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The Clause

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The President's Column Susan Warshaw Ebner

Dear BCABA Members:

It's time for our June issue of *The Clause*. Not only are there some great articles in this quarter's *The Clause*, but there are some pictures in this edition that you will not want to miss. In follow up to our very successful Annual Conference, we planned and held our first ever Annual Mentoring Event in May, at which aspiring and recent law school graduates mingled with those of us who have been practicing Government Contracts for awhile. It was a great opportunity to meet people in the field, talk about what it's like to practice Government Contracts with judges and practitioners who are working in the trenches every day, and even find people willing to be a mentor. Many thanks to Anissa Parekh, Jerry Miles and Daniel Strouse, who brainstormed and carried off this event without a hitch. Make sure to view the pictures of the event!

We are now in the planning stages of our Annual Boards of Contract Appeals Judges Reception, which we cosponsor with the District of Columbia Bar Association Government Contracts and Litigation Section and the Federal Bar Association Government Contracts Committee. In order to be more inclusive and encourage greater participation, we are planning to host this event on July 13 as a summer social, and encourage all in the

(continued on page 3)

Table of Contents

BCABA, Inc. Directors/Officers	2
BCABA, Inc. Articles of Incorporation	69
ASBCA Charter Revisions	5
The Government's Right to Recoupment Under FAA ODR Case Law <i>by C. Scott Maravilla</i>	6
Limitations on Teaming Arrangements in Small Business Set-Asides <i>by Reginald M. Jones and Douglas P. Hibshman</i>	10
At What Cost? Contingency Contracting in Iraq and Afghanistan <i>by Michael Thibault and Christopher Shays</i>	20
Constructive Acceleration and Concurrent Delay: Is There a "Middle Ground"? <i>by Thomas H. Gourlay, Jr.</i>	29
The Doyle-Gresham Spectrum of Waiver of Contract Terms Through Prior Course of Dealing <i>by David Schneider</i>	65

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President's Column (cont'd):

government contracts legal community, including judges, practitioners, law students and summer associates to attend. Stay tuned for more information. We hope to get the invitations out shortly.

Plans for the Annual Conference, which will be held at **The Renaissance Hotel** on M Street, NW, Washington, DC on **October 7th**, are coming together now. Current plans for panels at the upcoming event include: Procurement Policy Developments In the Second Year of the Obama Administration; Implementation of the FERA Amendments to the False Claims Act; Adventures in Accounting: Preparing Claims for ... Lawyers [This is Pete McDonald's panel and is a work in progress]; The Interplay Between Administrative Law and Procurement Law: Seeing the Big Picture; and of course our Annual BCA Judges Panel. We have invited Chief Judge Randall R. Radar, the incoming Chief Judge of the Court of Appeals for the Federal Circuit, to keynote our event. Mark your calendars and save the date for what should be a really stupendous educational opportunity. We are hoping to obtain CLE credit for the event. Many thanks to David Black, our Vice President and Chair of the event this year.

Unfortunately some of our plans for the Spring and Summer have been delayed, but we hope to host them in the Fall. We had scheduled what would have been a wonderful Colloquium, in conjunction with The George Washington University Law School, on "Procurement Reform -- Next Steps for the White House Congress." However, conflicts arose and we had to postpone that event. Thanks to Michele Mintz Brown and Professor Chris Yukins, who are coordinating on all sides to see whether and when we can reschedule this event.

Jennifer Zucker and Shelley Ewald are working on the schedule for a Fall Trial Practicum. In this trial practicum, we hope to aid new and aspiring Government Contracts practitioners in gaining the skills they need to more effectively practice before our specialized tribunals. If you are interested in this event, please contact Jennifer Zucker or Shelley Ewald.

Last, we are proud to announce that we have established and incorporated the "Boards of Contract Appeals Bar Association, Inc.," as a 501(c)(6) nonprofit professional organization. We are working to wrap up things at the BCABA and will be hosting all new and future events as the "Boards of Contract Appeals Bar Association, Inc." or "BCABA, Inc." Those of you who are members of the BCABA will now be members of the BCABA, Inc. Dues notices will be coming to you in August for your annual renewal. More on this in our next issue. A copy of our filed Articles of Incorporation is found at the end of this issue.

I hope to see you at our BCA Judges reception in July and our Annual Meeting in October. Have a safe and productive summer!

Best regards,

Susan Warshaw Ebner
President, BCABA, Inc.

Annual Dues Notice

This is to remind everyone about the upcoming BCABA, Inc. dues procedures:

- ☺ Dues notices will be emailed on or about August 1st.
- ☺ Annual dues are \$30 for government employees, and \$45 for all others.
- ☺ Dues payments are due NLT September 30th.
- ☺ There are no second notices.
- ☺ Gold Medal firms are those that have all their government contract practitioners as members.
- ☺ Members who fail to pay their dues by September 30th do not appear in the Directory.
- ☺ The Membership Directory is maintained on the website.
- ☺ The BCABA, Inc., constitution and by-laws are on our website (www.bcaba.org).
- ☺ The BCABA, Inc., articles of incorporation are included in this edition of *The Clause* and will be posted on www.bcaba.org.

BCABA Reception First Ever Mentoring Event



Charter Revisions

Armed Services Board of Contract Appeals

Defense Federal Acquisition Regulation Supplement; Appendix A, Armed Services Board of Contract Appeals, Part 1-Charter, 75 Fed. Reg. 14095, March 24, 2010.

SUMMARY: DoD is issuing the updated Charter of the Armed Services Board of Contract Appeals (ASBCA), dated May 14, 2007. The ASBCA is chartered to serve as the authorized representative of the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force in hearing, considering, and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities regarding claims on contracts under the Contract Disputes Act of 1978 or other remedy-granting provisions.

Effective Date: March 24, 2010.

The Government's Right to Recoupment Under FAA ODRA Case Law

by
C. Scott Maravilla*

The Federal Aviation Administration (FAA) Office for Dispute Resolution for Acquisition (ODRA) is the FAA's exclusive administrative forum¹ for resolution of contract disputes and bid protests under the Acquisition Management System (AMS).² Due to its emphasis on alternative dispute resolution (ADR), the ODRA adjudicates few of the contract disputes brought before it. As of 2008, 91 percent of all contract disputes at the ODRA have been resolved through the use of voluntary ADR.³ Relatively recently, the ODRA has had the opportunity to visit the issue of the Government's right to recoupment in two Transportation Security Administration (TSA) contract disputes brought before the ODRA: *Contract Dispute of Siemens Government Services, Inc., Decision Denying Motion for Summary Judgment*⁴ and *Consolidated Contract Disputes of Huntleigh USA Corporation and Transportation Security Administration, Decision Denying Cross Motions for Summary Judgment*.^{5,6} The Aviation and Transportation Security Act, establishing the TSA, required the TSA to use the AMS for its procurement needs thereby conferring jurisdiction over its AMS procurements to the ODRA.⁷ However, on December 26, 2007, Congress enacted the Consolidated Appropriations Act of 2008 (CAA)⁸ repealing TSA's authority to use the AMS in its acquisitions and, instead, to use the FAR.

Contract Dispute of Siemens Government Services, Inc.; Decision Denying Motion for Summary Judgment, 08-TSA-040, 2010 ODRA LEXIS 1.

The Dispute was brought by Siemens Government Services, Inc. (Siemens) against the TSA seeking recoupment of monies withheld by the TSA as alleged overpayments. The contract in question required Siemens to perform preventive and corrective maintenance on TSA-owned security equipment deployed at airports throughout the United States.⁹ Pursuant to the Disputes Clause of the contract, Siemens asserted that part of the monies withheld by the TSA should have been filed as a Dispute with the ODRA and not as a unilateral setoff by the Contracting Officer.¹⁰ Consequently, a large portion of the sums withheld would then have been untimely before the ODRA.¹¹

The ODRA first observed that "[i]t is well established that the Government has a common law right to setoff contract debts to the United States against contract payments otherwise due to the debtor."¹² The ODRA recognized that the Government's common law contractual rights are embedded in the AMS.¹³ Consequently, as "a routine contract administration function," the act of setoff or recoupment "is not subject to the time limitations applicable to the filing of a contract dispute."¹⁴

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The Government's Right to Recoupment (cont'd):

Consolidated Contract Disputes of Huntleigh USA Corporation and Transportation Security Administration; Decision Denying Cross Motions for Summary Judgment, 04-TSA-008 and 06-TSA-025, 2009 ODRA LEXIS 6.

Huntleigh and the TSA entered into an undefinitized letter contract after 9/11, which required Huntleigh to provide temporary security screeners at 45 airports until the Federal screeners could be deployed.¹⁵ Huntleigh filed a Dispute with the ODRA seeking the balance of its unpaid invoices, and the TSA brought its own Dispute seeking recoupment of sums allegedly overpaid to Huntleigh.¹⁶ The TSA based its recoupment claim on the argument that it had absolute authority to impose a price for Huntleigh's services pursuant to the Contract Price Definitization Clause.¹⁷ The Clause provided for a "schedule to definitize the Contract before the end of the contemplated nine-month performance period" and "gives the TSA the unilateral right to 'determine a reasonable price or fee' if the parties cannot agree."¹⁸ The AMS Clause in question¹⁹ states, in relevant part:

- (a) A ____ [insert the type of contract] contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the price and any price related terms of a ____ [insert the type of contract] contract. The Contractor agrees to submit a ____ [insert specific type of proposal (e.g., fixed-price or cost-and-fee)] proposal and cost or pricing data supporting its proposal.
- (b) The schedule for negotiating the price of this contract is [insert target date for definitization of the contract price and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of make-or-buy and subcontracting plans and cost or pricing data]:
- (c) ***If agreement on the contract price is not reached by the target date in paragraph (b) above, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the Director of Acquisition and Contracting, or Chief of the Contracting Office, determine a reasonable price or fee, subject to Contractor appeal as provided in the "Contract Disputes" clause.*** In any event, the Contractor shall proceed with completion of the contract, subject only to the "Limitation of FAA Liability" clause. . . .²⁰

Notably, the FAR uses similar language to that in the AMS. The FAR states, in relevant part:

As prescribed in 16.6034(b)(3), insert the following clause: Contract Definitization (OCT 1997) (a) A ____ [insert specific type of contract] definitive contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition

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The Government's Right to Recoupment (cont'd):

Regulation (FAR) on the date of execution of the letter contract, (2) all clauses required by law on the date of execution of the definitive contract, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a __ [insert specific type of proposal (e.g., fixed-price or cost-and-fee)] proposal and cost or pricing data supporting its proposal.

(b) The schedule for definitizing this contract is [insert target date for definitization of the contract and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of make-or-buy and subcontracting plans and cost or pricing data]:

(c) ***If agreement on a definitive contract to supersede this letter contract is not reached by the target date*** in paragraph (b) above, or within any extension of it granted by the Contracting Officer, ***the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee*** in accordance with subpart 15.4 and part 31 of the FAR, ***subject to Contractor appeal as provided in the Disputes clause***. In any event, the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause. . . .²¹

The ODRA rejected the TSA's position that Huntleigh had the burden to prove that TSA's definitized price was unreasonable.²² Instead, the ODRA held that, unlike any "other standard clauses in government contracting that give the Government a right to assert and prove claims, the Government, here the TSA, "has the burden to prove by a preponderance of the evidence that its unilaterally definitized price . . . actually is 'a reasonable price or fee,' as stated in the Definitization Clause."²³ The ODRA analogized the Definitization Clause with challenges under similar clauses with regard to terminations for default and liquidated damages.²⁴

* - C. Scott Maravilla is a Dispute Resolution Officer, Federal Aviation Administration, Office of Dispute Resolution for Acquisition. The Author's full biography is available at www.faa.gov/go/odra.

Endnotes

1. The FAA Administrator, through the ODRA, adjudicates all "bid protests or contract disputes which are not resolved through alternative dispute resolution." 49 U.S.C. §40110(d)(4).
2. The AMS was established in response to the 1996 Department of Transportation and Related Appropriations Act, Pub. L. No. 104-50, which mandated that the FAA develop its own unique acquisition management system pursuant to its own unique procurement needs.
3. See Anthony N. Palladino, Marie A. Collins, and Behn M. Kelly, The FAA ODRA: A Tenth Anniversary

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The Government's Right to Recoupment (cont'd):

Endnotes (cont'd)

- Report, *The Procurement Lawyer*, Vol. 43, No. 3, Spring 2008 at 12; *See also* Anthony N. Palladino, Marie A. Collins, and Behn M. Kelly, The FAA's Unique Disputes Process: A Primer, *The Air & Space Lawyer*, Vol. 22, No. 1, 2008 at 17.
4. 08-TSA-040, 2010 ODRA LEXIS 1.
 5. 04-TSA-008 and 06-TSA-025, 2009 ODRA LEXIS 6.
 6. The full text of these decisions are also available online at www.faa.gov/go/odra.
 7. Pub. L. No. 107-71, §101(n), 115 Stat. at 602.
 8. Pub. L. No. 110-161, 121 Stat. 1844.
 9. 2010 ODRA LEXIS 1 at 1.
 10. *Id.* at 22.
 11. *Id.*
 12. *Id.* at 22-23 citing *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947).
 13. *Id.* at 23.
 14. *Id.* at 25.
 15. 2009 ODRA LEXIS 6 at 3-4.
 16. The Disputes were individually filed and consolidated for decisional purposes. *See Huntleigh*, 04-TSA-008 and -025; 2009 ODRA LEXIS 6.
 17. 2009 ODRA LEXIS 6 at 4-5, 7.
 18. *Id.* at 7.
 19. The TSA Clause in the Letter Contract omitted paragraph (d) of the AMS Clause. *See id.* at 5, fn. 3.
 20. AMS Clause 3.2.4-23 - Contract Price Definitization (January 2010) (emphasis added).
 21. 48 C.F.R. § 52.216 - 25 - Contract Definitization (emphasis added).
 22. The ODRA stated: "TSA's effort to collect alleged overpayments after definitization is fundamentally indistinguishable from other recoupment claims, and it is well established that when 'the Government recoups an erroneous payment, it is pressing a Government claim and, thus, under the normal rules regarding burdens of proof, the Government must prove its entitlement to the refund by a preponderance of the evidence.'" *Id.* at 8 citing *In re Thomas*, AGBCA No. 2001-138-1, 03-1 BCA ¶32,219, citing *W.B. & A., Inc.*, ASBCA No. 32524, 89-2 BCA ¶21,736.
 23. *Id.* at 8-9 (emphasis in original).
 24. *Id.*

Limitations on Teaming Arrangements in Small Business Set-Asides

by
Reginald M. Jones
And
*Douglas P. Hibshman**

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The United States government sets aside approximately 23 percent of all procurement dollars spent annually, that is, some \$100 billion last year alone, for the procurement of goods and services from small businesses. About 15 percent of that amount is designated for federal construction contracts set aside for small business prime contractors. Such money comes with a number of strings attached. Any contractor seeking to compete for small business set-aside must understand the Small Business Administration (SBA) rules and regulations, which are contained in Title 13 of the Code of Federal Regulations. The SBA regulations and rules are complicated and can be confusing, especially when applied to teaming arrangements between two or more contractors competing for small business set-asides.

Many small business concerns (SBCs) are not capable of performing a significant percentage of the procurements set aside for small businesses by themselves. Similarly, many larger business concerns acting alone are ineligible to compete for small business set-asides because of their size. These realities make it desirable for small business contractors to team with other SBCs or with large business concerns to enable the small business contractor to successfully compete for and perform small business set-aside contracts. The SBA regulations and the Federal Acquisition Regulation (FAR) provide small business contractors several teaming arrangement vehicles to use to team up with large and small businesses alike.¹ The most common teaming arrangements are joint venture agreements and teaming agreements.

The use of these teaming arrangements, however, presents significant potential risks for contractors. Teaming arrangements can violate the SBA affiliation rules, which the SBA uses to analyze the relationships between a concern competing for a small business set-aside and its affiliated concerns to determine if the competing concern conforms to the procurement's applicable size requirements. Even the appearance of an affiliatory teaming arrangement can force contractors to dedicate significant time, effort, and resources to prove that they meet the small business size standard for a particular procurement. As such, SBCs must be familiar with the nuanced limitations on the use of teaming arrangements.

This article addresses the SBA regulations and FAR provisions that govern this unique and potentially confusing area of the law. It provides practical guidance for contractors preparing to compete for a small business set-aside through the use of teaming arrangements.

SBA Size Standards and Affiliation Rules

The SBA regulations establish small business size standards by industry based on a
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Limitations on Teaming Arrangements (cont'd):

particular industry's North American Industry Classification System (NAICS) code.² Each NAICS code addressed in the SBA regulations is assigned a designated size standard based on (1) a concern's average annual receipts (total income or gross income), or (2) a concern's number of employees.³ The designated SBA size standards for small business set-asides based on average annual receipts range from \$750,000 to \$33.5 million depending on the industry or NAICS code at issue, and the designated SBA size standards based on number of employees range from 100 to 1,500 employees depending on the NAICS code at issue.⁴ Concerns that do not meet the size standard of the applicable procurement are ineligible to compete for, or receive, the contract award.

Understandably, many SBCs do not have the bonding capacity to bond a \$33.5 million procurement, or even a \$14 million procurement, without assistance from a larger, more experienced contractor. Therefore, it is common for SBCs to team up with other large contractors that are capable of providing the craft labor, equipment, financing, and technical capabilities required to perform the contract. When forming these teaming arrangements, however, SBCs must ensure that the very act of entering into a teaming arrangement with one or more contractors does not cause the SBC to exceed the size standard of the procurement under the SBA's affiliation rules.

SBA determinations of the size of an SBC with regard to its eligibility to compete for a small business set-aside contract award, known as "size determinations," are made by considering the size of the SBC competing for the small business set-aside in combination with any of the SBC's affiliates. Often the affiliation of a SBC with another concern is enough for the SBA to find that the SBC is a "large" rather than a "small" business concern for the purposes of a particular set-aside. An SBC that otherwise satisfies the size standard of a particular small business set-aside on its own, whether based on average annual receipts or number of employees, will become ineligible to compete for the set-aside contract award if the aggregated size of the SBC and its affiliates exceeds the size standard of the procurement.

The SBA affiliation rules are found primarily at 13 C.F.R. §121.103. The SBA considers concerns to be affiliates of one another if, either directly or indirectly, "one controls or has the power to control the other, or a third party or parties controls or has the power to control both."⁵ Generally, a person or entity that owns or has the power to control 50 percent or more of a concern, or controls the management of the concern, is deemed to be in "control" of the concern for affiliation purposes.⁶ It does not matter if control is actually exercised as long as the power to control exists.⁷

When making affiliation determinations, the SBA considers all appropriate factors, including common ownership or management; identical or substantially identical business and economic interests; past relationships between the concerns, such as previous teaming arrangements or prime/ subcontractor relationships; whether the SBC is "unusually reliant" on a potential affiliate as an "ostensible subcontractor;" and the concerns' status as joint venturers.⁸

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Limitations on Teaming Arrangements (cont'd):

The SBA's affiliation inquiry calls for a "totality of the circumstances" analysis of all facts and circumstances that may indicate the existence of an affiliatory relationship, and the SBA may find that an affiliation exists even though no single factor is sufficient to constitute affiliation on its own.⁹ In other words, affiliation can arise where business or personal ties, combinations, or relationships lead the SBA to "a reasonable conclusion" that businesses are affiliated.¹⁰

A finding of affiliation requires the SBA to aggregate the average annual receipts or number of employees of an SBC with those of all of its affiliated concerns to determine if the SBC satisfies the size standard of the small business set-asides for which it competes.¹¹ Generally, the finding of an affiliatory relationship between an SBC and any other concerns ends that SBC's ability to compete for a small business set-aside, because the aggregated average annual receipts or number of employees of the SBC will be increased by those of its affiliates, likely causing the SBC to exceed the size standard of the procurement. Therefore, an SBC must evaluate any potential affiliatory relationships that it has with other concerns before deciding to compete for a set-aside. In the event a potential affiliatory relationship is found, the SBC must take steps to terminate or mitigate that relationship before the SBC's size is challenged by another offeror or by the procuring agency during the competition for a small business set-aside.

Joint Ventures and Teaming Arrangements—Which to Use and When

Teaming arrangements are a valuable tool for contractors to use to pool resources, management abilities, and technical knowledge to better compete for federal contract awards. If not done properly, however, the use of teaming arrangements can lead to adverse consequences for SBCs with regards to their ability to satisfy the size standards of small business set-asides.

Subpart 9.6 of the FAR recognizes two distinct forms of "teaming arrangements" that may be used by concerns competing for federal contract awards: (1) a teaming arrangement based on a joint venture; and (2) a teaming arrangement based on a teaming agreement.¹² The FAR recognizes that teaming arrangements are beneficial to both potential offerors and to the government because teaming arrangements allow contractors to "[c]omplement each other's unique capabilities" and "[o]ffer the Government the best combination of performance, cost, and delivery for the system or product being acquired."¹³ As a result of the mutual benefits that teaming arrangements provide the government and contractors, the FAR requires procuring agencies to "recognize the integrity and validity of contractor team arrangements" as long as those arrangements are disclosed to the agency via the contract proposal.¹⁴

The FAR defines a joint venture as a situation in which "[t]wo or more companies form a partnership or joint venture to act as a potential prime contractor" on a federal procurement.¹⁵ Joint ventures are generally considered to be independent legal entities separate and distinct from the entities that form them. Joint ventures have the ability to compete for and receive federal contract awards as prime contractors, to subcontract work to other contractors, and to receive work as subcontractors on federal contracts.

