ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Systems Management American Corporation | ) | ASBCA Nos. 45704 49607 52644 |
| | ) | |
| Under Contract No. N00039-87-C-0173 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Systems Management American Corporation (SMA) appeals the denial of its claims for equitable adjustment (ASBCA No. 45704) and breach damages (ASBCA Nos. 49607 and 52644) under the above-captioned contract. We deny the appeal on the equitable adjustment claim. We sustain the appeals on the breach claim in the amount of $31,025 with interest from 6 October 1994.

FINDINGS OF FACT

1. Contract No. N00039-87-C-0173 (Contract 0173) was the fourth in a series of contracts awarded to SMA for the procurement of "SNAP II" non-tactical administrative computer systems for Navy surface ships and submarines. All four contracts were

awarded pursuant to Section 8(a) of the Small Business Act. The first contract was awarded on 4 November 1981 (R4, tab 1410). The second contract was awarded on 30 April 1985 (R4, tab 127).

2. On 14 August 1986, a Navy acquisition plan was approved for completing the SNAP II program (R4, tab 639 at 7958). This plan stated among other things that: "It is the intention of the program to continue SNAP II hardware acquisition through SMA under the aegis of the SBA 8(a) program" (R4, tab 639 at 7964). Consistent with this plan, the third SNAP II contract was awarded to SMA on 24 September 1986 (R4, tab 129).

3. On 2 December 1986, the Navy's executive director for the SNAP II program told SMA and its bankers that the SNAP II program was "50 percent completed and we intended to continue contracting with SMA" (tr. 4/7-8, 5/270; R4, tab 649 at 7). The SNAP II program executive director had no contracting authority, and SMA understood that contractual commitments could be made only by a contracting officer (tr. 7/173; R4, tab 30).

4. On 12 December 1986, the Government requested proposals from SMA for the SNAP II hardware procurement and installation requirements for FY's 1987 through 1991 (R4, tab 287). On 19 December 1986, the contracting officer authorized SMA to incur pre-contract costs for both proposed contracts. The authorizing letter, however, warned that any such costs would be "solely at your own risk," and that "the Navy is under no obligation to reimburse you should no contract be awarded on either or both of the above identified RFPs." (R4, tab 2)

5. On 28 April 1987, Contract 0173 (the hardware procurement contract) was awarded to SMA as a cost reimbursement letter contract, subject to definitization of firm fixed prices for both base and option year items by 30 September 1987. The letter contract included a firm requirement for 92 systems and system upgrades in FY 1987 and options for an additional 333 systems and system upgrades in FYs 1987 through 1991. (R4, tab 4 at 1-18, 84)

6. The Navy's internal pre-negotiation business clearance memorandum for Contract 0173 stated "[e]xercise of the FY-88 options are [sic] anticipated to follow soon after definitization" (R4, tab 296 at 9001065). There is no evidence, however, that any unequivocal promise was made by the Navy in the negotiation of the letter contract with SMA that the options would in fact be exercised. Nor did the letter contract itself include any such guarantee. To the contrary, the option exercise provision of the letter contract stated that "[t]he option items shall be exercised <u>if at all</u>, by written or telegraphic notice signed by the Contracting Officer . . ." (emphasis added) (R4, tab 4 at 94-95).

7. On 14 August 1987, a conference on the future of the SNAP II program was held at SMA. At this conference, the Navy program manager stated that the Navy was pleased with SMA's performance and that, barring unforeseen circumstances, "SMA would continue to be our prime contractor." The program manager was not a contracting officer, nor was his statement made in negotiating the definitization of Contract 0173 (R4, tab 379; tr. 6/13, 92-94, 150)

8. The definitization of Contract 0173 was negotiated between 8 and 30 September 1987 (R4, tab 1095). On or about 22 September 1987, SMA learned that Small Business Administration (SBA) policy precluded exercise of the options unless their prices were definitized before SMA's "graduation" from the 8(a) program on 21 October 1987 (R4, tab 1399; tr. 12/72-74). On 23 September 1987, the Navy contracting officer, SMA and the SBA agreed that the option prices could be "definitized" for purposes of the 8(a) graduation deadline at ceiling amounts subject to downward only adjustment for overhead rate and other cost reductions (R4, tab 689; tr. 13/42-43). This agreement was made by authorized representatives of the Government, there was no monetary value attached to it, and it did not require approval by higher Navy authority.

