.* at 164,301.

³³ *Id.* at 164,300.

³⁴ *Id.* at 164,305. The flushing procedure, modified by a Departmental Operating Instruction, deviated from the original specification which mandated the use of flushing fuel, rather than water. *Id.* at 164,298. In addition, other exacerbating causes were design flaws of the piping, and the use of a level transfer facility instead of inclined which allowed the water to stay in the destroyer. *Id.* at 164,303.

³⁵ *Id.*

³⁶ *Id.* at 164,305.

³⁷ The board noted that "(i)t is a fair inference that . . . (the Bath Iron Works employee) did not design or plan the corrosion damage." *Id.* at 164,306.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 164,308.

Value Engineering Change Provisions

Contractor Entitled to the Value of Its Proposal—Not a Penny More

Last year, the *Year in Review*¹ discussed a case affirming an earlier Armed Services Board of Contract Appeals (ASBCA) decision concerning a value engineering change proposal (VECP).² On reconsideration, the ASBCA determined that because the contractor failed to prove it was entitled to additional cost savings resulting from a VECP, the contractor was not entitled to additional compensation.³ The contractor appealed the ASBCA decision to the Court of Appeals for the Federal Circuit (CAFC) and the CAFC affirmed the ASBCA decision.⁴ While last year's *Year in Review* discussed the contractor's (Applied) contract appeal to the ASBCA, this article addresses only the CAFC appeal.

The CAFC case arose from two contracts the Army awarded to Applied in 1985 for horizontal air conditioning units.⁵ Both contracts contained a VECP clause⁶ encouraging Applied to present the government with cost savings measures by permitting the government to compensate Applied for any savings realized as a result of the VECP.⁷ After Applied submitted a VECP to the government, Applied disputed the amount the government owed it, resulting in an appeal to the ASBCA and then another appeal to the CAFC.⁸

The sole issue the CAFC considered was whether the VECP applied to cost savings on future purchases of the 36K BTU/HR model air conditioner only, or rather, whether the VECP also applied to cost savings on future purchases of other air conditioning unit models.⁹ In its analysis, the CAFC applied the basic principles of contract interpretation in attempting to resolve any ambiguities by first relying on the plain language of the contract.¹⁰ In examining the scope of the VECP, the court considered the language of the contractor's VECP, contract modification P9 (which incorporated the VECP into the contract), and also contract modification P15 (which stated the amount of cost savings to which the contractor was entitled). The court found that the language of the VECP referred only to the 36K BTU/HR model because it specified "the commercialization of the 36K horizontal unit."¹¹ Similarly, the court found that contract modification P9 referred only to that particular model because the modification stated the VECP applied to the "[horizontal AC] 36,000 BTU/HR."¹² Finally, the court found that modification P15 also referred only to that particular model (mentioned in modification P9) by detailing the total amount of cost savings to which the contractor was entitled resulting from its VECP.¹³

¹ See Major Andrew Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 79.

² Applied Cos., ASBCA No. 50593, vol. 05-2 BCA ¶ 32,986 at 163,475.

³ *Id.*

⁴ Applied Cos., 456 F.3d 1380, 1385 (Fed. Cir. 2006).

⁵ Applied presented the Army with a value engineering change proposal (VECP) for cost savings for future purchases of 36K BTU/HR air conditioners. *Applied Cos.*, 05-2 BCA ¶ 32,986 at 163,475. The government accepted the VECP and determined that Applied's share of the cost savings was \$1,540,181; the contracting officer determined that the VECP pertained only to the 36K BTU/HR model. *Applied Cos.*, 456 F.3d at 1385. Later, Applied submitted a claim for \$81,000,000 arguing that it was entitled to cost savings not only for future purchases of 36K BUT/HR air conditioners, but also for future purchases of other related air conditioners. *Id.* The government denied the claim but later settled the matter of "instant savings," leaving \$19,806,796 in dispute regarding future savings. *Id.* at 1382. Applied appealed the disputed amount to the Board. *Id.* The Board awarded Applied nearly \$1,000,000 representing a fifty percent cost savings for future purchases of 36K BTU/HR air conditioners. *Id.* The Board found that Applied failed to prove that the VECP pertained to future purchases of other air conditioners. *Id.* Upon a request for reconsideration, the Board affirmed its earlier decision. *Id.*

⁶ The contract contained the 1984 version of FAR 52.248-1 (Value Engineering) which stated that "the contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECPs) voluntarily, in accordance with the incentive sharing rates in paragraph (f) below [in this case, the rates are fifty percent]." Applied Companies, ASBCA Nos. 50593, 52102, vol. 99-2 BCA ¶ 30,554 at 150,880. See also U.S. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 52.248-1 (1984 version) [hereinafter FAR].

⁷ *Applied Cos.*, 456 F.3d at 1381.

⁸ *Id.* at 1382.