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Limitations on Teaming Arrangements (cont'd):

The FAR defines a teaming agreement as a situation in which “a potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.”¹⁶ Teaming agreements are essentially contracts between a potential prime contractor and one or more potential subcontractors in which the prime contractor agrees to subcontract a designated portion of the contract work to its potential subcontractor should it receive the prime contract award. Teaming agreements are extremely flexible tools for prime contractors and subcontractors to use to form binding cooperative relationships to compete for federal contracts.

When to Use Joint Venture Agreements

Joint ventures should only be used by SBCs in limited circumstances and with extreme caution when competing for small business set-asides because the SBA regulations limit the number of procurements that a joint venture may compete for and the regulations presume that the members of a joint venture are affiliated for size determination purposes. The SBA regulations limit a joint venture’s ability to compete for small business set-asides by prohibiting a joint venture from “submitting more than three offers over a two-year period, starting from the date of the submission of the first offer.”¹⁷ This restriction prevents joint ventures from competing for every small business set-aside for which they may be eligible. It requires joint ventures to strategically target and compete for only the contracts that they believe that they can realistically receive. Such restraint is not easy in an economy where the number of offerors or bidders on any given procurement has increased from four or five a few years ago to 15 or more in today’s market.

Affiliation is a significant concern for joint venture teaming arrangements because “concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.”¹⁸ SBCs should only enter joint venture relationships with other SBCs, and only when the aggregated average annual receipts or number of employees of all members of the joint venture will not exceed the size standard of the small business set-asides for which the joint venture plans to compete. Joint ventures between an SBC and a large business concern, by definition, disqualify the joint venture from competing for small business set-asides with size standards below the average annual receipts or number of employees of the large concern because the SBC and large concerns will be viewed as affiliates, thereby causing the joint venture to exceed the size standard of small business set-asides.¹⁹

The SBA regulations recognize three limited exceptions to the general rule that members of a joint venture are presumed to be affiliated with each other for size determination purposes. Specifically, the regulations carve out limited exceptions from the general affiliation rules for Mentor Protégé joint ventures, for SBC-only joint ventures, and for 8(a) joint ventures.

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Limitations on Teaming Arrangements (cont'd):

Mentor Protégé Joint Ventures

The first exception from the general SBA affiliation rules allows an SBC to joint venture with a large business concern under the SBA's Mentor Protégé Program established by 13 C.F.R. §124.520.²⁰ The SBA's Mentor Protégé Program is designed to encourage large business concerns to team with, or mentor, small business concerns in performing federal prime contracts. The assistance provided by the mentor concern may be technical or management assistance, financial assistance in the form of investment or loans, performance assistance as a subcontractor, or teaming with the SBC as a joint venturer to compete as a prime contractor for small business set-asides.²¹

The mentor and protégé firms must enter into a written agreement setting forth the protégé's needs and describing the assistance that the mentor is committed to providing to address those needs.²² The agreement must specify that the mentor will provide such assistance to the protégé for a period of at least one year, and the SBA must approve the mentor protégé agreement.²³

The protégé must be a "socially and economically disadvantaged" small business concern, that is, an 8(a) SBC under the SBA regulations.²⁴ The protégé must also be in the developmental stage of the 8(a) program, have not yet received an 8(a) contract, or have a size that is less than half the size standard corresponding to its primary NAICS code, and be in good standing in the 8(a) program.²⁵ To qualify as a mentor, a concern must demonstrate that it possesses favorable financial health (including profitability for at least two years), good character, does not appear on the federal list of debarred or suspended contractors, and can impart value to a protégé due to lessons learned and practical experience gained through the 8(a) program or from its general knowledge of government contracting.²⁶

Mentor protégé teaming arrangements are generally immune from the SBA affiliation rules. The SBA regulations specifically state that no determination of affiliation will be found between a mentor and protégé firm based solely on the mentor protégé agreement, the assistance provided by the mentor to the protégé, or the mentor's ownership of up to 40 percent of the protégé.²⁷ As such, an 8(a) that joint ventures with a large business concern will not be presumed to be affiliated with that large business concern like non-mentor protégé joint venturers are.

The mentor protégé exception provides a unique opportunity for SBCs and large concerns alike to pool their resources and compete for small business set-asides. The drawback to this exception is that it is a narrow carve-out from the general rule that deems all joint venturers to be affiliated, and the exception is cumbersome to set up and manage. However, SBCs that are willing and capable of pursuing a mentor protégé joint venture can enjoy a significant edge over other SBCs because, in theory, the mentor protégé arrangement allows the protégé to take advantage of the mentor's vast knowledge, experience, and resources. Similarly, it allows the mentor to participate in a market for which it is otherwise ineligible.

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Limitations on Teaming Arrangements (cont'd):

SBC-only Joint Ventures

The second exception from the general SBA affiliation rules allows an SBC to joint venture with another SBC to compete for a small business set-aside as long as both concerns individually satisfy the procurement's size standard, and (1) the procurement is a "bundled" procurement where the procuring agency consolidated two or more procurement requirements previously performed under separate smaller contracts into a single procurement that is likely unsuitable for a lone SBC to perform due to the size of the procurement or the complexity of the performance required; or (2) the procurement is not a "bundled" procurement and the dollar value of the procurement exceeds half of the size standard where the size standard is based on average annual receipts, or the procurement exceeds \$10 million where the procurement size standard is based on number of employees.²⁸

This exception encourages SBCs to compete in joint ventures for small business set-aside contract awards that those SBCs would otherwise be unable to perform as individual concerns due to the size and complexity of the procurement. Because the SBA wants to encourage such beneficial teaming arrangements between SBCs, no affiliation will be found between two SBC members of a joint venture as long as the project the joint venture seeks to perform is at least half of the size of the size standard of the procurement, or in excess of \$10 million. This exception can be of tremendous benefit to two SBCs that seek to pool their resources and compete for procurements they would otherwise be incapable of performing on their own.

8(a) Joint Ventures

The third and final exception for joint ventures from the general SBA affiliation rules is limited to 8(a) set-asides. Specifically, this exception allows an 8(a) SBC to joint venture with one or more 8(a)s or non-8(a) concerns to compete for an 8(a) small business set-aside as long as all members of the joint venture satisfy the size standard of the procurement, the size of at least one of the 8(a)s is less than half of the procurement's size standard, and the dollar value of the procurement exceeds half of the applicable size standard based on average annual receipts or the procurement exceeds \$10 million where the size standard is based on the number of employees.²⁹

This exception provides opportunities for one or more 8(a)s to joint venture with each other, or with other small non-8(a) concerns, without being affiliated with each other. All of the members of the joint venture must be SBCs with regards to the procurement at issue, and at least one of the 8(a)s must be particularly small in size, or less than half of the size of the procurement's size standard. Such joint ventures are particularly useful in the construction industry where several 8(a)s, along with non-8(a) contractors, can pool their resources, management, and technical capabilities to compete for 8(a) set-asides.

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Limitations on Teaming Arrangements (cont'd):

When to Use Teaming Agreements

SBCs are authorized by the SBA regulations to subcontract portions of set-aside contracts to other large or small business concerns unless specifically prohibited from doing so by statute, regulation, or the solicitation.³⁰ SBCs commonly form these prime contractor/subcontractor arrangements through the use of teaming agreements. Teaming agreements are valuable vehicles that enable SBCs, acting as prime contractors, to subcontract work to other SBCs or to large businesses in order to compete for and perform small business set-asides. Teaming agreements allow SBCs to maintain their small business size standard and to obtain subcontracting assistance from other SBCs or large business concerns.

There are limits on the amount of work that an SBC prime contractor may subcontract to other contractors. Specifically, an SBC prime contractor must perform: (1) at least 50 percent of the cost of the contract incurred for personnel with its own employees on a services contract (except for construction); (2) at least 50 percent of the cost of manufacturing supplies or products on a supplies or products contract; (3) at least 15 percent of the cost of the contract (not including the cost of materials) with its own employees on general construction contracts; and (4) at least 25 percent of the cost of the contract (not including the cost of materials) on a construction contract calling for a “special trade contractor” as the prime contractor.³¹

Unlike joint venturers, parties to teaming agreements are not presumed to be affiliated with each other based solely on their teaming relationship, but team members can be found to be affiliated under the general SBA rules of affiliation. Specifically, parties to teaming agreements may be found by the SBA to be affiliates based on common control or management (13 C.F.R. §121.103(a)), identical or substantially identical business or economic interests (13 C.F.R. §121.103(f)), or the “Ostensible Subcontractor” rule (13 C.F.R. §121.103(h)(4)).

SBCs must ensure that they team only with concerns that do not raise a significant appearance of affiliation. To successfully navigate the SBA’s affiliation rules, an SBC should avoid teaming agreements with concerns that (1) share common ownership or control with the SBC; (2) have identical business and economic interests as the SBC; or (3) would be deemed to form an “ostensible subcontractor” relationship with the SBC. SBCs and their teaming partners should be wary of teaming exclusively with the same subcontractors over and over, as this practice may lead to a claim that the two concerns have substantially identical business interests, especially if the two concerns do not have similar teaming relationships with third-party contractors. An SBC’s failure to weed out these potential affiliatory relationships from its teaming arrangements makes it susceptible to protests of its size status based on affiliation principles.

The “Ostensible Subcontractor” Rule

The “Ostensible Subcontractor” rule is oftentimes the most common type of affiliation found between a prime contractor and the contractors with which it teams. An ostensible subcontractor is one that “performs primary and vital requirements of a contract,” or is a
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Limitations on Teaming Arrangements (cont'd):

subcontractor that the prime contractor is “unusually reliant” upon.³² The SBA regulations affiliate a prime contractor with all of its ostensible subcontractors for size determination purposes.³³ The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade the SBA’s size requirements.

As with other forms of affiliation, the finding of affiliation based on the “Ostensible Subcontractor” rule will likely cause an SBC prime contractor to exceed the size standard of the procurement for which it is competing. Therefore, any relationships between an SBC prime contractor and one of its subcontractors that could potentially be characterized as an ostensible subcontractor relationship should be avoided.

The SBA looks at all aspects of the relationship between an SBC prime contractor and its subcontractors to determine if an ostensible subcontractor relationship exists, including the following factors: (1) the terms of the prime contractor’s proposal, to include management of the contract, technical responsibilities of the parties, and the percentage of the work subcontracted to the large concern; (2) the terms of the teaming agreement between the prime contractor and its subcontractors, specifically provisions dealing with bonding assistance; and (3) whether the subcontractor is an incumbent contractor on a procurement and ineligible to submit a proposal because it exceeds the size standard of the procurement.³⁴ While these factors are important to determining whether there is an ostensible subcontracting relationship, the factors are not all-inclusive. The SBA regulations specifically require that a “totality of the circumstances” analysis be conducted when determining whether such a relationship exists.

Any SBC prime contractor on a project, whether the prime contractor is a joint venture or an independent contractor, is susceptible of teaming with an ostensible subcontractor and triggering affiliation between the prime contractor and the subcontractor. This includes a mentor protégé arrangement where the protégé serves as the prime contractor on a small business set-aside and subcontracts significant work to its mentor to the extent that the protégé is “unusually reliant” on that mentor to perform.

The key for an SBC to avoid falling victim to the ostensible subcontractor trap is to ensure that its proposal, proposal-related documentation, and teaming agreements do not indicate, on their face, that an ostensible subcontractor relationship exists. Specifically, SBCs must be careful not to “oversell” the technical expertise, past experience, or work to be performed by their subcontractors in the proposal or proposal-related documentation.³⁵

While it may be necessary for an SBC to emphasize the positive qualities of a large subcontractor to enable it to compete effectively for a contract award, the SBC does not want to make it blatantly obvious that the SBC is wholly dependent or “unusually reliant” on the large subcontractor to perform. An SBC must ensure that it proposes to perform a significant portion of the contract work or management with its own resources, or to spread this work and management out amongst multiple subcontractors to ensure it is not “unusually reliant” on any one subcontractor.³⁶

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Limitations on Teaming Arrangements (cont'd):

At the same time, an SBC prime contractor does not want to minimize the actual work to be performed by its subcontractors. The failure of an SBC prime contractor to sufficiently detail the work to be performed by its own employees on the one hand, and by its subcontractor employees on the other, will be interpreted to the SBC's detriment during an ostensible subcontractor analysis.³⁷ In sum, an SBC's proposal and any documentation produced with that proposal can be used against it by the procuring agency, and possibly by other competing offerors, to challenge on "ostensible subcontractor" grounds the SBC's size and eligibility to compete for small business set-asides. Therefore, SBCs must ensure that their proposals are tightly crafted to ensure that a reasonable reading of the proposal and its accompanying documents does not raise the appearance of an ostensible subcontractor relationship.

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Endnotes

1. 13 C.F.R., Pts. 121-134 (2005); FAR Subpart 9.6.
2. 13 C.F.R. §121.201.
3. 13 C.F.R. §§121.103, 121.201; *see also* Size Appeal of Channel Logistics, LLC, SBA No. SIZ-5019 (2008) (a concern's receipts are defined as its "total income" plus "cost of goods sold" as those terms are defined and reported on its federal tax returns); Size Appeal of Weidlinger Associates, Inc., SBA No. SIZ-4846 (2007) (the SBA determines the number of employees by calculating the average number of individuals employed by a concern and its affiliates, including part-time employees, during the preceding 12 months).
4. 13 C.F.R. §121.201.
5. 13 C.F.R. §121.103(a)(1).
6. 13 C.F.R. §121.103(c)-(e).
7. 13 C.F.R. §121.103(a)(1); *see also* Size Appeal of Eagle Pharmaceuticals, Inc., SBA No. SIZ-5023 (2009) (control over a concern will exist where a person or entity has the power to veto or block certain actions of the concern, or to exercise "negative control" over the concern, even when the controlling person or entity owns or controls less than 50 percent of the concern).
8. 13 C.F.R. §121.103(a)-(h).
9. 13 C.F.R. §121.103(a)(5); *see also* Size Appeal of Taylor Consultants Inc., SBA No. SIZ-5049 (2009) ("Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor (13 C.F.R. §121.103(c), (d), (e), (f), or (g)), the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates.") (citations omitted).
10. *Size Appeal of Taylor Consultants*.
11. 13 C.F.R. §§121.104(d), 121.106(b)(4)(i).
12. FAR 9.601.
13. FAR 9.602(a)(1)-(2).
14. FAR 9.603.
15. FAR 9.601(1).
16. FAR 9.601(2).

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Limitations on Teaming Arrangements (cont'd):

Endnotes (cont'd)

17. 13 C.F.R. §121.103(h).
18. 13 C.F.R. §121.103(h)(2) (emphasis added).
19. *See* Size Appeal of Medical and Occupational Services Alliance, SBA No. SIZ-4989 (2008) (firms that submit offers on a particular procurement as joint venturers are “affiliates with regard to that contract, and they will be aggregated for the purpose of determining size for that procurement.”).
20. 13 C.F.R. §121.103(h)(3)(iii). A number of other agencies besides the SBA have Mentor Protégé Programs, including the Department of Defense, Department of State, Department of Energy, Department of Veterans Affairs, NASA, and the FAA.
21. 13 C.F.R. §124.520(a).
22. 13 C.F.R. §124.520(e).
23. *Id.*
24. *See* 13 C.F.R. §124.101.
25. 13 C.F.R. §124.520(c).
26. *Id.*
27. 13 C.F.R. §124.520(d)(4).
28. 13 C.F.R. §121.103(h)(3)(i).
29. 13 C.F.R. §121.103(h)(3)(ii).
30. *See* 13 C.F.R. §125.6.
31. 13 C.F.R. §125.6(a). The SBA Regulations also set minimum performance standards for SBC prime contractors on small business contracts set-aside for HUBZone or Service Disabled Veteran Owned (SDVO) SBCs. *See* 13 C.F.R. §125.6(b)-(c).
32. 13 C.F.R. §121.103(h)(4).
33. *Id.*
34. *Id.*
35. *See* Size Appeal of TKTM Corp., SBA No. SIZ-4885 (2008)(ostensible subcontractor relationship existed where prime contractor indicated in its proposal that its subcontractor would perform approximately 25 percent of the work, the prime contractor was reliant on the subcontractor’s “enormous capacity” and its heavy equipment, and the prime contractor would perform primarily administrative functions); Size Appeal of RTL Networks, Inc., SBA No. SIZ-4923 (2008) (ostensible subcontractor relationship existed where prime contractor was unduly reliant on the past performance of its subcontractor and planned to hire the entire incumbent staff of its subcontractor).
36. *See* Size Appeal of Alutiiq International Solutions LLC, SBA No. SIZ-5098 (2009) (subcontractor that was going to perform approximately 45 to 49 percent of the contract work was not an ostensible subcontractor).
37. *See* Size Appeal of ACCESS Systems, Inc., SBA No. SIZ-4843 (2007) (prime contractor’s failure to segregate out which duties each of its team members were going to perform on the contract was an indication of a possible ostensible subcontractor relationship).



At What Cost?
Contingency Contracting in Iraq and Afghanistan
by
Michael Thibault and Christopher Shays*

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Extensive reliance on contractors to support U.S. operations in Iraq and Afghanistan, compounded by highly publicized allegations of waste, fraud, and abuse — including misuse of force by private security contractors — spurred Congress to create the Commission on Wartime Contracting (CWC) in Iraq and Afghanistan. The Commission’s legislative mandate is to examine the role of contractors, document shortcomings in how they are managed, and make recommendations for improvement. Its June 2009 interim report, “*At What Cost? Contingency Contracting in Iraq and Afghanistan*,”¹ is the focus of this article.

The Problem

Since 2001, Congress has appropriated nearly \$888 billion to pay for U.S. operations in Iraq and Afghanistan.² Reliance on private contractors to support these contingency operations has reached unprecedented levels. More than 240,000 contractor employees— about 80 percent of them foreign nationals—currently work in both countries for the Department of Defense (DOD) alone.³ There are nearly as many contractors as military personnel, 282,000 of whom serve in Iraq and Afghanistan.⁴

Contractor employees manage dining facilities, wash uniforms, transport supplies, repair equipment, build everything from roads to water-treatment systems and hospitals, and run programs to foster local democracy and women’s rights. Contractors also perform essential security functions, including protecting diplomats and guarding military bases and convoys. The growth in contingency contracting, even as federal contracting personnel levels remain constant, has overtaken our capacity to keep up with the unprecedented workload.

The U.S. government’s systems for awarding contracts, overseeing and auditing them, and managing contractors in a contingency environment are severely stressed. Widespread criticism and concerns about waste, fraud, abuse, and mismanagement have surfaced. Over the years, numerous audits, investigations, and congressional hearings have documented a host of problems.

The Defense Contract Audit Agency estimated in 2006 that there were more than \$10 billion in questionable and unsupported costs relating to reviewed contracts valued at \$57 billion for Iraq reconstruction and military support.⁵ Another \$300 billion worth of contracts had yet to be audited. In a May 2008 congressional hearing, the DOD deputy inspector general testified that its review of 702 U.S. Army commercial payments in Iraq, Kuwait, and Egypt revealed an estimated \$1.4 billion in contract and vendor payments made without the required supporting documentation and information.⁶ These instances of contingency contracting waste are only the tip of the iceberg.

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At What Cost? (cont'd):

The Commission is required to survey and assess — but not replicate — the broad body of audits and recommendations already published on contingency contracting in Iraq and Afghanistan by the community of federal oversight agencies.⁷ So far, we have identified 527 reports containing nearly 1,300 recommendations. Many of these recommendations repeat themselves over and over. This literature is invaluable in documenting systemic and persistent problems of mismanagement, poor planning, and taxpayer money gone to waste. Several themes surface time and again:

- Insufficient staffing,
- Poor internal controls, and
- Failure to properly train frontline personnel on contingency contracting.

Despite the difficulty of operating in these environments, our military personnel, federal civilian employees, and private contractors have executed countless support tasks faithfully and well — too often at a personal price. Criticism of the contingency contract system and suggestions for reform in no way diminish their contribution or their sacrifices. Our mission is to bring about change that reduces waste so we may more efficiently use taxpayers' dollars to give our warfighters the support they deserve.

Who We Are

The CWC in Iraq and Afghanistan is an independent, bipartisan commission established by Congress in 2008, and charged with studying and assessing federal-agency contracting for reconstruction, logistical support of coalition forces, and the performance of security functions in Iraq and Afghanistan.⁸ Our mandate is broad. We are required to identify instances of contingency contracting waste, fraud, and abuse, and to recommend changes to improve accountability. We are authorized to conduct hearings and refer any violation or potential violations of law to the appropriate investigative authorities. The Commission is required to issue a final report to Congress by July 2011 with findings, lessons learned, and specific recommendations for systemic improvements in wartime contract management. The final report will identify and recommend strategies and activities designed to overcome the historical and bureaucratic barriers to implementing systemic reform.

