ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Empire Energy Management Systems, Inc.	)	ASBCA No. 46741
	)	
Under Contract No. F44650-88-C-0004	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal was taken from a contracting officer's decision terminating the captioned contract for default. The contract was for purchase of utilities from Empire Energy Management Systems, Inc.[1] (Empire or appellant). The contract called for the utilities to be provided to the United States Air Force (Air Force) from two cogeneration plants at MacDill Air Force Base, Florida (MacDill). The plants were to have been constructed by Empire. We deny the appeal.

FINDINGS OF FACT

Background

1. Brian Travis is the sole shareholder, chairman and president of Empire (tr. 1673, 2749). In the 1980's he began talking to the Air Force about means of energy saving. He considered Nellis Air Force Base to be a "prime candidate" for a third party-financed project. During this process he met with Air Force personnel from Tactical Air Command Headquarters, Langley, Virginia (Langley). (Tr. 3921-24) The Air Force identified MacDill as the appropriate base for such a project (tr. 3940, -45). Langley concluded that the project had to be competitively bid (tr. 3949-50).

2. The procurement process involved a technical Request for Proposals and an Invitation for Bids (R4, tab 1, at A2). Empire's Technical Proposal identified Hudson Engineering Corporation (Hudson), a company experienced in the development and construction of cogeneration facilities, as a part of the Empire contracting team. It also proposed using the local gas distributor, Peoples Gas System, Inc. (R4, tab 1; tr. 3957) The contract awardee was to be the technically qualified entity providing the greatest overall savings to the Air Force (tr. 3959). Pricing, as bid and awarded, was derived from stated monthly utility minimums at a price discounted from the price the Air Force would have paid to the local utility provider (R4, tab 1; tr. 72-73).

3. Empire and the Air Force understood the project to be third party-financed, and Empire intended to use the contract as collateral (tr. 71, 3978). The contract was not to be a construction contract, nor was it to include progress payments. The awardee would build and own the plant. Payment was to be made for utility services provided. (Tr. 71-74)

The Contract Prior to Modification P00007

4. Empire was the successful bidder, and on 10 June 1988 the Air Force and Empire entered into Contract No. F44650-88-C-0004. The contract required appellant to provide cogeneration of electricity, chilled water, hot water and steam at specified discounts from a date to be determined later through 6 October 2019. Appellant's proposal, which was incorporated into the contract, defined cogeneration as "the simultaneous production of electricity and other utilities at or near, the site of their consumption . . . ." Appellant was required to furnish at its own expense "all plant, labor, equipment, engineering and perform all operations necessary to furnish, install, own, operate and maintain a cogeneration plant." Appellant was to comply with all Federal, State and local environmental and archeological laws and regulations. All necessary approvals, permits, etc. were appellant's responsibility. Liquidated damages of $821.92 per day were established. (R4, tab 1)

5. The contract contained the following relevant clauses: FAR 52.243-1 CHANGES - FIXED PRICE (APR 1984) AND ALTERNATE I (APR 1984); FAR 52.249-8 DEFAULT FIXED PRICE SUPPLY AND SERVICE (APR 1984); FAR 52.233-1 DISPUTES (APR 1984); and FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984) (R4, tab 1).

6. The contract specification provided, *inter alia*:

> 1. DESCRIPTION
>
> a. General:
>
> The cogeneration facility may involve, but is not limited to, changes in Air Force equipment, energy systems, buildings

and/or procedures of operation, maintenance of management as mutually agreed. The contractor shall, at his expense, furnish all plant, labor, equipment, engineering and perform all operations necessary to furnish, install, own, operate, and maintain a cogeneration plant, and shall sell electricity and chilled and/or hot water/steam to the Air Force. The Air Force shall purchase all Thermal Output of the Cogeneration Plan [sic] in accordance with terms specified by this contract.

b. Facilities/Government Property/Contractor Property:

(1) The contractor, at his expense, shall furnish, install, operate and maintain all facilities required to furnish service hereunder, and to measure the service to the determined point of delivery. Title to all of these facilities shall remain in the contractor and he shall be responsible for all damage to those facilities except that arising out of the fault or negligence of the Government, its agents or its employees. All taxes and other charges in connection herewith, together with all liability arising out of the negligence of the contractor in the construction, operation or maintenance of these facilities, shall be assumed by the contractor.

. . . .

3. SPECIFIC TASKS

. . . .

b. Environmental Considerations:

(1) The contractor will comply with all Federal, State and local environmental and archeological laws and regulations and will plan and conduct activities under this contract to minimize adverse environmental impacts during construction and operation of the cogeneration facility. The contractor shall obtain all necessary approvals, permits, etc. at his expense after contract award.

(2) The facility shall be designated in such a manner that when sited it will not increase the average day-night noise level (DNL) for that site. The current Air Installation

Compatible Use Zone (AICUZ) shall be used to determine existing DNL values for proposed sites.

(3) Prior to the start of cogeneration, the contractor must comply with all applicable provisions of AFR 190-2.

(R4, tab 1 at C-1, C-3)

7. On 27 June 1988 the Department of the Air Force leased to appellant certain property on MacDill, known as the hospital site. The lease was executed by Mr. Travis and Ohler S. Scalf, the contracting officer. The lease was for 31.3 years and had as its purpose the construction and operation of a 5 megawatt (MW) cogeneration power plant and "appurtenant facilities." The lease contained the following pertinent provisions referred to as "Conditions":

3. Representations and Condition Report

a. It is understood and agreed that the leased premises are leased in an "as is, where is" condition without any representation or warranty by the Government, and without obligation on the part of the Government to make any alterations, repairs, or additions thereto, and the Government shall not be liable for any latent or patent defects therein. The Lessee has inspected, knows and accepts the condition and state of repair of the leased premises, and acknowledges that the Government has made no representation concerning such condition and state of repair, nor any agreement or promise to alter, improve, adapt, repair, or keep in repair the same, or any item thereof, which has not been fully set forth in this lease.

b. Attached hereto and made a part hereof is a condition report marked "Exhibit C," signed by representatives of the Government and the Lessee, which sets forth the condition of the leased premises as determined from their joint inspection thereof.

. . . .

12. Compliance with Applicable Laws

a. The Lessee will at all times during the existence of this lease promptly observe and comply at its sole cost and expense with all laws, orders, rules, regulations, ordinances,

and other governmental standards and requirements, which may be applicable to the leased premises and the improvements to be constructed thereon or any part thereof, and particularly those provisions concerning the protection and enhancement of environmental quality and archeological resources, pollution control and abatement, safety, construction, sanitation, and licenses or permits to do business, whether the same now are in force, or that may, at any time in the future, be enacted or directed.

b. The Lessee will be responsible for and obtain, at its own cost and expense, prior to the commencement of construction, and upon completion of the building of the Facilities, any approvals, permits, or licenses which may be necessary to construct and operate the Facilities in compliance with laws, codes, and regulations applicable to a private project constructed on MacDill Air Force Base.

c. This condition does not constitute a waiver of Federal Supremacy or sovereign immunity. Only laws and regulations applicable to the leased premises under the Constitution and statutes of the United States are covered by this condition. The United States presently exercises exclusive Federal jurisdiction over the leased premises.

d. The Lessee shall not release or discharge air emissions, waste, effluent, hazardous substances or contaminants from the leased premises in such a manner that such release or discharge will unlawfully pollute or contaminate air, ground (including subsurface strata), water (including ground water), or become a public nuisance. Any treatment, testing, or control of releases or discharges, including monitoring or mitigation measures required as a result of Lessee's operations will be solely the responsibility of the Lessee.

e. The Lessee shall, as between the parties, bear sole responsibility for any actions and costs required to clean up or remove solid, hazardous or toxic wastes, pollutants, and contaminants from the leased premises or which had their origins on the leased premises, as required under the Comprehensive Environmental Response Compensation and Liability Act of 1980, the Resource Conservation and

> Recovery Act of 1976, or the Toxic Substances Control Act, or the laws of the state of Florida, unless such wastes, pollutions or contaminants have been deposited by the Government on the premises prior to the beginning date of this lease.

Exhibit C was a blank sheet. Under Condition 20 disputes under the lease were to be resolved by the Base Commander, whose decision was final unless appealed to the Secretary of the Air Force or his authorized representative within 30 days. The Secretary's decision was final "unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." The Lessee was to proceed diligently with the performance of the lease pending final decision of the dispute. The lease was incorporated into the contract on 27 June 1988 by Modification No. P00001 (Mod 1), which established a cancellation ceiling of $5,805,000.00. (R4, tab 1)

8. Modification No. P00002 (Mod 2), dated 19 December 1988, changed the appellant's name from Empire Systems, Inc. to Empire Energy Management Systems, Inc. Modification No. P00003 (Mod 3), also dated 19 December 1988, permitted installation of a real time data acquisition and control system. Modification No. P00004 (Mod 4), dated 2 February 1989, changed appellant's address. Modification No. P00005 (Mod 5), dated 1 May 1990, authorized Empire to purchase production equipment and obtain a firm commitment for a gas contract. It also anticipated a revision to the lease and imposed a schedule for construction plans and a completion date of 365 days after approval of construction plans. The modification also contained a reservation of certain claims by Empire, including legal expenses incurred in a proceeding before the Florida Public Service Commission (finding 9, *infra*). (R4, tab 1)

9. The Tampa Electric Company (TECO) filed a petition with the Florida Public Service Commission on 30 September 1988 alleging that Empire's sale of utility services to MacDill was inconsistent with Florida law. The petition was dismissed on 23 May 1989. (App. supp. R4, tab E-402) During the period when the Florida Public Service Commission was considering the TECO petition, Empire conducted an analysis of MacDill's energy needs (tr. 4005).

10. The lease was amended by Modification No. P00006 (Mod 6) on 11 June 1990 (R4, tab 1). The MacDill Avenue site was added by Mod 6 as a result of appellant's additional analysis of MacDill's energy needs and the parties' decision to build two plants (tr. 4026-29). The MacDill Avenue site was chosen sometime before 19 December 1989 (app. supp. R4, tab E-481). The purpose of the lease was changed to include construction and operation of a cogeneration system of 6 to 9 MW, consisting of two cogeneration plants to be completed within 360 days of written Government approval of construction plans. At the MacDill Avenue site, a 5-7 MW plant was to be constructed. At the hospital

site, a 1-2 MW plant was to be constructed. Conditions 3, 12, and 20 were unchanged. (R4, tab 1)

The MacDill Avenue Site

11. Adjacent to the MacDill Avenue site was a fenced area which included Building 1050, a facility which was part of the MacDill aircraft refueling operation (app. supp. R4, tab E-206; ex. A-13, #1). In 1985 installation of an oil-water separator (OWS) at Building 1050 was proposed with the following description of the then-current situation:

> CURRENT SITUATION: Presently this facility has no oil-water separator. Fuel bladders are cleaned and washed in the grassy areas adjacent to this facility. This project will provide a means of preventing fuel from being released into the ground areas, thereby, keeping oils and greases out of stormdrains after rainfall washes the present area. This project is necessary and required by the industrial waste water and Air Force environmental regulations in order to prevent further saturation of existing areas surrounding building 1050 with pollutants from the fuel bladders.

(App. supp. R4, tab E-249) Thus, at least by 1985, the Air Force understood the need to control petroleum wastes.

12. In 1987 the Air Force had an OWS installed to prevent the adjacent area from exposure to pollutants (app. supp. R4, tab E-206). An OWS is a device that uses gravity to cause materials that are lighter than water to rise and cause materials that are heavier than water to sink. Inlet water in this case was expected to contain diesel fuel, JP-4, JP-5, engine lubricating oil, ethylene glycol and oil-based hydraulic fluids. An OWS is not capable of total elimination or separation of all potential pollutants, as some may be soluble and become part of the water which is released. (App. supp. R4, tab E-1501; resp. supp. R4, tab 23 at 3-13, 3-19; tr. 2498-2501) The OWS contained an oil storage tank and thus contained petroleum products which were periodically pumped out and disposed of (app. supp. R4, tabs E-215, E-1501). The water outlet discharged into a storm sewer, not to a sanitary sewer. The storm sewer discharged into a retention pond north of the MacDill Avenue site, the waters from which could ultimately reach Tampa Bay. This subjected the OWS and its discharge to regulation by the United States Environmental Protection Agency (EPA). (Resp. supp. R4, tab 23 at 3-19, 7-5; app. supp. R4, tab E-1501, drawing OWS-1-0; ex. A-18; tr. 1279)

13. The OWS was a large object, 28 feet, 8 inches long and 6 feet in diameter, with two plainly visible influent pipes coming from the east, or Building 1050 end, and one plainly visible discharge pipe on the west, or MacDill Avenue end, going into the ground at a

45-degree angle. It held 6,000 gallons and was mounted on a concrete pad approximately 30 feet long. Pictures of the OWS include one showing a man using a ladder to climb on top of it, and the OWS is taller than the man. (Tr. 4713-14; app. supp. R4, tab E-911, E-1501; resp. supp. R4, tab 104A)

14. During the period before execution of Mod 6 but after selection of the MacDill Avenue site, Empire sought information and assurances as to subterranean conditions at both sites, and was told it would receive a letter from COL Gray and a document prepared by CH2M Hill (app. supp. R4, tab E-483; *cf.* finding 7, ¶ 3. Representations and Condition Report). We infer that the CH2M Hill document referred to is a November 1981 Installation Restoration Program Records Search which identifies Building 1050 as producing and disposing of the following waste materials: trichloroethane, paint thinner, hydraulic fluid, oils, fuels, and sulfuric acid. (R4, tab 114) Empire was denied the CH2M Hill document, but received the following letter from COL Gray, Base Civil Engineer:

> Per your request on 18 Jan 90, we conducted a records search for possible soil contamination near the proposed locations of the cogeneration facilities. Since a comprehensive survey of contamination sites on MacDill Air Force Base has been completed, this was not a difficult search. A contamination site location map is attached, showing the project locations highlighted in orange and fuel contamination sites highlighted in yellow.
>
> Contaminant plumes have been delineated accurately and efforts are underway to remediate the sites. However, the project locations are approximately one-half mile from any site and there is no migration toward the project locations. Therefore, no constraints (due to soil contamination), have been placed on development of these two locations.
>
> Please feel free to contact Mr. David Stokes, the Base Environmental Engineer, at 830-2576 regarding this matter.

(Resp. supp. R4, tab 2; tr. 4054-60)

15. In September 1989 a letter was received from EPA informing MacDill that it had noted several unmonitored stormwater discharge points. Thereafter, an emergency procurement action was initiated by MacDill to obtain services for writing the applications for the two environmental permits. (App. supp. R4, tab E-207) The CH2M Hill NPDES Survey Report and Permit Application for MacDill (CH2M Hill report), dated August 1990, was prepared in conjunction with MacDill's application for a National Pollutant Discharge Elimination System (NPDES) permit. Such permits are issued to address what is allowed to

be discharged, and the process. (Resp. supp. R4, tab 23; tr. 2470) MacDill sought renewal of expired permits, which permits remained in effect until issuance of revised permits. The CH2M Hill report explains the history of the process as follows:

> In 1986, MacDill AFB submitted an NPDES permit application for renewal of the NPDES Permit No. FL0002704. EPA received the application and requested some additional information. However, the permit was not reissued at that time. In July 1989, EPA again initiated the permit renewal process and conducted a Compliance Evaluation Inspection (CEI) at the MacDill AFB facilities. As a result of the CEI, EPA issued an inspection report noting numerous deficiencies in the previous permit and in the monitoring program currently administered by MacDill AFB. A baseline survey is required to identify the proper monitor locations, analytical parameters, and monitoring frequency for the point source discharges from the Base. This information will be used to complete a revised NPDES permit application.
>
> The FDER [Florida Department of Environmental Regulations] has not required a state discharge permit for the stormwater drainage canals. FDER's previous involvement has been limited to a review and certification of the NPDES permit issued by EPA. Indications to date are that FDER will again certify the NPDES permit issued by EPA, and will not require a separate state discharge permit. However, FDER has the authority to require a separate state discharge permit if they choose to do so.

(Resp. supp. R4, tab 23 at 1-4)

16. The OWS is identified in the CH2M Hill report as Outfall 014, which is reported in Table 5 as discharging wastewater into the storm sewer near MacDill Avenue. The following recommendation is made about the OWS:

> Outfall 014 is the direct discharge from the oil water separator located at Building 1050 to the storm sewer. Analytical data collected at this facility indicated elevated levels of BOD, TOC, ammonia, phosphorus, surfactants, cadmium, copper, and volatile aromatic organics. It is recommended that MacDill evaluate options to treat, divert, or eliminate the discharge of pollutants from this facility. Any alternative proposed for this facility would be required to reduce the concentration of fuel

> residuals in the storm sewer discharge to the levels required by the revised NPDES permit. This discharge could also be connected to the sanitary sewer; however, the effect of additional infiltration must be evaluated.

(*Id.* at 7-5)

The Early Performance Period

17. Empire arranged for financing the project through Sanwa Business Credit Corporation (Sanwa) (app. supp. R4, tab E-395; tr. 4441).