9. On 30 September 1987, the Navy, SBA and SMA executed Modification No. PZ0003 to Contract 0173. Modification No. PZ0003 (i) superseded the letter contract, (ii) definitized the base year (FY 1987) prices, (iii) provided that the option year prices would be definitized "by modification to this contract on or before 21 October 1987," (iv) incorporated by reference in the option exercise provision the option line items from the letter contract, and (v) stated that "this modification . . . constitutes the entire agreement between the parties with respect to the items listed therein." (R4, tab 35 at 2 and B-1 through B-5, H-10, H-11).

10. There is no credible evidence that any representations were made by the Government in the negotiation of Modification No. PZ0003 that the options would definitely be exercised. Nor was any such representation made in the modification itself. To the contrary, the option exercise provision in Modification No. PZ0003 was the same as in the letter contract and stated "[t]he option items shall be exercised <u>if at all</u>, by written or telegraphic notice signed by the Contracting Officer . . ." (emphasis added). (R4, tab 35 at H-10)

11. At sometime between 30 September and 16 October 1987, SMA and the contracting officer agreed to price the option items at the same unit prices negotiated for the base year, subject to downward only adjustment for changes in indirect cost rates as approved by the Defense Contract Audit Agency (DCAA) (tr. 12/75-76, 210-11). On 16 October 1987, the contracting officer prepared a contract modification to this effect.

The total ceiling dollar amount of the proposed modification was $101,557,933. (R4, tab 703 at 332559-81).

12. On 16 October 1987, a press release by the United States Attorney for the Eastern District of Virginia stated that a former SMA employee had pleaded guilty in United States District Court to charges of conspiracy to defraud the United States in a kickback scheme involving "senior officials of SMA," subcontractors and purchase orders charged to a contract with the Department of the Navy. The press release further stated that the investigation was ongoing. (Tr. 7/143-44, 12/234-36, 13/45; R4, tabs 403, 406, 702)

13. Because the total ceiling dollar amount in the proposed modification definitizing the option prices exceeded the contracting agency business clearance threshold, the contracting officer could not execute the modification without the approval of the Assistant Secretary of the Navy (Shipbuilding and Logistics) (ASN(S&L)) (R4, tab 414; tr. 12/41, 254-55). On 20 October 1987, the ASN(S&L) refused to approve the proposed modification on the grounds that (i) "any option should be fully priced from the outset unless the circumstances and uncertainties surrounding the procurement make this impossible," and (ii) "in view of the current investigations regarding SMA . . . establishing unpriced or ceiling priced options is inappropriate at this time" (R4, tab 414).

14. Subsequent statements of the ASN(S&L) and his testimony at hearing show that the first reason was not the decisive reason, and would not by itself have caused him to withhold approval of the definitization modification. *See* Finding 16 below. The decisive reason for his withholding approval was concern over the "current investigation." The ASN(S&L)'s knowledge of that investigation, however, was limited at that time to the press release by the U.S. Attorney (tr. 5/112-13).

15. Since approval of the proposed definitization modification would not have obligated the Government to exercise the options or been otherwise detrimental to the Government's interests pending further investigation of the issues raised by the U.S. Attorney's press release, and since authorized representatives of the Government had previously agreed that definitization could be properly accomplished by ceiling prices subject to downward only adjustment, we find no reasonable basis on the cited grounds for the ASN(S&L)'s refusal to approve the proposed modification within the time required by Modification No. PZ0003. There is no credible evidence, however, that his refusal was motivated by malice alone, or by some specific intent to injure SMA.