The eight members of the Commission are co-chairs Michael Thibault and Christopher Shays, and commissioners Clark Kent Ervin, Grant S. Green, Robert J. Henke, Katherine Schinasi, Charles Tiefer, and Dov S. Zakheim.⁹ They bring a wide range of hands on and policy experience in government, law, the military, education, and business; and they share a deep commitment to reforming our system of planning, managing, and overseeing wartime contracts that support military, diplomatic, and reconstruction activities.

The good news about our task is that the system-wide problems are now so widely acknowledged that calls for reform are legion. The bad news is that these problems are so deeply rooted and interconnected — crossing the lines of administrations, budgetary issues, policy, doctrine, and historical accretion — that grappling with them and implementing rational

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At What Cost? (cont'd):

change presents enormous obstacles. But we believe the climate is ripe for making change happen.

Starting Point: The Intractable Issues on the Table

The Commission has identified a set of fundamental and interconnected issues to address in its final report. If successfully resolved, they hold promise for significant reform in contingency contracting.

First, there must be a sea change in leadership, culture, and accountability in the key agencies responsible for contingency operations. The expanding role of contracting must be recognized as a core mission and dealt with at every level. Institutional barriers that impede change must be identified, analyzed, and overcome. The U.S. Army's Gansler Commission report is a landmark effort on this front.¹⁰

Other issues of longstanding concern include staffing shortages, an inadequately trained federal acquisition workforce, and a lack of pre-deployment planning for contractor support and integration. Defining contract requirements, estimating contract costs and prices, enhancing competition, streamlining the acquisition process, overseeing contractor performance and compliance, and managing the heavy reliance on foreign-national subcontractors also cry out for attention.

Underlying these issues is a longstanding policy question: what contingency support services should and should not be outsourced — especially in the area of security support services for military and diplomatic personal details, security on military installations, and convoy protection? Congress has tasked the Commission to develop specific recommendations to improve the process for determining which functions are inherently governmental and which are appropriate for performance by contractors in a contingency environment.

The Iraq drawdown and the Afghanistan buildup pose an immediate challenge. The current drawdown of U.S. forces in Iraq risks incurring enormous waste, including money spent on completing projects that are no longer needed. On one trip to Iraq, we identified a particularly egregious example: a \$30 million project was underway to construct a new dining facility at a military forward operating base, Camp Delta, even though the existing one had been recently renovated and appeared perfectly adequate for the number of U.S. forces forecasted to remain at the base.

Finally, the disposition of and accountability for U.S. government property under the control of contractors in Iraq — worth at least \$3.5 billion — presents yet another high risk of waste as troops redeploy.¹¹ At the same time, in Afghanistan, the rapid buildup of U.S. troop strength imposes new responsibilities on contracting oversight personnel already stretched thin. Insufficient personnel to oversee contractor performance and the administration of property will exacerbate what is already a major issue in the country — management of federal property.

At What Cost? (cont'd):

Things That Need To Be Fixed Now

The Commission learned a great deal in its first year. “At What Cost?” (our interim report based on independent research); several hundred interviews; travels to Iraq, Afghanistan, and Kuwait; and hearings flagged problems that call for immediate attention by federal agencies and Congress. The issues of immediate concern include:

- The drawdown of U.S. forces in Iraq risks incurring enormous waste, which could range from completion of work that may not need to be done, to poorly controlled handling and disposition of U.S. government property.
- There is a critical shortage of qualified contract management personnel in theater and those that are there are stretched too thin. In particular, the process for designating and training contracting officer’s representatives to check contractor performance in theater is broken.
- The benefits of competition are not being fully realized because of the slow pace of the transition from the U.S. Army’s logistics civil augmentation program (LOGCAP) III single-award contract to the multiple-award LOGCAP IV contract.
- Too many contingency contractor business systems are inadequate and must be fixed to improve accountability.
- There is a need for greater accountability in the use of subcontractors. Subcontracts account for about 70 percent of the work, but government has very little visibility into their operations.
- The effectiveness of contractor support of expanded U.S. operations in Afghanistan is compromised by the failure to extract and apply lessons learned from Iraq, particularly those about poor coordination among agencies.
- DOD should accelerate its plans to establish a contracting command in Afghanistan. The troop surge in Afghanistan demands that contracting authority and oversight be conducted in-country rather than from Iraq, which is currently the case.
- DOD should take immediate steps to ensure that contractors providing security for our operating bases are well trained and properly equipped for adequately protecting our military force.

DOD immediately responded to the report by establishing a task force to deal with these high-risk areas. The commission is working closely with officials in DOD on these issues.

Key Areas of Investigation:

Management and Accountability

In focusing on wartime contracting in the areas of logistics, security, and reconstruction, we see many crosscutting issues that must be addressed at a systemic level. For example, neither the military nor the federal civilian acquisition workforce has expanded to keep pace with the enormous growth in the number and value of contracts in recent years. The demands of contingency contracting did not create this problem, but the wartime mission has exacerbated it.

Agencies must provide better and timelier training for employees who manage contracts
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At What Cost? (cont'd):

and oversee contractor performance. In particular, deployed military personnel are assigned as contracting officers' representatives only after they arrive in theater, where they have neither the time nor the Internet access needed to complete the requisite training.

We are also concerned that contract auditors are not used effectively in contingency contracting and that contracting officials all too often do not use contract "withhold" provisions recommended by their auditors. In addition, questions arising from many contract audit findings and recommendations are not properly resolved.

Logistics

Logistical support may be the most significant— it is certainly the most costly — piece of the contingency contracting pie. Without it, wars cannot be fought. Contractors provide critical support to U.S. military personnel in Iraq and Afghanistan, yet DOD cannot account for all the contracts or contractors it relies on. The lack of definitive information adversely affects commanders' ability to understand and make best use of the support they receive, impedes policymakers' ability to address the appropriate balance between contractors and military personnel, complicates the work of federal contract managers and auditors, and even raises questions about adequate force protection.

DOD has failed to recruit and retain enough staff to perform adequate contract oversight of its logistics support contracts. Inadequate oversight, poorly written statements of work, lack of competition, and contractor inefficiencies have contributed to billions of dollars in wasteful spending in the Army's largest contract for support services, the LOGCAP.

The LOGCAP contractors have a key role in the drawdown of U.S. military forces in Iraq. As military units withdraw from bases, the number of contractor employees needed to handle base closures, transfer activities, and disposal of government property will increase. Strong government oversight will be required, but preparations for this major shift out of Iraq and into Afghanistan or other areas are sketchy.

Security

The use of private security contractors for security services in the contingency environment has proven to be a vexing and contentious issue, aside from the underlying question of whether certain security roles constitute inherently governmental functions that should not be outsourced. Another issue is consistent training in and application of standards for the use of force. The Rules of Engagement, which define the use of military force by warfighters on the battlefield, are significantly different than the Rules for the Use of Force for private security contractors, which provide clear guidance about when to escalate force. There have been some instances, however, where application of these rules by private security contractors failed to provide adequate protection.

We are also concerned about problems with the selection, training, equipping, arming, performance, and accountability of private security contractor employees. These will require further analysis and perhaps policy and regulatory changes to ensure more effective oversight. *(continued on next page)*

At What Cost? (cont'd):

Reconstruction

Reconstruction activities present unique issues. Reconstruction, stabilization, and development activities in contingency operation zones often involve a host of government agencies and private-sector organizations. But the need for unity of effort and the achievement of measurable results is often hampered by weaknesses in the planning, organizing, coordinating, and oversight of reconstruction and development projects. There is no locus of planning, coordination, and information — a situation that undermines the goals of the mission, and one that demands a quick remedy. For example, the lack of coordination between U.S. Agency for International Development projects and those funded by DOD's Commander's Emergency Response Program poses a serious risk to the success of capacity building.

Hearings

Hearings are a critical part of the Commission's strategy to get to the truth, identify new research topics, and get a fix on how issues can be addressed. The Commission's first public hearing took place on February 2, 2009, in a historic venue, the Caucus Room of the U.S. Senate. The topic was lessons learned about wartime contracting by the inspectors general overseeing contingency contracting in Iraq and Afghanistan, with testimony by the special inspector general for Iraq reconstruction and the inspectors general of DOD, the Department of State, and the U.S. Agency for International Development. Also testifying were senators instrumental in creating the Commission and supporting its mandate: Senators Claire McCaskill (D-MO) and James Webb (D-VA), the original Senate sponsors of the legislation establishing the Commission; and Senator Susan Collins (R-ME), the ranking member of the Senate Homeland Security and Governmental Affairs Committee.

A hearing on May 4, 2009 addressed the U.S. Army's multibillion-dollar logistics contract that supports U.S. military operations overseas under LOGCAP. Officials from the U.S. Army Contracting Command, the Defense Contract Management Agency, the Defense Contract Audit Agency, and the Army's LOGCAP Program Office testified on issues including the contracting and property management challenges relating to the drawdown of forces in Iraq, the transition from the single-award LOGCAP III contract to the more competitive LOGCAP IV, contractor performance and the adequacy of contract oversight, as well as the structure and administration of LOGCAP.

On August 11, 2009, a hearing explored weaknesses in contractor business systems and the effectiveness of federal oversight and auditing of those systems, particularly the challenges government oversight officials face in auditing and enforcing remedies when contingency contractors' systems for estimating, billing, purchasing, labor, and compensation are inadequate. The Commission learned that half of the systems for billing and compensation amounting to some \$43 billion of work had been found "inadequate" by federal auditors. Witnesses included representatives from contractors DynCorp, Fluor, and KBR, as well as from the Defense Contract Management Agency, Defense Contract Audit Agency, and the U.S. Army Contracting Command. At a follow-up hearing on November 2, 2009, a senior DOD official made a public commitment to put in place a process within 90 days for resolving these

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At What Cost? (cont'd):

issues. And on December 4, DOD issued a policy memorandum instructing contract officers on how to resolve disagreements with its audit agency, the Defense Contract Audit Agency. This is exactly the kind of rapid reform that our hearings can generate.

On August 12, 2009, the Commission looked at the five-year, nearly \$5 billion contract awarded by the U.S. Army Intelligence and Security Command to Global Linguist Solutions (GLS) for translation and interpretation services in Iraq — a case study in contracting and subcontracting. The prime contractor, GLS, subcontracted work to two large competing bidders, Northrop Grumman and L-3 Communications, raising the question whether this multi-tiered subcontracting practice leads to increased costs.

A hearing on September 14, 2009, dealt with the State Department's selection, management, and oversight of security and other contractors in support of the Kabul embassy. The topic arose from the Commission's mandate to study the widespread use of private security contractors, and was spurred by recent allegations of misconduct among employees of the State Department's contractor, ArmorGroup North America, a unit of Wackenhut Services, Inc. The company attracted intense media scrutiny when a watchdog group released photos purporting to show ArmorGroup employees engaging in alcohol-fueled incidents of nudity, sexual misconduct, and degradation of junior employees. The State Department later announced that several guards and some supervisors had been fired and that it will not renew the contract.

On November 2, 2009, we explored the effectiveness of the DOD database — the Synchronized Deployment and Operational Tracker (SPOT) — an automated system for tracking all contingency contracts and all contractors deployed with the troops.

A December 18, 2009 hearing took a hard look at contracts for training the Afghan National Security Forces, an effort on which the U.S. government has spent more than \$20 billion since 2001. Reports from oversight agencies have found rampant corruption and equipment shortages among Afghan forces, plus poor contract management capability and a lack of accountability. Federal officials and representatives of the key training contractors DynCorp, MPRI, and Xe testified and took questions from the commissioners.

More information on CWC hearings is available at www.wartimecontracting.gov/hearings.htm.

Special Reports

Commission hearings may generate special reports calling for immediate action to address significant contracting problems that adversely affect U.S. operations and that cannot wait for the recommendations in the final report. Special Report 1, "Defense Agencies Must Improve Their Oversight of Contractor Business Systems to Reduce Waste, Fraud, and Abuse," was issued on September 21, 2009. It recommended reform across a spectrum of issues, noting that DOD needs to speak with one voice to contractors, and urged that the two primary

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At What Cost? (cont'd):

agencies involved in overseeing contractor business systems — the Defense Contract Management Agency and the Defense Contract Audit Agency — work together more effectively.

Special Report 2, “Lowest-Priced Security Not Good Enough for War-Zone Embassies,” issued on October 1, 2009, in the wake of the Commission’s hearing on private security contractors at the Kabul embassy, urged Congress to change a statutory restriction that forced the State Department to choose security contractors to protect embassies solely according to “lowest-price technically acceptable” offers. The Commission believes that the unintended consequences of this mandate were exemplified in the poor contract performance and widely publicized misconduct by guards at the Kabul embassy which the State Department said endangered the embassy and its personnel. The special report called on Congress to allow the use of the “best-value” standard for evaluating contract offers.

These reports are available on the CWC’s Web site, www.wartimecontracting.gov/index.php/reports.

Where We’re Going

We plan to hold many more hearings in the months ahead, casting light on key aspects of our work. We will strengthen our collaboration with government entities that share our commitment to change and continue to work with federal oversight agencies. For example, we have established a Contingency Contracting Officers Council, a 23-person group of acquisition personnel from 10 organizations with a role in wartime contracting. And with the establishment of field offices in Baghdad and Kabul to be staffed until summer 2011, we will be able to see how contracting really works, or doesn’t work, in theater.

We have recruited a remarkable cadre of civilian and military professional staff members. Some members come from agencies such as the Army, the Air Force, the State Department, the Defense Contract Audit Agency, the DOD Office of the Inspector General, the Defense Contract Management Agency, and the U.S. Army Corps of Engineers. Others have had distinguished careers in the military, academia, and the private sector; have served on congressional staff and in agencies — such as the Government Accountability Office and the Special Inspector General for Iraq Reconstruction — or at the ambassadorial level in the State Department. They are seasoned by hundreds of years of combined experience in contracting, executive leadership, organizational cultural change, federal acquisition and procurement, financial management, federal procurement law, auditing, criminal investigation, and policymaking.

The Commission can’t bring about meaningful reform on its own. We need the engagement of the whole community of stakeholders — from all branches of government and nongovernmental organizations, from think tanks to contractors to academia, and others in the private sector. When the Commission fulfills its mandate, we all benefit.

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At What Cost? (cont'd):

* - MICHAEL THIBAULT, commission co-chair, served as deputy director of the Defense Contract Audit Agency, and was recently a director of Navigant Consulting. He can be reached at michael.thibault@wartimecontracting.gov. CHRISTOPHER SHAYS, commission co-chair, former member of the House of Representatives for Connecticut's 4th District, served as chairman, then ranking member, of the Subcommittee on National Security and Foreign Affairs of the Oversight and Government Reform Committee. He can be reached at christopher.shays@wartimecontracting.gov.

Endnotes

1. Available at the CWC's Web site, www.wartimecontracting.gov.
2. The \$888 billion figure does not include the value of contracts executed by other agencies supporting the wartime mission in Iraq and Afghanistan, principally the Department of State and the U.S. Agency for International Development. GAO Report 09-791R, "Overseas Contingency Operations: Reported Obligations for the Department of Defense" (July 10, 2009): 1.
3. Office of the Deputy Under Secretary of Defense (Logistics and Materiel Readiness), "Contractor Support of U.S. Operations in USCENTCOM AOR, IRAQ, and Afghanistan" (November 2009): 1, available at www.acq.osd.mil/log/PS/hot_topics.html.
4. Moshe Schwartz, Congressional Research Service Report R40764, "Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis" (September 21, 2009): 5.
5. Committee on Oversight and Government Reform, Memorandum, "Supplemental Information on Iraq Reconstruction Contracts" (February 15, 2007): 2, available at www.reform.democrats.house.gov/documents/20070215105317-73621.pdf.
6. Statement by Mary C. Ugone to Committee on Oversight and Government Reform, United States House of Representatives (May 22, 2008): 7, available at www.dodig.mil/fo/HOGR%205-22-08%20Final.pdf.
7. This includes reports by the inspectors general of the Department of State and the U.S. Agency for International Development, the special inspectors general for Iraq and Afghanistan reconstruction, the inspectors general of the military services, the Government Accountability Office, the Congressional Budget Office, and the Congressional Research Service.
8. National Defense Authorization Act for Fiscal Year 2008: Commission on Wartime Contracting in Iraq and Afghanistan, 110th Congress, *Public Law* 110-181, Section 841 (January 28, 2008).
9. Commissioner Schinasi was appointed in November 2009 to succeed Commissioner Linda Gustitus.
10. Jacques S. Gansler, Chairman, "Urgent Reform Required: Army Expeditionary Contracting," Commission on Army Acquisition and Program Management in Expeditionary Operations (October 31, 2007).
11. GAO Report 09-380T, "Iraq and Afghanistan: Availability of Forces, Equipment, and Infrastructure Should be Considered in Developing U.S. Strategy and Plans" (February 12, 2009): 8.



Constructive Acceleration and Concurrent Delay: Is There a “Middle Ground”?

by
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I. Introduction

Contractors often speed up production on a contract to meet the contract’s completion date. This acceleration can be a voluntary, contractor-initiated effort, or an effort expressly directed by the Government, or a constructive effort where acts or statements by the Government have the effect of propelling contractor performance to a higher intensity. A claim of acceleration is a claim for the increased costs that result when the Government requires the contractor to complete its performance in less time than was permitted under the contract. The claim arises under the “Changes” clause of the contract; the predicate for the claim is that the Government has modified contract by shortening the performance period.

The measure of recovery under an acceleration theory is the reasonable costs attributable to acceleration or attempting to accelerate, minus the lesser costs the contractor reasonably would have incurred absent its acceleration effort, plus reasonable profit. Common acceleration costs normally include the following factors: increased labor costs, increased material costs due to expedited delivery, and loss of efficiency or productivity. One method to compute this cost is to compare the work accomplished during the accelerated period with the work accomplished during the normal, baseline period. All three situations, however, present pitfalls for the unwary.

II. Voluntary Acceleration

Contractors occasionally increase the pace of their work in an effort to finish early. Early completion normally brings reduced overhead and permits the contractor to take on additional work. While there are clear economic rewards from finishing early, there can be unexpected developments. A good case of voluntary acceleration gone wrong confronted the contractor in *Maitland Brothers Co.*¹ There the contractor performed a \$7.9 million contract, with a stated term of three years, “to construct a stone breakwater and revetment, along with various other barrier measures, designed to protect the historic El Morro fort at the entrance to San Juan harbor, in San Juan, Puerto Rico.”²

In its bid the contractor “included a significant allowance for overtime work—generally about two hours per day per employee with the expectation of completing the job ahead of schedule.” According to the contractor’s president, it was the contractor’s practice to try to

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Constructive Acceleration and Concurrent Delay (cont'd):

projects ahead of schedule because “early completion produced the ‘best economic position’ for [the contractor].” Overtime work was one method of attaining early completion. In addition to the cost savings attendant to early completion, the contractor’s estimator observed that certain efficiencies could be achieved in marine construction by working ten-hour days: “Among other things, a full eight hour work day could be achieved, because transit time to and from the work site was not ‘lost.’” The estimator priced overtime work at time-and-one-half when he prepared the bid.³ The Board of Contract Appeals (“Board”) described the problems that arose during construction:

The breakwater was to be constructed, in part, using Government-furnished stone. The stones, ranging in size up to [forty-five] tons, were furnished with imbedded wire cables in the form of a loop, which was supposed to aid in lifting and placement. However, the contractor immediately experienced problems in handling the stones, because the wire loops tended to break easily. Because of the failure of the cables and the attendant safety factor, the contractor notified the Government of the problem.⁴

The contractor then proposed to place the stone using cranes equipped with grapples for rock handling, and the Government concurred. The parties subsequently executed a bilateral modification increasing the contract price by \$1.5 million for changing the method of stone placement. Once the contractor began placing stone using the grapples, however, its overtime usage increased because the new placement method “was slower than it had anticipated, and the use of grapples increased its maintenance time, at [sic] the expense of operating time.” The contractor’s estimator believed that the “overtime utilization per job category doubled following the adoption of the [new] placement method.”⁵ The Board described the contractor’s steps to speed contract performance as follows:

[The contractor] followed a work regimen that included seven-day work weeks, multiple shifts and overtime work, which enabled it to complete the project almost one year ahead of schedule. While the Government was aware of [the contractor’s] unilateral plan to speed up performance, it did not order early completion or otherwise dictate [the contractor’s] work schedule.⁶

Unfortunately for the contractor, Puerto Rico labor law mandated paying double time for work in excess of eight hours per day,⁷ and its employees asserted claims totaling \$219,383 for unpaid overtime salaries, as the contractor had only paid overtime at time and one-half. When the contractor asserted a claim for this amount, the Contracting Officer (CO) issued a final decision denying the claim. The CO noted that even though the “Contract Work Hours and Safety Standards Act—Overtime Compensation (1986 MAR)” clause referred to overtime payments of “not less than” time and one-half, the “Permits and Responsibilities” clause obligated the contractor to comply with all local laws.⁸

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Constructive Acceleration and Concurrent Delay (cont'd):

The Board denied the appeal, noting that when used in federal labor legislation, the term “not less than” has been recognized as creating only a minimum; higher rates may be required by local authorities. The Board reviewed the language of the Contract Work Hours and Safety Standards Act and found congressional intent that workers would be paid at a rate not less than time and one-half, and that implementation of the Puerto Rico double-time requirement did not frustrate the intent of the federal statute. The Board concluded that the decision to undertake overtime work was made exclusively by the contractor “as part of a set of business judgments intended to facilitate the early completion” of the project, and “it was not caused by any confusion regarding the scope and nature of the work.”⁹

III. Directed Acceleration

FAR 52.236-15, “Schedules for Construction Contracts,” provides in subparagraph (b), “If, in the opinion of the [CO], the [c]ontractor falls behind the approved schedule,” the CO may require the contractor to take steps to improve its progress without any additional cost to the Government. These steps can include increasing the number of work “shifts, overtime operations, days of work, and/or the amount of construction plant.”