18. Hudson was not engaged by Empire to construct the cogeneration plants as Empire considered its price too high (tr. 1714). Instead, Mr. Travis created Empire Cogen, Inc. (Cogen) to construct the plants (tr. 1789-90). He owned Cogen through another wholly owned Travis company, Datrix, Corp. (tr. 1830-31). Mr. Travis envisioned a corporate structure that was composed of several entities, all under his ownership. Empire Energy Management Systems, Inc. was to be the owner of the project and the entity which signed both the contract and the loan agreement. Cogen was the construction subcontractor. Mr. Travis set up another entity, Eagle Operating Systems, to be operator of the plant upon completion. He also set up Empire Texas Oil and Gas for drilling for the gas supply and Empire Gas Marketing for gas transportation. Under Mr. Travis's vision, the latter company would also have been involved in trading gas futures. (Tr. 4092-94)

19. Early in the project, Empire employed Thomas Bartley as project director. Mr. Bartley hired Charles Monteith as construction manager sometime prior to selection of the MacDill Avenue site (app. supp. R4, tab E-404; tr. 429, 432). Upon formation of Cogen in early 1990, Mr. Bartley and Mr. Monteith worked for Cogen (tr. 483, 485).

20. Empire maintained from the beginning of construction that the OWS was an impediment to construction access (tr. 502-03). In a 28 January 1991 meeting, removal of the OWS was discussed. Empire's notes state it "stressed that this removal must occur promptly in order to avoid a conflict with the Construction work/schedule [sic]." (App. supp. R4, tab E-588) The Air Force's notes state "Mr. Cawley [Air Force engineer] will find out when this is to be accomplished, but certainly prior to completion of construction (should not be in the way of construction?)." (App. supp. R4, tab E-590) The Air Force thereafter issued a Work Request dated 7 February 1991 for removal of the OWS by 7 March 1991 (ex. G-15, attach. 25).

21. Groundbreaking was on 7 February 1991 (ex. A-5). By letter of 19 February 1991, Empire asked for removal of the OWS, stating that construction could not begin until the OWS was removed (resp. supp. R4, tab 11). However, the site dimensions are 160 feet, east to west, by 240 feet, south to north, and the concrete pad for the OWS occupied only

30 feet on the south end, with MacDill Avenue providing easy access on the west side (resp. supp. R4, tab 104 A; tr. 4715-18). We find site access was not impeded in any substantial way by the OWS, and that Empire's 19 February 1991 letter does not accurately represent conditions at the site regarding access (tr. 1415-18; ex. G-15). John T. Donaldson, the Air Force's construction expert, considered the site "a dream site" as to access (tr. 4718). Some work was accomplished thereafter -- clearing and grubbing, bringing in fill, digging footings, putting in reinforcing steel and pouring footings most of the way around the main building (tr. 4683-84; resp. supp. R4, tab 124). Cogen informed Empire on 21 March 1991 that it was stopping work due to non-payment (resp. supp. R4, tab 115). That letter was forwarded to the contracting officer, Judith Hall, by Empire's letter of 21 March 1991, in which Empire also informed Ms. Hall that Sanwa would not issue the Irrevocable Letter of Credit to which it had previously agreed (resp. supp. R4, tab 116).

The Sanitary Sewer Proposal

22. By letter of 21 March 1991 Mr. Bartley informed Ms. Hall that the on-site sanitary sewer main was abandoned and removed. Thus, the sewer connection intended by Empire could not be made. Mr. Bartley informed Ms. Hall further that the Air Force's Mr. Cawley had suggested, and Empire proposed to implement, a plan whereby Empire would install a new lift station and the Air Force would tie the OWS into the new main. Empire would supply materials for pipe routing and connections. An attached drawing shows a line coming from the OWS to the proposed pumping station. (Resp. supp. R4, tab 114) Ms. Hall approved the plan by letter of 27 March 1991 (resp. supp. R4, tab 122). It would be unreasonable to believe that the OWS was inactive once Empire knew the Air Force wanted to connect it to the proposed new sanitary sewer. Mr. Monteith knew in 1991 that the OWS was connected to a storm drain, and that it was active (tr. 963-67, 969-70). Moreover, it would have been unreasonable to believe that the OWS was discharging into an abandoned sanitary sewer, and one of Empire's contemporaneous construction drawings shows the existing storm drainage pipe on the west end of the site paralleling MacDill Avenue (resp. supp. R4, tab 104). The only alternative to discharge into that storm sewer was discharge into the ground. We find that as of 21 March 1991 Empire knew the OWS was active and that it discharged into the storm sewer, an improper installation (*see also*, ex. G-15, tab 4, at 20-21; resp. supp. R4, tab 14; tr. 202, 553, 4659-60, 4861-67).

Troubles with Sanwa

23. The relationship between Empire and Sanwa became troubled relatively early in contract performance. In December 1990 Sanwa had contacted Coopers & Lybrand to evaluate Empire's situation with emphasis on whether expenditures were reimbursable under Government regulations (ex. G-11). In a 20 December 1990 letter Sanwa informed Empire "this is an attempt to summarize, clarify, and expand on our conversations of the past six weeks and, specifically, our discussions regarding the funding request received by us on December 17. As you know, you have not yet met the conditions necessary to allow

SBCC [Sanwa] to advance further funds . . . ." The letter goes on to, *inter alia,* express the need for more detailed cost information. (Ex. G-12) In a 30 January 1991 letter to Empire, Sanwa addressed certain open issues but agreed, subject to listed terms and conditions, to advance $1,865,647.00 for payment to U.S. Turbine Corporation (ex. G-14).

24. Sanwa employed Coopers & Lybrand to review Empire's records to ascertain the adequacy of its cost accounting system and how much could be recovered under FAR in the event of a termination for convenience (tr. 4445-46, 4574-75). The review was conducted on-site from 28 January 1991 to 1 February 1991. Empire refused to provide access to Cogen's records and Mr. Travis did not show up for a scheduled meeting on 1 February 1991. (Tr. 4576-79) Another site visit was made in late February without additional success (tr. 4580).

25. In a 26 February 1991 letter Sanwa expressed dissatisfaction with cost overruns, Empire's progress and Empire's record-keeping. Sanwa imposed conditions on future funding. (Resp. supp. R4, tab 109) By letter of 11 March 1991 to Mr. Travis, a law firm representing Sanwa requested "[a] plan in the nature of a 'true budget'" to show how the project was to be completed within the loan agreement's limitations, and full access to the financial and engineering records of Empire and Cogen (resp. supp. R4, tab 111).

26. A 12 March 1991 draft report was prepared by Coopers & Lybrand in which various shortcomings in Empire's accounting methods were reported and questions were raised as to the adequacy of the cancellation ceiling. Coopers & Lybrand questioned a total of $6,543,224 on the basis that the costs would not be allowable under FAR. (Resp. supp. R4, tab 112)

27. In a letter of 21 March 1991 to Empire and its law firm, Sanwa informed Empire that it considered Empire to be in default under the loan agreement, and that it would reject future requests for advances. The letter further advised Empire that its obligations to Sanwa were immediately due and payable. (Resp. supp. R4, tab 117)

28. Further correspondence between Sanwa and Empire ensued, with the final result that the loan was terminated. On or about 9 March 1992, Empire's debts were settled at $6,500,000, or $3,670,00 less than Sanwa provided to Empire. (Resp. supp. R4, tabs 118, 119, 123, 131, 137, 142; tr. 2002) Mr. Travis received a subordinated note from Empire in that amount (tr. 2009-10). During this period, Empire set out to find a new lender and began discussions with National Westminster Bank (NatWest) in summer, 1991 (tr. 3730).

The March 1991 Work Stoppage

29. There is no dispute that the work stoppage occurred because Sanwa refused to honor further funding draws (tr. 1760). There is a dispute as to whether an interview with a Government employee in the February 1991 issue of a publication called *Energy User*

News (EUN) published in February 1991 (app. supp. R4, tab E-594) precipitated the work stoppage by creating problems between Sanwa and Empire, thereby escalating the significance of the cancellation ceiling. The gist of Empire's position is that the cancellation ceiling of $5,800,000 was supposed to be increased by the Air Force to reflect the documented installed cost of the project. This had not happened by March 1991 and an interview in the February 1991 EUN incorrectly gave the value of the project as $5,800,000 which caused Sanwa to become concerned about the collateral for its loan to Empire and ultimately caused the default. According to Mr. Travis, Empire was "blameless." (R4, tab 1; tr. 1760-62) We have considered Mr. Travis's testimony, the testimony of James Rome (tr. 3402-10) and that of Marybeth Hoffman of Sanwa (tr. 4439-4570). We have weighed in the balance the fact that Ms. Hoffman was compensated by the Air Force for her preparation and appearance at the hearing (tr. 4505), and Mr. Travis's obvious financial interest in the outcome of this appeal (*see, e.g.*, tr. 3252-55). Mr. Rome, who was retained by Mr. Travis in 1989 while still under retainer to Sanwa (tr. 3360-61, 3409), asserts Ms. Hoffman called him about the EUN article in February or March 1991 in his capacity as a retained advisor to Sanwa and wanted some written assurances from the Air Force that it was still committed to the project (tr. 3402-10). Ms. Hoffman denies this, denies ever seeing the article before trial preparation, asserts that the cancellation ceiling was the least of Sanwa's concerns, and maintains that the problems between Sanwa and Empire stemmed from Mr. Travis's and Empire's refusal to cooperate, as well as "common sense" issues as to where the money went and why more was needed by Empire (tr. 4496-99, 4504, 4570). We have also examined the contemporaneous documentation for corroboration and for its independent probative value in resolving this issue. We conclude that the letters from Sanwa do not raise the EUN article or the cancellation ceiling, and thus do not corroborate the testimony of Mr. Travis and Mr. Rome. (Resp. supp. R4, tabs 109, 111, 117, 118, 119, 123, 131, 137) Moreover, the documents date from mid-December 1990 and reference discussions about Sanwa's concerns related to overruns by Empire, and meetings with Empire and Sanwa, with Sanwa's attorneys present, in mid-January 1991 regarding the Coopers & Lybrand review (resp. supp. R4, tab 109; exs. G-11, -14). Difficulties thus predated the EUN article. Empire's contemporaneous meeting minutes and correspondence with the Air Force, and particularly its 5 April 1991 letter, which Mr. Rome drafted, do not even mention the EUN article. The first mention is in Mr. Rome's 2 August 1991 letter. (R4, tab 146; resp. supp. R4, tabs 116, 133, 135) Mr. Rome initially testified that the "primary factor triggering this [5 April letter]" was the EUN article (tr. 3417). However, on cross-examination he testified that the EUN article "was an element" but not the primary purpose of the 5 April 1991 letter, and conceded without explanation, except to assert there were other "critical issues," that the EUN article was not mentioned in the letter. The 5 April 1991 letter also suspends construction activities, a matter which was earlier communicated in a 21 March 1991 letter. He testified he did not know about the earlier letter. (Tr. 3494-97) We find sufficient vacillation in his testimony to raise questions as to how much he had been told about the situation at the time, and about whether his recollection and perception on the significance of the EUN article is reliable. Our assessment of the probative value of Mr. Rome's testimony on this point is

reinforced by the failure of the 5 April 1991 letter to mention the EUN article. On balance, we find that the preponderance of the credible evidence demonstrates that the EUN article's effect on the relationship between Sanwa and Empire, if any, was negligible, that Empire's problems with Sanwa were of its own making, and that the denial of further loan advances by Sanwa was the cause of the 21 March 1991 work stoppage. The work stoppage continued until approximately 4 May 1992 (ex. G-15, tab 4, at 22-23).

30. During the work stoppage Empire pressed the Air Force for a modification to the pricing formula and an increase in the cancellation ceiling. By letter of 5 April 1991 Empire informed the Air Force that it could not continue construction without a contract modification to effect the desired changes in the pricing formula and cancellation ceiling. The letter asserts that "[t]ime is very much of the essence." (R4, tab 146) In response, Ms. Hall stated in a 23 April 1991 letter that Empire had been asked for support for a requested increase in the cancellation ceiling in conjunction with Mod 6, issued 11 June 1990, but that Empire had failed to provide the support. She directed appellant to return to work. (Resp. supp. R4, tab 127)

31. During this period, MacDill was identified as a candidate for partial or full closure by the Base Realignment and Closure Commission (BRACC), raising the possibility of downsizing or abandoning the project (tr. 4083-86). By letter of 17 May 1991 to Empire, Ms. Hall documented her understanding of agreements between the parties: 1) Empire would provide an appropriate irrevocable letter of credit; 2) Empire would submit proposals for and the parties would renegotiate the current pricing structure; 3) Empire would promptly submit a proposal for downsizing the plant; and, 4) the contract performance period would be extended by 90 days in recognition of time to consider changing the cancellation ceiling, downsizing, and the payment formula. (R4, tab 147)

32. Discussions continued regarding pricing, plant size and the possible effects of BRACC action (resp. supp. R4, tabs 130, 132, 133). By letter of 2 August 1991 from Mr. Rome to Air Force attorney LT COL Dennis Shaw, Empire informed the Air Force that the completion cost was then $24,000,000 and rising and that the Air Force must provide, by "[t]he middle of the coming week," an unconditional guarantee to repay the lender or a conditional guarantee and a $12,000,000 advance payment (resp. supp. R4, tab 135). By a letter of 5 August 1991 to Ms. Hall, Mr. Rome reported the completion cost as $24,000,000 and stated that unless a Government guarantee was provided, Empire would prepare a claim of at least $15,000,000 against the Government (resp. supp. R4, tab 136). By September 1991 the parties were engaged in significant negotiations toward Modification No. P00007 (Mod 7) (R4, tab 148).

The HSWA Permit and the Radian Plan

33. On 15 August 1991 MacDill was notified by EPA that EPA had decided to issue the corrective action portion of the Resource Conservation and Recovery Act (RCRA)

permit which covered the requirements of the 1984 Hazardous and Solid Waste Amendments (HSWA). The letter states "[t]his portion, together with the hazardous waste permit issued by the State of Florida, constitutes a full RCRA permit for [MacDill]." Under the permit, MacDill was required to conduct a RCRA Facility Investigation (RFI) with respect to 4 of 27 OWS units at MacDill, which were identified collectively as Solid Waste Management Unit (SWMU) No. 35. Previously, as part of the process, a RCRA Facilities Assessment (RFA) had been conducted, which had culminated in an 8 November 1990 report which identified the Building 1050 OWS as one of the units in SWMU No. 35. The RFA had expressed concern about the discharge points for the units comprising SWMU No. 35.[2] MacDill was required to prepare and submit to EPA an RFI workplan to determine, *inter alia*, the nature and extent of releases and the potential pathways of the identified SWMUs. (R4, tab 127 at 18-19; resp. supp. R4, tab 80)

34. A 25 November 1991 preliminary draft workplan and a draft workplan dated 8 December 1991 were prepared by Radian Corporation (Radian). The draft workplan identified the Building 1050 OWS as one of the four units in SWMU No. 35. The workplan identifies as concerns the discharge of potentially hazardous constituents into the retention pond and possible leakage from underground pipes. It proposes to take four soil samples along the path of the piping to the pond and three sets of water samples from the pond (off-site), as well as samples from a catch basin near the pond (off-site) and a catch basin near the OWS. (Resp. supp. R4, tab 81) Ms. Hall was unaware of any of this (tr. 1133, 1135-36). The plan was rejected by EPA on 5 February 1993. EPA gave MacDill 60 days to file a new plan. The rejection package makes specific comments about the inadequacy of plans for other SWMUs and areas of concern, but does not mention the OWS or SWMU No. 35. (App. supp. R4, tab E-1248) The process appeared to be continuing as late as May 1994 (resp. supp. R4, tab 82).

Mod 7

35. NatWest played a significant role in the negotiation of Mod 7. It wanted the loan to Empire to be free of substantial risk (tr. 3751-52). NatWest was concerned about environmental liability and sought indemnity,[3] even though Mr. Travis assured NatWest the site was clean and provided the COL Gray letter (tr. 3728-29, 3792-93, 3797-800). It also wanted a six-month "cushion" in the schedule[4] (tr. 3774-75). NatWest required a guarantor, and Empire provided Powell Industries (tr. 3739).

36. A problem arose about the perceived need for Congressional approval of a cancellation ceiling if the amount was more than $20,000,000. The parties had intended to include a cancellation ceiling of $27,000,000 (R4, tab 148). NatWest wanted a legal opinion from LT COL Shaw, who believed that Congressional approval was necessary for amounts over $20,000,000. In order to obtain the opinion and not delay the project by obtaining Congressional approval, the parties and NatWest agreed to separate the project

into the effort to construct the MacDill Avenue plant and the effort to construct the hospital site. The cancellation charge would apply only to the MacDill Avenue plant, allowing the cancellation ceiling to be reduced to an amount below $20,000,000. The hospital plant would be constructed at a later date, with the contracting officer undertaking the necessary Congressional notification upon notice that Empire would be proceeding with construction. (Tr. 3778-81) This resulted in the loan amount being reduced to $19,900,000 (tr. 3781). From NatWest's perspective, this had become a two-stage project (tr. 3790-91).

37. A $19,900,000 Construction and Term Loan Agreement (the loan agreement) was executed by NatWest and Empire on 30 April 1992. The loan agreement precluded Empire from taking any steps to construct, or finance the construction of, the Hospital Facility before the commercial operation date as defined in the Air Force/Empire contract. Pursuant to Section 3.17, all utilities necessary for construction, operation and maintenance of the project were to be available. (Resp. supp. R4, tab 208; tr. 2949-55)

38. Contract clearance for Mod 7 was granted by the Tactical Air Command Director of Contracting by memorandum of 30 April 1992 (app. supp. R4, tabs E-836 at 15, E-854). Mod 7 was executed on 4 May 1992 (R4, tab 1). Its purpose, *inter alia*, was to establish a completion schedule for the MacDill Avenue Cogeneration Facility (*id*., Mod 7 at 02). Mod 7 included a facility charge, to be paid monthly to Empire or its lender after the commercial operation date (COD), based on a $20,000,000 construction budget plus interest. This charge, which was not to exceed $235,000 per month, acted as a loan guarantee. (R4, tab 1, Mod 7 at H-10 through H-15; tr. 2058) Mod 7 contained a release of all claims under facts and circumstances arising prior to Mod 7, except for claims for costs incurred on or after 1 November 1991 which arose from delays caused by the Government on or after 5 April 1991 (*id*. at 02-03). The MacDill Avenue COD, the key date for performance, was the date after successful commercial operations acceptance tests (COAT) when the contracting officer accepted the plant as substantially complete, and was established as the earlier of 300 calendar days from finalization of construction financing or 1 July 1992 (R4, tab 1, Mod 7 at B-2, H-11, -12). After COD, emissions/performance testing would take place, resulting in project completion somewhat later (app. supp. R4, tab E-1503). The parties agreed to 4 May 1992 as the starting date for performance, resulting in a COD of 28 February 1993 (tr. 1664-65). In paragraph 21, the parties agreed in relevant part:

> 21. ADDITIONAL DEFAULT PROVISIONS:
>
> a. Prior to the MacDill Avenue Commercial Operation Date.
>
> (1) In accordance with Contract Clause No. 80 entitled "Default", the failure of the contractor to meet obligations established by this contract may be grounds for

> Termination for Default. Notwithstanding the provision of Contract Clause No. 80, the Government agrees not to terminate this contract for Default for a period of 480 calendar days from the date the contractor finalizes construction financing for the MacDill Avenue Cogeneration Facility or from 1 July 1992, whichever is earlier. However, the contractor has indicated an intent and expectation of completing construction within 300 calendar days. The parties therefore agree that between the 301st day and the 480th day, the Government shall recover from the contractor anticipated energy savings lost as a result of completion later than the 300th day. The parties agree that the Liquidated Damage rate specified in Part I, Section F, Paragraph 2 is an appropriate measure of the daily savings lost. The contractor's failure to complete construction of the MacDill Avenue Cogeneration Facility in a timely manner shall be eligible for mitigation if resulting from circumstances set forth in Contract Clause No. 80, Default FAR 52.249-8 (c) and/or (d), notwithstanding the fact that the referenced FAR clause is for Fixed-Price Supply and Service contracts and not Fixed-Price construction contracts.
>
> . . . .
>
> c. (1) With respect to any condition of default (including those conditions set forth in Part I, Section H, Paragraph 2, Safety and Accident Prevention), other than those specified in subparagraph "b" above or the failure to achieve the MacDill Avenue Commercial Operation Date within the time specified in Part I, Section B, Page B-2, of the Contract, the Contracting Officer shall provide the contractor a cure notice providing a period of 10 days or any longer time reasonably necessary to cure the condition of default, whichever is greater.

Calculating from 4 May 1992, 480 days results in a COD completion date of 27 August 1993. Mod 7 also included the following provision regarding termination for convenience.

> 25. GOVERNMENT LIABILITY UNDER TERMINATION FOR CONVENIENCE OR CANCELLATION OF ITEMS PROVISIONS.
>
> a. The Government may terminate this contract for its convenience at any time pursuant to Clause No. 78 entitled:

"Termination for Convenience". The Government may also cancel all the services required under this contract after the MacDill Avenue Commercial Operation Date, pursuant to the Cancellation of Items provision (Part I, Section H, Paragraph 15).

b. Termination Prior to MacDill Avenue Commercial Operation Date:

(1) If the Government terminates this contract for convenience prior to the MacDill Avenue Commercial Operation Date, the Government shall pay directly to the Contractor, or to the Lender (if the contractor has assigned the right to receive such payment), an amount equal to the sums owed to the Lender by the contractor for the early termination of such loan relating to the construction and related project costs for the partially completed MacDill Avenue Cogeneration Facility, as specified in the construction financing documents. If assigned to the Lender, this payment shall not be subject to any offsets for amounts owed to the Government by the contractor or its subcontractors, to the extent permitted by law. Such payment shall not exceed $20,000,000.

(2) Payments made by the Government pursuant to subparagraph (1) above shall be a credit against the termination for convenience claim filed by the contractor.

(R4, tab 1, Mod 7 at H-16, -17, -21).

39. Mod 7 imposed the following regarding the supply of natural gas:

18. LONG-TERM GAS CONTRACT.

a. The contracting parties envision the contractor entering into a fixed-price long-term gas supply contract for this project. The contractor shall place contract(s), or be in possession of irrevocable option(s) for the creation of contract(s), ensuring adequate supplies for the project no later than 180 days after the MacDill Avenue Commercial Operation Date in Part I, Section H. Para 19a(4). The contractor shall submit a complete copy of the contract(s) or option(s) plus sufficient supporting documentation, consistent with generally

accepted industry standards and practices, to assure the Government that:

(1) The gas supply contract provides for adequate gas reserves to meet project needs for the full term of the contract.

(2) The contractor has secured transportation of natural gas in sufficient volume to meet project demand for the full term of the contract.

(3) The contractor shall ensure, consistent with industry practice, that the owner(s) of the gas reserves supporting the project files, in the appropriate jurisdiction, a lien or other legal notice of the dedication of gas reserves to the cogeneration project and which entitles the Government to notice prior to any attempted sale or disposal of the gas reserves for uses other than for the project.

b. The Government shall have the right of approval, not to be unreasonably withheld, of the contract(s), option(s), and amendments thereto. If no written response is provided by the Government within 30 calendar days from receipt of written notice, approval shall be deemed granted.

(R4, tab 1, Mod 7 at H-9, -10)

40. Mod 7 also contained paragraph 26:

26. ENVIRONMENTAL LIABILITY.

a. The Air Force hereby agrees that as the lessor and landowner of the property which is the subject of the Air Force Lease it is responsible for the condition of the property at the time of lease execution and is liable for any damages, losses, costs or expenses as a result of, or in connection with, (i) any Environmental Claim (as defined below) arising out of, based on, or related to, the Air Force's management, use, control [sic] ownership or operation of all or any portion of the property which is subject to the Air Force Lease or any previous owner's or operator's management, use, control, ownership or operation of all or any portion of such property (including, without limitation, all related on-site and off-site activities) and

> (ii) any Environmental Claim arising out of, based on, or related to, any activity conducted by the Air Force or any of its officers, employees, advisors, or agents at MacDill Air Force Base.
>
> b. For purposes of the foregoing subsection, "Environmental Claim" means any claim, action, cause of action, investigation or notice (written or oral) by any person or entity alleging potential liability (including, without limitation, potential liability for investigatory costs, cleanup costs, governmental response costs, natural resources damages, property damages, personal injuries, or penalties) arising out of, based on or resulting from (i) the presence, or release into the environment, of any chemicals, pollutants, contaminants, wastes, toxic substances, petroleum or petroleum products or (ii) circumstances forming the basis of any violation, or alleged violation of, or any failure to comply or alleged failure to comply with, any law, rule, regulation, order, decree, or governmental approval relating to pollution, natural resources, or protection of the environment (including ambient air, surface water, ground water, land surface or subsurface strata).

(R4, tab 1, Mod 7 at H-23) At the time Mod 7 was executed both parties knew the OWS was processing and storing petroleum products, was discharging into a storm sewer, and the storm sewer discharged into a retention pond (findings 12, 22). In addition, the Air Force had received the August 1990 CH2M Hill report and the December 1991 Radian workplan. It knew or should have known that the OWS required further investigation before its NPDES permit could be renewed, and to comply with the terms of its HSWA permit.

41. A Novation Agreement was executed by the Air Force, NatWest, and Empire on 4 May 1992. Under it, the Government agreed in paragraph 9 to accept NatWest as Empire's successor in interest to the facility charge in the event the Government terminated the operating rights and obligations of the contract. (Resp. supp. R4, tab 152)

Remobilization and the Second Extended Work Stoppage

42. Shortly after execution of Mod 7 Cogen remobilized. The OWS was still in place. (Tr. 539) According to Mr. Monteith, this created a problem with site access for pouring footings. The Air Force suggested using the northeast corner. Mr. Monteith expressed concern about concrete trucks passing over ground which had piping underneath, notwithstanding that Empire had earlier employed heavy equipment that passed over the piping in question. The Air Force installed aluminum runway matting capable of handling the impact of an airplane along the east side of the site on or about 19 May 1992. We have

considered videotapes of the site, as well as the testimony of Mr. Monteith and Mr. Donaldson. (R4, tab 8; exs. A-14, -15, G-16; tr. 540-45, 899-900, 4719-31, 4736-43, 4970; app. supp. R4, tab E-1625) We find the OWS's impedance of Empire's access, if any, was negligible.

43. Mr. Monteith testified that on 15 May 1992 he learned the reason the OWS had not been moved was because it would cost $80,000 to pump out its contents and, according to him, the Air Force had budget problems with that amount.[5] Mr. Monteith testified that this made him suspicious. He stated "I didn't want to take responsibility for something that appeared illegal," a reference to the discharge into the storm drain. We find that, if the condition appeared illegal then, Mr. Monteith possessed the facts necessary to reach that conclusion a year earlier. He further testified that he investigated the storm sewer and found an oil-absorbent boom, or "pig," in the storm drain nearest the OWS. He assumed from this that the OWS was passing oil into the storm sewer.[6] He then proceeded to walk along the path of the storm sewer, parallel to MacDill Avenue and in a northward direction to the retention pond. He discovered another "pig" in the grate near the retention pond and one on the edge of the pond itself. There was also an oily slick in the retention pond. He made a video of the conditions he encountered on 15 May 1992. (Tr. 549-59, 579-80) Empire, through Mr. Monteith, presented clips from the video, which are also in the record as still photographs. Two of the clips and photographs show decaying "pigs," one in the drain near the retention pond and another on the edge of the retention pond, while another shows an oily slick in the retention pond. The slick is elliptical and appears to be about 18 by 24 inches. The video clips and photographs do not show the "pig" allegedly encountered closest to the OWS, do not show the grate and storm drain at the site, and do not show any sign of oil discharging from the outlet pipe of the OWS. (Exs. A-14, nos. 57, 63, 64, A-15, no. 1; app. supp. R4, tab E-1625; tr. 4807 08) Mr. Monteith asserts that, although the grate and storm drain were on the MacDill Avenue work site, he had never before noticed an oil absorbent boom in the pipe (tr. 563). Mr. Monteith had known the OWS improperly discharged into the storm sewer for more than a year, had been told by the Air Force prior to Mod 7 that it contained oil, and understood the difference between storm and sanitary sewers. He believed, based on experience gained prior to working for Empire, that oil-based contaminants should not be released into a retention pond, knew the OWS contained such contaminants, and had known for some time the OWS was active. (Finding 22; tr. 851, 912-15, 959-60, 977-78) Mr. Monteith had prior experience with an environmental problem involving a fuel tank and knew that in Florida any fuel tank would be of concern to a contractor (tr. 976-79). Yet he testified that the OWS did not become a "concern" until the events of 15 May 1992 (tr. 967) and that he had "great concern and shock" upon finding out what was in the OWS and "the liabilities associated with what was in it as far as doing any more construction to the site." (Tr. 575) We find this testimony and other testimony to similar effect lack credibility in the face of his prior knowledge about the OWS and environmental issues affecting fuel tanks. We also find, based on the foregoing and finding 22, that Mr. Monteith and Empire knew or should have known in 1991 that the OWS

represented a potential environmental problem. Thus, Empire knew of the condition upon which its subsequent work stoppage and its assertion that the Air Force breached the contract are substantially based. Empire's state of knowledge was essentially unchanged by the "investigation" of 15 May 1992 as recounted by Mr. Monteith's testimony. Accordingly, we further find that, if Empire believed the OWS was a potential environmental problem in May 1992, it formed or should have formed the same belief one year earlier.

44. After making his investigation, Mr. Monteith contacted Empire to notify it of the situation and asked Empire to contact the Air Force. According to him, Mr. Travis came to the site later that day, expressed shock, and directed that all work cease until the situation could be resolved. (Tr. 569-70)

45. The Board ordered the production of the video tapes from which the exhibits regarding 15 May 1992 were made (tr. 849-50). The portion of the tapes from 15 May 1992 was entered into the record as sequence 6 of ex. G-16. Notably, the tape does not show the storm drain and grating on the work site which, according to Mr. Monteith, contained an oil absorbent boom. It does contains audio. The three Empire employees[7] present are heard laughing throughout the tape. The camera operator is heard to say "I got it on standby. Stop the recorder." While the video is not running, the following exchange takes place, followed by laughter:

> "We bill the project yet?"
>
> "No."
>
> "Get on it."

In a further exchange, preceded by laughter, the following takes place while the video is running:

> "I hope this doesn't delay us."
>
> "I got to tell you, I can see the picture of Brian and his new boat, Forbes Magazine."

46. The Board shares the view of Mr. Donaldson, who, in commenting on sequence 6, testified that it is atypical for a claim video in that it does not show the allegedly offending drainage structure closest to the site (tr. 4811-12). He testified further that a condition which could cause a work stoppage is serious as it represents a loss of livelihood, and that is not a laughing matter (tr. 4817). He characterized the conduct on the tape as follows:

> I mean, the way those remarks come in sequence, it appears to me that they're saying that, oh, goody, we're delayed, and we're going to convert that to a lot of money. I mean, that's an inference I draw from those statements, and the way they appear on this sequence.

(Tr. 4817-18)

47. The storm sewer carried off water from parking lots and roads which would have contained petroleum products (R4, tab 109; tr. 904-09, 4691-97). Empire's own construction drawing shows various drains through which groundwater entered the storm sewer (R4, tab 109). Thus, any contamination visible at the retention pond discharge point could have come from sources other than the OWS. Moreover, oil absorbent booms were used by MacDill at various outfalls[8] (resp. supp. R4, tab 23, at 7-5; app. supp. R4, tab E-902; tr. 2292-93). We agree with Mr. Donaldson that the failure to videotape the discharge point closest to the OWS is atypical for a party documenting a problem. Further, as Mr. Monteith did not testify that there were other signs of oil or other contaminants in that storm drain, and had the means to tape such evidence but did not, we find there were no such indications of contamination (*see also*, tr. 2293). Our finding is corroborated by a 1 June 1992 letter from The Danmark Company (Danmark) in which it reports to Empire that its 20 May 1992 inspection revealed "no visible signs of petroleum" (app. supp. R4, tab E-902).[9] Based on our earlier findings, we find Mr. Monteith knowingly included material misrepresentations in his 18 May 1992 memo to Empire wherein he states "*It is Empire Cogen's understanding that the storm water and sanitary piping under the site had been abandoned, and the oil separator tank [OWS] had been decommissioned*." (Emphasis supplied) (Resp. supp. R4, tab 155 A) We find the memo and its inaccurate content to contribute to our concern as to Mr. Monteith's credibility and to lend support to the Air Force's concerns that Empire was trying to create a paper trail to support a claim.

48. In a 19 May 1992 letter Empire requested a stop work order from the contracting officer "because Empire has just become aware that it is being prevented from proceeding with performance by the presence of an unknown quantity of an environmentally hazardous substance on the project site." The letter continues:

> The site contamination has result [sic] from the Government's operation of an oil-water separator which is on the project site, was scheduled to be removed by the Government, and has leaked waste oil into an underground storm water drain system which traverses the site. Empire expects that the remedying of this condition will require the draining and removal of the oil-water separator as well as the

removal of the storm water system and any surrounding soil that has been contaminated.

The presence of this hazardous substance is preventing Empire's performance on the Contract because (1) proceeding with construction near this hazard violates the terms of Empire's insurance policy and poses a threat to worker safety, (2) Empire cannot accept the risk that normal construction activities may aggravate the present situation, (3) it would be imprudent to pour the slab (scheduled for May 20, 1992) prior to determining whether any of the contaminated oil has leaked through the storm water system and into the surrounding soil, because if contaminated soil was to be found under the slab, the additional remediation costs would approximate one million dollars, and (4) alternate solutions to proceed with work while the Government addresses the environmental problem, such as re-routing the cement trucks from the north so as to avoid the oil-water separator, present other risks which Empire should not be required to bear, such as potential damage to the underground water pipes in that area and the risk to the truck and driver of driving over a soft surface area.

Empire is required to notify its lender, its construction guarantor and its insurance carrier of the present situation. To prevent any adverse reaction, Empire should include with that notification an acknowledgement [sic] by the Government of its responsibility and an affirmation from the Government that it will promptly return the site to an acceptable condition. Empire's expectation is that the insurance company will not permit construction to proceed until the site is remediated due to worker safety hazards, potential liability for additional damage, and the potential impact of site remediation on the structures which are scheduled to be constructed both above and below ground.

Therefore, Empire suggests that the best way to proceed, so as to protect the interests of all parties while minimizing damage, is as follows:

(1) The Government issues a stop work order and provides a letter as described above;
(2) The Government commissions an independent study to determine the extent of the damage;

(3) The Government fully and properly remediates the site;
(4) Empire, the insurance carrier and the independent engineer determine that the site is suitable for construction to continue; and
(5) Empire proceeds with construction.

Given the significance of the present situation and the requirement that Empire must send out written notifications today, your immediate response is necessary.

(R4, tab 8) The letter set the stage for the next year, during which no work was done. Mr. Donaldson testified about Empire's actions during this period as follows: "[t]hey were unreasonable to the point of being inexplicable" (tr. 4660).

49. A site inspection was conducted on 20 May 1992 by Ms. Hall and MAJ Nyle Bosier, head of the Environmental Flight at MacDill. There were no visible signs of contamination. (Tr. 2253, 2291-94, 2368-70) MAJ Bosier believed whether to continue work was a "judgment call" and he did not at the time consider the RFI to prevent Empire from proceeding (tr. 2310). Ms. Hall responded in a 20 May 1992 letter which contained input from MAJ Bosier. She denied appellant's request for a stop work order. She informed appellant that a site inspection had been conducted which produced no evidence of leakage of waste oil into the storm sewer. She conceded that the OWS is an imperfect instrument which may permit contaminants to get through the system, but that the retention pond "ameliorate[d]" any such failure by permitting "treatment by natural processes." She stated further:

> In the unlikely, but of course not impossible, event that unknown conditions may exist under the project foundation that would warrant some degree of environmental remediation in the future, technologies do exist that should be able to accommodate it. Any such action, and the cost thereof, that might be required would certainly not be the responsibility of the contractor unless the contractor clearly was responsible for the contamination.

(R4, tab 9; tr. 2291) The information as to technologies to remediate under the foundation was provided by the Environmental Flight. MAJ Bosier's testimony and the lack of substance it provides has led us to conclude there are no realistic technologies for remediation under the foundation (tr. 2306-09). In any event, and notwithstanding Ms. Hall's back-to-work order, MacDill began discussions with Dames & Moore (D & M) in June 1992 regarding an investigation of soil conditions at the site, and subsequently contracted with D & M for that purpose (app. supp. R4, tabs E-923, -929, -946).

Accordingly, we find it would have been impractical to continue work at that point while tests were being conducted and until the situation could be clarified.

50. In a 22 May 1992 letter Empire informed the contracting officer that Empire had "conducted its own investigation into the implications that the discharge of waste oil from the oil-water separator has on Empire, and on its construction efforts under the . . . Contract." Empire represented that its investigation consisted of a site inspection and telephone interviews with Florida and Hillsborough County personnel, whom Empire had "notified of the waste oil discharge." Empire notified the contracting officer that Empire "is still being prevented from performing by the presence of these contaminated and hazardous substances." Empire asserted a variety of grievances, stated it would hold the Air Force liable for damages, and requested various information and actions from the contracting officer. (R4, tab 10) In this regard, Mr. Donaldson testified, and we find, that Empire had sufficient knowledge that it could have proceeded safely (tr. 4939) and that Empire never reached a point where it could not proceed because of the RCRA investigation (tr. 4949). In so finding, we take support from the conduct of Empire and its unsubstantiated assertions of contamination and hazardous substances, which undermine the credibility of Empire's motivations for not proceeding since we find there was no proof of actionable contamination (matter that violated the environmental laws and regulations of the United States or Florida) or OWS malfunction (finding 87, *infra*.).

51. The contracting officer was suspicious of Empire's actions because they occurred so soon after execution of Mod 7 (tr. 331-32). She responded in a 1 June 1992 letter disputing the presence of any soil contamination and requesting any evidence tending to substantiate Empire's concerns (R4, tab 11).

52. By letter of 5 June 1992 Empire again set out its position that environmental issues existed at the construction site. The letter contained quotations from and references to relevant documents concerning the OWS, and seven attachments consisting of hundreds of pages. The attachments included a 15 May 1992 letter from the Environmental Protection Commission of Hillsborough County, Florida (EPC). On or about 5 June 1992, Empire clearly knew of the RFI and that the OWS had been identified for further investigation by EPA. Empire's letter asserted there was soil and water contamination and other hazards at the site, and that "the Government's failure to conduct the assessments requested by the EPA and the EPC and the Government's unauthorized operation of the oil-water separator are both the basis for an environmental claim [under paragraph 26] and violations of Executive Order No. 12088." Empire states it has retained Danmark as an environmental consultant[10] to collect and analyze soil and groundwater at the site. The letter also requests additional information and states:

> Given the information attached to this letter, including recommendations, conclusions, correspondence and orders from the EPA, the EPC and the President of the United States,

> Empire believes that it provided evidence sufficient to convince any reasonable person that in order for construction to continue and in order for the Government to fulfill its legal obligations pursuant to Part I, Section H, Paragraph 26 of the Contract:
>
> (1) the oil-water separator must be removed from Empire's site;
>
> (2) The soil and groundwater on Empire's site and on the easements identified as requiring underground pipe, wire or cable installation on the plans and specifications incorporated into the Contract must be thoroughly tested by one or more qualified, independent consultants at the Government's sole expense;
>
> (3) That the consultant's certified reports and conclusions must be provided to Empire, the EPA, the EPC and the FDER; and
>
> (4) If the report determines that any quantity of soil or groundwater contamination is present on Empire's site or on the pipeline easements, on which Empire must remove soil and groundwater in order to continue construction, all of these areas must be completely and properly remediated by the Government at the Government's sole expense, risk and peril.

(R4, tab 13)

53. The OWS was removed from the MacDill Avenue site on 10 June 1992 and used thereafter as a holding tank (R4, tab 19; resp. supp. R4, tab 18). The contents of the OWS, described as 10,000 gallons of wastewater contaminated with approximately 300 gallons of JP-4 fuel, were pumped out and disposed of at a price of $.42 per gallon (R4, tab 134). Although Air Force sampling determined the contents could be treated as non-hazardous, Empire's environmental expert, Marcia Williams, disagrees. She believes the sampling technique is inadequate. (Tr. 2518-21) We find the evidence is inconclusive, as Ms. Williams' opinion is based on a "quick calculation" (tr. 2520-21). Ms. Williams had ample opportunity to do a structured, thorough analysis, and her failure to do so affects the probative value of the "quick calculation."

54. In June 1992 MacDill requested the help of EPC in resolving the dispute with Empire about soil contamination from the OWS. EPC thereafter conducted an inspection on 19 June 1992 which was attended by Ms. Hall and Mr. Travis. The EPC representative, Fred Nasser, told those in attendance there was no reason to stop construction (tr. 335-36). EPC's inspection is documented in a 24 June 1992 letter to respondent. EPC confirmed that the OWS had been relocated and the discharge line to the storm drain plugged; that there was no evidence of wastewater in the stormwater system (including the retention pond); and a visible inspection revealed no soil stains or odors. While EPC found no obvious signs of contamination, it commented that "no assurance can be given about a particular site without a full assessment" and suggested that MacDill also perform organic vaporizer analysis (OVA) screening of pertinent areas and soil borings. (Resp. supp. R4, tab 31)

55. In a 17 July 1992 letter about the proposed gas contract authored by Steven Greenberg, Empire's vice president,[11] Empire included the following paragraph, which it was to use thereafter in virtually all its correspondence with the Air Force:

> PLEASE BE ADVISED THAT EMPIRE'S CONTINUED CORRESPONDENCE AND/OR PERFORMANCE OF WORK UNDER AND/OR RELATED TO THE CONTRACT DOES NOT CONSTITUTE, AND SHOULD NOT BE CONSTRUED AS, A WAIVER OF THE CONTRACTUAL BREACHES PREVIOUSLY OR HEREWITH ASSERTED BY EMPIRE AGAINST THE GOVERNMENT. EMPIRE HOLDS THE GOVERNMENT FULLY RESPONSIBLE FOR ALL DAMAGES PREVIOUSLY OR HEREWITH CLAIMED BY EMPIRE. EMPIRE IS PROCEEDING DUE TO ITS EXPECTATION THAT THE GOVERNMENT WILL CURE THE CONTRACTUAL BREACHES ASSERTED BY EMPIRE, AND ITS BELIEF THAT PROCEEDING IS IN THE BEST INTEREST OF THE GOVERNMENT BECAUSE THIS PROJECT IS DESIRED BY AND WILL PROVIDE NUMEROUS BENEFITS TO THE GOVERNMENT, AND BECAUSE PROCEEDING BEST MITIGATES AND MINIMIZES THE GOVERNMENT'S DAMAGES.

(R4, tab 26) The record is replete with Mr. Greenberg's letters, most of which take a strongly adversarial tone.

56. By letter of 27 July 1992 Bibb & Associates, Inc. (Bibb) reported to NatWest about a site visit conducted by Bibb. The letter referred to Empire's consultants' investigations and stated it was advisable for Empire to cease all construction activity until

environmental concerns are resolved. Mr. Travis was provided a copy of the letter. (R4, tab 139)

57. Respondent contracted with D & M to perform an assessment of the soil at the MacDill Avenue site. Commencing on 21 July 1992 and concluding on 23 July 1992, D & M took samples at 26 locations throughout the construction site and did organic vapor testing. In its August 1992 report D & M stated:

> The results of the investigation in this report indicate that further site assessment is not required by state or federal rules or regulations.
>
> The site investigation confirmed compliance with all applicable federal, state and local environmental laws and regulations and that the site is suitable to complete construction of the cogen facility.

(Resp. supp. R4, tabs 73 at 4, 74, figures 2, 4) The D & M report was provided to Empire and NatWest by letter of 28 August 1992 (R4, tab 186). The total time for testing and providing the report to Empire was 38 days. On 3 September 1992 MacDill met with EPA representative Elizabeth Wilde and FDER. MacDill told EPA and FDER of the soil lead levels found by D & M, and they advised it was not a level of concern (resp. supp. R4, tab 46; tr. 2190). That meeting constituted notice to EPA that MacDill intended to change the site (tr. 2193).

58. Empire had a site investigation performed by OHM Corporation (OHM). The preliminary OHM report, a two-page letter, was provided to respondent in a letter of 8 September 1992. The letter, authored by Mr. Greenberg, accuses Ms. Hall of intentionally misrepresenting the position of EPC and threatens "Empire hereby advises MacDill AFB that . . . [it] has one week from August 31 1992 to notify DER of the excess soil contamination found, or be in violation of Section 17-770.250 F.A.C." In the report, OHM questioned D & M's report insofar as D & M did not test groundwater. It recommended that results be presented, *inter alia,* to EPC. (R4, tab 55)

59. By letter of 6 November 1992 Empire provided a copy of OHM's supplemental investigation report. OHM reported it had collected groundwater on 6 October 1992 and detected the presence of chromium in the sample in a concentration that exceeds standards set by Florida. The report notes, however, that inordinate turbidity was present which may have distorted the test result. Excessive chromium was not detected in a second test. OHM also reported that EPC conducted a test at the same time. (R4, tab 66) By letter of 9 November 1992 Ms. Hall forwarded a 23 October 1992 EPC letter in which EPC reported to MacDill that the elevated chromium level could not be duplicated from its 6 October 1992 sample. EPC asserted, referencing the OHM and D & M reports:

> Neither report, taken separately or together, presents any reason to suspect widespread, gross contamination of the soils or groundwater at this site. There is no evidence, based upon the reports, to justify any further pursuit of these issues at this time.

EPC also commented that a RCRA RFI may be underway at MacDill that may be fulfilled by the work done by D & M and OHM, although that would be up to EPA. Also enclosed was a 6 November 1992 D & M letter commenting on the EPC letter and the OHM report. D & M stated it "believes there is no environmental hazard at the site which would prevent construction of the cogeneration facility." (R4, tab 67)

60. Empire nevertheless continued to express its concerns and to request assurances from regulatory agencies. In its 16 November 1992 letter Empire sought a consent order between EPA and the Florida Department of Environmental Regulation (DER) waiving all actions against the site by those two Government entities. The work stoppage continued. (R4, tab 68; tr. 352-54) Correspondence became increasingly adversarial (*id*.; *e.g*., R4, tabs 72-75).

61. MacDill sent a letter dated 17 November 1992 to EPA forwarding the EPC letter of 23 October 1992, the OHM report and the D & M report, seeking expedited approval of the RFI. The letter requested that EPA review the D & M report and the OHM report and use the reports to satisfy the RFI requirements. (R4, tab 70) By letter of 11 December 1992, drafted by Ms. Wilde, EPA responded, informing MacDill that on the strength of the D & M report the MacDill Avenue site did not need further investigation and did not need to be addressed as part of the RFI:

> The U.S. Environmental Protection Agency (EPA) has reviewed the Dames and Moore August 1992 document titled Environmental Site Investigation Cogeneration Facility Site, for MacDill Air Force Base. Part of the cogeneration site is on the area identified as part of SWMU # 35 in the RCRA Facility Investigation (RFI) and the rest of the cogeneration site is contiguous with a bermed area identified as Area of Concern # 29 in the RCRA permit. This area is also addressed in the RFI.
>
> Based on the Dames and Moore report, it appears that the area adjacent to the above reference sites does not warrant further investigation. Therefore this area does not need to be addressed under the RCRA Facility Investigation. This constitutes a redefinition of the area to be investigated under the RFI, and will not require a permit modification. The part of

> SWMU # 35 and Area of Concern # 29 not addressed in the Dames and Moore report, will still need to be addressed in the RCRA Facility Investigation Work Plan for MacDill Air Force Base.

The letter incorrectly referred to Area of Concern # 29, which was corrected in a letter of 4 January 1993. (Resp. supp R4, tabs 45, 47; tr. 2186) Ms. Wilde drafted a 30 December 1992 EPA letter to Senator Mack which stated it had reviewed the D & M report and "the construction site did not need any further investigation and/or remediation . . . . [MacDill] is in compliance with the provisions of its RCRA permit . . . ." (resp. supp. R4, tab 46; tr. 2188).

62. By letter of 8 January 1993, 238 days after the 15 May 1992 work stoppage, respondent provided to Empire copies of the 11 December 1992 and 4 January 1993 letters from EPA and a 19 November 1992 EPC letter stating that based on available information it had no reason to believe "further research, analysis, or correction is required. EPC therefore has no intentions of pursuing this issue, and at this time does not require anything further from MacDill or Empire on this matter." The contracting officer, as she had done throughout, directed Empire to return to work. (R4, tab 79) In this regard, the parties held a meeting on 8 January 1993 at which Mr. Greenberg stated that once work began, the project could be completed in four or five months, "depending on how fast you want to go," by use of overtime (resp. supp. R4, tab 174 at 63-64; tr. 378-79).

63. Also, on 8 January 1993 Empire delivered to respondent a 68-page document with numerous attachments in which it set out, *inter alia*, various alleged environmental claims arising under paragraph 26. The document does not contain a certification as prescribed in the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1). It seeks damages of $3,884,756.27 and a day-for-day extension commencing on 18 May 1992. It states on page 52 the following environmental claims, as the term is defined in paragraph 26, were filed by: EPC letters of 15 May and 23 October 1992; a member of the base plumbing shop on or about 15 July 1992; the "IE" (whom we construe to mean Bibb) on 27 July 1992; and Empire on numerous occasions commencing with an 18 May 1992 telephone call to the contracting officer. (R4, tab 78)

64. By letter of 26 January 1993 respondent acknowledged receipt of the letter, and informed Empire it would be held in abeyance until receipt of the up-to-date summary of delay costs and damages referred to in Empire's letter (R4, tab 81).

65. By letter of 11 February 1993 Empire updated its costs and damages to $10,992,432.91. The update did not contain a CDA certification. (R4, tab 83)

66. In a 17 February 1993 letter, the contracting officer reminded Empire of respondent's right to assess damages of $350 per day for recovery of anticipated energy

savings pursuant to Part I, Section F, paragraph 2, as amended, and paragraph 21a(1) of Mod 7 beginning on 1 March 1993. That date was based on the contract provision requiring completion of the cogeneration facility within 300 days after signing Mod 7, which respondent treated as the date when construction financing was completed. (R4, tab 84) By letter of 2 March 1993 respondent informed Empire it had commenced assessment of $350 per day for anticipated energy savings (R4, tab 85).

67. EPA rejected the OHM report in a 12 March 1993 letter, which provides as follows:

> The OHM report cannot be accepted by EPA to characterize the presence and extent of contamination at Area of Concern # 22 and SWMU # 35. The required RCRA Facility Investigation (RFI) for MacDill Air Force Base (MAFB) must be conducted under an approved RFI Work Plan. EPA's comments on the Draft RFI Work Plan, submitted by letter dated February 5, 1993, required that all sampling work meet the requirements of EPA Region IV, guidance documents.
>
> The OHM report does not incorporate EPA standards for sampling and analysis. The headspace analysis used at the site is a screening technique only and requires confirmation of positive results by off-site analysis. A total of sixty-six samples were collected but only five samples were analyzed at an off-site laboratory. A higher percentage of samples must be analyzed off-site for adequate confirmation of the screening results. In addition, the analytical parameters for the off-site analysis should have been more extensive to adequately characterize the soil. Four of the five samples analyzed off-site were analyzed for total recoverable petroleum hydrocarbons only and one sample was analyzed for volatile and semivolatile compounds. Since only one semivolatile analysis was performed, it is not possible to determine if compounds such as fluoranthene, pyrene, chryses, all present in the sediment sample, are widely present in the soil samples.
>
> In addition, the water sample analyzed in Section 3.3, was analyzed for the eight RCRA metals but the associated sediment sample was only analyzed for four metals, arsenic, cadmium, chromium and lead. The analytical parameters should have been more extensive to adequately characterize the sediment.

> In conclusion, EPA cannot approve any RFI work that is not conducted under the guidance and procedures of an approved RFI Work Plan.

The letter was provided to Empire on 12 April 1993. (R4, tab 89) The letter appears to directly contradict EPA's 11 December 1992 letter.

68. Empire filed a properly certified claim on 12 March 1993 in the amount of $178,851,542, "a sum which represents the profits which Empire would have earned and realized but for the Government's breaches of its material contractual obligations." The alleged breaches rely substantially on paragraph 26 and the Air Force's alleged superior knowledge. A Notice of Appeal dated 12 May 1993 was filed based on the contracting officer's deemed denial. The appeal was docketed as ASBCA No. 46076. (Correspondence file, ASBCA No. 46076)

69. We do not here attempt to recount the numerous letters in the record which the parties sent during the May 1992-June 1993 period. There are many exchanges which took on an increasingly acrimonious tone. Empire sent many letters which, in Ms. Hall's words, "had ever-expanding demands, ever-expanding requests." (Tr. 220) During this period, an 11 June 1993 letter was sent from Tampa Electric to the Air Force containing the following paragraph:

> On June 8, 1993 Tampa Electric Company (TEC) representatives had a meeting with MacDill's Contract personnel, Empire, and Empire's bank representative. It appears the cogeneration project is now on the fast track. Ms. Hall indicated that the Contract requires Empire to complete the project by August 1993 or another contractor will step in and complete it by December 1993.

(App. supp. R4, tab E-1392) Ms. Hall denies making any statement as to another contractor completing the project (tr. 1644-45).

70. In a 28 April 1993 cure notice, Ms. Hall gave Empire until 10 May 1993 to advise the Air Force of its intentions regarding return to the work site. She points out to Empire that it had previously projected 23 weeks to finish the project and that less than 23 weeks remained until 27 August 1993. (R4, tab 91) By letter of 10 May 1993, Mr. Greenberg responded with an eight-page letter and voluminous attachments. He states "a fast track construction schedule would enable Empire to achieve [COD] on or before 27 August 1993." (R4, tab 93 at 6) Empire resumed work on the cogeneration plant on or about 24 May 1993 (R4, tab 95). The work stoppage had lasted 374 days. By letter of 2 June 1993, provided to Empire at a meeting on that day, EPA stated it did not object to construction activities planned at the MacDill Avenue site:

> This is to inform your office that based upon telephone conversations between myself and Mr. Bosier of your office on June 1 and 2, 1993, the Environmental Protection Agency (EPA) does not object to the construction activities planned in the area of Solid Waste Management Unit (SWMU) No. 35. It is my understanding that the construction in the area will include the construction of pipeline trenches above the water table and related activities. EPA does not believe such construction would interfere with the Resource Conservation and Recovery Act (RCRA) Facility Investigation (RFI) to be conducted at SWMU No. 35 pursuant to the EPA issued RCRA Permit.

(R4, tab 130; resp. supp. R4, tab 284). However, Ms. Wilde, who drafted the letter as the EPA remedial project manager with responsibility for MacDill (tr. 2073), explained that she would have required additional sampling for any trenching below the water table. (Tr. 2162-63) She also testified that the 2 June 1993 letter was the culmination of discussions between her and MAJ Bosier regarding installation of two steam lines and that the request was unusual (tr. 2151-63). We find her comment on the request being unusual to be with regard to a facility seeking EPA approval for specific work. We also find the letter was not intended as a "site clearance" letter approving all future construction. Nonetheless, Empire surged ahead (ex. G-15 at 36-38).

Witnesses on the Environmental Issues

71. Marcia E. Williams, an expert on environmental matters, testified and prepared a report on Empire's behalf (ex. A-18). Ms. Williams provided testimony about the regulatory scheme (tr. 2437-587). She was critical of the D & M report (tr. 2582). She stated, and we find, that the environmental laws and regulations in effect at the relevant period applied to the cogeneration site. She opined that a work stoppage was appropriate in the circumstances and work could not have been resumed prior to provision of EPA approvals in June 1993. She characterized the Air Force's lack of knowledge and sophistication as "surprising." (Ex. A-18 at 7, 9) She understood that Empire first learned that the OWS contained hazardous waste in May 1992 when they learned it would be expensive to dispose of the contents of the OWS (tr. 2560). She also testified that, once Empire knew that the OWS was active and discharged into a storm drain, her advice would have been to make sure the storm drain had a proper permit and, where Empire was doing construction in areas near the retention pond, to "properly sample and characterize" the areas. She would also have advised Empire to ask the Air Force about the integrity of the storm water drain piping. (Tr. 2657) She testified it would be "useful" for a contractor to know if an OWS on its site did not have a permit for discharging into the storm drain (tr.

2662). We note that we have found that Empire knew of the OWS' discharge in March 1991, and that Empire did not take the actions she recommended.

72. Appellant called Richard B. Stewart, who was assistant attorney general for the Environment and Natural Resources from 1989 to 1991 (tr. 4292). He testified, and we find, that environmental laws and regulations were sometimes enforced and penalties assessed where regulations were violated but no environmental harm was found (tr. 4298-300). Such enforcement action originates with EPA (tr. 4294-95). Mr. Stewart testified that if a contractor acted responsibly and in good faith, he was "off the hook criminally" (tr. 4313).

73. Elizabeth Wilde testified it is EPA's authority and mission to determine what needs corrective action; "how or if" remediation is necessary (tr. 2099, 2101). She has considerable autonomy in administering permits and could have removed the site and the OWS from further consideration (tr. 2182-85). Where areas have been identified as needing further investigation, a permittee may not make changes without notifying EPA (tr. 2101). She received notice of a change to the site on 3 September 1992 (finding 57). She testified that a Federal permittee cannot use a contractor to "end run" EPA regulations (tr. 2079-80). When EPA investigates a SWMU it is focusing on hazardous materials (tr. 2083-86), and hazardous wastes are defined specifically by statute (tr. 2090). There are seldom penalties for violation of a permit on a Federal facility; the additional cost of doing the work associated with the EPA imposed requirements is penalty enough (tr. 2103-04). At the time of the controversy, Ms. Wilde would have been concerned with the area immediately adjacent to the OWS (three to five feet) at its MacDill Avenue end, and the catch basin near the pond, which was not on the construction site (resp. supp. R4, tab 81 at 3-42; tr. 2114). If the sampling produced evidence of contamination, sampling would then proceed further out (tr. 2196-99). EPA does not give absolute approvals, but qualifies most of what it says (tr. 2214). Decisions on the sufficiency of an investigation are judgment calls (tr. 2215). She was not interested in the totality of the MacDill Avenue site, only that which was part of or adjacent to the SWMU (tr. 2134, 2211). She considered the SWMU to be different than the construction site (tr. 2221). She considered the SWMU to be the OWS (tr. 2207). She testified:

> in my perspective of looking at this site, I wouldn't be interested in the -- in areas that the Air Force was constructing in. [U]nless they were identified to me as being . . . adjacent to or part of the SWMUs, and then I would make recommendations I could and I would have input into that part of construction that I thought impacted on my area. But certainly, most of the things that the Air Force did wasn't connected or relevant to what I was doing.

(Tr. 2211) Thus, we find that construction work could have been done on site without interfering with the RFI work. However, with regard to the 11 December 1992 letter, she testified she did not consider the review of the tests to satisfy the RFI requirements until both the D & M and OHM reports were accepted (tr. 2137). Her main concern was that construction activities not disrupt EPA's investigation of the site and she testified it was the Air Force's responsibility to obtain permission for construction activities. (Tr. 2150-54) This is in sharp contrast to the content of both the 11 December 1992 letter and her letter to Senator Mack (finding 61). At several points in her testimony she used the terms "schizophrenic," "schizo" and "schizoid" to describe the appearance of individual actions taken by EPA (tr. 2142, -53, -62). We construe this as a colorful way of saying that certain EPA communications inexplicably contradict or conflict with other EPA actions, particularly the 11 December 1992 and 12 March 1993 letters (findings 61, 67). The former appears to clear the way for construction, while the latter appears to withhold approval. In this regard, she testified she had "a lot of confidence in" the D & M report, but considered the OHM report "clearly substandard" (tr. 2143). We find, based on her testimony and the correspondence she authored, that for purposes of the RFI the OWS and an area three to five feet around it was the SWMU, that EPA was not concerned with other areas of the site, and that the D & M report was a high quality report that addressed and dispelled concerns about the site. We further find construction could have proceeded without violating the permit and, in any event, enforcement against Federal facilities is rare.

The Gas Supply Issue

74. During the work stoppage there was communication about the supply of natural gas, commencing with Empire's submission of a *pro forma* gas contract for the contracting officer's approval on 4 June 1992. The proposed contracting parties were Empire and Empire Gas Marketing, Inc. (Empire Gas). (R4, tab 12) Ms. Hall believed the proposed contract did not include the contractually required documentation and she knew nothing of Empire Gas, as Empire had previously proposed Peoples Gas, a local supplier. As the proposed contract did not provide information about the long-term supply of gas, she believed it was not in compliance with the contract. (Tr. 247-48; finding 39) In a 29 June 1992 letter she declined to approve the proposed contract and provided a list of items that were necessary before approval would be granted (R4, tab 16).

75. Mr. Greenberg replied for Empire in a 17 July 1992 letter in which, among other things, he asks for clarification as to whether Ms. Hall's 29 June 1992 letter conditionally approved or rejected the proposed contract[12] (R4, tab 26). Ms. Hall responded on 6 August 1992, further explaining that the proposed contract "does not address the ultimate issue—whether [Empire Gas] . . . will be able to satisfy the buying demands of the purchaser." She again requested the specific items set out in her 29 June 1992 letter. (R4, tab 38)

76. By letter of 12 August 1992 Mr. Greenberg accused the Government of delaying Empire and asserted that the Government had to execute a confidentiality agreement before Empire would provide the requested documentation. It threatened damages of $44,000,000. (R4, tab 41) Ms. Hall believed Empire was "posturing for a claim" and did not execute the confidentiality agreement (tr. 256-58). In a 1 September 1992 letter Mr. Greenberg reiterated Empire's position, forwarded a Wall Street Journal article on the damage to natural gas facilities suffered in a storm, and requested an answer within five days (R4, tab 50). Ms. Hall responded in a 3 September 1992 letter in which she again declined to execute the confidentiality agreement and requested supporting documentation (R4, tab 51).

77. The parties met on 14 October 1992. Mr. Travis stated that Empire Gas, which he owned, had been in existence for two years and had never supplied gas to anyone (tr. 1831, 3020-21). By letter of 15 October 1992 Mr. Greenberg explained, for the first time, that the proposed contract was not submitted to meet all of Empire's obligations under paragraph 18 (R4, tab 65). Ms. Hall responded, approving the format of the contract. She stated that, in so doing, she was not waiving any contractual rights or accepting or rejecting Empire Gas as the gas subcontractor. She requested supporting documentation within 180 days after the Commercial Operation Date. (R4, tab 69)

78. On 21 December 1992 Empire requested an $88,000,000 increase in the contract's cancellation ceiling "to include the unamortized cost of 44 BCF of natural gas reserves at a price not to exceed $2.00/MCF. When this increase is made, Empire will be in a position to contract for, and dedicate, the required natural gas reserves." Empire also sought a cancellation ceiling increase of $4,000,000 to accommodate construction while its environmental claims were being processed. (R4, tab 75) Mr. Travis wanted to structure the project on a "shared savings" basis. He was looking at natural gas fields in the $500,000,000 range, which would have been privately financed through sale of bonds except for the portion dedicated to MacDill. He estimated the MacDill portion to be about $44,000,000, but he wanted the cancellation ceiling to be $88,000,000 because of "the level of volatility." (Tr. 3012-19)

79. By letter of 8 January 1993 Ms. Hall waived the Government's approval rights under paragraph 18 of the contract and agreed to accept the actual price of Empire's purchased natural gas for pricing formula purposes "subject to the established cap." The letter also took exception to Empire's claim reservation language (finding 55) and asserted it was "treat[ing] Empire's statement as a waiver of the materiality of any breaches alleged by Empire in all correspondence containing such statements." (R4, tab 80) She heard nothing further from Empire on the gas issue and assumed this was because Empire had no long-term gas supply. This was a factor in her ultimate decision to default. (Tr. 268-69)

Work Performed from Late May 1993 to Termination

80. At the 2 June 1993 meeting at which the EPA letter was presented, Empire presented a new schedule which showed COD on 16 November 1993 and project completion on 13 December 1993. Transcribed notes show Ms. Hall made the following comment:

> [N]ow is not the time to talk about a schedule extension. Uh, you've got till the 27th of August [1993] we will see how construction proceeds and see how close, whats [sic] going on and then we can talk about. But now is not the time to talk about a schedule extension. We've already said there is no extension.
>
> . . . .
>
> If we get towards the end and we see that your [sic] substantially complete, we'll talk about it again and I, you know, I appreciate the effort that we've got here and I think we're showing a good faith effort both sides and when I start seeing the building come up off the ground and everything being installed then we'll [statement ends]

Mr. Travis wanted to discuss the matter further, but finally stated "[s]o we'll let it go till then." (Resp. supp. R4, tab 284, at 1, 30-31; app. supp. R4, tab E-1503; tr. 704)

81. A subsequent schedule (the 7 July 1993 schedule) showed Air Force acceptance of COAT, and thus COD achieved, on 20 December 1993 and Empire finishing emissions performance testing on 7 January 1994 (app. supp. R4, tab E-1504; tr. 709). Empire had advised NatWest on or before 9 July 1993 that it was two weeks behind the 13 December 1993 completion date (resp. supp. R4, tab 188, at 1). The relationship between Empire and NatWest was becoming strained (resp. supp. R4, tabs 232, 232A-E).

82. Once Empire resumed work it made progress and its 30 July 1993 cost report showed total costs to date in excess of $30,000,000 (ex. G-9, tab 20; tr. 4686). Nevertheless, it was not going to be finished by the contract completion date of 27 August 1993 (ex. G-15, at 37). Ms. Hall sent a show cause letter to Empire on 21 July 1993 in which she informed Empire that its response to her 28 April 1993 cure letter did not "cure the situation" or address the Air Force's concerns, that its then-current COD (as provided to the Government) of 16 November 1993 was unacceptable, that Empire was three weeks behind that schedule, and that its rate of actual progress was such that it was three weeks behind Empire's own estimated completion date. She also requested four items previously

requested. She further informed Empire that termination for default on 28 August 1993 was being considered. Empire was given ten days to respond. (R4, tab 98)

83. Empire, in a 27 July 1993 letter, stated that its cost to complete was now $23,500,000 and asked for "Government . . . evidence of its authority to allow Empire to borrow more than $20,000,000 . . ." (R4, tab 100). Ms. Hall responded to the letter on 30 July 1993, stating the Government had no intention of increasing the cancellation ceiling (R4, tab 101). Empire responded to the show cause letter in a 30 July 1993 letter. Empire disputed Ms. Hall's representations, and set out various Government actions which Empire averred were the cause of the delay. Empire stated it considered the cure notice to still be in effect and asked that the cure notice be lifted. (R4, tab 102) Ms. Hall deemed the response inadequate and, in a 17 August 1993 letter, informed Empire that "[y]ou still have not cured the situation" and it could submit a specific proposal for an extension which "must include consideration on both sides." (R4, tab 107). Ms. Hall would only have considered granting a request for an extension if it was accompanied by consideration to the Government, and she never received such a request (3 September 2001 Joint Stipulation of Testimony). Empire responded in a 19 August 1993 letter which proposed an extension to 31 January 1994, which, it stated, was derived from the 7 July 1993 schedule with "a minimal margin for unexpected delays." (R4, tab 108).

84. By letter of 27 August 1993 Empire informed Ms. Hall that it had been "led to believe that the Government intends to terminate . . . for default." Empire asserted that it "should reach the Commercial Operation Date by mid-December of this year." The letter set out the provisions at FAR 49.402-3(f). (R4, tab 111) Ms. Hall testified she considered the provisions (tr. 401).

85. Ms. Hall, who repeatedly asserted that she had little personal expertise in areas such as environmental issues, law and engineering, and appeared cautious with respect to the decision process generally (tr. 56-417, 985-1669 *passim*), began a consultative process with advisers. She requested and received memos from the engineer and inspector close to the project as to percentage of completion (resp. supp. R4, tabs 193, 195; tr. 403-06). She met several times with MAJ Bosier, personnel from Headquarters, the logistics commander, the civil engineering commander, staff judge advocate, contracting commander, project engineer, contract administrator and others. They discussed the FAR termination factors in detail, item by item. They discussed the effect of termination on Empire. She got "advice from the people that the Government has to advise me." She prepared a Determination and Findings which states, *inter alia*, "all the options available to the Government were discussed in accordance with FAR 49.402 to include consideration of the factors identified at 49.402-3(f)." She characterized Empire as "the least cooperative [contractor] that I have seen in 20 years . . . . The Government would gain nothing by continuing a contract with Brian Travis, Empire, for the next 30 years." The document concludes that termination for default would be processed in accordance with the FAR. (Resp. supp. R4, tab 200; tr. 406-17) Respondent terminated the contract for default on 1

September 1993 (R4, tab 112). It is undisputed that Empire failed to meet the MacDill Avenue Commercial Operation Date. The project was not substantially complete when Empire was defaulted (tr. 4368). Empire continued to work after the termination as it still intended to complete the project. After several days the Air Force sent a letter and a FAX stating that passes were invalid and utilities would be cut-off. (R4, tab 190; tr. 814-17)

86. The record contains several estimates of the percentage of completion at termination. Empire's Architectural Institute of America (AIA) billings showed 87 percent completion (tr. 768-73). However, this is based on dollars spent and is not, in our view, a reliable measure of time to complete. Contemporaneous, on-site Government estimates ranged from 30 to 35 percent complete on 27 August 1993 (resp. supp. R4, tabs 193, 195; tr. 403-05). Empire's energy expert, John R. Martin, testified and reported that the project was 45.21 percent complete to COD "on a time-basis, not on a value basis." (Ex. A-22; tr. 4360) We construe this to mean that, while the costs of design and procurement may have been incurred, the construction process was less than half completed. He also testified the $30,000,000 cost of the project was "very high" (tr. 4370). Mr. Martin's calculation had Empire completing COD on 13 December 1993 (ex. A-22 at 5-6). NatWest's engineering consultant, Bibb, estimated site construction progress at 28 percent on 30 August 1993 (resp. supp. R4, tab 194). In this regard, Mr. Martin reviewed the Bibb report, commented that he had no reason to question it, and that his report did not have a comparable analysis of the state of construction progress (tr. 4372-73). Because it was contemporaneous and in significantly greater detail than the Government estimates, we find Bibb's estimate persuasive, and find that Empire's construction effort was 28 percent complete on 1 September 1993. Although Empire returned to the site on 24 May 1993 (finding 70), its 7 July 1993 schedule, prepared after work had recommenced, shows it starting work in earnest on 8 June 1993 (app. supp. R4, tab E-1504). It thus took from 24 May 1993 to 8 June 1993 to mobilize, or 15 days. The 7 July 1993 schedule shows a performance period of 195 days for COD, with Empire reaching COD on 20 December 1993 (*id.*). On 1 September 1993, 72 percent of the work necessary to reach COD remained. Therefore, according to Empire's 7 July 1993 schedule, on 1 September 1993 Empire needed 140 days to reach COD (.72 x 195). However, the schedule had a two-week logic flaw in an activity commencing on 16 August 1993, 71 days into the schedule, or at 36 percent of completion, and thus after the point of completion reached by Empire at 28 percent (app. supp. R4, tab 1504; ex. G-15, at 55-56). We find those 14 days must be added to the time to complete. We find 154 days (140 + 14) would have been required for Empire to reach COD. We find it would have taken Empire until 2 February 1994 to reach COD. D & M's testing on 21-23 July 1993 would have denied site access to Empire for 3 days, and the D & M report was not issued for 35 days thereafter (finding 57). Allowing Empire that full period, plus 15 days for remobilization, we find 53 days, or until 19 October 1993, to be the maximum extension to which Empire is entitled. Accordingly, we find there was no reasonable likelihood Empire could have met COD with a 53 day extension. We further find that Ms. Hall had a reasonable basis for default termination of the contract on 1 September 1993.

87. There is no evidence of any remediation at or near the MacDill Avenue site, no proof of actionable contamination and MacDill was never cited by EPA for violations of any kind at the MacDill Avenue site. While there is evidence that some pollutants may be soluble and become part of the effluent from oil water separators generally (finding 12), there is no probative evidence that the Building 1050 OWS released polluted effluent or otherwise malfunctioned, *i.e*., failed to properly separate oil and water, notwithstanding its improper discharge into a storm drain. Thus, we cannot find that the effluent from the OWS contained actionable contamination, *i.e*., matter that violated the environmental laws and regulations of the United States or Florida.

PRELIMINARY MATTERS

As stated in finding 68, Empire filed a claim for anticipatory profits in the amount of $178,851,542 which was appealed and docketed as ASBCA No. 46076. In its brief the Government asks that we "make detailed findings of fact and conclusions of law" on issues which also appear in that appeal (Gov't br. at 299). The issues are the hospital site dispute, the gas contract dispute, the cancellation ceiling dispute, and the Congressional notification dispute. We have addressed those issues only to the extent we deem necessary to understanding and resolving this appeal. To do more would require us to consciously and conspicuously propound *obiter dicta* in this appeal with the specific aim of resolving another appeal, a practice we think unwise. Accordingly, we decline to do as the Government has asked.

DECISION

In support of their positions under this complex and somewhat unconventional contract, the parties offer a variety of arguments and counter-arguments. Principally, Empire argues that the Air Force breached the contract or otherwise improperly terminated the contract for default, while the Air Force contends the termination for default was proper. We do not attempt to summarize all of the arguments here.[13] We hold that the default was proper.

Burden of Proof

The Government bears the initial burden of proof in a default termination. Once that is met, the burden of proving the excusabilty of the contractor's default shifts to the contractor. *General Ship & Engine Works, Inc.*, ASBCA No. 19243, 75-2 BCA ¶ 11,574 at 55,265, *aff'd on reconsid*., 79-1 BCA ¶ 13,657. In this appeal, there is no dispute that Empire failed to meet the contract date for COD, or that failure to meet that date is a valid contractual ground for default termination.

Abuse of Discretion

Empire argues that Ms. Hall abused her discretion in terminating the contract for default. There is little question that Empire was past COD and had months yet to go when Ms. Hall issued the default notice. In reviewing a discretionary action, we may not substitute our judgment for that of the contracting officer. We may review only to ascertain if the action amounts to an abuse of discretion or is otherwise arbitrary and capricious. Four separate factors are to be considered: 1) whether the Government official acted with subjective bad faith; 2) whether the official had a reasonable, contract-related basis supporting the decision under review; 3) the amount of discretion vested in the official whose action is being reviewed; and 4) whether a proven violation of relevant statutes or regulations can render a decision arbitrary and capricious. *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999); *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 622, 628-30 (Ct. Cl. 1982); *Keco Industries, Inc. v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974). The burden of proof to show abuse of discretion is "very high." *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d at 631.

As to the first element, Ms. Hall is presumed to have acted in good faith. The burden of proof on Empire to show otherwise is a high one, and it must show with convincing clarity a high probability that she acted from personal animus with specific intent to injure Empire:

> [I]t logically follows that showing a government official acted in bad faith is intended to be very difficult, and that something stronger than a "preponderance of evidence" is necessary to overcome the presumption that he acted in good faith, *i.e.*, properly.

Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

While Ms. Hall may not have liked dealing with Mr. Travis and Empire, that does not prove subjective bad faith. Were we to decide that a contracting officer's dislike of a contractor was tantamount to subjective bad faith, we would establish a precedent that would promote animosity and give hostile, uncooperative contractors an advantage over helpful, cooperative contractors in proving subjective bad faith. Further, we equate this test with the "reasonable basis" test, *Burroughs Corp. v. United States*, 617 F.2d 590, 597 (Ct. Cl. 1980), and we hold below that Ms. Hall had a reasonable basis for her actions after 27 August 1993. The specific evidence of animus toward Empire relied on by Empire is Ms. Hall's Determination and Findings, in which she characterizes Empire as "the least cooperative [contractor] that I have seen in 20 years . . . The Government would gain nothing by continuing a contract with Brian Travis, Empire, for the next 30 years." (Finding 85) The acrimonious tone of the many letters generated by Empire, and particularly its vice

president, Mr. Greenberg (findings 55, 58, 76), give a factual basis to Ms. Hall's statement with regard to the lack of cooperation. Similarly, Empire's problems with lenders, the many changes in the project, and the structure of Empire, with its recently created entities all owned and controlled by Mr. Travis (none with any experience), raised reasonable doubts as to a successful long-term relationship. Ms. Hall was not precluded from considering pre-Mod 7 events. *Decker & Co. v. West*, 76 F.3d 1573, 1581-82 (Fed. Cir. 1996). We cannot conclude that Empire has met its considerable burden of proof on element 1. We cannot find, on this record, that Ms. Hall acted with subjective bad faith.

Regarding element 2, it must be remembered that this was not a construction contract, but a contract for delivery of utilities. Ms. Hall's basis for default termination must therefore be reviewed from the standpoint not only of the construction schedule, but Empire's ability to provide the discounted utility services that it was supposed to deliver. Nevertheless, Empire was significantly behind the contract schedule and she never received a proposal for an extension with consideration to the Government, as she had requested (finding 83). Empire's own expert testified the cost of Empire's construction effort, which had grown to $30,000,000 plus, was "very high" (finding 86). Moreover, Empire's actions in raising unfounded access issues[14] had continued after Mod 7. It is difficult to understand why Empire raised access issues unless it was looking to file a claim. We can, after all, see from the videos and still photographs just how accessible the site was. We consider the positions on access taken by Empire at the time to be unreasonable. Empire's actions were indicative of total inflexibility in its construction approach, inexperience, or some unstated agenda. In any case, Empire's unreasonable access arguments have eroded our confidence in Empire's credibility.

Ms. Hall sought and obtained advice from her environmental advisors throughout performance. They told her that the work could continue, and there is no evidence she knew of the RFI requirements (finding 34). EPC told her in June 1992 there was no reason to stop construction (finding 54). Ms. Wilde testified that her interest was not in the total MacDill Avenue site, that EPA makes "judgment calls" about what investigatory steps are necessary in a given situation, and that the SWMU and the construction site were not the same (finding 73). Moreover, some of EPA's actions during performance were, in our view, confusing. As with some of the actions of EPC, there appears to have been a singular desire to shield itself from blame. There is also testimony from the Government's construction expert that Ms. Hall's direction to continue work was reasonable and that Empire had sufficient knowledge to allow it to proceed with appropriate caution (findings 49, 50). Her conclusion that the delay was not excusable, and the default termination therefore appropriate, finds support in the foregoing.

Notwithstanding the advice Ms. Hall received and evidence of the "judgment call" nature of the determination as to whether work should continue or stop, we have found it would have been impractical to continue work during the D & M testing. D & M took soil samples throughout the site, including in the area of the foundation for a period of three

days, and pronounced the site fit for construction. The D & M report was provided to Empire on 28 August 1992, 35 days later (finding 57).

Empire argues it is entitled to a delay of 135 days in connection with the D & M report, based on its contentions that it was entitled to the 180 day "cushion" included by the forbearance period so that the enforceable COD was 27 August 1993, that an additional 30 days should be added to any extension to provide for remobilization, and that Empire was entitled to an extension equal to the entire period from 15 May 1992 through the delivery of the D & M report on 28 August 1992.

Empire's analysis is not consistent with the facts. We have found that Empire could have proceeded safely, and that it never reached the point where the RCRA investigation prevented it from proceeding (finding 50). We have also found that EPA was concerned with a small area of the site, that construction could have proceeded without violating MacDill's permit, and that enforcement against Federal facilities is rare (finding 73). It should be remembered that Empire's contemporaneous communications overstated its case to such a remarkable degree, with frequent references to hazardous substances and contamination, as though the site were a ticking environmental time bomb (*see, e.g.*, findings 48, 50, 52), that the Board's view of Empire's credibility on these issues has been strongly and adversely affected in light of the undisputed facts that no actionable contamination was ever proven, no remediation was ever done (unless removal of the OWS can be considered remediation), and MacDill was never cited for an environmental violation at the site (finding 87). When combined with the fact that Empire knew in 1991 that the OWS discharged into a storm drain, we simply do not believe Empire on the contamination issue. Either it was posturing, or its analysis of the situation was so flawed as to be unreasonable. In either case, it could have kept working, except for the three day period when it was denied site access while the D & M testing was carried on in 1992. Allowing Empire those three days and affording it the fullest benefit of the doubt on the 35-day period between the end of testing and issuance of the D & M report (findings 57, 86), it would have been entitled to a 38-day extension plus time to remobilize.

Empire would have needed 154 days to successfully achieve COD (finding 86). Thus, because Empire was so far behind it would have been in default even if Ms. Hall had issued a contract modification granting an extension for the D & M delay, we conclude that she had a reasonable basis for default terminating Empire (*id.*). We discuss this issue further under the "Excusable Delay" section, *infra*.

Somewhat related to the "reasonable basis" prong is Empire's argument that it is "undisputed" that the Air Force offered the work to another contractor who could have completed by December 1993. Presumably, this is raised to aver that Ms. Hall had no rational basis for default but just wanted to get rid of Empire. The factual underpinning for this argument is very much disputed (finding 69; app. prop. find. 219). It is based on a letter from TECO to an Air Force officer, the substance of which is subject to varying

interpretations. Ms. Hall, under oath, denied she told the TECO representative that if Empire did not complete the contract by August 1993 another contractor would complete it by December 1993. We find the letter insufficiently probative to reach the conclusion urged on us by Empire.

As to element 3, the extent of her discretion, we believe there is no dispute that the default termination decision was hers to make as the contracting officer, and that her discretion was broad.

Regarding the fourth element, we think there has been no showing that Ms. Hall violated a law or regulation. Empire cites *Darwin Construction Co., Inc. v. United States*, 811 F.2d 593 (Fed. Cir. 1987) in support of its argument that it was an abuse of discretion not to consider all the factors listed at FAR 49.402-3(f). Ms. Hall testified that she did consider all the factors (finding 84). While that bare testimony, standing alone, might not be enough to carry the day, she also gave detailed testimony as to the specific actions she took (finding 85). We find the detailed testimony and her Determination and Findings sufficient evidence to defeat Empire's arguments, particularly since Empire has a high burden of proof on abuse of discretion. It must also be noted that *Darwin* cites the predecessor regulation to FAR 49.402-3(f) as "further support to our decision," *id*. at 598. *Darwin* does not stand for the proposition that failure to consider all elements is *ipso facto* an abuse of discretion. *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996); *National Medical Staffing, Inc.*, ASBCA No. 40391, 92-2 BCA ¶ 24,837.

As to violation of environmental laws or regulations, we have carefully considered Ms. Williams' testimony. However, it is Ms. Wilde whose responsibility it was to enforce EPA regulations at MacDill, and it is to her testimony we have looked for guidance. Of significance is that Ms. Wilde, whose job it was to define such things, considered the SWMU to be the OWS and thus a part of, not the entire, construction site (finding 73). It is also material to resolution of this issue that EPC told Ms. Hall there was no reason not to continue with construction in June 1992 (finding 54). Ms. Hall's environmental advisor was MAJ Bosier. He believed whether to continue with construction was a "judgment call" and he did not at the time consider the RFI to prevent Empire from proceeding. (Finding 49) From Ms. Wilde's definition of the SWMU and other testimony, we conclude substantial work could have continued even before commencement of the D & M tests. Work at the site could have proceeded apace thereafter. (Finding 73) Mr. Donaldson offered testimony supportive of this holding (findings 49, 50). Ms. Wilde also testified that the extent of any necessary investigative steps is a "judgment call" (finding 73). In light of that evidence, we conclude Ms. Hall did not, by directing Empire to proceed, violate a law or regulation. Moreover, the Air Force did contract with D & M for a site investigation and report. The only specific, quantifiable circumstance that could have constituted a violation was discharging the OWS into a storm drain, which Empire had known about for a year. That situation was rectified on 10 June 1992 when the OWS was moved (finding 53).

The Air Force was never cited for any violation as a result, nor was any remediation on the site ever required (finding 87). We conclude that Ms. Hall did not abuse her discretion in terminating the contract for default.

Ms. Hall's experience with Empire had been strewn with difficulties and her lack of confidence in Empire's ability to timely build and deliver to MacDill an operating cogeneration plant which would lower MacDill's utility costs had understandably eroded. We have characterized Ms. Hall as cautious, seeking advice at every turn. While Ms. Hall's actions may, at times, have been rigid and her approach highly structured, that does not equate to an abuse of discretion.

Empire also argues that Ms. Hall did not consider "all relevant facts and circumstances" and thereby abused her discretion. The nature of the project and Ms. Hall's lack of technical knowledge imposed on her the duty to consult with advisors who possessed the technical knowledge required. She did this throughout and the termination decision was only made after consultation with various disciplines, which, in our view resulted in consideration of all relevant facts and circumstances (finding 85). We conclude Empire has not met its burden of proving she did not consider all relevant facts and circumstances.