16. Following a conference with SMA's attorneys, the U.S. Attorney wrote to the ASN(S&L) on 2 November 1987, stating: "Given the posture of our investigation, I am not in a position to assess the potential criminal liability of the SMA Corporation, or its principle [sic] officers" (R4, tab 712). On receipt of this letter, the ASN(S&L) told

SMA's President on 5 November 1987 that "the events which had occurred in the Eastern District of Virginia - Norfolk Division would not affect SMA's further participation in the SNAP II program" (R4, tab 452). At hearing, he further testified that he was willing on 5 November 1987 to allow execution of a modification reestablishing the options in Contract 0173, because "the letter from [the U.S. Attorney] had erased the concerns that I'd had" (tr. 5/159-60). At this point, however, it was too late to save the options for SMA. The SBA would not allow the Contract 0173 options to be definitized after SMA's graduation from the 8(a) program on 21 October 1987 (R4, tab 3011).

17. After the elimination of the options from Contract 0173, the Government issued a solicitation in April 1988 to procure the remaining SNAP II requirements on a competitive, small disadvantaged business (SDB) set-aside basis (R4, tab 1420). Protests and amendments delayed award of a contract on this solicitation for more than two years (R4, tabs 1217, 1245, 1285, 1733, 1748, 1758). SMA was not debarred from competing for this contract, and did in fact submit offers in response to the solicitation and subsequent amendments (R4, tab 1762). Ultimately, a contract for the remaining SNAP II requirements was awarded to another contractor on 27 July 1990 (R4, tab 1785).

18. SMA completed the FY 1987 base year work under Contract 0173 on or about 28 April 1989 at a total incurred cost of $28,936,279 (R4, tabs 1571 at 386140 and 3030 at 73). On 13 May 1991, SMA submitted a certified request for equitable adjustment (REA) under Contract 0173 in the amount of $7,195,094 for alleged increased costs incurred in performing the base year work (R4, tabs 98, 124, Vol. I, Section 1 at 5). On 30 September 1994, SMA submitted a certified claim for breach damages in the amount of $6,005,854 for the Government's failure to definitize the Contract 0173 option prices and failure to exercise those options. This claim was received by the contracting officer on 6 October 1994. (Gov't Motion for Partial Summary Judgment, dated 5 July 1996, ex. 1) Both the REA and breach damages claim were denied by the contracting officer (R4, tabs 112, 3026). The denials were appealed and the appeals were docketed respectively as ASBCA Nos. 45704 and 49607.

19. Pursuant to Board orders for a final statement of amounts claimed, SMA submitted a statement on 11 May 1998 in the total amount of $27,586,844 for 11 items of damage. With the exception of unabsorbed overhead, this statement did not include any of the items in the previous REA or breach damages claims. (R4, tab 1617 at 2 and Attachment C) In a "Revised Listing of Damages" submitted on 25 November 1998, and in its post-hearing brief, SMA reduced the total claimed amount to $23,428,359 (R4, tab 1618; tr. 11/128; app. br. at 200).

20. In response to a Government argument that its 11 May 1998 submission and Revised Listing of Damages constituted a new claim, SMA submitted a certified claim to the contracting Officer on 5 February 1999 in the amount of the Revised Listing of

Damages. On 28 February 2000, SMA appealed a deemed denial of that claim. The appeal was docketed as ASBCA No. 52644. By order of 1 March 2000, ASBCA No. 52644 was consolidated for decision with ASBCA Nos. 45704 and 49607 on the basis of the record in those appeals.

21. Only two of the items in SMA's Revised Listing of Damages are directly related to breach of the obligation to definitize the option prices. Those items are $111,190 in labor costs and $31,241 in travel costs incurred in preparing and negotiating the option price definitization proposal (R4, tab 1618 at Schedules G and H). The DCAA auditor found that the claimed labor costs were based on 1988 rates, when the alleged work was performed in 1986 and 1987. He further found that many of the claimed hours were for employees who were normally charged to indirect accounts, that there was no documentation of the distribution of their hours between direct and indirect accounts, and that there was no documentation of the distribution of either labor or travel costs between the base year and option year proposals. The auditor concluded that only $24,891 of the claimed labor cost, and $6,134 of the claimed travel costs were supported and allocable to the preparation and negotiation of the option year price proposal. (R4, tab 3030 at 14-15, 19-22) We agree with the auditor and find those items proven only in those amounts. All other items in the Revised Listing are damages for breach of the alleged obligation to exercise the options, or are otherwise unrelated to breach of the agreement to definitize the option prices.