An improper order under the provisions of the clause—when the contractor is entitled to a time extension for an excusable delay—constitutes a constructive change. In *Norair Engineering Corp.*, the Board held that letters from the CO directing the contractor to do whatever is necessary to ensure completion of work by a certain date were orders to accelerate.¹⁰ The Board reached this conclusion because the right to order expedited operations under the relevant contract clause depended on a valid finding that the contractor was behind schedule.¹¹ The Board noted that the record disclosed that “the [CO] was mistaken in his belief that the contract, as awarded, required completion of the [buildings’] foundations within the original 400-day contract performance period and that [a pre-existing structure] was an immutable restraint on” appurtenant work. The Board further noted that the CO was incorrect in assuming that expedited operations were on the critical path. “Hence, the work was not behind schedule. The [CO’s] orders to make up time thus became acceleration orders.”¹²

An order to accelerate performance to meet a noncontractual interim completion date has been found to constitute a constructive acceleration. In *Hurst Excavating, Inc.*, the Navy awarded a contract to rehabilitate a steam distribution system.¹³ “The contract did not restrict work during the heating season,” defined as October 15 through April 15, “and did not include interim completion dates for installation of the new system.” The architect/ engineer had assumed that excavation, pipe installation, and building installations would occur during the heating season. The Government’s minutes for the preconstruction conference indicate that the contractor “agreed to make building tie installation outside the heating season.” Thereafter, the Government advised the contractor that “no hookups will be permitted during winter weather.” Work during the spring and summer progressed slowly, and the “resident officer in charge of construction” (“ROICC”) advised the contractor that it must complete hookup by the start of the

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Constructive Acceleration and Concurrent Delay (cont'd):

heating season “no matter what.”¹⁴ The record indicated that the ROICC was unconcerned with the burden on the contractor. The Board found that the Government changed the contract when it restricted work during the heating season, and that once the contractor began installation of the system, the start date for the heating season became an inflexible interim completion date. The Board held that the contractor’s additional efforts to meet this new date were compensable acceleration costs.¹⁵

In *E.C. Morris and Son, Inc.*, the Government awarded a contract for alteration of an HVAC system in a composite medical facility to include the surgical areas.¹⁶ The facility was relatively remote. As a consequence, the contract provided for phased operations in order that one of the two adjacent surgical theaters would remain in use during the performance of the contract. As such, the contract included a staggered phasing for alteration work to the two surgical areas. Because of problems affecting the operations of the surgical theaters that arose during construction, i.e., the unaffected surgical theater could not be used when construction was performed in the adjacent theater, the Government established a single specific date for completion of both theaters. These reestablished completion dates occurred earlier than the completion date for one surgical theater and later than the completion date for the other theater. The Board found that the Government accelerated the project by establishing a single completion date.¹⁷

IV. Constructive Acceleration

In *Continental Consolidated Corp. v. United States*, the U.S. Court of Claims specifically recognized a claim for constructive acceleration.¹⁸ Constructive acceleration occurs in situations where a contractor is compelled to complete the work at a date earlier than required by the contract because of the failure or refusal by the CO to grant time extensions for excusable delays in a timely fashion.¹⁹

In order to recover for a constructive acceleration, the contractor must establish the following elements: (a) the contractor encountered a delay that was excusable under the contract; (b) the contractor timely notified the Government of the delay and requested a time extension; (c) the Government refused to grant the requested time extension or failed to act on it within a reasonable period of time; (d) the Government insisted, by either an express or implied order, on completion of the contract within a time period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay; and (e) the contractor undertook reasonable efforts to accelerate, resulting in increased incurred costs.²⁰

Much as with early completion claims, where contractors claim that completion would have occurred earlier “but for” government interference, discussed *infra* Part V, a determination of whether a contractor was accelerated is aided by a baseline finding of what level of effort the contractor would have expended “but for” the impact of the delay.²¹

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Constructive Acceleration and Concurrent Delay (cont'd):

A. One or More Excusable Delays

FAR 52.249-10(b) describes excusable delay. The excusable delay provisions of FAR 52.249-10 are silent as to how a contractor should demonstrate the existence and extent of such delay. Nonetheless, case law makes clear that

[w]hen a contractor is seeking extensions of contract time, for changes and excusable delay, which will relieve it from the consequences of having failed to complete the work within the time allowed for performance, it has the burden of establishing by a preponderance of the evidence not only the existence of an excusable cause of delay but also the extent to which completion of the contract work as a whole was delayed thereby.²²

Accordingly, “the contractor must demonstrate that the excusable event [proximately] caused a delay to the overall completion of the contract, i.e., that the delay affected activities on the critical path.”²³ Establishing an excusable delay is a question of fact. An excusable delay is one that “arises from unforeseeable causes beyond the control and without the fault or negligence of the [c]ontractor” and its subcontractors.²⁴ Examples of excusable delays include the following:

- Acts of God, i.e., force majeure, or of the public enemy: Acts of God include natural disasters but not necessarily personal tragedies that affect personnel.²⁵
- Strikes: Strikes include job actions by the contractor’s own employees, those of a subcontractor’s employees, and collateral job actions that have the effect of a strike against the contractor, such as organizational strikes.²⁶ In order for a strike to be considered as an excusable delay, however, the contractor must prove that it acted reasonably by not wrongfully precipitating or prolonging the strike and took steps to avoid it.²⁷
- Weather: A proper analysis of delays caused by unusually severe weather requires that the parties consider not only the severity of the weather but the type of work being performed and the impact of the weather on the work.²⁸
- Government acts in its contractual capacity: When the Government is acting in its contractual capacity, the contractor must prove that the government act causing the delay was wrongful.²⁹
- Government acts in its sovereign capacity: Sovereign acts that delay the contractor’s performance are grounds for excusable delay.³⁰
- Floods: A flood must be distinguished from heavy rain runoff. Traditionally a flood has been viewed as a situation in which water overflowed from its source.³¹

B. Notice and Request for an Extension of Time

Notice to the CO that an excusable delay has occurred is particularly important, as the

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Constructive Acceleration and Concurrent Delay (cont'd):

CO cannot be held to have ordered an acceleration if he or she had no knowledge of the delay and, hence, no knowledge of the contractor's entitlement to a revised schedule. While some cases have insisted upon a formal request for a time extension, other cases focus on the knowledge of the CO as the controlling factor.³²

When the Government affirmatively denies a contractor's request for a time extension for an excusable delay, the Government effectively is insisting on performance of the contract according to the original schedule.³³ This is different than when a CO delays in granting a time extension to a contractor. There, the length of the contract performance period may have a significant impact on the reasonableness determination regarding the delay and, hence, whether delayed action on a request for a time extension will be considered a constructive acceleration. Grants of time extensions, however, need not be immediate. The Government is afforded the opportunity to grant or deny a time extension request. In general, acceleration will be found if the interval between the request and the government action is unreasonable.³⁴ As an example, when a contractor sought a time extension on June 6 and the Government granted the extension on August 28, the Corps of Engineers Board of Contract Appeals held that in the absence of evidence to the contrary, there was no reason that such an interval of time was unreasonable.³⁵ This approach represents a realistic assessment of the construction industry; it is not unusual to negotiate after the fact as to the number of extra days that are justified under the contract and to incorporate the extensions in contract modifications issued weeks after the fact.³⁶ Where the Government has neither actual nor constructive knowledge of the contractor's excusable delay, however, claims for constructive acceleration will be denied.³⁷

The contractor must quantify the time extension it seeks. In *Intermax, Ltd.*, the Armed Services Board of Contract Appeals (ASBCA) found no acceleration order when the CO refused to act on requests for time extensions because the contractor did not provide substantiating information with its requests.³⁸

C. Actions That May Lead to Constructive Acceleration

A variety of actions may lead to constructive acceleration, including a threat to terminate the contract and a threat to assess liquidated damages. The consequences of default termination are so serious that courts and boards have ruled consistently that a threat to terminate the contract for default will constitute an acceleration order.³⁹ Merely urging a contractor to complete the work in accordance with the original schedule, however, does not give rise to a constructive acceleration.⁴⁰ Statements that the Government has an urgent need for completion of the project, coupled with a threat to assess liquidated damages, also constitute an acceleration order.⁴¹

D. Causation

To recover costs associated with an acceleration, the contractor must demonstrate

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Constructive Acceleration and Concurrent Delay (cont'd):

the nexus between the government action or inaction and its incurred costs.⁴²

E. Concurrent Delay

When a contractor's performance is delayed by multiple causes acting concurrently, and only one cause is excusable, i.e., where other causes lie with the contractor, courts and boards of contract appeals have adopted the approach that neither party will benefit from the delay.⁴³ While concurrent delay will not defeat a contractor's claim for additional time due to excusable delay, under a Changes clause analysis, a contractor cannot recover acceleration costs flowing from a concurrent delay unless the record supports a clear apportionment of the delay and expense attributable to each party.⁴⁴ Two cases decided by Boards of Contract Appeals have addressed the concurrent delay in the constructive acceleration environment: *Hemphill Contracting Co.*⁴⁵ and *R.J. Lanthier Co.*⁴⁶

1. Hemphill: Background

The Corps of Engineers awarded a contract to Hemphill Contracting Company, Inc. ("Hemphill") to clear and remove vegetation in conjunction with a lock and dam project on the Mississippi River.⁴⁷ The contract required Hemphill to comply with "all applicable State and local air pollution restrictions," and the contract permitted burning of material within the contract area and at any time within the contract period, provided that the burning did not violate the state and local standards.⁴⁸

Prior to award, Hemphill asked a government representative whether Hemphill could burn the debris in the open, i.e., "open air burning," or in a pit with air injection, i.e., "air curtain burning," in relation to the contract's requirement for compliance with local environmental requirements. The Government's representative responded that Hemphill should plan on open air burning because local Missouri laws would not apply since this was a "government project." The awarded contract "was silent on the burning method to be employed for the disposal of material."⁴⁹ Hemphill's Construction Progress Chart indicated that it would begin clearing and burning on March 17, 1988, and would conclude those activities on July 17, 1988. This submittal did not indicate whether it planned to work on weekends, and it did not indicate the crew size that Hemphill planned to employ when burning began.⁵⁰

Shortly after work began, the State of Missouri advised the parties that it "would not issue a permit for open air burning and, instead, required the use of air curtain burning." The Corps directed Hemphill "to suspend burning operations until an acceptable disposal method was found." Hemphill was not precluded from clearing trees, however. The CO issued a unilateral modification directing the use of air curtain burners and increasing the contract price, and did not grant a time extension.⁵¹

When Hemphill was unable to burn as planned, from March 17 to April 7, 1988—the "no burn" period—it cleared the site, "decking" material for later burning. Hemphill generally employed "an eight or nine member work crew, working eight to ten-hour days." During this

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Constructive Acceleration and Concurrent Delay (cont'd):

twenty-one-day period, Hemphill worked on only nine days. “Rain or wet conditions prevented work on seven days, but the record [did] not indicate whether this inclemency was abnormal.” Hemphill worked on only one weekend day. There was “no evidence demonstrating that delayed burning impacted any work, or otherwise detailing the precise effect on Hemphill’s overall progress.”⁵²

When Hemphill began burning, it “undecked” the piles of debris and moved the materials into the pits excavated for air curtain burning. From April 7 to May 16, 1988, the “burn only” period, Hemphill burned materials that had been cleared when burning was suspended. During this period its crew ranged from twelve to twenty-five workers, averaging twenty-two workers per day; Hemphill normally recorded only eight-hour workdays and did not incur a meaningful amount of overtime. “In the early stages of the ‘burn only’ period, Hemphill’s workers also performed clearing and decking in addition to burning, but the crew size did not change appreciably.” On April 27, 1988, the Corps of Engineers’ “Inspector noted that ‘Contractor has stopped clearing until burning can catch up. No problem with schedule.’”⁵³ Hemphill began full-scale operations on May 16, 1988:

[Hemphill began by] performing both clearing and burning. Its crew size Remained unchanged from the “burn only” period. On [July 13, 1988], the Corps’ . . . Inspector noted that “Contractor bringing in more equipment to speed up progress.” Up to this point, the Inspector had continually observed that [Hemphill’s] work was “on schedule.”⁵⁴

Hemphill completed the clearing work on July 15, 1988. “In the 132 days from the commencement of burning activity until contract completion, [Hemphill] worked at the site for [ninety] days.” It opted not to perform work “on [thirty-eight] weekend days, two ‘rain’ days, and two national holidays.”⁵⁵

Hemphill utilized both owned and rented equipment; rental equipment operating hours constituted thirty-two percent of the total equipment time. Hemphill’s own equipment was idle forty-one percent of the time; thus, the rental equipment operating hours were roughly comparable to the “idle hours” for Hemphill’s equipment.⁵⁶ The rental equipment largely duplicated Hemphill’s inventory, and Hemphill did not mobilize the rental equipment solely to supplement its owned equipment.⁵⁷

Hemphill filed a certified claim for costs it allegedly incurred as a result of the change from open air burning to air curtain burning.⁵⁸ Hemphill subsequently filed another claim under a differing site conditions theory.⁵⁹

2. Hemphill: The Board’s Decision

On appeal Hemphill argued that the twenty-one-day suspension of burning during the “no burn” period, absent any contract time extension, constituted an excusable delay that forced Hemphill to accelerate its subsequent burning efforts in order to complete the project on time.⁶⁰

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Constructive Acceleration and Concurrent Delay (cont'd):

The ASBCA was not persuaded “that any delay to Hemphill’s work was occasioned solely by the Government’s restriction on burning during the ‘no burn’ period, or other excusable causes.”⁶¹ The Board attributed Hemphill’s failure to work during the majority of that period either “to rain or wet conditions that did not rise to the level of ‘unusually severe weather,’ ” or to Hemphill’s consistent pattern of no weekend work.⁶² The Board also observed that “there is nothing in this record by which we can apportion any segment of the delay exclusively to the Government. For these reasons, we conclude that Appellant’s partial idleness during the ‘no burn’ period was not exclusively the result of an excusable delay.”⁶³

The Board reviewed “the second and third factors of acceleration, namely, a contractor request for and a Government denial of, a time extension. Hemphill never gave notice of delay to the Corps nor sought a time extension.” In addition, there was no “exhortatory conduct” on the part of the Government that otherwise induced Hemphill to accelerate.⁶⁴

The paramount factor in any analysis of an acceleration claim is whether, in fact, the contractor actually accelerated.

When Hemphill was restricted to clearing and decking during the “no burn” period, it employed eight or nine-member crews working eight to ten-hour days. Following the onset of burning . . . Hemphill’s [daily] work crew averaged [twenty-two] workers per day, working eight-hour days. While most of Hemphill’s efforts during the “burn only” phase were devoted to “catch-up” burning, when full-scale operations began . . . its crew size did not change appreciably . . . [and] no significant overtime, weekend or holiday work was performed⁶⁵

Hemphill’s practice of using a combination of owned and rented equipment did not perfect its claim of acceleration. The Board found that the presence of rental equipment on the site did not establish acceleration, and that “some, if not all, of the work performed by rental equipment reasonably could have been accomplished using contractor-owned equipment.” The Board went on to state that while it was “not privy to Hemphill’s decisional matrix in employing equipment,” there was nothing in the record to suggest that the introduction of rental equipment was necessary or demonstrated an “effort to accelerate, inasmuch as contractor-owned equipment lay idle for almost the same amount of time as [when] rental equipment was operating.” The Board acknowledged that although there were “fleeting references in the record to the fact that [Hemphill] brought rental equipment onto the site in order to ‘speed up’ performance, there [was] no demonstrable nexus between this action and accelerated performance.”⁶⁶

In making its acceleration analysis, the Board analogized to “early completion” claims, where contractors claim that contract completion would have occurred earlier “but for” government interference, and it held that “a determination of whether a contractor was

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Constructive Acceleration and Concurrent Delay (cont'd):

accelerated is aided by a 'base line' finding of what level of effort the contractor would have expended 'but for' the delay factor." The Board's analysis of the claim was handicapped by the fact that it had no evidence of the crew size and the equipment inventory Hemphill originally intended to employ had burning proceeded according to its original schedule. Following on this observation, the Board found that Hemphill did "not establish the extent (if any) to which its use of labor and equipment exceeded its original plan." Adding the absence of some of the traditional indicia of acceleration to this uncertainty, e.g., overtime hours, weekend and holiday work, the Board found that the record was insufficient to support Hemphill's claim. The Board observed that while both parties alluded to acceleration, it did not receive any credible demonstration of that effect and that "[m]ere allegations do not constitute proof." The Board noted that "[w]hile we do not doubt that the [twenty-one] day burning suspension disrupted Appellant's operation, we are not persuaded that Hemphill accelerated its performance as a consequence of that interruption."⁶⁷

Hemphill's major problem was the quality of its evidence. It did not perform a schedule analysis. The record did not divulge the cost and scope of the additional work attendant to the change to air curtain burning. Consequently Hemphill's claims consultant utilized a series of changing assumptions in his four internally conflicting, and arithmetically flawed, cost proposals in an attempt to isolate the costs attributable to the changed versus original work. In the section of the "cost statements quantifying the change to air curtain burning," the claims consultant used "three different allocation formulas for equipment operator and laborer costs in an effort to identify the increased costs attributable to the change." Further, "There was nothing in the record against which [the claims consultant's] judgments could be measured."⁶⁸

The claims consultant also "adopted different proportions of owned and rented equipment costs associated with the change that . . . were not verifiable." His "unexplained variations in labor and equipment allocations were mirrored in" other aspects of the claim. The Board noted that the claims consultant "adopted numerous judgmental positions in pricing the various claims that were not susceptible to independent verification," and the claims consultant "readily acknowledged that his efforts were an after-the-fact operation unaided by personal knowledge of the events underlying the claims."⁶⁹

The Board of Contract Appeals characterized the claims consultant's efforts as follows: "Through a review of the sterile, and not particularly informative, documentary record, [the claims consultant] attempted to recreate the job events in an attempt to price the various aspects of Hemphill's claims. His difficulties were best illustrated in his attempt to allocate labor to equipment hours" from the sparse record; the daily reports did not disclose the relationship between labor and equipment and no other information was available. Perhaps the most prominent example of the effect of the paucity of information could be found in his allocation of labor hours to chain saw operating hours, where his calculation "produced the anomalous result of chain saws being 'operated' for about [1000] hours without operators."⁷⁰

The proof underlying Hemphill's damage claim was based almost exclusively on the

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Constructive Acceleration and Concurrent Delay (cont'd):

testimony and estimates prepared by its claims consultant. There was no “corroborative evidence to substantiate his judgments and assumptions,” and he “also failed to demonstrate the various processes through which he developed the allocations he used.”⁷¹ The Board noted:

We have not recited the full litany of erroneous, contradictory and confusing determinations contained in [the claims consultant’s] four cost statements, but the quantity, continuing nature and profusion of unexplained judgments and arithmetic errors contained in these determinations leaves [sic] us with little confidence in his proposals. While we appreciate the great difficulty he faced in attempting to reconstruct Hemphill’s incurrence of added costs, this overriding pattern Of shifting and unverifiable assumptions, overlain by judgmental calls equally not susceptible to verification, potential duplication of costs, arithmetic errors and unexplained changes in accounting and allocation approaches leaves us no choice but to reject his conclusions.⁷²

The Board finally observed that failure of proof ordinarily “connotes a proponent’s inability to marshal sufficient persuasive evidence and argument in support of its position.” The Board observed that the appeal [did] not suffer from a shortage of allegations. Rather, we are faced with an interwoven mass of unverifiable and conflicting postulates. In the absence of corroboration from the record, we are not persuaded that the myriad proposals by [the claims consultant] have established that Hemphill is entitled to compensation in excess of that already allowed by the [CO]. Furthermore, this record does not permit us *sua sponte* to make any independent assessment of the cost framework that would itself be anything more than mere surmise.⁷³

3. R.J. Lanthier: Background

The Navy awarded a contract to R.J. Lanthier Co., Inc. (“Lanthier”) to repair the graving dock and electrical systems for a building at the San Diego Naval Station in California. The contract’s original completion date of March 10, 1996, was extended through bilateral modifications to June 25, 1996.⁷⁴

Lanthier subcontracted the electrical portion of the work to Neal Electric, Inc. (“Neal”). “Neal thereafter issued a purchase order to Beacon Electric Supply (‘Beacon’) for the entire switchgear portion (i.e., low-voltage and medium-voltage switchgear equipment) of the electrical work. . . . Beacon, in turn, issued a purchase order” for the work to General Switchgear, Inc. (“GSI”), an “original manufacturer” of low-voltage and medium-voltage switchgear equipment. GSI’s purchase order with Beacon was premised on the assumption that the Government would approve GSI’s long lead components immediately, based only on preliminary drawings without a formal submittal. The Government’s preliminary approval of submittals was essential to GSI’s ability to meet its schedule for timely delivery of the switchgear.⁷⁵

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Constructive Acceleration and Concurrent Delay (cont'd):

On May 22, 1995, GSI submitted a list of “Clarifications and Exceptions” for the low-voltage switchgear that contained fourteen separate items. This submittal was not part of a formal process under the contract but “was an incomplete, preliminary working document that, *inter alia*, had not been reviewed by [Lanthier’s] quality control organization.” The parties met on the next day to discuss GSI’s submittal.⁷⁶

Twenty days later, the Government provided its “courtesy review” of GSI’s submittal. The review fully and adequately addressed all fourteen items described by GSI, as well as four other items that were not highlighted by GSI.⁷⁷

On July 17, 1995, Lanthier forwarded a letter to the Government that included a letter from GSI in which GSI asserted that the items identified in its earlier submittal constituted changes in the work that merited variances and additional compensation. GSI did not indicate either that it was being delayed or that it was seeking a time extension. The Government responded two days later, reminding Lanthier that the Government had not received a formal submittal for the switchgear. The Government went on to point out that the contract permitted it twenty working days within which to review the submittal, and that variations, if any, would be processed in accordance with the terms of the contract. Lanthier responded that it had directed Neal to submit the switchgear formally as soon as possible.⁷⁸

The parties met on 27 July 1995 to discuss the low-voltage switchgear. GSI reiterated that it would not start production without payment for alleged changes. [Lanthier’s] representative then informed GSI that its proper recourse was to continue to perform the work in question and to submit a claim regarding any areas of dispute. At that meeting, the Government agreed to start a concurrent, informal review of GSI’s submittals at the same time when they were submitted to Lanthier’s quality control organization, CTE. The Government’s formal time for Review [twenty calendar days] would still start only when it received the submittals from [Lanthier] with CTE’s comments.⁷⁹

The parties also discussed GSI’s list of desired variances and questions, the upshot being that the parties believed that they had reached agreement on the issues, and that GSI was ready to prepare submittals. GSI promised to provide submittals for the low-voltage switchgear equipment by August 14, 1995.⁸⁰

On August 22, 1995, Lanthier’s quality control manager advised Neal “that GSI had not yet provided complete submittals for the low-voltage switchgear stating, *inter alia*, that ‘[t]he lack of the rest of the LV Submittal and the absence of any part of the . . . [medium-voltage switchgear] submittal has [sic] now become a serious impact to the CPM [critical path method] schedule.’ ” GSI’s program manager responded, “ ‘I will not respond until I get submittals from [the Government].’ ”⁸¹

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Constructive Acceleration and Concurrent Delay (cont'd):

On August 30, 1995, Lanthier provided its first, partial submittal to the Government, dealing only with a section of the low-voltage switchgear. The Government approved this partial submittal on September 19, 1995, “with corrections noted.” Beacon forwarded this response to GSI and directed GSI to release the switchgear for immediate manufacture and shipment. When GSI did not comply, Lanthier advised Neal to proceed immediately with fabrication of the switchgear. Lanthier further advised Neal that if it considered the Government’s requests to be unjustified, it had the “option” to assert a claim for an equitable adjustment under the disputes clause of the subcontract.⁸²

Throughout October 1995 GSI claimed additional variances. In early November 1995 GSI released the low-voltage switchgear for production. Its decision to do so “stemmed from its knowledge that the [G]overnment needed the equipment and concern about liquidated damages. GSI thus ‘took [it] on our own to get [the project] completed on time.’” The switchgear equipment was delivered to the job site during January and February of 1996. “The usable completion date for the project occurred on April 19, 1996.”⁸³

From June 1995 through April 1996, Lanthier, Neal, Beacon, and GSI

complained to the Government on several occasions that the switchgear and thus contract completion was [sic] being delayed by “design issues as well as supplier issues” and indicated that it intended to file a request for a time extension. . . . The term “switchgear” was not limited to low-voltage electrical switchgear equipment in terms of the [twenty-two] items [that GSI had identified] herein but rather included other classes of electrical switchgear equipment (i.e., medium-voltage equipment).⁸⁴

Neither Lanthier nor any of its subcontractors, however, asserted either a general or a specific request, in terms of delay dates apportioned on a per item basis, for a quantified time extension relating to the low-voltage switchgear equipment.⁸⁵

Lanthier certified and forwarded Neal’s certified request for an equitable adjustment seeking “constructive acceleration costs for GSI, with mark-ups only for Beacon and Neal.” The claim asserted that “the Government failed to permit Lanthier, Neal and lower tier subcontractors to perform the specified work in accordance with its original schedule” due to government delay, suspensions of faulty specifications, ambiguous directives, tardy action on requests for time extensions, and disruptions to Neal’s progress on the project. Lanthier asserted that all of these factors forced Neal and its suppliers and vendors to accelerate the work constructively. Neal asserted “that the prolonged submittal review and design clarification process[,] together with various disputes arising from the errors and omissions in the contract documents[,] delayed and disrupted” Beacon and GSI. The CO issued a final decision denying the claim.⁸⁶ At the hearing Lanthier alleged that the constructive acceleration produced a loss of productivity for GSI that was characterized by inefficiencies caused by “excessive overtime” and “overcrowding” at the job site.⁸⁷

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Constructive Acceleration and Concurrent Delay (cont'd):

4. *R.J. Lanthier*: The Board's Decision

Lanthier's constructive acceleration argument was based on an allegation of the Government's untimely responses to its submittals/requests for variances and its ambiguous requirements. The Board rejected Lanthier's argument, which centered on untimely government response, noting that the Government routinely responded within the time required by the contract and that the intransigence of GSI frequently protracted the time required to proceed with fabrication. The Board also noted that Lanthier's and GSI's frequent resistance to comply with unambiguous contract requirements, describing them as "overkill," "not customary," "highly unusual," or "old-fashioned," did not suffice to excuse performance in strict compliance with the contract's requirements. The Board held that any delays flowing from these disagreements over unambiguous contract requirements were caused by GSI's own refusal to start production until its demands for additional compensation and variances were met.⁸⁸

The Board also focused on the testimony of Lanthier's damages expert regarding the "excessive overtime" and "overcrowding" argument. The expert acknowledged that his study did not attempt to allocate labor inefficiencies between causes attributed to the contractor and to the Government. Similarly, he acknowledged that he did not investigate GSI's planned staffing levels and "could not confirm that all the overtime/double shift work cited in his report actually involved performance" of "excessive overtime" on the project. The expert also acknowledged that he did not know the number of employees that GSI planned to use during performance or whether all of the GSI employees who worked on the switchgear during the relevant period were working "on the floor," an essential criterion in the "overcrowding" allegation.⁸⁹

The Board cited *Hemphill* with approval and held that Lanthier's and GSI's "own delays were fully concurrent with any alleged Government delays and" could not be segregated from the Government's delays. Moreover the Board found that Lanthier did not give notice of an excusable delay, that the Government neither refused nor failed to grant a requested time extension within a reasonable time, and that there was no government order to accelerate the work, either expressly or by implication, without regard to any excusable delay.⁹⁰

V. "Early Completion" Claims

Early completion claims are a logical corollary to acceleration claims. When contractors intend to perform the contract on an accelerated schedule in advance of the contractually mandated completion date, government-caused delays are compensable.⁹¹ Contractors frequently assert that the Government's conduct thwarted their plans for early completion of a contract and seek damages as a result.

Analysis of early completion claims should focus on the cause of the delay, the feasibility of the contractor's alleged early completion schedule, and whether the contractor

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Constructive Acceleration and Concurrent Delay (cont'd):

indeed planned to complete the work early.⁹²

A. Elements of the Claim

The contractor must show that its performance has been impacted and delayed by the Government. This involves the contractor's intent to perform the contract before the completion date established in the contract, and demonstration that its intent was manifested by its actions during performance. Further, the contractor must show that the early completion schedule alleged by the contractor was feasible, and performance in accordance with the contractor's proposed schedule would have led to early completion, absent unreasonable government-caused delays.⁹³

B. Government-Caused Delay

The first element that the contractor must establish in an early completion claim is an exclusive government-caused delay that prevented it from completing the work prior to the completion date established by the contract. The rationale underlying this requirement is derived from the Government's implied duty not to interfere with the contractor's performance.

An exclusive government-caused delay normally is established when the Government affirmatively suspends performance under the terms of the "suspension of work" clause. These cases usually are not controversial because the Government normally has issued a "stop work order." Government-caused delay also can arise from situations other than those where the Government has actually suspended work. In *Weaver-Bailey Contractors, Inc. v. United States*, defective specifications forced the contractor to delay finishing its work and, instead, concentrate on additional earthwork that the defective specification necessitated.⁹⁴

Where other, nongovernment causes operate to delay or otherwise extend the work, the concurrency of causes will relieve the Government of responsibility for the delay it caused, regardless of the relative "weights" of the various delay events.⁹⁵ While the contractor cannot recover damages for concurrent delay, it is entitled to a time extension.⁹⁶

Finally, contractor intent is the factor on which most early completion claims turn. Operative facts, as opposed to simple expressions of intent, are the focal point in an analysis of the contractor's intent.⁹⁷

C. Contemporaneous Expressions

Courts and boards look to the actions and statements by the contractor during the course of performance for guidance as to whether the contractor intended to complete the project early. Tribunals accord greater weight to contemporaneous documents and expressions by the contractor "since those proximate-in-time actions have greater indicia of reliability than after-the-fact recollections."⁹⁸

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Constructive Acceleration and Concurrent Delay (cont'd):

Bid papers and worksheets are some of the best evidentiary sources for evaluating early completion claims. For one thing, they are prepared long before a claim-driven early completion analysis is performed by the contractor. Additionally these early documents will serve either to support or refute later-developed progress schedules.⁹⁹

In many instances, the proposed schedules upon which contractors rely in fashioning early completion claims never were presented to the Government during performance, or were prepared after performance concluded, using the benefit of hindsight to quantify the productivity the contractor “would have” and “could have” attained, but for the government-caused delay.¹⁰⁰ In these situations, practitioners must focus on the speculative nature of the effort and prepare to distinguish the hypothetical process from what actually occurred. Practitioners should study all of the progress schedules submitted by the contractor. On more than one occasion, an early completion claim has failed because one or more of the contractor’s interim progress schedules revealed that the contractor only intended to perform the work within the contractually mandated time frame, and had no plans to complete early.¹⁰¹

D. Notice

The contractor need not notify the Government of its intent to complete the work early, although providing notice evinces a contemporaneous intention to complete early, as well as advising the Government of the proposed early completion, enabling the Government to seek to minimize any actions that might interfere with the contractor.¹⁰²

E. Objective Indicators

In addition to a contemporaneous expression of contractor intent, an “early completion” claim is supported by operative facts that demonstrate the contractor’s implementation of an early completion schedule. These factors are similar to those found in acceleration situations. Traditional indicia of acceleration can be found in labor and equipment utilization. A claim of early completion will be bolstered where the contractor has employed larger work crews, has implemented multiple shifts, or has incurred additional overtime work.¹⁰³

Similarly, an early completion claim will be strengthened when the contractor brings on additional equipment, either leased or owned, in support of an enhanced production program.

The fact that the contractor has brought additional labor or equipment onto the site does not per se establish an early completion claim. In many instances a contractor’s need for added labor or equipment stems from inefficient operations or the contractor’s misapprehension of the complexity of the work. Practitioners should scrutinize situations in which the contractor has marshaled additional labor or equipment in order to determine whether the added assets are driven by an early completion schedule or something else.

Last, but not least, the overall manner in which the contractor pursues the work from the outset should be explored. In many instances a contractor expresses a desire to complete the

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Constructive Acceleration and Concurrent Delay (cont'd):

work early, yet the record demonstrates that the contractor did not augment its labor or equipment pool until the project was well underway, or that the contractor unnecessarily protracted mobilization.

F. Feasibility

Determination of the feasibility of a contractor's alleged accelerated schedule is a question of fact. The record should indicate that the proposed schedule was reasonable given the existing conditions at the job site, the method proposed by the contractor, and the contractor's actual operations.¹⁰⁴

Contractors frequently attempt to establish an early completion claim through use of progress schedules. These schedules should be scrutinized carefully. In many instances the schedules are not prepared contemporaneously with contract performance. The problem underlying these "after the fact" progress schedules is that the assumptions contained in the progress schedule cannot be tested against the purported performance and the alleged impact of the government-caused delay.¹⁰⁵

VI. Things to "Look For" in Acceleration and "Early Completion" Claims

Practitioners can take a variety of actions to better identify potential issues involved in acceleration and early completion claims.

First, study the daily logs prepared by the contractor, as well as the quality assurance documentation prepared by the Government. Pay particular attention to the staffing and equipment information contained in those documents. Very often, these documents will reveal whether the contractor has undertaken the necessary augmentation of labor and equipment necessary to achieve early completion.

Second, ask questions about contemporaneous documents. Did the contractor prepare a progress schedule, e.g., a CPM chart, or a bar chart, prior to commencement of work? What does this schedule indicate? Look to the contractor's bid papers. What scheduling is indicated from those documents? Study the contemporaneous correspondence between the parties. Does the contractor raise the "early completion" contention early in the work?

Third, analyze the source of the delay. If the delay is concurrent, the contractor should not be able to recover under an "early completion" theory.

VII. The "Path Forward"

A. Apportionment

Cases are legion in which the tribunal observes that a contractor cannot recover

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Constructive Acceleration and Concurrent Delay (cont'd):

acceleration costs flowing from a concurrent delay unless the record supports a clear apportionment of the delay and expense attributable to each party. The courts and the boards have rarely embarked on this journey, leading naturally to the question, “Why not?” The first, and most obvious, reason is that most claims for constructive acceleration founder not due to the issue of the apportionment of delay between the parties but because of the litigants’ inability to satisfy the other four factors that support such a claim. As noted in *Hemphill* and *Lanthier*, the contractors either failed to put forward evidence demonstrating the increased costs, in terms of labor consumption and equipment utilization, or did not or could not demonstrate the difference between the labor and equipment costs incurred and the baseline costs that would have prevailed but for the Government’s action.¹⁰⁶

Some commentators have observed, correctly, that the courts and boards have not been aggressive in pursuing efforts to apportion the delay periods.¹⁰⁷ This frequently occurs against the backdrop of the contractor’s failure to satisfy one of the other elements underlying a claim for constructive acceleration.

Another reason underlying this phenomenon stems either from a failure to make a complete record or a failure of advocacy. Litigants must understand that an acceleration argument generally will not succeed solely based on banalities; the available literature and precedent etch a clear outline of the type and quality of proof that a litigant must marshal in order to prevail under a constructive acceleration theory. Similarly, from a point of advocacy, the contractor must remember that the burden of proof rests with the appellant; the contractor cannot rely on the judge to ferret out the necessary information from the record. In many post-hearing briefing orders, the parties are admonished that the tribunal may not address evidence in the record that is not highlighted in the post-hearing process. While lapses in the briefing process that fail to highlight the aspect of the record that supports an effort to apportion the delay periods may stem from a party’s timely failure to appreciate the need for that meaningful information, or the fact that it has “run out of time” or “steam,” a litigant cannot adopt the attitude of Wilkins Micawber that something will show up,¹⁰⁸ and hope that the judge somehow will save the day.

B. Direct Apportionment

1. Fischbach & Moore International Corp.

The Boards of Contract Appeals have engaged in apportioning concurrent delay periods mathematically. In *Fischbach & Moore International Corp.* (“*Fischbach II*”), the Board addressed matters that had been the subject of a quantum remand in an earlier decision.¹⁰⁹ In the earlier decision, “*Fischbach I*,” the Board heard an appeal arising from a contract issued by the U.S. Information Agency for the construction and installation of a complex of 104 radio and receiving facilities located in remote areas on the Island of Luzon.¹¹⁰

During performance of the contract at issue, the Government issued various stop work orders and other directives concerning the surface seams in steel bars that were to be used in the

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Constructive Acceleration and Concurrent Delay (cont'd):

construction of the towers. The Board held that the Government's stop work orders and corrective work directed by the Government together constituted a constructive change entitling the contractor to an equitable adjustment. When the parties were unable to agree on quantum, the matter was restored to the Board's docket after the contractor filed an appeal from an adverse final decision.¹¹¹

In *Fischbach II* the Board first noted that the factual issues included certain affirmative defenses raised by the Government, such as the existence of concurrent delays for which Fischbach was responsible or that were coextensive with time extensions granted by the Government for causes unrelated to the steel seam problem. "The principal theme of the Government's defense against [Fischbach's] claim [was] that Fischbach [had] failed to prove a causal connection between the Government's suspension of work relating to the steel seam problem and the delays, disruption of work, and acceleration for which it incurred the costs it [claimed]."¹¹² The Board then noted:

This issue, in turn, is affected by concurrent delays which the Government alleges were an intervening cause of the delay, disruption[,] and acceleration of appellant's work, and for which either appellant or its first tier subcontractors are responsible or for which the Government granted adequate time extensions in due course.¹¹³

The Board found that "the [CO] consistently denied any time extension for the delay relating to the steel seam problem" and "repeatedly failed to grant time extensions for [other] excusable delays within a reasonable time." The Board also found that the denials and tardy approvals on the part of the CO

coupled with his insistence that [Fischbach] demonstrate, to his unspecified satisfaction, a causal connection between the events giving rise to the delays and the overall job scheduling, led [Fischbach] reasonably to believe that the requested time extensions would not be granted and that it would be held to the original contract completion date.¹¹⁴

In addition, although the CO never formally assessed liquidated damages against Fischbach, his contemporaneous letters "implied that the Government might do so if [Fischbach] failed to meet the contract completion date." Consequently the Board held that Fischbach "was compelled to accelerate in an attempt to meet the original contract completion date, and did not do so voluntarily."¹¹⁵

The Government contended "that any delays caused by it in relation to the steel seam problem were inextricably intertwined with other delays, such as those caused by the inefficiencies and poor performance of [Fischbach's] subcontractor, PEI, which [Fischbach]

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Constructive Acceleration and Concurrent Delay (cont'd):

would have suffered even in the absence of the steel seam problem.” The Government argued, “When Government caused delays are concurrent or intertwined with other delays for which the Government is not responsible, . . . a contractor cannot recover delay damages.”¹¹⁶

The Board addressed the “alleged intertwining of Government-caused and concurrent delays” and found that the critical path analysis offered by Fischbach offered a “ready and reasonable basis for segregating the delays.” The Board acknowledged the Government’s argument that the critical path analysis performed by Fischbach’s expert was “abstract in the sense that a critical path method of scheduling was not called out in the contract,” but the Board also noted that “the validity of the analysis was not challenged in any way.”¹¹⁷ As a consequence, the Board accepted it as credible, since it was based “on application of the construction experience of an expert to depict the orderly sequence of events that must be followed to accomplish a complex project.”¹¹⁸

The Board then noted that if delays can be segregated, responsibility for those delays may be allocated to the parties.¹¹⁹ “If there is no basis in the record on which to make a precise allocation of responsibility, an estimated allocation may be made in the nature of a jury verdict.”¹²⁰ The Board distinguished the case from a contrary decision rendered by the Court of Claims by noting that, based on the record in that case, the court was unable to separate delays for which the Government was not responsible from those for which it was.¹²¹

Unfortunately for the Government, the Board did not face the same difficulty in *Fischbach II*, and was willing to review Fischbach’s critical path analysis in exhaustive detail. Based upon its review, the Board determined that Fischbach experienced a total of 253 days of delay, and was able to identify a delay of 151 days resulting from the suspension of work ordered by the Government in connection with the steel seam problem. Based upon this determination, the Board held that Fischbach was entitled to compensation for sixty percent of whatever reasonable acceleration costs it incurred and could prove, representing the share of delay that was attributable to the Government.¹²²

The lessons to be drawn from *Fischbach II* are twofold. First, the record must demonstrate that (1) the contractor encountered excusable delays; (2) the contractor notified the Government of those delays and requested a time extension; (3) the Government either refused to grant the time extensions or failed to act on them in a timely fashion; (4) the Government, by either its statements or implicit conduct, insisted upon completion at a date earlier than the date when the contractor would have been required to complete the work, accounting for the period of excusable delay; and (5) the contractor undertook reasonable efforts to accelerate, resulting in increased costs. Second, in the case of concurrent delays, the contractor, who bears the burden of proof, must present a scheduling analysis from which the judge can isolate the delays attributable to the Government.

2. Lovering-Johnson, Inc.

In *Lovering-Johnson, Inc.*,¹²³ the Navy awarded a contract, on September 1, 1995, to

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Constructive Acceleration and Concurrent Delay (cont'd):

Lovering-Johnson, Inc. (“LJI”) “for the design and construction of a housing office/community center, 140 family housing units . . . and associated site improvements at a former Naval Air Station in Glenview, Illinois.” Under the terms of this phased construction project, work was to be completed within 915 calendar days of award. The contract provided that construction work could not begin until the design had been approved by the CO.¹²⁴

In May 2002, four years after substantial completion, LJI submitted an omnibus claim incorporating fourteen individual claims seeking over \$6.8 million and a 267-day time extension. The CO denied the claim and LJI took a timely appeal. The bulk of the dollar value of the claim and all of the 267-day delay arose from five design period categories that were described as “Additional Civil Improvements,” “Additional Plan Review/Architectural Design,” “Additional Winter Protection Expenses,” “Acceleration,” and “Liquidated Damages.”¹²⁵

LJI contended that “it experienced delays and increased costs as a result of the [G]overnment’s excessive requirements for designing the storm water drainage system, the failure of the Navy to disclose [a 1990 stormwater report] and site revisions necessitated by the contaminated exclusion area.” LJI essentially argued “that it encountered a Type I differing site condition, i.e., higher storm water flows than represented in the contract; [the Government] failed to disclose superior knowledge, i.e., [the stormwater report]; [and that] it was not fully compensated by” a bilateral modification for a change to the location of the borrow pit. The Board rejected LJI’s differing site condition and superior knowledge claims. The Board found that LJI established entitlement to an equitable adjustment for the change to the location of the borrow pit.¹²⁶

The Board also found that the increased work caused by the change excusably delayed LJI, entitling it to a twenty-day time extension, but not delay damages, because it found that there were other contractor-caused delays during the design period.¹²⁷

LJI asserted “that the Government took too long to review its design documents and” its request for equitable adjustment (“REA”). “According to LJI, the [G]overnment’s review of the [forty percent] and [eighty percent] design should have been a minor, ‘over-the-shoulder’ analysis of its design.” The Board reached detailed findings that LJI’s “design documentation for months was incomplete, submitted piecemeal, error-filled, replete with variations from contractual requirements and otherwise inadequate.” The design deficiencies necessitated an ongoing dialogue with the Government aimed at assisting LJI to meet the contract’s requirements. The Board found no evidence “that the actions and comments of the Government reviewers were wrongful.” The Board observed that the contract granted the Government a sixty-day review period with respect to the final design package, and that the Government did not exceed that period.¹²⁸

The Board also found that the continuing design dialogue and communications between the parties prior to submission of the 100% design were necessary to address the extensive

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Constructive Acceleration and Concurrent Delay (cont'd):

issues and were reasonable. The Board remarked on the protracted negotiations surrounding LJI's REA but held that this event did not entitle LJI to a time extension.¹²⁹ The Board observed:

Voluntary negotiation of claims is a routine contract administration matter. [LJI] also repeatedly promised, but failed in important part, to provide supporting documentation for its allegations. This failure continues to be reflected in the record before us. Moreover, [LJI] could have invoked the disputes process by requesting a final decision.¹³⁰

Under the heading "Lack of Proof of Delay and Concurrent Delay Generally," the Board held that the record was "replete with evidence that [LJI] was responsible for other delays during the development of the overall design in general and the storm water design in particular." The Board noted that LJI started the civil design work late and that it waited to retain a civil engineer until more than two months after contract award. The Board stated that LJI sought "delay damages essentially from the award of the contract without deducting the period when it performed no meaningful civil engineering work." The Board recounted that LJI failed to prepare submittals in a timely fashion that were prerequisites to the start of construction. The Board noted, in particular, that there was no reliable contemporaneous network analysis system ("NAS") in the record for the design period.¹³¹

LJI "wholly failed to comply with its contractual responsibilities to" provide performance schedules in a timely fashion. The Board found that LJI's "failure to provide schedules deprived both parties of a valuable contract administration tool that was designed," among other things, to provide contemporaneous identification and "notice of the impact of the claim events on completion of the construction phases." The Board concluded that "multiple concurrent, contractor-caused delays [were] intertwined with any possible minor delays for which the [G]overnment could be held responsible." The Board found that LJI "failed to recognize, account for or segregate these other contractor-caused delays" and, as such, it could not recover monetary compensation for the periods involved.¹³²

The Board rejected LJI's acceleration claim, noting that the *sine qua non* of acceleration is proof of excusable delay. The Board held that, but for the twenty-day time extension as a result of the changes that impacted the storm drainage system, LJI's tardy performance was late for reasons other than any excusable delay regardless of any acceleration. The Board also observed that LJI concentrated on activities that were not on the critical path in the phased construction required by the contract. The Board further found that while updated scheduling information required by the contract could be used to identify acceleration efforts, LJI failed to explain how the schedules it provided to the Government demonstrated that work was accelerated by activities critical to phased project completion. The Board observed that "[t]his information is not self evident from unexplained scheduling data available. Moreover, the

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Constructive Acceleration and Concurrent Delay (cont'd):

Navy contemporaneously indicated that available information demonstrated undermanning of the job, not acceleration.”¹³³

LJI sought return of \$458,769 in liquidated damages withheld from final payment by the Government. The Board found that the Government was required to adjust the liquidated damage assessment to reflect the twenty-day time extension that it had granted.¹³⁴

Lovering-Johnson, Inc. should be viewed as another failure of proof case. The decision recounts repetitive failures by the contractor to provide comprehensive and accurate submittals to the Government and its failure to develop and maintain a meaningful NAS from which any acceleration could be determined.

3. Essex Electro Engineers, Inc.

Although this case did not involve an acceleration claim, the Board's efforts at apportioning concurrent delay are instructive. In *Essex Electro Engineers, Inc.*,¹³⁵ the Board reviewed an appeal from a contract for delivery of floodlight sets. The contract set forth a regime of “first article testing and the submission, Government review, and final submission of each of the data items.” The contract required Essex Electro Engineers, Inc. (“Essex”) to prepare a first article inspection procedure for conducting the first article testing that also set forth a schedule for Government review and comment.¹³⁶

Errors in government-supplied drawings compelled Essex to submit numerous engineering change proposals (“ECPs”) in an effort to secure correction of the errors. The Board found that the Government was responsible for the delay caused by the drawing errors, but that delay did not affect Essex's first article inspection procedures, which were submitted before the drawing errors were detected. The Board also found, however, that Essex was responsible for delays occasioned by its failure to submit complete ECPs.¹³⁷

Adding to Essex's woes was the fact that government-furnished equipment (“GFE”) that was to be used in the first article testing was defective. While the Board found that the Government was responsible for delay and disruption caused by the defective GFE during a forty-day period, it also found that the delay was concurrent with Essex's delay in submitting proper ECPs, and that only five days of that total were compensable. Similarly the Board found that the Government's actions on Essex's first article inspection report delayed production by fifty-nine days.¹³⁸

While Essex alleged that the Government was responsible for the entire 468-day delay to the contract, the Board found concurrent, contractor-caused delays and concluded that Essex was entitled to compensation for the sixty-four-day delay and disruption that resulted from the Government's delay in approving the first article inspection report and the impact caused by the defective GFE.¹³⁹

On reconsideration the Board revisited its findings and concluded that Essex had

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Constructive Acceleration and Concurrent Delay (cont'd):

incurred an additional compensable twenty-five-day delay in connection with the Government's tardy response to the ECPs submitted in response to the drawing errors.¹⁴⁰

On appeal the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that "a contractor cannot recover 'where the delays are "concurrent or intertwined" and the contractor has not met its burden of separating its delays from those chargeable to the Government.'"¹⁴¹ The Federal Circuit went on to observe that "if 'there is in the proof a clear apportionment of the delay and the expense attributable to each party,' then the [G]overnment will be liable for its delays."¹⁴² The Federal Circuit then assessed the events surrounding Essex's submission of ECPs and found that its submission and the Government's responses rendered "each party's delays inherently apportionable."¹⁴³ The Federal Circuit also found that the first article inspection procedure ("FAIP") likewise was susceptible to apportionment of delay and the expense attributable to each party.¹⁴⁴

In its remand order, the Federal Circuit directed the Board to attempt to enter findings whether the Government acted unreasonably in responding to the contractor's ECP and first article inspection reports.¹⁴⁵ The Federal Circuit then observed that if the Board could enter such findings, it should then

determine whether, as a result, Essex incurred delay to its overall contract performance. If, but for government-caused delay, the ECP and FAIP submissions would both have been approved prior to the date Essex actually began First Article testing, the Board should find the delay in the First Article testing to be attributable to the [G]overnment. The amount of any such overall delay chargeable to the [G]overnment should be equal to the period between the time both the ECP and FAIP submissions would have been approved absent culpable delay by the [G]overnment and the time Essex actually began First Article testing.

This inquiry requires the Board to focus on the overall effect that government caused delay had on the beginning of First Article testing, and not to focus on each discrete period of delay and then automatically treat as concurrent delay any period of government-caused delay during which Essex was causing unrelated delay. That type of instance-by-instance analysis of the delays could result in distortion of the proper measure of overall delay. The reason is that, in the absence of any government-caused delay, Essex's unrelated delays might have been concurrent with each other (rather than concurrent with government-caused delays), so that the overall delay in contract completion would not have been as great.¹⁴⁶

On remand, the parties did not supplement the record. Essex took the position on brief

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Constructive Acceleration and Concurrent Delay (cont'd):

that the Government was solely responsible for 276 days of overall delay to the start of first article testing and an additional forty days of delay resulting from defective GFE during the first article testing and first article inspection report (“FAIR”) period. The Government took the position that it was responsible for 123 days of delay, which included eighty-nine days that the Board had already assigned to the Government, the fifteen additional days assigned by the Federal Circuit, and an additional nineteen days of delay for which the Government assumed responsibility.¹⁴⁷

The Board embarked on a thorough review of all of the delaying events in the contract and entered additional findings of fact. From this review the Board “made an apportionment of the overall delay in contract completion taking into account the relationship of Essex’s concurrent delays to determine the actual cause of delay in contract performance.” The Board then concluded:

[T]he overall effect of the Government’s wrongful acts that caused delay in first article testing was 114 days of delay from the defective specifications, [twenty-seven] days for [first article inspection procedure] delays, and [forty] days from the defective [GFE,] for a total of 186 days and that delay in production and consequently the rescheduling and completion of contract deliveries was caused by five days from delayed [GFE], and [fifty-nine] days from delayed review and approval of the [first article inspection report]. The Government was solely responsible for causing 245 days of overall delay in contract completion.

The Board concluded that the contractor was “entitled to 156 days of compensable delay in addition to the [eighty-nine] days” identified in its original decision, as modified on reconsideration.¹⁴⁸

C. Jury Verdict

In *Koppers-Clough*,¹⁴⁹ the Board addressed five claims seeking an aggregate of \$8,045,795 in additional compensation, and various extensions of completion time to relieve the assessment of liquidated damages in the amount of \$305,685 under a contract for the second and third stages of construction of the U.S. Naval Communication Station, North West Cape, in Western Australia. “The contract provided for the construction of high frequency communications, support facilities, family housing and related buildings, along with necessary utilities and roads, at a price of \$20,470,000.”¹⁵⁰ The contractor’s claims sought relief in conjunction with (1) the unavailability of a pier (ninety-four-day delay),¹⁵¹ (2) the construction of temporary facilities to house and maintain its workforce and materials (thirty-day delay),¹⁵² (3) a labor shortage (ninety days),¹⁵³ (4) the construction of family housing (106 days),¹⁵⁴ and (5) various claims involving additional engineering work (212 days).¹⁵⁵

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Constructive Acceleration and Concurrent Delay (cont'd):

In the case of the labor shortage claim, there was a critical shortage of skilled labor in Western Australia when the invitation to bid was issued for the work covered by the contract. This fact was known to the Government and to Koppers-Clough ("Koppers"). The labor shortage was exacerbated by the fact that rich iron ore deposits in the nearby mountains would employ large numbers of construction workers during the contract term. "The specifications placed general responsibility for investigation of labor availability and recruitment upon the contractor." In addition, the contractor working on another phase of the station, Hardeman-Monier-Hutcherson ("HMH"), had fallen behind schedule and had decided to accelerate its efforts. HMH entered into an agreement with the officer in charge of construction ("OICC") whereby the Government subsidized part of HMH's acceleration costs. As part of its acceleration effort, HMH offered higher wages for its accelerated shift work, siphoning off more workers from Koppers.¹⁵⁶

Koppers' problems were complicated by the fact that its concrete subcontractor did not perform in a timely fashion, and Koppers' steel fabrication subcontractor's progress was retarded by Koppers' tardy delivery of necessary block layout drawings and drawings showing the placement of embedded items in footings and under concrete slabs. The steel fabrication subcontractor, however, also failed to prepare shop drawings in a timely manner, thereby delaying work. Additionally Koppers was required to increase the size of its temporary camp to accommodate a labor force necessary to populate the job.¹⁵⁷

Koppers contended that "it was delayed [ninety] days by the shortage of critical craft labor resulting from the HMH acceleration and impingement on the work of" its concrete and steel fabrication subcontractors. Koppers argued that sixty of the ninety days of delay were "concurrent with delays resulting from the temporary facilities 'approval' procedure." Koppers sought "a time extension, delay costs, and alleged acceleration costs in the nature of premium wages" and the effort associated with the enlargement of its temporary camp.¹⁵⁸

The Board sustained this aspect of the appeal, noting, "Although the proof is not certain, we accept the appellant's testimony that the job was delayed [ninety] days," and agreeing that the factors identified by Koppers contributed to the delay. The Board then proceeded, in the nature of a jury verdict, to hold that the Government's acceleration of the HMH work and the aftermath of the Government's delays to the temporary facilities created forty-five days of this delay. The Board held that Koppers was "entitled to a [forty-five] day extension of time to all milestones for these were 'acts of the Government' within the meaning of the Default clause of the contract."¹⁵⁹ It is not clear why the Board resorted to a jury verdict, but certainly the size of the record and the scope of the hearing may have contributed to this resolution.

The "jury verdict" method is "most often employed when damages cannot be ascertained by any reasonable computation from actual figures."¹⁶⁰ In order to adopt the jury verdict method, the tribunal must conclude "(1) that clear proof of injury exists; (2) that there is no more reliable method for computing damages; and (3) that the evidence is sufficient for a

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Constructive Acceleration and Concurrent Delay (cont'd):

court to make a fair and reasonable approximation of damages.”¹⁶¹ The evidence mustered to support such an approach, however, must have a demonstrable nexus to actual costs incurred and should be founded upon reasonable statistical methods or estimating techniques, not unsubstantiated and conclusory assertions.¹⁶² The tribunal must not be placed in a position where it must estimate for itself or guess the amount of extra expense to which the contractor is entitled.¹⁶³ Where the contractor cannot or does not demonstrate a justifiable inability to substantiate the amount of its damages by direct and specific proof, and the evidence is insufficient for the tribunal to make a fair and reasonable approximate of damages, the tribunal will decline to enter a jury verdict.¹⁶⁴

Resort to the jury verdict method oftentimes may be the only way in which to differentiate the competing delays in the concurrent delay environment. Contractors must be mindful of the fact that the jury verdict method is followed by the courts and the boards “as a last resort when there is clear entitlement to costs which cannot be established” with precision, “and where there is substantial and reasonable evidence which can be the foundation of a sound, unspeculative approximation which is fair to both parties.”¹⁶⁵ Stating the obvious, the tribunal most likely will abstain from using this alternative damage calculus if the contractor, as in *Hemphill*, presents multiple, conflicting, and constantly evolving damage calculations.¹⁶⁶

D. Concurrent Delay—Is It a Defense?

In *Essential Construction Co. & Himount Constructors, Ltd., A Joint Venture*,¹⁶⁷ the Board addressed an appeal from a denial of a consolidated impact /acceleration claim. The Government moved to dismiss on the grounds that the claim was settled through the previous nineteen appeals by the contractor.¹⁶⁸ The Government argued that the claimed periods of delay were concurrent with those claimed in the prior appeals. The Government contended that the denial of all the previous appeals automatically precluded the contractor from seeking recovery for costs attributable to delays that it requested in the instant appeal. “The Government also maintained that there [could] be no entitlement to claims for impact/acceleration costs because [the contractor had] failed to establish the basic element for such a claim, namely a given period of excusable delay.”¹⁶⁹

In ruling on the motion, the Board first addressed the status of the previously submitted claims and the resulting opinions of the Board with regard to the contract. In the nineteen previous appeals adjudicated under the contract, in every instance the Board denied any additional time extension beyond what had been previously allowed by the CO. In the Board’s view, the effect of those previous opinions validated the propriety of the time extensions granted by the CO, and foreclosed any further disputes with regard to the particular claims addressed. The Board noted that it had not reconsidered any of the earlier determinations and decisions in the nineteen appeals and, as such, the decisions were final. Since the decisions had become final, the Board reasoned, nothing in the present appeal could be offered by either party

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Constructive Acceleration and Concurrent Delay (cont'd):

that would establish a fact at variance with the facts as found by the Board in each of the earlier nineteen appeals; the Board observed that “[t]he most dominant fact found in these nineteen appeals is that [the contractor] was not delayed by any of the causes of delay alleged in the nineteen other appeals.”¹⁷⁰

The Board commented that the consolidation of the impact/acceleration claims into a single appeal was not intended to afford the contractor a “second bite at the apple” for any claims already decided. It was the product of a desire for efficiency. The Board’s intent was to consider all of the delays that might have been caused, so that the impact/acceleration costs could be reviewed from the vantage point of overall performance; this perspective was not available when the Board reviewed the claims individually.¹⁷¹

The Board then observed, “The defense of concurrent delay is valid only when applied to an actually established delay, not merely an alleged delay,” and referred to the parties’ stipulations in the opening hearing that

“any decision in favor of the [contractor] is subject to a future showing by the Government of possible concurrent delays and the effect thereof . . .” and that “[p]resumably evidence on concurrent delays will be presented by the Government when a hearing is held on the [contractor’s] impact acceleration claim. . . .”¹⁷²

The Board went on to observe that the principle of concurrent delay still would be applicable to any findings of government-caused delays arising out the claims in the present appeal.¹⁷³

The Board denied the Government’s motion, finding that dismissal was not appropriate without further proceedings. The Board first noted that it would be necessary to determine whether any of the facts underlying the instant claims already had been litigated in the process of deciding the prior appeals, but that such a determination could not be made on the existing record. The Board then identified the contractor’s remaining claims and directed the contractor to amend its complaint to detail its position with regard to each of the claims that the Board enumerated and to detail any claim arising from a modification to the contract and to identify “(1) [the] duration of the delay and the particular dates thereof; (2) [the] delay to the contract as a whole; and (3) any time extension previously granted by the Government covering any part of the” relevant delay.¹⁷⁴

When the Board next addressed the case, the preamble to the decision describing the tortured path that this appeal had followed spoke volumes: “Our discussion of the basis for our decision in this appeal would not be complete without noting the near total confusion which has surrounded this appeal.”¹⁷⁵ The Board denied the appeal, largely on failure of proof. It noted that the parties did not provide it with any analysis of how the claim items “individually or in concert acted [to] delay the completion of the project.”¹⁷⁶ The Board noted that the

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Constructive Acceleration and Concurrent Delay (cont'd):

Government's expert frequently speculated, used the "loosest and strangest mathematics," and derived contract completion dates through "some equally opaque process."¹⁷⁷ The Board similarly observed that the contractor's presentation was a "cloud of inferences, not proof."¹⁷⁸ Perhaps the best way to describe the denouement of this decade-long saga would be to recall the last stanza of "The Hollow Men," which instructs that the world ends "[n]ot with a bang but a whimper."¹⁷⁹

VIII. Conclusion

Constructive acceleration occurs when the Government's inattention to a contractor's request for a time extension, in the face of an excusable delay, is coupled with its insistence that the contractor complete on time. Contractor recovery of damages for constructive acceleration in the concurrent delay environment is difficult, but not impossible. Those cases in which tribunals have not awarded damages, as opposed to no-cost time extensions, invariably involve situations in which the contractor has failed to demonstrate either that it gave the Government timely notice of the delay and requested a time extension or that the Government did not accede to the request. Stated another way, constructive acceleration claims have not been denied solely on the rationale of a concurrent delay from which neither party should benefit. Government counsel should not view concurrent delay as a panacea, and the fact that the ASBCA has apportioned delay should disabuse them of that notion. Rather, the focus of Government counsel should be on the other factors restated in *Fraser Construction Co. v. United States*.¹⁸⁰ Failure of proof on one or all of those factors will cause the claim to fail and relieve the tribunal of the arduous effort of apportioning the delays. Should a contractor establish all of the last factors in the constructive acceleration analysis as announced in *Fraser*, the parties then will be faced with the opportunity to provide a framework to the tribunal for performing an apportionment.