Superior Knowledge

We have found that Empire knew in 1991 everything it claimed to "discover" on 15 May 1992 (finding 43). We so found for several reasons which arise largely from the testimony of Empire's Mr. Monteith as to what he knew well before 15 May 1992, knowledge properly attributable to Empire: 1) the OWS was a very large object located in plain sight; 2) Empire knew it contained oil;[15] 3) Empire knew it was active; 4) Empire knew it discharged into a storm drain which emptied into a retention pond; and 5) Empire knew that tanks containing oil are of concern during construction. (Findings 22, 43) Moreover, in a reference to the discharge into the storm drain, Mr. Monteith testified he did not want to be responsible "for something that appeared illegal" (*id.*). We think it strains credulity to ask us to believe that this condition he had known of for more than a year only became an apparent illegality on 15 May 1992. Indeed, the "appeared illegal" testimony helps establish that Mr. Monteith recognized a potential environmental issue when he saw one. In any case, we think it reasonable to infer to Mr. Monteith, and thus to Empire, well before 15 May 1992, the knowledge that the OWS was operational, improperly installed and contained contaminants, the uncontrolled release of which would have been potentially damaging to the environment. Empire presented testimony to the effect that the size and function of the OWS would not have alerted Empire or its lenders to potential environmental problems or caused Empire or its lenders to investigate the matter further. We find such testimony, which would have us believe that reasonable contractors and lenders would not be concerned about a 28 foot by 6 foot cylindrical oil tank with a 6,000

gallon[16] capacity, intrinsically unpersuasive.[17] *Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968). While Empire argues that it was entitled to believe that the Air Force-owned and maintained OWS was functioning properly, that argument is unpersuasive. The day-to-day functioning of the OWS[18] has not been shown as the problem here. The problem was that the OWS discharged into a storm drain which emptied into a retention pond and was thus improperly installed. Empire knew this in March 1991. (Findings 22, 43)

The Air Force, at least as early as the August 1990 CH2M Hill report, knew something needed to be done with the OWS. Among suggestions was elimination of the discharge, which was accomplished in June 1992 (findings 16, 53). The November 1991 Radian plan proposed to the Air Force that soil sampling along the path of the storm drain piping was desirable to further investigate the OWS as part of an RFI (findings 15, 16, 34). We are given no reason to doubt that Ms. Hall was not timely informed of this, but others in the Air Force clearly knew. Thus, both parties knew or should have known prior to Mod 7 that a situation existed which represented potential environmental liability under paragraph 26 thereof, and neither shared that information or took timely action.

Empire argues that the Air Force breached the contract by making misrepresentations and failing to disclose material facts. Empire's argument is based on the superior knowledge doctrine. That doctrine does not afford relief to a contractor where, as here, it already has the information at issue, or can get it from non-Government sources. *H. N. Bailey & Associates v. United States*, 449 F.2d 376 (Ct. Cl. 1971); *Sauer, Inc.*, ASBCA No. 43563, 92-3 BCA ¶ 25,021. In such circumstances the Government's knowledge is not "superior."

Moreover, Empire is hardly blameless here. The record discloses and we have found that Empire knew or should have known by March 1991 of the potential environmental problem presented by an active OWS hooked up to a storm drain and emptying into a retention pond which was ultimately connected to the waters of Tampa Bay (finding 12). While Empire argues that it did not know of the RFI prior to Mod 7, we are not persuaded that this mitigates its situation in light of the information it did have. Empire stopped work based on the 15 May 1992 "discovery," which did not provide it with any information not already known to Mr. Monteith (finding 43). In addition, the video of Empire's employees during the alleged 15 May 1992 "discovery" has led us, sharing the view of Mr. Donaldson, to find that Empire welcomed the prospect of a delay and the attendant claim (finding 46). This, combined with the fact that its 15 May 1992 "discovery" occurred only 11 days after execution of Mod 7 on 4 May 1992, when a potential environmental problem became compensable as an environmental claim under paragraph 26[19] whether or not there was actual contamination from the OWS;[20] and its filing of a claim which relies on paragraph 26 and the environmental work stoppage (findings 38, 43, 68), lead us to conclude that Ms. Hall's suspicions about Empire's actions (finding 51) were warranted.

Excusable Delay

Empire stopped work on its own and thus undertook a considerable risk given the Disputes clause's requirement to "proceed diligently" when there is a disagreement. *Alliant Techsystems, Inc. v. United States*, 186 F.3d 1379, 1381 (Fed. Cir. 1999). We have held "[e]ven if the CO's interpretation was wrong, [the contractor] was not justified in refusing to do as it was directed." *Benju Corporation*, ASBCA Nos. 43648 *et al*., 97-2 BCA ¶ 29,274 at 145,654, *aff'd, Benju Corp. v. Peters*, 178 F.3d 1312 (Fed. Cir. 1999) (table). Here, the effective indemnification of Empire under paragraph 26 of Mod 7, in combination with Ms. Hall's direction to continue work, make it more difficult than in *Benju* to rationalize Empire's actions. However, and despite Empire's pre-existing knowledge about the OWS and its inappropriate discharge into a storm sewer, Empire was denied access to the site while the D & M testing was done in July 1992 (finding 49). Notwithstanding this finding, we have also held that Ms. Hall did not abuse her discretion when she terminated Empire for default because the extension owed for the maximum period of excusable delay was inadequate to permit Empire to meet COD. Empire has raised a number of arguments in connection with the period of excusable delay which are, in the main, addressed in this section. Empire's arguments on delay are affected by its pre-Mod 7 knowledge of the discharge of the OWS and the extent to which the record engenders our disquiet regarding the legitimacy of its concerns about returning to work. In the Board's view, the coverage afforded to Empire under paragraph 26, and the fact that the contracting officer had lessened Empire's responsibility for most consequences by ordering Empire back to work generally bestow a less-than-persuasive quality on Empire's position.

Empire's knowledge that the OWS discharged into the storm sewer is the keystone of the Air Force's most compelling argument. The Air Force argues that Empire cannot raise as an excuse for delay potential contamination problems arising from the OWS:

> Based on fair dealing, if a contractor knew or should have known about an excusable cause of delay prior to entering into an extension of the contract delivery date, the contractor must raise that cause of delay PRIOR to signing the extension, otherwise the contractor waives the previously known cause of delay as an excuse to its subsequent default. [Emphasis in original]

(Resp. add'l br. at 2)

The Air Force cites *Container Systems Corporation, Inc.*, ASBCA No. 40611, 94-1 BCA ¶ 26,354, in support of its argument. In that case, as here, the contractor knew or should have known of certain alleged excusable causes of delay prior to executing a

modification that established a new delivery date. We held that as a result "appellant effectively surrendered its right to argue then existing excusable causes of delay as a defense to its later default." *Container Systems* at 131,091. Mod 7 established a new delivery date and a new date (4 May 1992) for the start of performance. Thus, Empire affirmatively pledged to commence work on 4 May 1992 and complete by 27 August 1993. (Finding 38) It did so knowing of the condition that it would use as an excuse to stop work on 15 May 1992. Because it knew of that condition, and notwithstanding paragraph 26, it surrendered the right to argue the OWS and any problems arising from its improper discharge into a storm drain as an excuse for delay. As discussed below, Empire's subsequent learning of the RFI made no material difference since, *inter alia*, the OWS was included in the RFI because it discharged into a storm drain, a fact that Empire had known for more than a year, and because the Air Force assumed the mantle of accountability when it ordered Empire back to work.

Empire argues that the failure of the Air Force to inform Empire of the RFI excused the delays occasioned by the work stoppage. The record does not disclose why Empire and Ms. Hall were unaware of the RFI. As we have stated, Empire knew about the OWS and how it was installed long before 15 May 1992, so it was well aware of the underlying basis for including the OWS in the RFI. Thus, it had knowledge of the fundamental factual underpinning. Moreover, the OWS was removed in June 1992. Elimination of the discharge was one of the recommendations of the CH2M Hill report in August 1990 (finding 16), and removal of the OWS and conversion of it to a storage tank (finding 53) effectively implemented that recommendation and removed any threat of contamination emanating from the OWS thereafter. While we understand that Empire alleged concern about the lingering effects of past leakage and culpability for interfering with the RFI, we do not now understand Empire to argue that there was actionable contamination at the site, or that the OWS did not function adequately. In any event, Empire has failed to meet its burden of proof with respect to actionable contamination and any malfunction of the OWS (finding 87). We are also not persuaded that Empire was ever truly concerned about contamination because it knew of the condition for a year and went back to work in 1992 without taking any steps to ascertain its level of risk. It returned to the site in 1993, at first without any EPA approval, and then worked full-bore based on partial EPA approval, which was itself based on the D & M report which Empire now argues was inadequate.

We find little that is persuasive concerning Empire's alleged trepidation about disrupting the RFI and the consequences thereof. In the first place, Empire overstated the physical area at issue. Ms. Wilde considered it to be a small area that would not have impeded construction ("most of the things the Air Force did wasn't connected or relevant to what I was doing."), and we have found that work could have continued in spite of the RFI (finding 73). Empire stopped work based on knowledge it had possessed for a year, not based on the RFI or interference with the RFI, which we have found it learned of around 5 June 1992 (finding 52). Curiously, Empire had returned to work after execution of Mod 7 already armed with the same information that was its excuse for stopping work after 15 May

1992. We conclude it was posturing when it stopped work. It would later resume work at full speed ahead with environmental issues remaining unresolved and, thus, without full EPA approval (findings 70, 73). Its actions were very different from its assertion of anxiety about interfering with the RFI when it chose to go to work. It must also be remembered that infractions on Federal facilities are seldom penalized by EPA, the added cost involved being considered penalty enough, and that Empire was indemnified under the contract (findings 40, 73). Moreover, the Air Force had ordered Empire to continue work with knowledge of the RFI, an act which shifted any culpability to the Air Force.

Empire cites *United States v. General Dynamics Corp.*, 755 F. Supp. 720 (N.D. Tex. 1991), for the proposition that a Government contractor acting under orders from a Federal agency can be held liable. We find the facts in that case distinguishable because General Dynamics was the operator of the offending plant, a party to the agreed order which was at issue, and there was a real, as opposed to regulatory, infraction. General Dynamics was, in fact, polluting the air. The Texas Air Control Board, General Dynamics and the Air Force had agreed to an order which permitted, *inter alia,* averaging of certain emissions. EPA challenged and the Court held that the agreed order violated state regulations. In the process General Dynamics filed a counterclaim asserting that it was immune from suit because the Air Force controlled activities at the plant. Plaintiff United States sought summary judgment on the counterclaim, which the Court denied, noting that "[t]he law is clear that when the United States institutes an action, a defendant can assert by way of recoupment any claim arising out of the same transaction or occurrence as the original claim in order to reduce or defeat the government's recovery." (Citations omitted.) *Id.* at 724. *Accord Livera v. First National State Bank of New Jersey,* 879 F.2d 1186, 1195-96 (3d Cir. 1989), *cert.denied,* 493 U.S. 937 (1989) (upholding the right to a recoupment claim against the Government). The Court declined to grant summary judgment for General Dynamics, however, finding a genuine dispute of fact because the Air Force had offered and General Dynamics declined funds for emission control equipment. *Id. General Dynamics* would appear to support the proposition that the Air Force here would have been the responsible party if EPA had instituted action.

The Government has been held liable for costs of cleanup incurred by a subsequent owner, including the costs of suit, where it was responsible for the contamination. In *FMC Corporation v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994) (*en banc*), American Viscose had been directed by the War Production Board (WPB) during World War II to expand its capacity to produce rayon at a facility ("the Facility") in Front Royal, Virginia. The Government rented equipment to American Viscose through Defense Plant Corporation (DPC) and engaged in other activities through which it exercised control. The Government also built a sulfuric acid plant adjacent to the Facility, to which the output of sulfuric acid was delivered. Wastes were disposed of at the Facility, which FMC purchased from American Viscose in 1963. FMC sold the Facility to Avtex Fibers, Inc. in 1976. Sometime prior to 1990 EPA ordered FMC to take remedial action at the site. The Court found Government control was such that it was an owner and operator of the Facility

as well as an arranger for disposal. It affirmed the District Court's opinion holding the Government responsible for costs which could be allocated to the Government-controlled operations. In the instant appeal, the Air Force owned and operated the OWS and the facility. Moreover, by ordering Empire back to work it attempted to exercise control. The Air Force, not Empire, was thus responsible for any infraction of environmental regulations and the costs attendant thereto.

Empire also raises the specter of criminal liability as a basis for excusable delay, citing the Clean Water Act (CWA), 33 U.S.C. §§ 1319, 1342, 1344; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9607, 9609; and RCRA, 42 U.S.C. § 6928. We are not persuaded that Empire ran the risk of criminal liability by continuing work at the site. In the main, this is because of the testimony of Mr. Stewart, who was the Assistant Attorney General for Environment and Natural Resources from 1989 to 1991. Testifying as a witness for Empire, he stated that a contractor who acted responsibly and in good faith would avoid criminal liability (finding 72). In addition, Empire has cited no cases where Government contractors have been held criminally liable for work at a Government facility, let alone when proceeding under Government orders. Moreover, CERCLA would here apply to the Air Force as the owner and operator of the OWS and the facility. The cited RCRA and the CWA sections penalize only knowing and negligent actions. As there was no actionable contamination and the Air Force had informed Empire it was safe to go back to work -- indeed, ordered Empire to go back to work -- we see no basis for finding a violation on Empire's part.

We next address the argument that Empire could not return to work until it had EPA approval. The critical evidence on this point came from the testimony of Ms. Wilde, who was the EPA remediation project manager, and who had significant authority. That testimony was not without ambiguity, but has persuaded us that work could have continued at the site (finding 73). Specifically, Ms. Wilde testified, on the one hand, that EPA did not want a site which was undergoing an RFI to be changed without its knowledge. She testified that notice was received by EPA on 3 September 1992. However, she clearly distinguished between the SWMU and the construction site. Her version of the SWMU was the OWS, with the understanding that an area three to five feet around it and the catch basin near the pond would be of interest to EPA. However, the catch basin was not on the site. She stated that if the sampling in the immediate area produced items of concern, you would then sample further out. However, D & M had already done the sampling "further out," and its report effectively cleared the site (finding 57). Ms. Wilde stated she had "a lot of confidence" in the D & M report. She rejected the OHM report (finding 67), but had previously drafted the 11 December 1992 letter and a letter to Senator Mack stating that, based on the D & M report, the construction site needed no further investigation (finding 61). She also testified that, with respect to Federal facilities, the penalty for violation of a permit requiring some investigation is that it costs more to do the work involved. There are seldom other penalties against Federal facilities. (Finding 73) The total effect of Ms. Wilde's testimony is that the area of EPA interest was physically quite limited and defeats

Empire's argument that the RFI area was the entire site and the retention pond. A reasonable inference from her testimony, and our finding (*id*.), is that construction work could have proceeded without violating the permit, and that, in any case, violations arising from Federal facilities were rare.

Even assuming, for argument's sake, that the area previously occupied by the OWS as extended by five feet in each direction was totally off limits and soil samples were needed on the west side along the storm drain piping pursuant to the Radian plan, there was a road at the north end and runway matting on the east side, and a substantial area to the south and west that was not affected. Empire could have continued working without interfering with the sampling areas. In fact, however, any concern was rendered moot by the D & M report, which had already sampled in the areas where construction was to proceed.

We also reject Empire's argument that it could not return to work without EPA approval because of Empire's actions. EPA had notice that the site would be changed on 3 September 1992 and took no action (finding 57). Moreover, not only did Empire return to the job before it had EPA approval, the EPA letter of 2 June 1993 cites only the D & M report and only approved work above the water table (finding 70). If, as Empire had earlier maintained in not accepting the D & M report, it had concerns about groundwater not addressed by D & M, its actions in returning to work with no additional assurances as to water contamination contradict its prior stance and give its argument a hollow sound. Moreover, the 2 June 1993 letter was the culmination of discussions between MAJ Bosier and Ms. Wilde about installation of two steam pipes. It was not intended as an unqualified clearance of the site (finding 70). EPA does not give unqualified clearances (finding 73).

We also find that Empire's professed concern about civil liability or being held accountable for a regulatory violation (that is, a violation where there is no actual contamination) without EPA approval does not ring true. While regulatory violations may have been enforced at times, penalties for violations originate with EPA (finding 72), and EPA rarely cited Federal facilities for violations (finding 73). Empire, which had been directed back to work by the contracting officer on a Government base, had the remotest of possibilities of EPA or Justice Department action against it. The potential source of any contamination was the OWS, which was Air Force owned and operated and subject to MacDill's permit. The OWS had been removed in early June 1992. As we understand the permitting process, the permit was not revoked and the EPA had not directed MacDill to stop using the OWS, but to take unspecified corrective action, which the Radian plan proposed as four soil, two sediment and three water samples. Of the Radian plan's suggested samples, four soil samples along the pipe line and one sediment sample were actually on the site (finding 34). The D & M report sampled at 26 locations and did an organic vapor analysis (finding 57). Not only was it reasonable, it was the basis on which the 2 June 1993 letter was issued. Ms. Wilde had "a lot of confidence" in that report. In addition, MacDill, not Empire, had ordered and relied on the D & M study. The D & M study provided a reasonable basis to proceed, but any inadequacies in the report were the

responsibility of the Air Force, not Empire. We are not persuaded that Empire was confronted by any realistic likelihood that it, and not the Air Force, would have been the party against whom a violation would be enforced. As to civil monetary liability, Empire was effectively indemnified under paragraph 26. Moreover, any concerns not covered by the D & M report were not discharged by the 2 June 1993 letter, so, as with the May 1992 "discovery" of the alleged contamination that started the work stoppage, nothing had materially changed in the interim. Similarly, Empire's safety and health contentions are undermined by its actions in proceeding with work prior to 15 May 1992 when it knew the situation with the OWS, and returning to work full-bore in May-June 1993 when nothing had changed since the D & M report.[21] In any event, its contractual duty was to return to work. We are simply not persuaded that the record supports a viable excuse for failing to do so. *Benju Corporation.*, 97-2 BCA, *supra*.