22. On 1 July 1991, SMA was convicted in the United States District Court for the Eastern District of Virginia, Norfolk Division, on a plea of guilty to one count of conspiracy to defraud the Navy. The criminal information and agreed statement of facts set forth various fraudulent charges to the first two SNAP II contracts from 1981 through on or about 22 June 1986. (Ex. G-2) Previous to SMA's conviction, two senior vice presidents, one vice president and two employees of SMA were convicted on multiple counts relating to fraudulent charges to the same two contracts (R4, tabs 3040-3044). The records of these convictions do not show that any of the fraudulent charges were made to Contract 0173 (ex. G-2; R4, tabs 3040-3044). Moreover, the last of the convictions in evidence, that of SMA on 2 July 1991, occurred seven months before DCAA and SMA agreed to final overhead rates for 1987, and more than seven years before DCAA's audit of the present claim. When it audited the rate proposal in 1992 and the breach claim in 1998, DCAA was fully aware of the fraud convictions. There is no indication in the DCAA 12 February 1992 agreement on the 1987 rates or in its 31 July 1998 audit report on the breach claim that either the rate proposal or the breach claim included fraudulent charges. (R4, tabs 1493, 3030)

## DECISION

### A. ASBCA No. 45704

Apart from the claim document, SMA has presented no substantial evidence, and its post-hearing brief has presented no proposed findings, on its 13 May 1991 REA claim. SMA appears to have abandoned that claim. On this record, the claim is not proven. The appeal in ASBCA No. 45704 is denied.

### B. ASBCA Nos. 49607 and 52644

In these appeals, SMA claims that the Government breached (i) the agreement to definitize the option prices, and (ii) an alleged obligation to exercise the options. Whether the Government breached the agreement to definitize the option prices depends on whether the ASN(S&L)'s refusal to approve the proposed definitization modification was justified. We conclude that it was not. Two reasons were cited for that refusal. The first reason, that the options were not "fully priced," was contrary to the parties' agreement of 23 September 1987 which included ceiling prices subject to downward only adjustment within the meaning of "definitize" as that term was subsequently used in Modification No. PZ0003. This agreement as to the meaning of definitize was made by authorized representatives of the Government, involved no monetary amount and was not subject to the ASN(S&L)'s approval. *See* Finding 8 above.

The second reason, the concern over the report of a criminal investigation of SMA and a conviction of one former SMA employee, raised an issue of SMA's responsibility/integrity. But the proposed definitization modification did not obligate the Government to exercise the options, and it was not otherwise detrimental to the Government's legitimate interest in having only a responsible contractor perform the option work. Approval of the proposed modification, while suspending consideration of any actual exercise of the options until the responsibility issue was resolved, would have protected the Government's interest, without causing SMA an immediate and irretrievable loss of the options from its contract.

Given the preceding agreements by authorized representatives of the Government that (i) definitization could be accomplished by ceiling prices subject to downward adjustment, and that (ii) the option prices would be definitized by 21 October 1987, the ASN(S&L) did not have unlimited discretion in approving or refusing to approve the proposed definitization modification. He was obligated to act reasonably within the constraints of those agreements. Had he determined that the ceiling prices were too high or that the downward adjustment provision lacked an essential term, his refusal to approve would likely have been reasonable. But his refusal to approve the proposed modification on the cited grounds -- one ground contrary to the preceding agreement

on the meaning of definitization and the second ground unrelated to the terms of the proposed modification and with no interest of the Government served thereby – was arbitrary and unreasonable, and put the Government in breach of Modification No. PZ0003. *See* Findings 13-16 above.