*Fischbach*¹⁸¹ and *Essex Electro Engineers*¹⁸² demonstrate that once a contractor has established these last four factors, the tribunal, either on its own initiative or with "encouragement," can embark on an apportionment of concurrent delay. The obligation of the practitioner is to present a coherent analysis of the delay in order to facilitate the judge's efforts. When the contractor's NAS is reliable, this should be the first resource that the parties can use. If the NAS is not reliable, or one was not prepared, the parties should examine whether the equities in the case suggest that the tribunal should pursue a jury verdict approach. While resort to a jury verdict approach may create apprehension in the minds of both parties, when the contractor otherwise has satisfied the criteria for establishing a constructive acceleration claim, a good argument can be made that the judge will recognize the equities and may resist the temptation to consider the existence of concurrent delay as an absolute bar to the claim.

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Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes

1. ENGBCA No. 5782, 94-1 BCA ¶26,473.
2. *Id.* at 131,781
3. *Id.*
4. *Id.*
5. *Id.* at 131,781–82.
6. *Id.* at 131,782.
7. *Id.*
8. *Id.* at 131,782, 131,784.
9. *Id.* at 131,784–85, 131,787.
10. ENGBCA Nos. 3804, 4075, 4135, 4579, 3823, 4105, 90-1 BCA ¶22,327, at 112,210.
11. *Id.* The underlying contract issued by the Washington Metropolitan Area Transit Authority (WMATA) included General Provision 1.31, “Progress Schedules and Requirements for Maintaining Progress.” This provision authorized the CO to expedite work when a contractor was behind schedule, much like FAR 52.236-15. *Id.*
12. *Id.*
13. ASBCA No. 37351, 93-2 BCA ¶25,893, at 128,789, *aff’d on recons.*, 93-3 BCA ¶25,935.
14. *Id.* at 128,792–93.
15. *See id.* at 128,792–94.
16. ASBCA No. 20697, 77-2 BCA ¶12,622, at 61,171.
17. *See id.* at 61,171–73.
18. 200 Ct. Cl. 737 (1972).
19. *See* Pathman Constr. Co., ASBCA No. 14285, 71-1 BCA ¶ 8905, at 41,377.
20. *See, e.g.*, Fraser Constr. Co. v. United States, 384 F.3d 1354, 1361 (Fed. Cir. 2004); R.J. Lanthier Co., ASBCA No. 51636, 04-1 BCA ¶32,481, at 160,668 (citing Commercial Contractors Equip., Inc., ASBCA Nos. 52930, 52931, 52932, 52933, 52934, 52935, 03-2 BCA ¶32,381, at 160,261); Hemphill Contracting Co., ENGBCA Nos. 5698, 5776, 5840, 94-1 BCA ¶26,491, at 131,853; McNutt Constr. Co., ENGBCA No. 4724, 85-3 BCA ¶18,397, at 92,279; Fermont Div., Dynamics Corp. of Am., ASBCA No. 15806, 75-1 BCA ¶11,139, at 52,999–53,000, *aff’d*, 216 Ct. Cl. 448 (1978).
21. *See* Skyline Painting, Inc., ENGBCA No. 5810, 93-3 BCA ¶26,041, at 129,459; Bell Coatings, Inc., ENGBCA No. 5787, 93-2 BCA ¶25,805, at 128,450–51; J.M.T. Mach. Co., ASBCA Nos. 23928, 24298, 24536, 85-1 BCA ¶17,820, at 89,183–84.
22. *Morganti Nat’l, Inc. v. United States*, 49 Fed. Cl. 110, 132 (2001) (citations omitted).
23. *Id.* (citing *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)).
24. FAR 52.249-10(b)(1).
25. *See, e.g.*, Centennial Leasing v. Gen. Servs. Admin., GSBCA No. 12037, 94-1 BCA ¶26,398, at 131,321 (finding that the death of the chief operating officer was not an act of God); M&T Constr. Co., ASBCA No. 42750, 93-1 BCA ¶25,223, at 125,636 (finding that a heart attack suffered by one of subcontractor’s personnel was not an act of God); Nogler Tree Farm, AGBCA No. 81-104-1, 81-2 BCA ¶15,315, at 75,842 (holding that the eruption of the Mt. St. Helens volcano was an act of God).
26. *See, e.g.*, Fred A. Arnold, Inc., ASBCA No. 16506, 72-2 BCA ¶9608, at 44,934; Bill’s Janitor Serv., ASBCA Nos. 10345, 10393, 65-2 BCA ¶4916, at 23,243; Elec. & Missile Facilities, Inc., ASBCA Nos. 9325, 9507, 1964 BCA ¶4127, at 20,102.
27. *See* FAR 22.101-2(b).
28. *See, e.g.*, Alley-Cassetty Coal Co., ASBCA No. 33315, 89-3 BCA ¶21,964, at 110,490 (finding that contractor delay was excused when the earliest winter weather in twenty-three years caused a river to freeze and prevented the contractor from making coal delivery by river barge); J&M Lumber, Inc., ASBCA No. 25951, 82-1 BCA ¶15,500, at 76,880 (finding that contractor delay was excused due to unusually severe rainfall).

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Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes (cont'd)

29. See Aaron Refrigeration Servs., ASBCA No. 27361, 84-2 BCA ¶17,368, at 86,534–35 (holding that contacting a bonding company concerning possible Davis-Bacon Act violations was not improper); San Antonio Constr. Co., ASBCA No. 8110, 1964 BCA ¶4479, at 21,533 (noting that an improper failure to pay for work performed can effect a delay beyond the fault or negligence of the contractor).
30. See *United States v. Winstar Corp.*, 518 U.S. 839, 891 (1996) (characterizing a sovereign act as having a “public and general” effect not directed to the contract); Home Entm’t, Inc., ASBCA No. 50791, 99-2 BCA ¶30,550, at 150,860.
31. See, e.g., Potashnick Constr., Inc., ENGBCA No. 2865, 69-2 BCA ¶7817, at 36,335 (finding that runoff is not a “flood”); Koppers Co., ENGBCA No. 2700, 67-2 BCA ¶6492, at 30,121.
32. See Cal. Shipbuilding & Dry Dock Co., ASBCA No. 21394, 78-1 BCA ¶13,168, at 64,354 (formal request); Corbetta Constr. Co., PSBCA No. 299, 77-2 BCA ¶12,699, at 61,621 (citations omitted) (CO’s knowledge).
33. See, e.g., Norair Eng’g Corp. v. United States, 666 F.2d 546, 549 (Ct. Cl. 1981); Fischbach & Moore Int’l Corp., ASBCA No. 18146, 77-1 BCA ¶12,300, at 59,228, *aff’d*, 617 F.2d 223 (Ct. Cl. 1980) (holding that the contractor had been compelled to accelerate because denials and tardy approvals of time extensions, coupled with government intransigence, led the contractor “reasonably to believe that the requested time extensions would not be granted and that it would be held to the original contract completion date”).
34. See McKenzie Eng’g Co., ASBCA No. 53374, 02-2 BCA ¶31,972, at 157,925; Olin Mathieson Chem. Corp., ASBCA No. 7605, 1963 BCA ¶3983, at 19,693, *aff’d*, 179 Ct. Cl. 368 (1967) (examining a three- to four-month delay in granting a time extension request found reasonable on a complex project); Barrett Co., ENGBCA No. 3877, 78-1 BCA ¶13,075, at 63,853–54 (finding acceleration where the CO delayed for two months in acting on a request for a time extension to a contract with a sixty-day performance period).
35. McNutt Constr. Co., ENGBCA No. 4724, 85-3 BCA ¶18,397, at 92,279.
36. See, e.g., *Olin Mathieson*, 179 Ct. Cl. at 404–07; *Fermont Div., Dynamics Corp. of Am.*, ASBCA No. 15806, 75-1 BCA ¶11,139, *aff’d*, 216 Ct. Cl. 448 (1978).
37. See Hemphill Contracting Co., ENGBCA Nos. 5698, 5776, 5840, 94-1 BCA ¶26,491, at 131,853–54.
38. ASBCA Nos. 41828, 42225, 42226, 42227, 42228, 43899, 43900, 93-2 BCA ¶25,699, at 127,849.
39. See *Norair Eng’g Corp. v. United States*, 666 F.2d 546, 549 (Ct. Cl. 1981); *Tri Indus., Inc.*, ASBCA Nos. 47880, 48140, 48491, 99-2 BCA ¶30,529, at 150,765; *Intersea Research Corp.*, IBCA No. 1675, 85-2 BCA ¶18,058, at 90,631; *Hugh Brasington Contracting Co.*, ASBCA No. 25471, 84-3 BCA ¶17,528, at 87,277.
40. See *R.J. Lanthier Co.*, ASBCA No. 51636, 04-1 BCA ¶32,481, at 160,669 (finding that government pressure to complete the contract on time was not unreasonable or tantamount to an acceleration order, particularly in the absence of a proper request for a quantified time extension based solely on excusable delays); *A. Teichert & Son, Inc.*, ASBCA Nos. 10265, 10804, 11444, 11580, 68-2 BCA ¶7175, at 33,304; *Kingston Bituminous Prods. Co.*, ASBCA Nos. 9964, 10902, 67-2 BCA ¶6638, at 30,771.
41. *Hawaiian Dredging & Constr. Co.*, ASBCA No. 25594, 84-2 BCA ¶17,290, at 86,114 (quoting *Fermont*, 75-1 BCA ¶11,139, at 53,000); *B.J. Larvin, Gen. Contractor, Inc.*, ASBCA Nos. 20946, 20948, 21021, 20945, 20947, 77-2 BCA ¶12,717, at 61,788; *Pathman Constr. Co.*, ASBCA No. 14285, 71-1 BCA ¶8905, at 41,377.
42. See *Solar Foam Insulation*, ASBCA No. 46278, 94-1 BCA ¶26,288, at 130,775 (denying acceleration claim where the record revealed that the contractor had increased its crew sizes prior to the alleged acceleration order and had taken no further steps to accelerate after the order was received).
43. See, e.g., *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714–15 (1944) (“Where both parties contribute to a delay neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.”); *Hardeman-Monier-Hutcherson, Joint Venture*, ASBCA No. 11869, 67-2 BCA ¶6522, at 30,312 (“The rule is well settled that where both parties are responsible for the delay in completion of the contract and it is impossible to ascertain the true balance [of fault] . . . no liquidated damages can be assessed.”) (quoting *Sun Shipbuilding Co. v. United States*, 76 Ct. Cl. 154, 188 (1932)) (internal quotation marks omitted).

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Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes (cont'd)

44. *See, e.g.*, *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1292 (Fed. Cir. 2000); *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982); *Smith v. United States*, 34 Fed. Cl. 313, 325 (1995); *John McShain, Inc. v. United States*, 412 F.2d 1281, 1284–85 (Ct. Cl. 1969); *Rivera Gen. Contracting*, ASBCA No. 25888, 85-2 BCA ¶18,095, at 90,833; *Hardeman-Monier-Hutcherson*, 67-2 BCA ¶6522, at 30,312.
45. ENGBCA Nos. 5698, 5776, 5840, 94-1 BCA ¶26,491.
46. ASBCA No. 51636, 04-1 BCA ¶32,481.
47. *Hemphill*, 94-1 BCA ¶26,491, at 131,842.
48. *Id.* at 131,843.
49. *Id.* at 131,845.
50. *Id.*
51. *Id.* at 131,845–46.
52. *Id.* at 131,846.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 131,847.
57. *Id.*
58. *Id.* at 131,848 (docketed as ENGBCA No. 5698).
59. *Id.* at 131,851 (docketed as ENGBCA Nos. 5776, 5840).
60. *Id.* at 131,853.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 131,853–54.
65. *Id.* at 131,854.
66. *Id.*
67. *Id.*
68. *Id.* at 131,872.
69. *Id.*
70. *Id.* at 131,872–73.
71. *Id.* at 131,873.
72. *Id.* Indeed, when errors or inconsistencies were exposed during cross-examination, the claims consultant routinely erased the erroneous or inconsistent entry and recalculated the particular sum. *Id.* at 131,858–68.
73. *Id.* (emphasis in original) (citation omitted).
74. *R.J. Lanthier Co.*, ASBCA No. 51636, 04-1 BCA ¶32,481, at 160,645.
75. *Id.* at 160,648.
76. *Id.* at 160,649.
77. *Id.* at 160,650.
78. *Id.* at 160,650–51.
79. *Id.*
80. *Id.* at 160,651.
81. *Id.* at 160,651–52.
82. *Id.* at 160,652–53 (internal quotation marks omitted).
83. *Id.* at 160,653.
84. *Id.*
85. *Id.*
86. *Id.* at 160,653–54.
87. *Id.* at 160,664–65.
88. *Id.* at 160,666–67.
89. *Id.* at 160,665.

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Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes (cont'd)

90. *Id.* at 160,669.
91. *See* Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1582 (Fed. Cir. 1994); Interstate Gen. Gov't Contractors v. West, 12 F.3d 1053, 1058–59 (Fed. Cir. 1993); Preventive Maint. Servs., Inc., ASBCA Nos. 41445, 44661, 94-3 BCA ¶27,115, at 135,147–48; *see also* G&S Constr., Inc., ASBCA No. 28677, 86-1 BCA ¶18,740, at 94,307; C.N. Flagg & Co., ASBCA Nos. 26444, 26655, 84-1 BCA ¶17,120, at 85,272; Owen L. Schwam Constr. Co., ASBCA No. 22407, 79-2 BCA ¶13,919, at 68,330.
92. *See Interstate*, 12 F.3d at 1058–59.
93. *See id.* at 1058–60.
94. 19 Cl. Ct. 474, 475–76 (1990).
95. *See* G.M. Shupe, Inc. v. United States, 5 Cl. Ct. 662, 700 (1984) (citations omitted).
96. *See* Wayne Constr., ENGBCA No. 4942, 91-1 BCA ¶23,535, at 118,033, *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992).
97. *See, e.g.,* Skyline Painting, Inc., ENGBCA No. 5810, 93-3 BCA ¶26,041, at 129,459.
98. Jim Smith Contracting Co., ENGBCA Nos. 5870, 5883, 94-2 BCA ¶26,879, at 133,791.
99. *See* Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶23,378, at 117,288.
100. *See id.*
101. *See, e.g.,* VEC Inc., ASBCA No. 35988, 90-3 BCA ¶23,204, at 116,452.
102. *See* Oneida Constr., Inc./David Boland, Inc., ASBCA No. 44194, 94-3 BCA ¶27,237, at 135,727.
103. *See* Preventive Maint. Servs., Inc., ASBCA Nos. 41445, 44661, 94-3 BCA ¶27,115, at 135,148; Skyline Painting, Inc., ENGBCA No. 5810, 93-3 BCA ¶26,041, at 129,459.
104. *See* Lloyd H. Kessler, Inc., AGBCA No. 88-170-3, 91-2 BCA ¶23,802, at 119,191 (rejecting the contractor's claim that it could have performed work within twenty-one days, absent government-ordered suspension of work, where the record indicated that the contractor did not visit the site prior to bidding and did not see the site until the day before operations commenced). The *Kessler* board also noted that the government estimate, corroborated by an independent estimate prepared by the State of California, envisaged a five- to six-week work period. It determined that the contractor's ignorance of potential problems at the job site contradicted its allegation that it could have completed the job before the contract term ended. *Id.*
105. *See* Bell Coatings, Inc., ENGBCA No. 5787, 93-2 BCA ¶25,805, at 128,450 (finding the contractor's claim that it would have achieved early completion by working throughout the entire winter, absent government-ordered suspension of work, was not susceptible to evaluation because the contractor did not return to work in early winter, making it impossible to corroborate the contractor's assumed production rates).
106. R.J. Lanthier Co., ASBCA No. 51636, 04-1 BCA ¶32,481, at 160,668–69; Hemphill Contracting Co., ENGBCA Nos. 5698, 5776, 5840, 94-1 BCA ¶26,491, at 131,854.
107. *See* W. Stephen Dale & Robert M. D'Onofrio, *Reconciling Concurrency in Schedule Delay and Constructive Acceleration*, 39 Pub. Cont. L.J. 161, 170–74 (2010), for discussion of the *Hemphill* and *Lanthier* decisions and of schedule analysis techniques for concurrent delay.
108. *See* Charles Dickens, *David Copperfield* 804 (Random House 1950) (1850).
109. *Fischbach & Moore Int'l Corp.*, ASBCA No. 18146, 77-1 BCA ¶12,300, *aff'd*, 617 F.2d 223 (Ct. Cl. 1980).
110. *Fischbach & Moore Int'l Corp.*, ASBCA No. 14216, 71-1 BCA ¶8775, at 40,744.
111. *Fischbach & Moore*, 77-1 BCA ¶12,300, at 59,206.
112. *Id.* at 59,224.
113. *Id.*
114. *Id.* at 59,216.
115. *Id.* at 59,228. The Board noted, “[A]s [a] practical matter, if [Fischbach] had not accelerated, it would have suffered recoverable delay costs, including unabsorbed overhead, on account of the delay in project completion that otherwise would have resulted from the steel seam problem.” *Id.* The Board compared Fischbach's delay claim of \$735,174 with its acceleration claim of \$154,516 and observed “that delay costs, including unabsorbed

(continued on next page)

Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes (cont'd)

overhead less an allowance for productive work, would have considerably exceeded the cost of acceleration.” *Id.* As such, under the circumstances of the case, the Board concluded “that the effect of [Fischbach’s] decision to accelerate was substantially to mitigate the damages resulting from the Government-caused steel seam problem.” *Id.*

116. *Id.* at 59,224 (citations omitted).

117. *Id.* The Court of Claims has described the critical path method as

an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. . . . The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the “critical path.” A delay, or acceleration, of work along the critical path will affect the entire project.

Haney v. United States, 676 F.2d 584, 595 (Ct. Cl. 1982); *accord* Manuel Bros., Inc. v. United States, 55 Fed. Cl. 8, 48 n.10 (2002).

118. Fischbach & Moore Int’l Corp., ASBCA No. 18146, 77-1 BCA ¶12,300, at 59,224, *aff’d*, 617 F.2d 223 (Ct. Cl. 1980).

119. *Id.* (citing Chaney & James Constr. Co., Inc. v. United States, 421 F.2d 728 (Ct. Cl. 1970)).

120. *Id.* at 59,224 (citing Raymond Constructors of Afr., Ltd. v. United States, 411 F.2d 1227 (Ct. Cl. 1969)).

121. *Id.*

122. *See id.* at 59,226–28.

123. ASBCA No. 53902, 06-1 BCA ¶33,126.

124. *Id.* at 164,154, 164,164.

125. *Id.* at 164,155–56.

126. *Id.* at 164,169 (emphasis omitted).

127. *Id.* at 164,172.

128. *Id.* at 164,172–73.

129. *Id.* at 164,173.

130. *Id.*

131. *Id.* at 164,173–74.

132. *Id.*

133. *Id.* at 164,174–75.

134. *Id.* at 164,175.

135. ASBCA No. 49915, 99-1 BCA ¶ 30,229.

136. *Id.* at 149,547–48.

137. *Id.* at 149,552–53.

138. *Id.* at 149,554, 149,560.

139. *Id.* at 149,559–60.

140. Essex Electro Eng’rs, Inc., ASBCA No. 49915, 99-2 BCA ¶30,418, at 150,374.

141. Essex Electro Eng’rs, Inc. v. Danzig, 224 F.3d 1283, 1292 (Fed. Cir. 2000) (quoting Blinderman Constr. Co. v. United States, 695 F.2d 552, 559 (Fed. Cir. 1982)).

142. *Id.* (quoting Coath & Goss, Inc. v. United States, 101 Ct. Cl. 702, 714–15 (1944)).

143. *Id.*

144. *Id.* at 1294.

145. *Id.* at 1295.

146. *Id.* at 1296.

147. Essex Electro Eng’rs, Inc., ASBCA No. 49915, 02-1 BCA ¶31,714, at 156,696.

(continued on next page)

Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes (cont'd)

148. *Id.* at 156,701.
149. ASBCA Nos. 12485, 13119, 71-2 BCA ¶8920.
150. *Id.* at 41,438.
151. *Id.* at 41,444.
152. *Id.* at 41,447–49.
153. *Id.* at 41,449–50.
154. *Id.* at 41,454.
155. *Id.* at 41,455–84.
156. *Id.* at 41,449–50.
157. *Id.* at 41,450.
159. *Id.* at 41,451.
160. *Hi-Shear Tech. Corp. v. United States*, 356 F.3d 1372, 1376 (Fed. Cir. 2004) (citation omitted); *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991), *overruled on other grounds by* *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995).
161. *Dawco*, 930 F.2d at 880 (citation omitted).
162. *See id.* at 881–82.
163. *See id.*
164. *See* *GAP Instrument Corp.*, ASBCA No. 55041, 08-2 BCA ¶33,920, at 167,852–53; *Grumman Aerospace Corp.*, ASBCA No. 48006, 06-1 BCA ¶33,216, at 164,621, *aff'd sub nom.* *Grumman Aerospace Corp. v. Wynne*, 497 F.3d 1350 (Fed. Cir. 2007); *NavCom Def. Elecs., Inc.*, ASBCA Nos. 52292, 52293, 52294, 52295, 52296, 52297, 50767, 01-2 BCA ¶31,546, at 155,787 (declining to use the jury verdict method because the contractor did not demonstrate “a justifiable inability to substantiate the amount of its damages by direct and specific proof, and because the evidence [was] insufficient [for the Board] to make a fair and reasonable approximation of its damages”); *Serv. Eng'g Co.*, ASBCA No. 40274, 93-1 BCA ¶25,520, at 127,112 (declining to adjust requests for equitable adjustments by way of the jury verdict method where the contractor’s “claimed material, shop material and subcontractor costs were supported by no more than its contract administrator’s estimates”).
165. *Int'l Equip. Serv.*, ASBCA Nos. 21104, 23170, 83-2 BCA ¶16,675, at 82,925 (quotation omitted); *see* *Techni Data Labs.*, ASBCA No. 21054, 77-2 BCA ¶12,667, at 61,410.
166. *Hemphill Contracting Co.*, ENGBCA Nos. 5698, 5776, 5840, 94-1 BCA ¶26,491, at 131,873.
167. ASBCA No. 18706, 83-2 BCA ¶16,906.
168. *Id.* at 84,109. The underlying contract had proved to be a fertile source of Board litigation. Over a fourteen-year period, the contractor pursued over twenty ASBCA appeals that were the subject of nine published Board decisions. *See, e.g.,* *Essential Constr. Co. & Himount Constructors, Ltd.*, ASBCA No. 18520, 74-1 BCA ¶10,635.
169. *Essential*, 83-2 BCA ¶16,906, at 84,113.
170. *Id.* at 84,114.
171. *Id.* (internal quotation marks omitted).
172. *Id.* at 84,114–15.
173. *Id.* at 84,115.
174. *Id.* at 84,115–16.
175. *Essential Constr. Co. & Himount Constructors, Ltd.*, ASBCA No. 18706, 89-2 BCA ¶21,632, at 108,833.
176. *Id.* at 108,834.
177. *Id.* at 108,834–35.
178. *Id.* at 108,835.
179. T.S. Eliot, *The Hollow Men*, in *Poems: 1909–1925*, at 123, 128 (1926).
180. 384 F.3d 1354, 1361 (Fed. Cir. 2004) (“Although different formulations have been used in setting forth the elements of constructive acceleration, the requirements are generally described to include the following elements, each of which must be proved by the contractor: (1) that the contractor encountered a delay that is excusable under

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Constructive Acceleration and Concurrent Delay (cont'd):

Endnotes (cont'd)

the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.").

181. Fischbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶12,300, *aff'd*, 617 F.2d 223 (Ct. Cl. 1980).

182. Essex Electro Eng'rs, Inc., ASBCA No. 49915, 99-1 BCA ¶30,229.



The *Doyle-Gresham* Spectrum of Waiver of Contract Terms Through Prior Course of Dealing

by
David Schneider*

The doctrine of prior course of dealing allows parties to change contract terms and provisions, as a matter of equity, through their actions which results in a waiver to the original contract.^{1,2} The Restatement (Second) of Contracts §223 defines a prior course of dealing as “a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other contract.”³ The Court of Claims,⁴ with jurisdiction over government contracts, defined a prior course of dealing, specifically one that waives a contract provision, as following: “a contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead.”⁵

The court requires that the “emphasis [of this inquiry] is on a sequence of events,” because a waiver is a drastic remedy that results in modifying the contract.⁶ For example a prior course of dealing cannot create a waiver by merely establishing a single deviation during performance.⁷ This emphasis on a sequence of actions raises the question of how many prior actions are needed to establish a waiver through creating prior course of dealing. To properly ascertain the amount of prior actions needed, this article focuses on contract disputes centering on clear and functional specifications in order to isolate the waiver aspect and not its interpretative function. In government contract cases the courts have not approached this issue by forming a threshold; rather, they have used a spectrum.⁸ The lower end of this spectrum is bookended by *Doyle Shirt Manufacturing Corporation v. United States*⁹ and the other end of the spectrum is marked by *Gresham & Company, Inc. v. United States*.¹⁰

In *Doyle*, the government awarded the contractor, a shirt manufacturer, contracts to manufacture and deliver 98,640 men’s khaki shade #2111 shirts.¹¹ The contracting parties, understanding that the shade of khaki could not perfectly be recreated every time, added that the shade must be a “good approximation” of the khaki #2111.¹² The court held that the “good approximation” language clearly referred to the government’s prescribed shade range, which removed any possible ambiguity from the case, and then the court decided the issue as a waiver case.¹³ In three earlier contracts, the government had granted the contractor waivers for shirts that fell outside the government’s shade range.¹⁴ The contractor tried to argue that by accepting shirts outside of the color range on three separate contracts, the government waived the contract’s color specification through a prior course of dealing.¹⁵ The court held, establishing the lower end of the spectrum, that three departures from clear contractual specifications did not constitute a modification of the contractual provisions through a prior course of dealing.¹⁶

In *Gresham*, the other bookend of the spectrum, the contractor was awarded thirty-six contracts to make dishwashers for the government.^{17, 18} The dispute arose because the contractor did not include automatic detergent dispensers on the dishwashers under a

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The Doyle-Gresham Spectrum of Waiver (cont'd):

specification.¹⁹ The Armed Services Board of Contract Appeals (ASBCA) found that the specification required the automatic detergent dispensers and was “not vague, misleading or ambiguous.”²⁰ The twenty-one undisputed contracts were completed before the fifteen disputed contracts and all the dishwashers provided by the contractor did not include the automatic detergent dispensers.²¹ The court held that the undisputed contracts waived the specification by creating a prior course of dealing.²² The court reasoned that the twenty-one undisputed contracts, along with the fifteen disputed contracts, formed a “reasonable belief” and reliance that the specification for automatic detergent dispensers was waived.²³

As there is no magic number of deviations which would constitute a waiver through a prior course of dealing, a party would claim its contract dispute is more akin to one of the two cases in this *Doyle-Gresham* spectrum. For example, in *Kvaas Construction*, the contractor provided expansion loops in steam and condensate pipes for a heat distribution system and the ASBCA held, citing *Doyle*, that a waiver was not created through a prior course of dealing after four previous deviations from the contract.²⁴

On the other end of the spectrum, the General Services Administration Board of Contract Appeals (GSBCA) found a prior course of dealing in *Unlimited Supply Company, Inc. v. GSA*.²⁵ In this case, the contractor provided the General Services Administration (GSA) with stainless steel food mixing bowls.²⁶ After the contractor delivered nineteen different shipments of mixing bowls manufactured from the same molds, the GSA terminated the contract for default.²⁷ The GSA took the position that the bowls provided were not made to the exact specifications.²⁸ The GSBCA overturned the government’s termination for default holding that the contractor reasonably relied on nineteen previous orders that the bowls delivered were satisfactory.²⁹ The *Unlimited Supply Company* holding places these nineteen deviations on the *Gresham* end of the spectrum.³⁰

Thus, establishing a sequence of contractual deviations as a prior course of dealing on the *Gresham* side of the spectrum is daunting. To alleviate the high burden that *Gresham* has created, a party wanting to prove a waiver of contractual terms through a prior course of dealing should differentiate its contractual situation from that of *Gresham*.³¹

One of the distinguishing factors necessary to place a case on the *Doyle-Gresham* spectrum is that the contractual language was clear and functional and did not require interpretation. For example, the contractor in *L.W. Foster Sportswear Company, Inc. v. United States*, established a prior course of dealing waiving a specification after “five or six previous contracts.”³² The contract was for goatskin flying jackets and included the exact specifications for the jackets.³³ The court found the specifications to be defective because they could not practically be used for mass production.³⁴ This case does not present an issue of interpreting contractual specifications; however, the language is not functional like in *Doyle* and *Gresham*.³⁵ This key difference in this case led the court to assign a great weight to the prior course of dealing, like in interpretation cases, and, thereby, to remove it from the *Doyle-Gresham* waiver spectrum.³⁶

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The Doyle-Gresham Spectrum of Waiver (cont'd):

The *Doyle-Gresham* spectrum runs from three contractual deviations, which did not create a waiver, to twenty-one contractual deviations, which form a waiver.³⁷ The spectrum cast by the case law demonstrates the difficulty in establishing a waiver through prior course of dealing.

* - David Schneider is an intern at the Federal Aviation Administration Office of Dispute Resolution for Acquisition, Summer 2010; Emory University School of Law, J.D., expected graduation 2012. Member of the Emory Law School Moot Court Society; Tufts University, B.A., English, *magna cum laude*.

Endnotes

1. Prior course of dealing is also referred to as "course of dealing." See, e.g., *Va. Elec. & Power Co. v. Norfolk S. Ry. Co.*, 278 Va. 444 (2009).
2. A prior course of dealing can also demonstrate the intent of the parties, especially in cases of textual ambiguity. John Cibinic, Jr & Ralph C. Nash, *Administration of Government Contracts* 199-200 (3d ed., 1995). The performance of one previous contract can proffer strong evidence of the true intent of the parties for contract in dispute. *Minneapolis-Moline Co. v. U.S.*, 137 Ct. Cl. 790, 795 (1957) ("A previous contract already performed and already interpreted is strong evidence of the parties' interpretation of the disputed contract."). The courts assign a great weight to the conduct of the contracting parties when interpreting ambiguous language in the contract for intent. *General Warehouse Two, Inc. v. U.S.*, 181 Ct. Cl. 180, 187 (1967). Establishing a prior course of dealing is much easier when the issue is one of interpretation than when the issue is one of waiver of contractual terms. Cibinic, *supra*, at 200.
3. Comment (a) of the Restatement Second of Contracts § 223 explicitly adopted Uniform Commercial Code § 1-205. Restatement (Second) of Contracts § 223 cmt. a (1981).
4. Congress reorganized the Court of Claims in 1982 as The United States Court of Federal Claims. Court History Brochure, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf.
5. *Gresham & Co., Inc. v. U.S.*, 200 Ct. Cl. 97 (1972).
6. *Underground Constr. Co. v. U.S.*, 16 Cl. Ct. 60 (1988) (quoting *Int'l Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 491 (5th Cir. 1983)).
7. *Int'l Res. Recovery, Inc. v. U.S.*, 60 Fed. Cl. 428, 432 (2004); *Doyle Shirt Mfg. Corp. v. U.S.*, 462 F.2d 1150, 1154, 199 Ct. Cl. 150 (1972).
8. See, e.g. *Kvaas Constr. Co.*, 94-BCA ¶26,513 (1993).
9. *Doyle Shirt Mfg. Corp. v. U.S.*, 199 Ct. Cl. 150 (1972).
10. *Gresham*, 200 Ct. Cl. 97.
11. *Doyle*, 199 Ct. Cl. at 152.
12. *Id.* at 155.
13. *Id.*
14. *Id.* at 158.
15. *Id.*
16. *Id.* at 159.
17. *Gresham*, 200 Ct. Cl. at 99. Out of these 36 contracts only the last 15 were disputed in this case.
18. Out of these 36 contracts only the last 15 were disputed in this case. *Id.* at 121.
19. *Id.* at 110.

(continued on next page)

The Doyle-Gresham Spectrum of Waiver (cont'd):

Endnotes (cont'd)

20. *Id.* (quoting *Gresham & Co., Inc.*, 70-1 B.C.A. ¶8318 (1970)).
21. *Id.* at 121.
22. *Id.*
23. *Id.*
24. *Kvaas Constr. Co.*, 94-BCA P 26,513 (1993).
25. *Unlimited Supply Co., Inc. v. G.S.A.*, 94-3 BCA ¶27,170 (1994).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Gresham*, 200 Ct. Cl. 97.
32. *L.W. Foster Sportswear Co., Inc. v. U.S.*, 186 Ct. Cl. 499, 508-09 (1969).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Compare Doyle*, 199 Ct. Cl. 150, with *Gresham*, 200 Ct. Cl. 97.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS



C E R T I F I C A T E

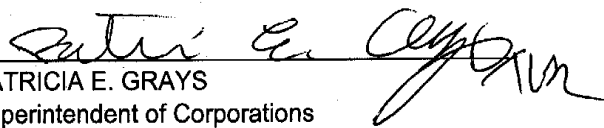
THIS IS TO CERTIFY that all applicable provisions of the District of Columbia NonProfit Corporation Act have been complied with and accordingly, this **CERTIFICATE OF INCORPORATION** is hereby issued to:

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION, INC.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed as of the **18th** day of **June, 2010**.

LINDA K. ARGO
Director

Business and Professional Licensing Administration


PATRICIA E. GRAYS
Superintendent of Corporations
Corporations Division

Adrian M. Fenty
Mayor

ARTICLES OF INCORPORATION
OF
BOARDS OF CONTRACT APPEALS BAR ASSOCIATION, INC.

TO: Department of Consumer and Regulatory Affairs
Business Regulation Administration
Corporations Division
1100 4th Street, SW
Washington, D.C. 20024

We, the undersigned natural persons of the age of eighteen (18) years or more, acting as incorporators of a corporation under the District of Columbia Nonprofit Corporation Act (D.C. Code, 2001 edition, Title 29, Chapter 3), adopt the following Articles of Incorporation:

FIRST:

The name of the Corporation shall be: BOARDS OF CONTRACT APPEALS BAR ASSOCIATION, INC. (hereafter, the "Corporation").

SECOND:

The period of duration is perpetual.

THIRD:

The Corporation shall be a nonprofit corporation which shall engage in any lawful act or activity for which corporations may be organized under the provisions of the District of Columbia Nonprofit Corporation Act. It shall be organized and operated exclusively as an organization authorized to engage in such purposes and activities as permitted by section 501(c)(6) of the Internal Revenue Code of 1986 (as amended from time to time, or the corresponding provisions of any future United States Internal Revenue law) ("Code") and as

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enumerated in Treasury Regulation §1.501(c)(6)-1. The Corporation shall be authorized to engage in any lawful acts and enter into all lawful agreements that may be necessary, useful, suitable or proper to accomplish the purposes of the Corporation, provided the same is permitted under section 501(c)(6) of the Code.

The Corporation shall not engage, other than to an insubstantial degree, in activities that are not in furtherance of its purposes.

Without limiting the foregoing, the Corporation shall have full power and authority:

- 1) to support and improve the administration of justice among the Boards of Contract Appeals of the Federal Government;
- 2) to foster, promote and maintain the highest professional standards of excellence, integrity, ethics, fairness, civility, competence, and proficiency in the practice of law before the Boards of Contract Appeals;
- 3) to improve communications among practitioners before the Boards of Contract Appeals (“practitioners”) and judges of the Boards of Contract Appeals (“judges”) and provide a forum for practitioners and judges to discuss issues of common interest;
- 4) to foster, encourage, and promote the professional development of practitioners and judges by providing, supporting and facilitating continuing legal education in government contract law and in practice before the Boards of Contract Appeals;
- 5) to foster, promote, improve and protect the professional interests of practitioners and judges;

6) to disseminate information and exchange ideas among its members and advise its members in regard to developments and trends concerning government contract law and practice before the Boards of Contract Appeals;

7) to inform and educate the public in regard to all aspects of government contract law and practice before the Boards of Contract Appeals, including developments and trends, *via* publications, seminars, continuing legal education programs, and other activities and services;

8) to represent the interests of its members generally before state and federal administrative, legislative and judicial fora in regard to all matters affecting its members;

9) to undertake and engage in all activities related to enhancing the effectiveness of the Boards of Contract Appeals; and

10) to perform any other act or do any other thing permitted by law not inconsistent with the purposes of the Corporation as stated herein.

To carry out and fulfill the purposes enumerated above, the Corporation shall have the powers enumerated in the District of Columbia Nonprofit Corporation Act, as amended from time to time, including the power to own, hold, use, lease and otherwise deal in and dispose of any real or personal property, or any interest therein, provided, however, that such powers shall not be inconsistent with the purposes of the Corporation described herein.

Notwithstanding any other provisions of these articles, the Corporation is organized exclusively as an organization described in section 501(c)(6) of the Code and shall not conduct or carry on any activities not permitted to be conducted or carried on by a corporation exempt from federal income tax under section 501(c)(6) of the Code.

It is intended that the Corporation shall have the status of an organization exempt from federal income taxation under section 501(c)(6) of the Code. All terms and provisions of these Articles of Incorporation and the Bylaws of the Corporation and all authority and operations of the Corporation shall be construed, applied and carried out in accordance with such intent.

FOURTH:

No part of the net earnings of the Corporation shall inure to the benefit of, or be distributable to, any director, officer, or member of the Corporation or any other private person; but the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes as set forth in Article THIRD hereof. No director, officer or member of the Corporation or any other private person shall be entitled to share in the distribution of any of the Corporation's assets upon dissolution of the Corporation.

FIFTH:

The activities and internal affairs of the Corporation shall be managed by a Board of Directors. The number of directors which shall constitute the whole Board shall be such as from time shall be determined in the manner provided in the Bylaws, but in no case shall the number be fewer than three (3). The initial directors named in Article "SEVENTH" of these Articles of Incorporation shall serve until the first annual meeting of the Board of Directors or until their successors have been elected and qualified in accordance with the Bylaws. The directors shall be elected at all times thereafter by the directors in accord with the procedure set forth in the Bylaws of the Corporation.

The directors shall have the powers and duties set forth in these Articles of Incorporation and in the Bylaws, to the extent that such powers and duties are not inconsistent with the status of the Corporation as a non-profit corporation which is exempt from federal income taxation under Section 501(c)(6) of the Code.

The officers of the Corporation shall be the President, Secretary and Treasurer; provided, the Board of Directors may create additional offices. Officers may be, but need not be, directors.

SIXTH:

The Corporation shall not have any capital stock.

The Corporation shall have one class of members known as "members" who shall not have the right to vote.

SEVENTH:

The names and addresses, including street and number and zip code, of the persons who shall serve as the initial directors of the Corporation until the first annual meeting or until their successors are elected and qualified are set forth below:

<u>NAME</u>	<u>ADDRESS</u>
Susan Warshaw Ebner	1700 K Street, NW Washington, DC 20006
David Black	1600 Tysons Boulevard McLean, VA 22102
Francis E. Purcell	8270 Greensboro Drive McLean, VA 22102
Thomas H. Gourlay, Jr.	441 G Street, NW Washington, DC 20548

David M. Nadler	1825 Eye Street, NW Washington, DC 20006
J. Chris Haile	1001 Pennsylvania Avenue, NW Washington, DC 20004
James McCullough	1001 Pennsylvania Avenue, NW Washington, DC 20004
Scott Dalton	601 South 12 th Street Arlington, VA 20598
Anne Donohue	4300 Fair Lakes Court Fairfax, VA 22033
Neil Whiteman	1383 Devona Terrace Sunnyvale, CA 94087
Hal J. Perloff	750 17 th Street, NW Washington, DC 20006
Holly Svetz	8065 Leesburg Pike Tysons Corner, VA 22182
Anissa Parekh	203 Yoakum Pkwy, #1624 Alexandria, VA 22304
Peter Pontzer	901 N. Stuart Street Arlington, VA 22203

EIGHTH:

Upon dissolution of the Corporation, the Board of Directors shall, after paying or making provisions for payment of all of the liabilities of the Corporation, dispose of all of the assets of the Corporation by distributing those assets exclusively to such organization(s) as shall at such time qualify as exempt from taxation under sections 501(c)(3) or 501 (c)(6) of the Code as the Board of Directors shall determine. Any such assets not so disposed of shall be disposed of by a court of competent jurisdiction for the county in which the principal office of the Corporation is

then located, exclusively for such purposes or to such organization or organizations as said court shall determine, which are organized and operated exclusively for such purposes.

NINTH:

The address, including street and number and zip code, of the initial registered office is 1900 L Street, N.W., Suite 215, Washington, D.C. 20036 and the name of the initial registered agent of the Corporation at such address is Noland MacKenzie Canter, III, P.C.

TENTH:

All references in these Articles of Incorporation to sections of the Internal Revenue Code shall be considered references to the Internal Revenue Code of 1986, as from time to time amended, and to the corresponding provisions of any applicable future United States Internal Revenue law, and to all regulations issued under such sections and provisions.

ELEVENTH:

The names and addresses including street and number and zip code, of each incorporator are:

NAME

ADDRESSES

MacKenzie Canter, III

1900 L Street, N.W.
Washington, D.C. 20036

Mark Diskin

1900 L Street, N.W.
Washington, D.C. 20036

Courtney Herbold

1900 L Street, N.W.
Washington, D.C. 20036

TWELFTH:

The Articles of Incorporation and Bylaws of the Corporation may be amended as set forth in the Bylaws.

IN WITNESS WHEREOF, the undersigned incorporators have executed these Articles of Incorporation on this 17th day of June, 2010.

MacKenzie Canter
MacKenzie Canter, III

Mark Diskin
Mark Diskin

Courtney Herbold
Courtney Herbold

District of Columbia SS:

I, Louise G. Hendricks, a notary public in and for the District of Columbia, do hereby certify that on the 17th day of JUNE, 2010, MacKenzie Canter, III, Mark Diskin, and Courtney Herbold appeared before me and signed the foregoing document as incorporators, and averred that the statements therein contained are true.

Louise G. Hendricks
Notary Public

LOUISE G. HENDRICKS
Notary Public, District of Columbia
My Commission Expires March 14, 2014

My Commission Expires: _____

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