⁹ *Id.* Although the CAFC and the ASBCA considered the same evidence in rendering their opinions, the CAFC decision focused on contract interpretation while the ASBCA decision focused on the contractor's burden of proof in a VECP claim. *Id.* See also *Applied Cos.*, 05-2 BCA ¶ 32,986 at 163,475.

¹⁰ *Applied Cos.*, 456 F.3d at 1383.

¹¹ *Id.* at 1383.

¹² *Id.*

¹³ *Id.* at 1383-84.

The court found that the contract language unambiguously showed that the VECP applied only to the 36K BTU/HR model air conditioning unit.¹⁴ Accordingly, the court found that the VECP did not apply to other models. The court stated that the contract language was unambiguous, and so, any consideration of extrinsic evidence would be inappropriate.¹⁵ Therefore, the court held that contractor was entitled only to future savings related to the 36 BTU/HR model. Because the government had already compensated Applied for future savings related to the 36K BTU/HR model, the CAFC affirmed the ASBCA decision.¹⁶

No Appeal of ASBCA Decision at COFC: Contractor Doesn't Get Second Bite at the Apple

In an unrelated case, the Court of Federal Claims (COFC) considered a contractor's appeal involving another VECP,¹⁷ however, the court dismissed the appeal on procedural grounds.¹⁸ Specifically, the court found that it lacked subject matter jurisdiction to hear the case. The court also noted that even if it did possess jurisdiction, the contractor would not prevail on its legal theories.¹⁹

This case arose from a series of contracts that the Defense Logistics Agency awarded to Bianchi in 1979 and 1980 to manufacture military clothing.²⁰ Pursuant to the contracts' value engineering clauses, in two separate earlier decisions, the ASBCA awarded Bianchi a VECP payment of \$58,613 and another VECP payment of \$16,754.²¹ Subsequently, the government paid the Bank of America, as the contractor's assignee, the amounts it owed to the contractor for the VECPs.²²

In a motion for summary judgment, Bianchi requested that the COFC determine whether the government had complied with the earlier ASBCA decisions by paying the bank (rather than the contractor) compensation resulting from the contractor's VECPs.²³ First, the court found that it lacked subject matter jurisdiction under the Contract Disputes Act²⁴ to hear the case because the contractor had elected to pursue its contract appeal at the ASBCA; once the ASBCA rendered a decision in the case, the contractor could not then appeal that decision to the COFC.²⁵ Second, the court noted that even if it did have jurisdiction, Bianchi could not prevail on its motion for summary judgment.²⁶ Although the court agreed that there were no genuine issues of material fact, the case was not so one-sided that the contractor must prevail as a matter of law.²⁷ While the court did not make a determination on the merits of the contractor's argument (that the government should have paid the contractor the VECP royalties directly), the court stated that under the facts of this case, the law did not clearly mandate the government to pay the contractor directly.²⁸

Major Marci A. Lawson

¹⁴ *Id.*

¹⁵ *Id.* at 1384. The court mentioned the testimony of retired Colonel Mills stating that the "Army intended Applied's VECP to apply to the entire family of (air conditioners)." *Id.* The contractor presented this testimony as evidence that the government should apply the VECP to other air conditioning unit models. *Id.* Nevertheless, because this testimony was extrinsic evidence and also because the contract language was unambiguous, the court did not rely upon this testimony in its interpretation of the contract. *Id.* The court opined that if the contracting officer did, in fact, intend the VECP to apply to other models of air conditioners, then the contracting officer should have incorporated that intent into the contract. *Id.*

¹⁶ *Id.* at 1385.

¹⁷ See generally *supra* note 6 for explanation of VECP.

¹⁸ *Bianchi v. United States*, 68 Fed. Cl. 442 (2005).

¹⁹ *Id.*

²⁰ *Id.* at 443.

²¹ *Id.* at 445.

²² *Id.* at 451.

²³ *Id.*

²⁴ 41 U.S.C.S. §§ 601-13 (LEXIS 2006).

²⁵ *Bianchi*, 68 Fed. Cl. at 450. The court stated that its jurisdiction to hear contract claims is based upon the Contract Disputes Act (CDA). *Id.* Under the CDA, a contractor may appeal an adverse contracting officer's final decision either to the appropriate Board of Contract Appeals or to the Court of Federal Claims (COFC), but not to both. *Id.* The court stated that when the contractor elects to proceed to one forum, that election is binding and it may not then elect to proceed to another forum. *Id.* See also 41 U.S.C.S. §§ 601-13 (LEXIS 2006).

²⁶ *Bianchi*, 68 Fed. Cl. at 464-65.

²⁷ *Id.*

²⁸ *Id.* at 465-66. The court explained that in a motion for summary judgment, the movant must prove that there are no genuine issues of material fact and that the moving party must prevail as a matter of law. *Id.*