SMA alleges that the ASN(S&L) acted in bad faith. A finding of bad faith by the Government requires proof of "some specific intent to injure the plaintiff," *Kalvar Corp., v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977), or of actions which are "motivated alone by malice." *Gadsden v. United States*, 111 Ct. Cl. 487, 489-90 (1948). We have found that the ASN(S&L)'s refusal to approve the proposed definitization modification was arbitrary and unreasonable, but not in bad faith as so defined. *See* Finding 15 above. The mere absence of bad faith, however, does not mean that the Government met its obligation under Modification No. PZ0003 to negotiate in good faith. The refusal of the ASN(S&L) to approve the proposed definitization modification on arbitrary and unreasonable grounds was a refusal to negotiate in good faith because it was in effect a refusal to negotiate at all. *See Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572-73 (Fed. Cir. 1991).

SMA also alleges that the Navy's refusal to definitize the options breached an obligation to exercise those options. SMA contends that an obligation to exercise the options arose by estoppel from the Navy's conduct and statements during the SNAP II program indicating an intention to continue SMA as the contractor until the end of the program. We disagree. The SNAP II program was implemented by a series of formal contract documents signed by the parties and setting forth their rights and obligations. None of the contract documents, up to and including Modification No. PZ0003, included any provision obligating the Government to exercise options or contract with SMA for the entire program. The letter authorizing pre-contract costs at SMA's risk for Contract 0173 expressly cautioned that the proposed contract might not be awarded, and both the letter contract and Modification No. PZ0003 for Contract 0173 included the "if at all" term in the option exercise provisions. See Findings 4, 6 and 10. In light of these contract documents, SMA could not have reasonably understood other statements and conduct of the Government indicating an intention to continue contracting with SMA as constituting a legal obligation to do so. Moreover, Modification No. PZ0003 was an integrated agreement discharging all prior agreements inconsistent with its terms. *See* Finding 9 and *Restatement (Second) of Contracts* §§ 210(1) and 213(1). The alleged obligation to exercise the options is clearly inconsistent with the "if at all" term in the option exercise provision of Modification No. PZ0003, and there was no representation by the Government in the negotiation of Modification No. PZ0003 that the options would definitely be exercised. *See* Finding 10 above. *Cf. Manloading & Management Associates, Inc. v. United States*, 461 F.2d 1299, 1301 (Ct. Cl. 1972) (Bidder's conference told that "there would be no question about the renewal of the contract.").

The appeals in ASBCA Nos. 49607 and 52644 are sustained in the amount of $31,025, the costs incurred by SMA in reliance on the Government's promise in both the letter contract and in Modification No. PZ0003 to definitize the option prices. *See* Findings 5, 9 and 21 above. While those costs did not appear in SMA's original breach claim, they arose from the same operative facts, and do not constitute a new claim. *See D.J. Barclay & Company, Inc.*, ASBCA No. 28908, 85-1 BCA ¶ 17,922 at 89,741. Accordingly, interest on the allowed amount pursuant to 41 U.S.C. § 611 will run from 6 October 1994, the date the original breach claim dated 30 September 1994 was received by the contracting officer. *See* Finding 18 above.

Dated: 19 September 2000

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I dissent in part and concur in part
(see separate opinion)

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I dissent in part and concur in part
(see separate opinion)

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

**OPINION BY JUDGES STEMPLER AND THOMAS**
**CONCURRING IN PART AND DISSENTING IN PART**

As to ASBCA No. 45704 (REA), we concur in the majority's denial of the appeal. As to ASBCA Nos. 49607 and 52644, we concur in the majority's holding that the Navy did not breach any agreement to exercise the options in the contract. We dissent from the majority's holding that the Navy breached the agreement to negotiate in good faith to definitize the option prices.

Consideration of the issues before the Board should start with our decisions on the Government's Motion to Dismiss for Failure to State a Cause of Action Upon Which Relief can be Granted. Although not referenced by the majority, our decision on the motion with respect to the issue of breach of the agreement to negotiate contained in Modification No. PZ0003, *Systems Management American Corporation*, ASBCA Nos. 45704 *et al*., 97-1 BCA ¶ 28,820, *mod. on reconsid. on other grounds*, 97-1 BCA ¶ 29,059, states:

> We agree with SMA that the agreement to agree in Modification No. PZ0003 is enforceable as an agreement to negotiate in good faith.