Other Issues Regarding the Default

Empire also argues that any period of excusable delay that takes it past 1 September 1993, the date of the default notice, converts the default termination from one for failure "to deliver the supplies or to perform the services" into a default for failure to make progress and, since a timely cure notice was not issued, the default is procedurally defective. We are not persuaded by Empire's argument for reasons addressed below.

Empire contends that it was not required to reach COD by 27 August 1993 if there was as little as 5 days of excusable delay and that the termination was therefore *per se* invalid under paragraph (a)(1)(i) of the Default clause FAR 52.249-8, (quoted *infra*). It is well established that a default termination will be upheld even though the contracting officer's decision cites unsustainable grounds where there are other valid grounds. *Kelso v. Kirk Brothers Mechanical Contractors, Inc.,* 16 F.3d 1173, 1175 (Fed. Cir. 1994). ("This court sustains a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason.") We do not understand Empire to argue otherwise, but to argue that those other grounds (here, progress failure) are also invalid.

Empire was removed for failure to meet the 27 August 1993 delivery date. We have found a 53-day excusable delay arising from the D & M testing and report. Therefore, the 27 August 1993 date cited by Ms. Hall is not the same date as the Board finds applicable, although we would sustain the default. If we apply Empire's view, our reason for sustaining the default may be viewed as a failure to make progress toward COD. Empire cites *Biomass One Operating Company, Inc.*, ASBCA No. 41972, 94-3 BCA ¶ 27,051, for the proposition that a minimal excusable delay of five days would excuse its failure to achieve COD. In that case there was an excusable delay of 5 months which meant that the obligation to deliver did not accrue for 5 1/2 months. As we understand the Board's holding, the contractor in that case could have delivered by the contract delivery date as extended by the excusable delay. The Board also found that the Government had failed to show the

contractor had failed to make progress. Such is not the case here. As we observed *supra*, Ms. Hall's decision had a reasonable basis because Empire was so far behind it could not have met COD as extended by this decision. This is adequate to sustain the default absent some other defect. *J. F. Whalen and Company*, AGBCA Nos. 83-160-1, 83-281-1, 88-3 BCA ¶ 21,066 at 106,386. ("For example, an unforeseeable delay of five days would generally not excuse a default wherein a contractor was 50 days behind schedule or had missed the completion date, by say, 20 days.")

In *Danzig v. AEC Corp.*, 224 F.3d 1333, 1336-37 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001), the Court applied the holding in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987), that for there to be a reasonable basis for default termination there must be no reasonable likelihood that a contractor can complete in the time remaining. While reversing on other grounds the decision of the Board, it affirmed the standard the Board applied, *i.e.*, that there must be no reasonable likelihood of completion within the time for performance as extended by the Board. In applying that standard here, we conclude there was no reasonable likelihood that Empire could have met COD by 19 October 1993, the date to which we have extended COD. Thus, Ms. Hall had a reasonable basis for default.

Empire argues that conversion of the default to one for progress failure required the Air Force to issue a cure notice. According to Empire, the Air Force failed to issue a cure notice and the default is procedurally, and fatally, defective. We disagree for several reasons.

The basic Default clause in the contract is FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (finding 5), which provides as follows, in pertinent part:

> DEFAULT (FIXED-PRICE SUPPLY AND SERVICE)
> (APR 1984)
>
> (a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

In paragraphs (a)(1)(ii) and (2) the clause requires a cure notice if the default is because the contractor failed to "[m]ake progress, so as to endanger performance." It is presumably on this that Empire relies in asserting that a cure notice was mandatory. Indeed, Empire could not rely on paragraph (a)(1)(i). That subparagraph is irrelevant here because achieving COD marks substantial completion of construction of the MacDill Avenue plant, not delivery of supplies or performance of services.

The parties, in an apparent recognition that achieving COD was a convenient way to acknowledge successful completion of the MacDill Avenue construction effort, included paragraph 21, ADDITIONAL DEFAULT PROVISIONS, in Mod 7. That provision, *inter alia*, established specific conditions for mitigation in the event Empire's construction effort was unsuccessful. Subparagraph a. (1) of paragraph 21 applied subparagraphs (c) and (d)[22] of the supply Default clause "notwithstanding the fact that the referenced FAR clause is for Fixed-Price Supply and Service contracts and not Fixed-Price construction contracts." (Finding 38) We interpret this as mutual recognition that the application of the supply Default clause as opposed to the construction Default clause was out of character with the norm for the construction effort here involved. The parties nonetheless wished to apply paragraphs (c) and (d) of the Supply clause to any default. Among other distinguishing characteristics of the clauses is the lack of a requirement for a cure notice in paragraph (a) of FAR 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION (APR 1984), to wit:

> (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

Subparagraph c. (1) of paragraph 21 singled out "failure to achieve [COD] within the time specified" as a condition of default for which a cure notice was not necessary (finding 38). It must be remembered that COD was a separable, interim event on the continuum to delivery of discounted energy supplies and failure to meet it was therefore a failure to make progress. The parties nonetheless supplemented the FAR 52.249-8 clause and eliminated the cure notice requirement for COD. Instead, they established a standard that does not track precisely the FAR default clauses for either supply ("fails to . . . [m]ake progress, so

as to endanger performance") or construction ("fails to prosecute the work . . . with the diligence that will insure its completion within the time specified"). As between FAR 52.249-8(a)(1)(ii) and FAR 52.249-10(a), however, the standard they established is closer to the construction clause in that it uses "within the time specified" to fix the condition for default based on failure to complete a separable part of the contract work. The parties' agreement to dispense with a cure notice had the effect, which was logical in the circumstances, of applying the *construction* default standard, which does not require a cure notice for a separable part of the work, to the construction portion of the contract. Thus, the *Lisbon* standard as applied in *Danzig* governs, and the failure to provide a cure notice is not fatal to the Air Force's position.

We have found that Empire could not have met COD until 2 February 1994, some 154 days after the default date of 1 September 1993. The maximum extension Empire was entitled to was 53 days from 27 August 1993. (Finding 86) Although we believe the intent of the parties was to recognize the construction phase of the contract such that it was exempt from the cure notice requirement, we also note that the circumstances of the negotiation of Mod 7 (findings 35, 36) were not those creating the usual Government contract of adhesion. Therefore, we cannot apply the *contra proferentem* rule against the Air Force. *Cf. Consumers Ice Co. v. United States*, 475 F.2d 1161 (Ct. Cl. 1973). We interpret the terms of Mod 7 as not requiring a cure notice before defaulting Empire for "failure to achieve" COD.[23]

Nonetheless, Ms. Hall did issue a cure notice on 28 April 1993, which was responded to by Empire on 10 May 1993 with a letter which stated, *inter alia*, that the contract date of 27 August 1993 could be achieved with a "fast track" program (finding 70). Thereafter, on 21 July 1993 Ms. Hall sent a show cause letter telling Empire it was behind schedule, that its current proposed completion date of 16 November 1993, which she believed was already three weeks late, was unacceptable, and that default termination on 28 August 1993 was being considered (finding 82). Empire responded with a 30 July 1993 letter acknowledging that it was still under the 28 April 1993 cure notice, and stating the cure notice should be lifted (finding 83). Ms. Hall's 17 August 1993 response informed Empire that "you still have not cured the situation." (*Id.*) Empire's 27 August 1993 response asserted that it believed the Air Force planned to terminate for default, but that Empire would reach COD by mid-December (finding 84), thus confirming Ms. Hall's statement in the show cause letter that Empire's construction effort had lost ground on its earlier proposed achievement of the contract's COD. Empire was defaulted five days later. Assuming, *arguendo*, a cure notice was required, under the scenario played out by the parties we conclude there was no procedural defect. The parties' correspondence establishes that the 28 April 1993 cure notice was still considered to be in effect by Empire and, in any event, a timely show cause notice was sent.

Empire cites *Lanzen Fabricating, Inc.*, ASBCA No. 40328, 93-3 BCA ¶ 26,079, for the proposition that a show cause notice cannot suffice where a cure notice is required.

That decision is distinguishable. First, the Board in *Lanzen* found the Government understood it had waived the contract delivery schedule and not established a new date. Here, the contracting officer steadfastly adhered to the contract date for COD. Secondly, the show cause notice in *Lanzen* did not apprise the contractor of the specific deficiency which the contractor was expected to cure. Ms. Hall did apprise Empire of its deficiency -- failure to achieve COD by the contract date of 27 August 1993. Finally, *Lanzen* specifically states "[i]t is unnecessary for us to decide whether a "show cause" notice may ever be regarded as a 'cure notice'" . . . . *Id.* at 129,609. We have elsewhere made it clear that we will not place form over substance in such matters.

In *Red Sea Trading Associates, Inc.*, ASBCA No. 36360, 91-1 BCA ¶ 23,567, we confronted a letter which contained information of the sort found in a cure notice, but which was not identified as a cure notice. This was followed by a show cause notice. We found the Government's actions acceptable because the appellant was adequately and timely notified of the defects in its performance. *Id.* at 118,155. *See also, American Marine Upholstery Company v. United States*, 345 F.2d 577 (Ct. Cl. 1965). (Defects in a letter apprising the contractor that it might be terminated for failure to make progress did not invalidate the default.) We hold the termination was not procedurally defective.

Waiver of Contract Schedule

Empire argues that the Air Force waived the original schedule regarding COD and is estopped from relying on failure to meet that date as a basis for default. The gist of Empire's position, as we understand it, is that Ms. Hall should have issued a termination notice on the 300th day, notwithstanding the 180-day forebearance period in Mod 7.[24] She did, however, assess liquidated damages effective on the 300th day (finding 68), which places on Empire a heavy burden to prove waiver of the right to terminate for failure to deliver on time. *Olson Plumbing & Heating Company v. United States*, 602 F.2d 950, 955 (Ct. Cl. 1979). Fundamentally, however, we reject Empire's argument because Mod 7 states "Notwithstanding the provision of [the FAR Default clause] the Government agrees not to terminate this contract for Default [sic] for a period of 480 calendar days . . . ." while providing for liquidated damages from the 301st to the 480th day (finding 38). The provision in question was the brainchild of Empire's lender, which wanted a "cushion," and precluded the Air Force from terminating for default before day 480 (finding 35). We find Empire's argument without merit. A termination notice on day 300 would have been a useless act, and we will not impose the requirement for useless acts on contracting parties appearing before us.

Empire also raises the more conventional waiver contention that the Air Force waived or is estopped from asserting the contract delivery date because it encouraged further performance when it knew Empire's efforts to meet the 27 August 1993 date were futile. We find the cases cited by Empire distinguishable because of essential facts that are present on this record. In addition to the heavier burden on the contractor when the

Government assesses liquidated damages, the contracting officer also made it clear that no extension of the delivery date would be granted without consideration to the Government (finding 83). No such offer was ever made (*id*.). Additionally, on 10 May 1993 Empire responded to the 28 April 1993 cure notice with the assertion that it could meet the contract delivery date on a "fast track" schedule (finding 70). In the 2 June 1993 meeting the contracting officer told Empire the 27 August 1993 date was firm, although she might consider an extension if Empire was substantially complete by that date (finding 80). Further, Ms. Hall issued cure and show cause notices and answered the letters Empire sent in response. In that correspondence she was consistent with the position that Empire's proposed schedules were not acceptable, and that any contract extension must be accompanied by consideration to the Air Force. Empire's responses also established that the mid-November date it proposed at the 2 June 1993 meeting had slipped to mid-December, and later it requested an extension to the end of January 1994. Empire was continuing to fall behind its own schedules, it was running out of money, and it sought the Air Force's further financial assurances. (Findings 80-83) Empire's 27 August 1993 letter articulated Empire's awareness that default may be imminent (finding 84) and the Government promptly issued its default notice. The cases cited by Empire are thus distinguishable.

They are also distinguishable because of the specific terms of Mod 7. The termination rights of the Air Force under the standard FAR Default clause were supplemented by paragraph 21 of Mod 7. The Air Force had no contractual basis to terminate for default until the 480th day after financing was approved (finding 38). It could not treat Empire as delinquent until that date. The well-established bases for waiver are set out in *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969):

> The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forebearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

Here, the first element is missing. Empire was terminated for default within five days of the contractual COD. Empire's waiver argument is without merit.

CONCLUSION

The termination for default is sustained. The appeal is denied.

Dated: 4 November 2002

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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] The name was changed from Empire Systems, Inc. (R4, tab 1).

[2] The RFA had incorrectly identified Building 1050 as the site of a fuel spill (R4, tab 127 at 13 of 22). The fuel spill occurred at Building 1053 (R4, tab 130 at 2-169).

[3] This is addressed in paragraph 26 of Mod 7 (R4, tab 1).

[4] This is addressed in paragraph 21 of Mod 7 (R4, tab 1).

[5] Prior contracts for pumping out and disposing of the liquid and sludge had cost $7.00 and $7.98 per gallon. Quantities are reported as 5400 gallons of fluid and 225 gallons of sludge, and 4044 gallons of fluid, respectively. (App. supp. R4, tab E-215)

[6] Mr. Monteith did *not* testify that the boom was oil-soaked or that he saw other signs of oil in that storm drain.

[7] Mr. Monteith and Robin Thorne, who assisted at the hearing, were two of the employees. The third employee, who appears quite youthful, is most likely Mr. Greenberg. *See* n. 11, *infra*.

[8] An outfall is generally meant as the point at which the discharged material enters into contact with surface water (tr. 2471).

[9] Mr. Greenberg's memo to Mr. Travis differs in reporting Danmark's comments and the condition of the site. Allegedly Danmark "[c]onfirmed apparent discharge of oil." The memo, without specific attribution, states remediation would be costly and time consuming. (App. supp. R4, tab E-894) We find Danmark's letter more credible.

[10] Danmark's role as Empire's consultant did not come to fruition (resp. supp. R4, tab 7).

[11] Mr. Greenberg was hired while he was in college and not yet 21 years old (tr. 1739-40). From the volume and content of correspondence he authored, his major function seems to have been letter-writing and claim-posturing.

[12] The Board notes that the fourth line of Ms. Hall's letter states "The Government does not approve the proposed gas contract . . . ." (R4, tab 16)

[13] We note that, in their voluminous briefs, each party has crafted arguments which, in the Board's view, fail to take into account facts we have found in the proceeding to this point, *e.g*., that Empire knew or should have known the potential environmental problem represented by the OWS, or place emphasis on pre-Mod 7 events which were contractually forgiven by that modification. We only address such arguments briefly, if at all, in order to keep the length of this opinion manageable.

[14] Mr. Donaldson described the site as a "dream site" with respect to access (finding 21).

[15] Its very name - "oil-water separator" - would alert any reasonable person to the fact that it contained oil.

[16] There is a conflict between drawings (6,000 gallons) and invoices (10,000) regarding the capacity of the OWS (findings 13, 53). We resolve it in favor of the drawings.

[17] The unpersuasiveness of the testimony is magnified because, as the Air Force argues, Condition 3.a of the lease (finding 7) imposed stringent responsibilities on Empire to "know[]" the site.

[18] While the OWS discharged into a storm drain and was thus improperly installed, we have found no probative evidence that it did not properly separate oil and water before discharging water into the storm drain.

[19] While Empire might have been protected from liability for hazardous wastes actually released into the environment by the OWS under Condition 12e. of the lease (finding 7), the broader coverage of Mod 7 made the Air Force liable for "investigation or notice . . . by any person or entity alleging potential liability" (finding 40).

[20] The video, which failed to show the catch basin nearest the OWS or the OWS, does not show any contamination which could not have come from wastewater reaching the storm drain system from the roads and parking lots. Certainly, the oil slick in the retention pond could have come from the roads and parking lots. (Finding 47)

[21] As Mr. Donaldson testified about Empire's actions after the May 1992 "discovery," "They were unreasonable to the point of being inexplicable . . . ." (finding 48).

[22] (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted

supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

[23] We do not address, and thus offer no opinion, as to whether application of the supply Default clause apart from Mod 7 would impose the requirement for a cure notice here, where the contract completion period is past and the contracting officer has failed to anticipate a Board-imposed extension within which there is no reasonable likelihood of completion.

[24] Empire appears to argue elsewhere that the 480th day should be construed as the delivery date. *See* the section on Abuse of Discretion, *supra*.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 46741, Appeal of Empire Energy Management Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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