(at 143,811)

Therefore, the relevant issue as framed by this Board is whether the Navy failed to negotiate in good faith with respect to the definitization of the option prices. *City of Tacoma, Dept. of Public Works v. United States*, 31 F.3d 1130, 1132-33 (Fed. Cir. 1994). "Good faith" describes "that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or

obligation." *Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006, 1010 (Fed. Cir. 1994), quoting *People v. Nunn*, 296 P.2d 813, 818 (Cal. App.), *cert. denied*, 352 U.S. 883 (1956). SMA bears the burden of proving that the Navy did not meet this standard. Inexplicably, the majority determines that while the Navy did not negotiate in bad faith, it still did not negotiate in good faith,[1] and it acted "arbitrarily and unreasonably."[2] The majority finds the ASN's willingness to approve the definitization on 5 November 1987 (15 days after SMA graduated from SBA's 8(a) program) to be an arbitrary and unreasonable **refusal**[3] to negotiate. As developed below, the majority's approach and reasoning are wrong.

21 October 1987 became an important date to SMA not because of any requirement of the Navy, but because of an SBA policy that prohibited SMA from receiving the option exercises under the subject contract unless they were definitized before SMA's graduation from SBA's 8(a) program. SMA became aware of this only one month before its graduation. The Navy then immediately began an effort to assist SMA by issuing Modification No. PZ0003 on 30 September 1987. This modification stated that the parties agreed to definitize the options by modification to the contract by 21 October 1987. The majority treats this agreement to agree as a warranty by the Government that the options would be definitized by 21 October. It, of course, was not. The definitization was a bilateral process in which any number of stumbling blocks could have occurred. It was, as mentioned earlier, merely an agreement that both parties would negotiate in good faith towards achieving that date.[4] The modification could represent nothing more since the CO who signed it held a limited warrant and was not authorized to definitize the options.

This brings us to the next issue presented: can a CO without authority to take a particular action, circumscribe and limit the discretion of the superior officer with such authority? The mere stating of the question compels a negative answer. *See Pacific Gas & Elec. Co. v. United States*, 3 Cl. Ct. 329, 342 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984) (table). Nonetheless, the majority holds that not only was the subordinate CO able to require the ASN to act by 21 October, but that in fact the ASN had little discretion to exercise. The effect of the majority's opinion is to reduce the ASN to little more than a ministerial clerk, bound to sign the definitization modification without regard to any delay he felt was necessary to secure additional information and virtually powerless to arrive at any decision but to sign, regardless of any *bona fide* questions that he had.

The draft modification definitizing the options was prepared on 16 October 1987 and presumably forwarded to the ASN for consideration and execution if found to be in the best interest of the Navy. However, before he could act, the ASN learned that a SMA employee had been convicted of conspiracy (with SMA officers) to defraud the Navy on SMA contracts and that the investigation was ongoing. Exercising his discretion, the ASN declined to sign the modification pending receipt of additional information.[5] Such

information was received on 2 November 1987 and the ASN stated that he would approve the definitization on 5 November 1987. It is the majority's conclusion that this action by the ASN was "arbitrary and unreasonable." Certainly the time taken by the ASN was not unreasonable, so we are left with consideration of whether it was arbitrary and capricious for the ASN to inquire at all in these circumstances.

The factors to consider in deciding a case involving an allegation that a decision was arbitrary and capricious were set out in *Keco Industries, Inc. v. United States*, 492 F.2d 1200 (Ct. Cl. 1974). These are: (1) evidence of subjective bad faith, (2) no reasonable basis for the decision, (3) the degree of discretion granted to the decision maker (the more discretion granted the more difficult it is to prove arbitrary and capricious) and (4) proof of the violation of an applicable statute or regulation may be enough to show the conduct was arbitrary and capricious. *See also Quality Environment Systems, Inc.*, ASBCA No. 22178, 87-3 BCA ¶ 20,060 at 101,569. We find the majority's opinion completely lacking of a meaningful discussion of these factors and the findings devoid of proof sufficient for a finding of an abuse of discretion.

We find it incredible that this Board would conclude that the senior acquisition officer of an agency is acting arbitrarily and capriciously when he delays a decision for a short period of time to secure additional information to determine whether it is in the best interests of his agency to take certain contractual actions in the face of serious criminal issues involving a contractor's conduct under his agency's contracts (tr. 5/11-12, 113, 119, 137).[6] To the contrary, one would think that the ASN would be derelict in his duties if he made no inquiry. The ASN considered his action in acquiring more information before deciding whether to approve the definitization modification not only prudent but "absolutely essential to the exercise of my responsibilities" (R4, tab 731). Indeed, only the most cavalier and indifferent attitude by an acquisition official could result in signing the proposed modification without investigation. Given the short time frames involved, it is hardly surprising that the ASN was not able to make a decision sooner, and it must be remembered that the intervening factor between the signing of Modification No. PZ0003 and the 21 October cutoff date was the revelation of the investigation of appellant's senior officials' criminal conduct and the conviction of its employee. Why the Navy should bear the responsibility attendant to such revelation escapes us. Appellant and its employees engaged in criminal conduct under the very program now before us and must bear the natural and reasonable consequences that resulted from a revelation of such conduct. It was not the Navy's deadline that SMA was rushing to beat, it was SBA's. It was not the Navy that was graduating from the 8(a) program, it was SMA. It was not the Navy who engaged in criminal conduct, it was SMA. In the end, the ASN was willing to approve the definitization but SBA would not allow SMA to receive the options. Apparently, SBA's policy has no flexibility and SMA was ruled, by the SBA, to be ineligible to participate in the 8(a) set-aside. The option requirements were eventually competed under a small disadvantaged business (SDB) set-aside. SMA competed but

award was made to another contractor when SMA was ruled by the SBA to be ineligible to participate in the SDB program.

The linchpin of the majority's opinion is its contention that the ASN could not raise the issue of SMA's "responsibility/integrity" by inquiring into the criminal conduct of SMA. The majority cites no law supporting its position that the ASN was not allowed to investigate appellant's criminal conduct before executing the proposed modification.

According to the majority, whether the Navy breached the agreement to definitize depends on whether the ASN's action was "justified." The majority concludes that it would not have been detrimental to the Government's interest for the ASN to execute the proposed modification without waiting for a response to the inquiry since the modification did not obligate the Government to exercise the options. The majority speculates that consideration of appellant's senior officials' criminal conduct at a later time would have been sufficient to protect the Government's interest. The majority has merely expressed its view that it would have made a different decision than the ASN as to the best interest of the Government given the circumstances. That is all well and good but this Board was not charged with making the ASN's decision at the time, is not charged with making it retroactively now, and our authority goes only to an examination as to whether the decision was arbitrary and capricious or taken in bad faith.

We would deny the appeals.[7]

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] We have searched the majority's opinion in vain for the well-nigh irrefragable proof that is necessary to overcome the presumption that public officials have

acted in good faith. *See Kalvar Corporation v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1970).

[2] We assume the majority refers to the arbitrary and capricious standard. *See Keco Industries, Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). The standard of proof for finding an arbitrary and capricious action is a high one. *Keco*, 428 F.2d at 1240.

[3] The ASN did not refuse to negotiate. He merely insisted on more information before he would execute the modification.

[4] At the time Modification No. PZ0003 (the agreement the majority finds the Navy breached) was signed, the contracting officer did not know anything of the matters contained in the U.S. Attorney's press release that would be issued on 16 October (tr. 12/234-36, 13/45; R4, tabs 403, 406, 702).

[5] As the majority finds, the ASN had two reasons for his hesitation: the criminal conviction and investigation which is discussed further, and a business practice objection. The majority finds that the business practice objection was not decisive and would not have caused him to withhold approval. While we do not agree that the ASN was not entitled to exercise his discretion as to what were appropriate business practices for the Navy, in view of the majority's finding, the issue is immaterial to these appeals.

[6] In fact, SMA and some of its officers were later convicted of criminal charges involving the predecessor Navy contracts to the one before us.

[7] The Government argues (Gov't br. at 88-91) that the contract at issue is void because of the criminal conduct of SMA and its officers. The majority does not mention this argument. We need not address it in view of our conclusion that the appeals should be denied.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 45704, 49607, 52644, Appeals of Systems Management American Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals