ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Dae Shin Enterprises, Inc., d/b/a/ Dayron	)	ASBCA No. 50533
	)	
Under Contract No. DAAA09-95-C-0115	)	

APPEARANCES FOR THE APPELLANT: Kenneth A. Martin, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Ralph J. Tremaglio, III, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

Appellant (Dayron) has appealed from the contracting officer's final decision terminating the captioned contract for default. A three-day hearing was held at the Board's offices. Both parties have filed opening and reply briefs. We decide only the validity of the default termination. Appellant contends that the termination should be converted to one for the convenience of the Government since it expressly conditioned performance on the ability of its subcontractor, Thiokol Ordnance Operations (Thiokol) to use Government property, and that the Government caused its failure to timely perform by interfering with the subcontractor's ability to use that property. The Government maintains that the Government property was always available for Thiokol's use and that appellant's failure to timely provide the First Article was not excusable due to causes beyond its or its subcontractor's control and without its or its subcontractor's fault or negligence.

FINDINGS OF FACT

1. On 12 April 1995, the U.S. Army, Industrial Operations Command, Rock Island, Illinois (IOC, Rock Island) issued Solicitation No. DAAA09-95-R-0019 for the manufacture and supply of 41,026 M804A1 projectiles (inert, practice 155-millimeter artillery rounds) (R4, tab 1; AR4, tab 24; tr. 564). Section M-1 (entitled "Evaluation Procedures for Use of Government-Owned Production and Research Property," incorporated in amendment No. 0001 to the solicitation), required that the offeror indicate in Section M (Evaluation Factors for Award) whether its proposal was "predicated on use of

Government property in offeror's proposed subcontracts of vendors" (R4, tab 1 at § M-1; tr. 566). Section L-10 (entitled "Instructions and Conditions for Submission of Proposals") required offerors to, *inter alia*, provide a complete description of equipment and processes that would be used to perform the M804A1 metal parts forging operation (R4, tab 1; compl. at ¶ 7; answ. at ¶ 7).

2. The solicitation contained Federal Acquisition Regulation (FAR) 52.209-4 FIRST ARTICLE APPROVAL - GOVERNMENT TESTING (SEP 1989), FAR 52.212-7 NOTICE OF PRIORITY RATING FOR NATIONAL DEFENSE USE (SEP 1996), FAR 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984), FAR 52.233-1 DISPUTES (MAR 1994), FAR 52.243-1 CHANGES - FIXED-PRICE (AUG 1987), FAR 52.244-1 SUBCONTRACTS (FIXED-PRICE CONTRACTS) (APR 1991), FAR 52.245-2 GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (91-DEV-44) (AL 93-10) (DEC 1989), FAR 52.245-19 GOVERNMENT PROPERTY FURNISHED "AS IS" (APR 1984), FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984), FAR 52.249-4 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984) and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) Government contract clauses (R4, tab 1).

3.(a) By letter dated 5 June 1995, appellant's prospective subcontractor, Thiokol, requested "rent-free use of facilities at Louisiana Army Ammunition Plant" (LAAP) and identified, pursuant to § M-1(c)(2) of the above described solicitation and by "Government ID number", the following 17 items of "Government-owned property" which it requested permission to use in support of appellant's proposal:

> Furnace, #2 Rotary; Press, L#2 Slug; Press, L#2 Pierce; Press, L#2 Draw; Furnace, Heat Treat M483; Lathe, Rough Turn #4; Guillotine, Stamets; Saw, Billet Forge; Lathe, Rough Turn #2; Lathe, Rough Turn #1; Saw, Billet Carbide; MCH, Hard Test #1; Center, Arcade; Nose Press; Ajax Magnathermic; Check Weigh (Prod); Check Weigh (QC)

(R4, tabs 1, 66; tr. 509-11, 566-70) Thiokol did not identify or otherwise suggest that its proposed performance in support of appellant's M804A1 proposal was predicated upon any other, separate contracts between it and the Government with respect to the LAAP (*id*.). The LAAP is a large (four by eight miles) facility encompassing several thousand acres containing 10-15 production lines and a variety of paved roads, railroad tracks and electrical systems owned by the Government (tr. 61-62, 378, 387-88, 495; AR4, tab 87). One of these production lines (Y-Line) had been used by Thiokol sometime during the latter part of 1994 or the early part of 1995 to produce metal parts for two types of High Explosive (HE, 155 caliber) 107 artillery rounds (tr. 113-17, 344-46, 381, 483, 495; AR4, tab 1). Under the terms of the "Industrial Preparedness Plan," this Y-Line portion of the LAAP was designated for use in a national industrial emergency (*id*.; tr. 460-63).

(b) Since 31 March 1987, Thiokol had been responsible for the "operation and maintenance" of the LAAP pursuant to cost reimbursable operating Contract No. DAAA09-87-Z-0010, issued by IOC, Rock Island, whereby Thiokol manufactured ammunition and performed facilities work at the LAAP (tr. 61-62, 378; AR4, tabs 2, 11). The full text of said contract has not been included in the evidentiary record by either party herein.

(c) On 5 October 1994, IOC, Rock Island had awarded Modification No. P00345 (Contract Line Item Number 2052AW, Flex Line Manufacturing Project) under Contract No. DAAA09-87-Z-0010, *supra*, to Thiokol "to provide metal working equipment" for the purposes of "enhanc[ing] the flexibility of the . . . [the already existing Y-line capability at the LAAP] to manufacture a wider variety of ammunition and commercial metal parts," to enable the Y-Line to provide smaller than 155 caliber rounds and to enable the facilities use contractor to bring in a wider variety of commercial work (tr. 69-74, 146, 350-52, 484-85, 490, 495; AR4, tab 2 at 3 of 5, tab 2 at 2 of 18). Said modification was issued in the amount of $7,258,706 and was not scheduled to be completely performed until 31 December 2001 (*id*. at 3 of 5). The P00345 work involved in the "first phase" of the Flex Line project consisted of seven separate "sub-projects" which were intended to "have an effect on the flexible manufacturing capability at LAAP. These sub-projects will not in any way reduce the assigned item replenishment capability for LAAP" (*id*. at 2 of 18; tr. 73-75). The seven sub-projects were the acquisition and installation of a short stroke forging press for small parts, the acquisition and installation of an induction heater slug and multi heating system for small parts, installation of necessary feeder wire and electrical equipment for operation of flexible metal working equipment to be located in the machine shop and induction heater located on the Y-Line, acquisition and installation of one vertical and one horizontal CNC machining center, relocation and installation of six (6) 2-axis CNC lathes to an adjoining machine shop outside of the Y-Line building, relocation and installation of a Government-owned painting system and the relocation/installation of two (2) Government-owned 4-axis CNC lathes together with the acquisition and installation of two (2) additional 4-axis CNC lathes (*id*.; tr. 72-74, 486). None of these work objectives were directly required to produce the forgings involved herein (*id*.; tr. 75, 483-85, 492, 496, 522, 556-58). Several of the "first phase" projects (small parts forging press, small parts induction heating system, a vertical and a horizontal machining center and the two 4-axis CNC lathes) were scheduled to be completed within 780 days after award of Modification No. P00345, or approximately 23 November 1996 (AR4, tab 2 at 10 of 18; tr. 74-75). These several equipment projects were scheduled to be installed within 690 days after the award of Modification No. P00345, or approximately 25 August 1996, and the final acceptance tests with respect to these several projects were scheduled to be completed 60 days thereafter, or approximately 24 October 1996 (AR4, tab 2 at 10 of 18). At trial, one of Thiokol's financial supervisors testified that "[s]ome of this [*i.e*., the above-described equipment] was used as far as upgrading the flexible manufacturing line. And the flexible manufacturing line was going to be used to manufacture the 804" (tr. 59-60, 72-73). This opinion is

apparently based upon the witness's "reviewing some of the documentation that we [Thiokol] have in our office and what [the witness] maintained on contracts" (tr. 89, 144-45). Said "documentation" is not otherwise identified or contained in the evidentiary record.

4. On 6 June 1995, appellant and Thiokol had entered into a "teaming agreement" in connection with the M804A1 solicitation herein that was expressly intended to be consistent with the policy stated in FAR 9.603 (AR4, tab 4). Said teaming arrangement references "the work defined as Thiokol's responsibility in Exhibit 'A' [thereto]" (*id*. at 2). Although said exhibit A has not been attached to or otherwise included in the evidentiary record by the parties, the parties do not dispute that Thiokol was to produce the forgings required with respect to the M804A1 round (*id*.; tr. 59). The teaming agreement terminated upon the "[a]ward by Dayron of a subcontract to Thiokol for the work . . . described in Exhibit 'A'" (AR4, tab 4 at 4). FAR 9.604 provides, *inter alia*, that said teaming agreement could not limit the Government's right to "[h]old the prime contractor fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors."

5. By letter dated 14 June 1995, appellant requested "an amendment to the 'Best Value' evaluation criteria" in the solicitation involved herein "to include identifiable and traceable cost savings/offsets on other existing Government contracts or agreements":

> Award of the M804 Projectile contract to the Dayron/Thiokol team will decrease the overhead costs and employee benefits costs charged to Thiokol Corporation's Louisiana Plant Cost Plus Fixed Fee Operating Contract DAAA09-87-Z-0010 by $560,532. A total of $470,239 in Overhead Costs and $90,293 in Payroll Related Costs (PRC) will not be charged to the Louisiana Operating Contract. Instead, these costs will be absorbed by the M804 contract effort.
>
> . . . .
>
> Award of the contract to another contractor will not prevent incurring the $560,532 in costs on the Louisiana Operating Contract. The only way these costs can be saved is to award the contract to Dayron/Thiokol.

(AR4, tab 5; tr. 83, 86, 199-202, 230, 352, 490, 565) The Government refused to amend said "Best Value" evaluation criteria (*id*.; R4, tab 1; AR4, tabs 5, 6, 13, 68; tr. 566).

6.(a) On 6 July 1995, IOC, Rock Island awarded Facilities Use Contract No. DAAA09-95-E-0007 to Thiokol on a no-cost basis for a term of five years (R4, tab 37;

AR4, tab 11; tr. 66-68, 343, 373; *see* FAR 52.245-11 GOVERNMENT PROPERTY (FACILITIES USE) (APR 1984)).

(b) The "Preamble" portion of said Facilities Use contract states:

> THE UNITED STATES OF AMERICA (THE GOVERNMENT) AND THIOKOL CORPORATION (THE CONTRACTOR) HAVE MUTUALLY AGREED TO ENTER INTO THIS FACILITIES USE CONTRACT FOR THE USE, MAINTENANCE, ACCOUNTABILITY AND DISPOSITION OF GOVERNMENT FURNISHED PROPERTY (GFP) AND EQUIPMENT AT LOUISIANA ARMY AMMUNITION PLANT (LAAP), SHREVEPORT, LOUISIANA. THIS FACILITIES USE CONTRACT WILL GOVERN THE RIGHTS AND OBLIGATIONS OF THE PARTIES WITH REGARD TO THE GFP FOR USE ON BOTH GOVERNMENT AND COMMERCIAL CONTRACTS PERFORMED AT LAAP.
>
> THIS CONTRACT IS IN SUPPORT OF AND PURSUANT TO THE PURPOSES SET FORTH WITHIN THE ARMAMENT RETOOLING AND MANUFACTURING SUPPORT (ARMS) ACT OF 1992 (PUBLIC LAW 102-484). THE ARMS ACT ENCOURAGES FACILITY CONTRACTING AND IS INTENDED AMONG OTHER PURPOSES TO FOSTER A MORE EFFICIENT, COST EFFECTIVE, AND ADAPTABLE ARMAMENTS INDUSTRY IN AMERICA. IT ENCOURAGES THE EFFICIENT AND ECONOMICAL USE OF GOVERNMENT-OWNED INDUSTRIAL PLANTS AND EQUIPMENT FOR COMMERCIAL PURPOSES.
>
> THIS FACILITIES USE CONTRACT ESTABLISHES A NEW WAY OF DOING BUSINESS AT LAAP WHICH CONTEMPLATES NO LOSS TO EITHER PARTY. UPON THE EFFECTIVE DATE, THIS CONTRACT WILL TAKE PRECEDENCE OVER THE CURRENT COST-REIMBURSABLE OPERATING CONTRACT (DAAA09-87-Z-0010) WITH REGARDS TO TERMS AND CONDITIONS. THE OPERATING CONTRACT WILL REMAIN IN EFFECT FOR TRANSITION PURPOSES ONLY. IN ADDITION TO THE FACILITIES USE CONTRACT, ONE (1) BASIC ORDERING AGREEMENT (BOA) (SEE FAR 16.703) WILL BE ENTERED INTO BETWEEN THE PARTIES. THE BOA WILL COVER SERVICES. WHILE THE BOA IS NOT

> A CONTRACT, EACH ORDER ISSUED PURSUANT TO THE BOA WILL CONSTITUTE AN INDIVIDUAL CONTRACT, THAT INCORPORATES THE TERMS AND CONDITIONS CONTAINED IN THE BOA, WHEN ACCEPTED BY THE CONTRACTOR. THE PARTIES CONTEMPLATE THE ISSUANCE OF FIXED PRICE AND/OR COST REIMBURSEMENT ORDERS UNDER THE REFERENCED BOA TO COMMENCE 1 JUL 95.
>
> GFP FURNISHED UNDER THE FACILITIES USE CONTRACT IS LISTED IN ATTACHMENT 01 WHICH MAY BE INCREASED OR DECREASED UPON THE MUTUAL AGREEMENT OF THE PARTIES.

(R4, tab 37; AR4, tab 11; tr. 68-69, 376-79; emphasis in original) Although said list of "GFP furnished under the facilities use contract" does not appear to have actually been included therein, the parties agree that the GFP items identified in finding 3(a), *supra*, were included among the GFP items furnished by the Government (AR4, tab 11 at § J at 12 of 12; tr. 71-83, 151-54, 180-82, 211-13, 322-25, 497-520, 527-45, 547-59).

(c) The Facilities Use contract incorporated by reference the standard FAR 52.232-21 LIMITATION OF COST (FACILITIES) (APR 1984), FAR 52.233-1 DISPUTES (MAR 1994), FAR 52.245-5 GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS) (JAN 1986), FAR 52.245-8 LIABILITY FOR THE FACILITIES (APR 1984), FAR 52.245-9 USE AND CHARGES (APR 1984), FAR 52.245-11 GOVERNMENT PROPERTY (FACILITIES USE) (APR 1984) and FAR 52.249-13 FAILURE TO PERFORM (APR 1984) Government contract clauses (R4, tab 37; AR4, tab 11).

(d) The Facilities Use contract included the section entitled "Government Property In Possession Of Contractors Scope Of Work" which provided, *inter alia*:

> 1.3.2. GOVERNMENT PROPERTY: Use of Government property is on an "as is" and "where is" basis. The Government is not obligated to repair, rehabilitate, modernize, or acquire new equipment simply because the need for such work has been disclosed. The contractor is hereby granted [sic] to use any Government property for any items awarded under the accompanying funding instrument; however, any other use requires the Contracting Officer's written approval for each specific use prior to the contractor's use of Government property.

> 1.3.3. RETENTION OF PROPERTY UNDER FACILITY USE: For that property identified for retention, the facility contractor must perform and bear cost burden for property management and maintenance IAW the approved maintenance plan within the negotiated contract.

(R4, tab 37 at attach. 2; AR4, tab 11; tr. 66-67) The "Administrative Scope of Work" section of the Facilities Use contract provided, *inter alia*:

> 9.0 **TERMINATION OF THE CONTRACT**.
>
> 9.1 The Government may terminate this contract or portions thereof . . . by giving . . . [a] 180 day notice . . . [to] the Contractor in the event that termination of the contract or portions thereof is in the best interests of the Government.
>
> 9.2 The Contractor may terminate this facilities use contract or portions thereof upon one hundred eighty (180) days written notice to the Contracting Officer. Upon such termination, the Contractor may assign all its rights and obligations under subcontracts with facility tenants to the Government, or at the Government's option, to substitute contractor as directed by the Government.
>
> 9.3 A time table will be negotiated for cessation of use of facility for each commercial contract . . . based on commitment of capital resources and length of other contractual commitments.
>
> 9.4 Upon termination of all or part of this contract, the Contractor shall return the equipment and facility, required for emergency planning mission, to its condition received less, fair wear and tear, before vacating the premises.

(R4, tab 37 at attach. 4; AR4, tab 11)

(e) The separate "Basic Ordering Agreement (BOA)" referred to in the "Preamble", *supra*, is Contract No. DAAA09-95-G-0004, dated 6 July 1995 (tr. 63, 69, 147-48, 343-44, 383; *see*, R4, tabs 41, 46; AR4, tabs 10, 21). Said BOA is an agreement between Thiokol and IOC, Rock Island containing separate, potential service work requirements. These requirements become a binding contract only when a delivery order is awarded thereunder (*id*., AR4, tab 11). The BOA, together with delivery orders issued thereunder, provided the vehicle whereby Thiokol was paid for services it typically performed for the

Government on an annual basis in connection with how the Government wanted to provide maintenance for the Y-Line (*id*.; tr. 342, 354-56, 394-95). The Government, however, did not obligate itself to fund such delivery orders on an upcoming, yearly basis irrespective of cost (*id*.; tr. 149-50). The text of said BOA has not been included in the evidentiary record by either party herein.

(f) As the operating contractor under the predecessor, cost reimbursable Contract No. DAAA09-87-Z-0010 (findings 3(a-b), *supra*) and the Facilities Use contract herein, Thiokol had the so-called "emergency assignment" for the Y-Line—*i.e*., Thiokol could be required by the Government, under the Industrial Preparedness Plan during a national emergency, to cease commercial contract activities involving the Y-Line production facility and produce metal parts for artillery projectiles on an emergency basis for compensation (tr. 113-19, 344-47, 381, 423, 460-63, 495; AR4, tab 1). Under the Government's Industrial Preparedness Plan, the equipment on the Y-Line was maintained by Thiokol in "layaway" status such that, in case of an emergency, the Government could cause the reactivation of the Y-Line for production of munitions within a 18-24 month period (tr. 116, 345-47, 381). At minimum, the Y-Line was in a partial "layaway" status as of 6 July 1995 (*id*.). Layaway status signifies, *inter alia*, that the machines are installed but that preservatives are placed on the machines to prevent corrosion, the gearboxes are filled with oil and that the machines may have been disconnected from the electricity source (*id*.; tr. 503).

7. By letters dated 14 July and 17 August 1995, IOC, Rock Island advised the Director of Finance and Administration of the LAAP that Thiokol was authorized to use the facilities and equipment at LAAP, identified by Thiokol on 5 June 1995, *supra*, to manufacture M804A1 projectile forgings as a subcontractor under the above described solicitation on a noninterference, rent-free basis from January 1996 through June 1997 (R4, tabs 38, 40; finding 3(a)). The Government noted the possibility that this time period could be extended upon appropriate request and justification from Thiokol (R4, tab 38).

8. Delivery Order No. 001, in the amount of $1,251,346, was issued under the BOA, *supra*, on 21 August 1995 for the provision by Thiokol of "[f]iscal Year 1996 Maintenance of Inactive Industrial Facilities (MIIF) activities and for the removal and disposal of friable and friable type asbestos for the period 1 July 1995 to 30 June 1996" (R4, tab 41; AR4, tab 10; tr. 76-79, 148, 347-49, 386, 393, 404). If a facility and its machines were utilized under a production contract, the maintenance of said facility/machines would be covered under that production contract and not a MIIF-related arrangement (tr. 459). The MIIF Scope of Work defined the "minimum maintenance practices and procedures for laid away and modified caretaker facilities. Laid away facilities are those facilities which must be maintained to support large caliber metal parts capability" (R4, tab 41 at 8; AR4, tab 10). Delivery Order No. 001 contained an "effective date" of 1 July 1995 (*id*.). Said delivery order incorporated by reference, *inter alia*, the standard FAR 52.249-8 DEFAULT (FIXED

PRICE SUPPLY AND SERVICE) (APR 1984) and unspecified "Termination For Convenience" clauses applicable to "Fixed Price Service" contracts (*id*. at 2-3).

9. Appellant, by Best and Final Offer (BAFO), dated 23 August 1995, stated that its offer was "predicated on use of Government property in [appellant's] proposed subcontracts of vendors" (R4, tab 1 at § M-1(b); AR4, tab 17; finding 6). Thiokol's Facilities Use Contract No. DAAA09-95-E-0007, *supra*, was identified as the agreement "under which the property is held" (R4, tab 1 at § M-1(b)). Appellant's BAFO indicated *inter alia*, that the manufacture of the M804A1 projectile "forgings" portion of the solicitation work would be accomplished using GFP at LAAP under a subcontract between appellant and Thiokol (*id*. at § K-16(a-b)). Appellant's BAFO indicates that it contains an enclosure which explains the equipment and processes that would be used to perform the metal parts forging operation. Said enclosure, however, has never been proffered into evidence herein (*id*. at § M-1 (c)(2); finding 1, *supra*). Appellant's BAFO does not state that it is in any way predicated upon either Thiokol's continued performance of the then extant Flex Line project (Modification No. P00345, *supra*) or of the MIIF maintenance, environmental, etc. services (Delivery Order No. 001, *supra*) (*id*.; findings 3(c), 6(e), 8). Appellant did not review Thiokol's aforesaid Facilities Use contract or the terms of Thiokol's then extant Flex Line project (*i.e*., Modification No. P00345, Contract No. DAAA09-87-Z-0010, *supra*) prior to submitting its BAFO (tr. 298-99; finding 3(c)).

10. By letter dated 30 August 1995, IOC, Rock Island informed appellant that appellant's BAFO "may be in error" and requested that appellant "carefully recheck [its] figures" (R4, tab 44). Said letter also stated that appellant:

> [s]hould review [its] subcontractor's (Thiokol) proposal to ensure that it covers those costs of security, environmental compliance, maintenance of equipment and buildings, fire protection, safety, and post retirement benefits which would increase as a result of production for the M804A1 projectile forgings beyond those required to maintain the plant under a facilities contract.

(*Id*.) By letter dated 31 August 1995, appellant stated, *inter alia*, that it had "carefully reviewed all the elements of [its] offered price for a possible mistake and hereby confirm that the . . . price . . . is correct as submitted" (R4, tab 45).

11. Delivery Order No. 0010 allocated the amount of $12,250,000 on a cost-plus-fixed-fee basis and was issued to Thiokol under the BOA, *supra*, on 30 September 1995 for the performance of the "Flexible Manufacturing Facility Prove Out Project" for metal parts (AR4, tab 86; tr. 76, 83-86, 216, 218, 350-53, 490). The work thereunder was to be performed during the ensuing Fiscal Years 1996-1999 time period (*id*.). All of the "applicable clauses required by law or Federal Acquisition Regulation, or other Federal

procurement regulation, as contained in the . . . [BOA, were] incorporated [in Delivery Order No. 0010]" (AR4, tab 86). Delivery Order No. 0010 states, *inter alia*:

> Prior to proceeding from one Phase of this action (see the CSOW) to another, the parties agree that the contractor will not begin expenditure of funds without express written direction of the Contracting Officer.

(*Id.*) The text of the "Scope of Work" for Delivery Order No. 0010, however, has not been included in the evidentiary record by either party hereto. Thiokol's cost estimate for the Delivery Order No. 0010 "Prove Out Project" shows that $3,944,065 of the total amount of funds earmarked for said work were allocated to work that was planned to be performed during Fiscal Year 1996 (*id.*). "Prove Out" essentially encompassed testing new machines to determine whether said machines satisfied applicable design parameters as well as to demonstrate operability by actual use of existing machines to produce the metal part and prove that the round could actually be made (tr. 90-92, 491).

12. Delivery Order No. 0011 allocated the amount of $4,840,338 on a cost-plus-fixed-fee basis and was issued to Thiokol under the BOA, *supra*, on 30 September 1995 for the performance of the "Flexible Manufacturing Facility Enhancements" project at the LAAP (AR4, tab 21). The purpose of said "Enhancements" project was to "enhance the flexibility of the . . . [LAAP] to manufacture a wider variety of ammunition and commercial metal parts" (*id.*; tr. 95, 352, 490). The completion date for the enhancements project was 31 December 1999 (AR, tab 21 at 3 of 4; tr. 350-53). Delivery Order No. 0011 stated, *inter alia*:

> All applicable provisions of the . . . [BOA] apply to this action, as well as all provisions of the scope of work (SOW). . . . [T]he contractor will not begin expenditure of funds on any subsequent phase of this action after completing the previous phase without express writtten [sic] permission of the contracting officer.

(AR4, tab 21; tr. 95, 490) The statement of work for Delivery Order No. 0011 identified five sub-projects (*i.e.*: acquisition/installation of a batch heat treat system; acquisition/installation of a phosphate and lube system; acquisition/installation of a flow form machine for precision forming metal parts; acquisition/installation of robotic and/or manual assist manipulator(s) for material handling; and, relocation of "key pieces" of manufacturing equipment from the Y-Line building to Building 2630) that would "not, in any way, reduce the replenishment capability currently assigned to LAAP" (AR4, tab 21). None of this "enhancement" project work was required by Thiokol to manufacture the M804A1 forgings involved herein (tr. 86-92, 176, 469-71, 493-95).

13. On 13 December 1995, IOC, Rock Island awarded Contract No. DAAA09-95-C-0115 (hereinafter, the M804A1 contract) in the amount of $4,914,504.54 to appellant for the manufacture of the M804A1 projectiles (R4, tab 1). A Defense Priorities and Allocations Systems rating of "DO-A6" was assigned thereto (*id*.; AR4, tabs 26, 28; tr. 233-36). A First Article submission was due 15 October 1996 and production quantities were due incrementally over the period from 14 February through 14 August 1997 (R4, tab 1 at 3-4 of 5). The subject contract does not state that appellant's performance thereunder was contingent, or otherwise predicated, upon Thiokol's performance either of the three, then extant, Flex Line projects or of the MIIF maintenance, environmental, etc. services described *supra* (R4, tab 1; findings 3(c), 6(e), 8-9, 11-12). It does, however, incorporate appellant's BAFO, dated 23 August 1995, wherein appellant predicated its performance upon Thiokol's use of the LAAP facility under its Facilities Use contract with the Government (R4. tab 1; finding 9).

14. Sometime during January 1996, IOC, Rock Island requested maintenance (MIIF), environmental, etc. proposals from Thiokol to perform said services pursuant to new delivery orders that would be issued under the BOA for the upcoming 1 July 1996-30 June 1997 performance period (tr. 354-56). After conducting technical and audit/pricing reviews, IOC, Rock Island concluded that the "proposals were excessive in price. They were unreasonable costs" (*id*.). The monetary difference between Thiokol's various proposal cost amounts and the Government's corresponding projected cost amounts was approximately $6 million (AR4, tab 35).

15. Thiokol executed and returned Purchase Order No. 1-69477 in the amount of $3,531,006 [1] to appellant on 25 March 1996 for the manufacture of the above described M804A1 projectile forgings. The purchase order required deliveries on 13 August 1996 and over the period from 13 December 1996 through 13 July 1997 and stated that "on time delivery is of extreme importance" (AR4, tab 28 at 3). Appellant agreed to "give first article approval to Thiokol 45 days prior to first production delivery due date" (*id*. at 4). The purchase order incorporated by reference the standard Government contract clauses identified in finding 2, *supra*, excepting the clauses identified as Government Property Furnished "As Is" and Termination for Convenience of the Government (Services) (Short Form) (AR4, tab 28 at 2 of 7). The purchase order specifically provided that appellant was entitled to "cancel all or any part" thereof "if Seller [Thiokol] breaches any of the terms hereof . . . . If Seller's breach is due to unforeseeable causes beyond the control and without the negligence on Seller's part, and [appellant] therefore cancels this order, such cancellation will be deemed to have occurred pursuant to paragraph B of this section" (AR4, tab 28 at § 7.A., General Terms and Conditions). Said purchase order does not identify, or otherwise indicate, that Thiokol's performance thereunder was contingent, or otherwise predicated, upon its performance either of the three then extant Flex Line projects or of the MIIF maintenance, environmental, etc. services described, *supra* (*id*.; findings 3(c), 6(e), 8-9, 11-12).

16. On 24 May 1996, IOC, Rock Island informed Thiokol that all Government-issued requests for proposals regarding MIIF maintenance, environmental, etc. services for the upcoming 1 July 1996-30 June 1997 performance period would be canceled (R4, tab 50; AR4, tab 33). IOC, Rock Island also stated that "[t]he Y line at Louisiana AAP is required under the Industrial Preparedness Plan. However, due to the relaxed timeframes now required for replenishment, we do not anticipate continuing to justify an operating contractor at Louisiana AAP" (*id*.). IOC, Rock Island explained that "[b]ased upon your recent proposals, there is insufficient funding to cover the BOA delivery orders at . . . [LAAP] during the performance period July 1, 1996 through June 30, 1997. Your overhead rates have increased your costs to the point that the Government no longer desires to pursue the present contract arrangement. Additionally, prospects under the Facilities Use Contract to create revenue and offset your costs do not appear obtainable" (*id*.). Thiokol's input "identifying the impacts of these changes to the overall workload at . . . [LAAP]" was solicited and due by 10 June 1996 (R4, tab 50; tr. 111-13). This 24 May 1996 communication to Thiokol stemmed from IOC, Rock Island's self-styled "'get tough' approach regarding costs at the inactive plants [*e.g*., LAAP]" (AR4, tabs 31-35; tr. 354-60). IOC, Rock Island was also cognizant of Thiokol's earlier issuance of "WARN Act notices (layoff notices [effective 1 July 1996]) to [its] employees at [LAAP]" in the absence of funding assurance from the Government and Thiokol's extant subcontract with appellant for the production of the M804A1 projectile as well as the extant "Metal Part Flex-Line projects/prove out" efforts (AR4, tabs 31-32, 35).

17. On 10 June 1996, Thiokol's Vice President and General Manager, Mr. Johnson responded, in pertinent part:

> [W]e recognize that the majority of the Louisiana Plant is not required for future Army mission. That is the reason we have consolidated our management team and relocated them physically within the Area Y facility at the Louisiana Plant. As you pointed out in your [24 May 1996] letter to me, Area Y is a facility that you require for replenishment in your present Industrial Preparedness Plan.
>
> As you know, we are executing a funded project to install a flexible metal parts manufacturing capability in Area Y at Louisiana. . . . When we priced the Flex Line scopes of work we had assumed little or no funding being available to support retention of the Louisiana AAP. We priced that effort and developed those scopes, as best we could, as free standing efforts that would not be adversely impacted when it became necessary for you to abandon other parts of the plant. . . . [F]uture Thiokol commercial initiatives could provide the

> vehicle for funding all of the costs of maintaining elements of . . . [the LAAP] that you require.
>
> . . . .
>
> The end of this fiscal year is approaching rapidly and I see little likelihood that we can definitize a fixed price contract by July 1, unless we change our approach. As a suggestion, I think it would be fairly simple, if you agree with the proposal I will submit Friday, to quickly negotiate a level of effort and provide a letter contract that would serve until a definitized fixed price contract can be executed. I suggest setting a goal to have that final contract in place by mid-September 1996.
>
> If we follow this strategy, we can avoid an adverse impact to our other funded work as a result of the actions you described in your letter.

(R4, tab 51) Mr. Johnson did not testify at the hearing.

18. On 19 June 1996, IOC, Rock Island notified Thiokol that "Thiokol no longer will have the emergency assignment for Y line at Louisiana AAP" (R4, tab 52; AR4, tab 38; tr. 114-19, 190, 370, 420). In this regard, the Government stated that LAAP "will retain the emergency assignment for Y line" and, further, that "competitive solicitation(s) will be issued for the efforts to be accomplished at Louisiana" (R4, tab 52). Thiokol was also given official notice that "the Government will terminate the current facility [sic] use contract with Thiokol at Louisiana on June 30, 1997," one year and ten days from said notice date (AR4, tab 38; tr. 359-60, 415). The Facilities Use contract was left in place for the additional time period in order for Thiokol to be able to fulfill its agreement with appellant to manufacture the M804A1 projectile forgings (tr. 415-16, 478, 575; AR4, tab 35). At trial, the contracting officer testified, *inter alia*, "you can only have a Facilities Use Contract under the ARMS Act . . . when the facility is still retained for emergency requirements" (tr. 415-20, 461). She explained that the Government removed the emergency assignment for the Y-Line from Thiokol (and took over responsibility for said emergency assignment) but deliberately gave Thiokol approval to continue using the Y-Line for production of the M804A1 forgings (*id*.; tr. 460, 462-63, 474-77; R4, tab 52; AR4, tab 38). The removal of the emergency assignment did not "save the Government money in any form. . . . Taking it away from [Thiokol] meant that [the Government] didn't necessarily have to use them in an emergency" (tr. 423-24). The evidentiary record does not establish that Thiokol's continued use of the Y-Line facility after 19 June 1996 would have been in support of industrial preparedness programs or otherwise authorized by law or regulation.

19. On 20 June 1996, IOC, Rock Island rejected Thiokol's 10 and 14 June 1996[2] proposed plans of action and officially notified Thiokol that the requests for proposals regarding MIIF maintenance, environmental, etc. services at LAAP for the upcoming 1 July 1996-30 June 1997 period were canceled (R4, tabs 53-54; AR4, tab 39). The Government reiterated:

> It is essential the Government protect the plants and secure minimum essential services. Until you provide your intent as to whether you will adhere to the requirements of the Facility [sic] Use Contract without funded Delivery Orders for the next performance period, July 1, 1996 through June 30, 1997, the Government is hindered in the planning efforts to execute the proper action to protect the plants.

(*Id*.) By separate letter dated 20 June 1996, IOC, Rock Island informed Thiokol, as follows:

> No further expenditures shall take place against . . . [Modification No. P00345] under Contract DAAA09-87-Z-0010; Delivery Order 0011 under Basic Ordering Agreement DAAA09-95-G-0004 . . . Flexline Enhancement; and . . . Flexline Prove Out, under Delivery Order 0010 of Basic Ordering Agreement DAAA09-95-G- 0004, without written prior approval by the Administrative Contracting Officer [ACO].
>
> Current existing purchase orders issued against the cited projects will continue.

(R4, tab 55; AR4, tabs 40, 54; tr. 120-28, 131-32, 360-61, 431) The evidentiary record does not show that Thiokol ever requested any such "further expenditures" with respect to said Flex Line projects.

20. As of 20 June 1996, all of the equipment that Thiokol had earlier requested permission to use on a rent-free basis in support of appellant's proposal herein had been activated with the exception of the nose press with its Ajax Magnathermic induction heater and the heat treat furnace (R4, tab 66; AR4, tab 58; tr. 132-33, 243, 497-507, 510-15, 522, 535-45, 547-50, 555-59). The nose press had been proven to be operational; however, Thiokol had independently decided to replace the internal controls (tr. 504, 513). It may also have been necessary to calibrate the hardness tester (tr. 542). The remaining maintenance work associated with the full activation of the nose press and the heat treat furnace could have been accomplished within three weeks by two workers (tr. 507, 515-18, 539-40, 544, 556, 560). The parties have not identified the additional amounts of time and

funds that, as of 20 June 1996, would have been necessary under the applicable Flex Line projects, *supra*, in order to timely produce the M804A1 projectile forgings for First Article Testing, etc. (*see*, findings 3(c), 11-12; tr. 99-108, 125-26, 132-34, 185-86, 195; R4, tab 25; AR4, tabs 27, 30).

21. On 20 June 1996, Thiokol's Mr. Johnson told his employees who were working on the Flex Line projects and the Facilities Use contract to "go home. You've all been fired by the Government" (tr. 129-32, 140, 182-85, 441, 487-91). Said employees, except for those who were closing out "existing open commitments on the flex line [projects]" then "walked off the [LAAP] facility" (*id*.; tr. 364-65; AR4, tabs 43, 68).

22. By letter dated 25 June 1996, Thiokol notified appellant: that the Army intended to terminate Thiokol's LAAP Facilities Use contract (No. DAAA09-95-E-0007, *supra*) for convenience; that no additional funding would be provided on the Facilities BOA; and, that "the Flex Line Project" would be completed by the Government (R4, tab 56; AR4, tab 41; tr. 303-04, 310). Thiokol concluded that these events rendered its purchase order for the delivery of the "M804 [*sic*] projectile forgings" with appellant "impossible" to perform and requested that appellant terminate said purchase order for convenience and "immediately begin work to prepare a claim against the U.S. Army to recover Thiokol and [appellant] costs incurred on this contract" (R4, tab 56; AR4, tab 41).

23. By letter dated 1 July 1996, appellant informed Thiokol that appellant could not terminate the purchase order for convenience until authorized by the Procuring Contracting Officer (PCO) for the M804A1 contract (R4, tab 57; AR4, tab 44). In addition, appellant informed Thiokol that Chamberlain Manufacturing Corporation (Chamberlain) had "orally refused" to submit a quote as a subcontractor for the manufacture of the projectile forgings (*id*.; tr. 239-44, 285). Finally, appellant expressed its desire to lease the LAAP from Thiokol in order for appellant to manufacture the projectile forgings under the same terms as Thiokol's original Facilities Use agreement with the Government, as well as stating its intent to seek relief from Thiokol and the Government for increased costs associated with its actions. In this regard, appellant stated its understanding that the "facility [sic] use contract [would] . . . terminate . . . on June 30, 1997" and that appellant's contemplated "production of the current contractual quantity will be completed on or before June 30, 1997" (AR4, tab 44).

24. By letter dated 1 July 1996 to IOC, Rock Island, Thiokol stated that the Government had "effectively" terminated Thiokol's Facilities Use contract for the convenience of the Government as of 30 June 1996 (AR4, tabs 43, 54; tr. 120-23, 131-32, 433-35). Thiokol stated its "clear understanding that the Government does not intend to fund Thiokol for any additional work at the [LAAP]" (AR4, tab 43). Thiokol also stated its understanding, based on the 20 June 1996 letter from IOC, Rock Island, *supra*, that "only existing purchase orders [under the Flex Line projects] will be authorized for expenditure" (*id*.; finding 18).

25. By letter dated 3 July 1996, IOC, Rock Island requested that appellant update the Government "as to the effect, if any, [that Thiokol's inability to use the LAAP facility after 30 June 1997] will have on the M804A1 contract" (R4, tab 3).

26. By letter dated 3 July 1996, Thiokol asked IOC, Rock Island for approval to lease appellant the "same Y-Line facilities to produce" the entire M804A1 projectile during the period from August 1996 to August 1997 (AR4, tabs 46, 54; tr. 244-45, 306-07). Thiokol's request stated, *inter alia*:

> This work will require the use of emergency planned equipment and facilities. The approval of the project will maintain the facilities and equipment for the government in a state of readiness since [appellant] will pay for the maintenance during the term of the lease.
>
> . . . .
>
> This project will have positive impact on MIIF as the rental will offset the MIIF.

(AR4, tab 46; tr. 128-29) The lease request also contained a "Listing of Government-Owned Property To Be Used For Performance." It identified 15 of the 17 Government-Owned production items identified by Thiokol in its 5 June 1995 request, *supra*, in connection with appellant's proposal herein (AR4, tab 46; findings 3(a), 7). The two originally requested items that were not included in Thiokol's 3 July 1996 lease request were the "Furnace, #2 Rotary" and the "Check Weigh (Prod)" *(id.)*[3]. Said lease request also included an additional 26 Government-Owned production equipment items including, *inter alia*, an "Induction Furnace" that had been manufactured in 1996 (AR4, tab 46). Apparently, the additional items of production equipment were necessary to allow appellant to produce the entire M804A1 round on the Y-Line *vice* only the "forgings, heat treat, and hardness testing" previously covered by Thiokol's purchase order with appellant (*id*.; AR4, tab 54 at 19 of 22).

27. By letter dated 15 July 1996, IOC, Rock Island "conditionally" approved Thiokol's proposed lease of the Y-Line facilities to appellant stating that Armament Retooling and Manufacturing Support (ARMS) funds were not available to support said leasing proposal (AR4, tabs 37, 47). ARMS funds are used, *inter alia*, to support Facilities Use agreements involving facilities that required work in order for a tenant to utilize said facility (tr. 247-51, 414). Furthermore, Thiokol would be responsible for any increased costs of utilities, environmental monitoring/testing and the layaway of equipment reactivated for said leasing proposal (*id*.; AR4, tab 54; tr. 133-34, 245-48, 311-13). The Government-estimated cost of placing the additional production equipment,

supra, taken "out of layaway back into a laid away state" was "approximately $416K" (AR4, tab 37; finding 26).

28.(a) By letter dated 18 July 1996 to the PCO at IOC, Rock Island, appellant's Vice President and General Manager, Mr. Slavens, stated that the future termination of Thiokol's Facilities Use contract, the lack of future funding for Thiokol's BOA and the fact that the Army *vice* Thiokol would be completing the Flex Line project made Thiokol's performance of its subcontract with appellant "impractical" (R4, tabs 4, 18; AR4, tab 48; tr. 64-65, 166, 198, 238-40, 330-39). In addition, Mr. Slavens stated that "the only other known source for M804 forging" (*i.e.*, Chamberlain) declined to quote to appellant for the supply of said forgings (R4, tabs 4, 18; AR4, tab 48; tr. 621-23). Consequently, Mr. Slavens stated that appellant would quantify the additional cost and delay to the delivery schedule associated with the withdrawal of its subcontractor, Thiokol, within 30 days (R4, tabs 4, 18; AR4, tab 48) Appellant did not ask for any assistance from IOC, Rock Island (tr. 592).

(b) Chamberlain initially declined to quote/supply appellant with the forgings involved herein apparently because appellant desired to perform "finish machining" in connection with the forgings rather than permit complete machining of the forgings by Chamberlain (R4, tab 60). Since discrepancies associated with "wall thickness, weight, volume, base thickness, etc." could be caused either during "forging" or "machining" and since the cause of such problems was "virtually impossible" to determine after "the part has been finish machined," Chamberlain felt that "[i]t would not be fair to either party to enter into an agreement that would result in an unresolvable [sic] dispute" (*id*.).

29. On 30 July 1996, appellant's Mr. Slavens stated that Thiokol's request for termination of its subcontract was a "business decision because of the termination of other work which would have absorbed some of their indirect costs, not because the government is terminating the facility contract" (R4, tab 59). In this regard, Mr. Slavens noted that the Government would not be terminating Thiokol's "Facilities Use Contract until 30 June 1997" (*id*.; emphasis in original).

30. By letter dated 1 August 1996, the PCO at IOC, Rock Island directed appellant to proceed with contract performance stating that the "problems encountered with your subcontractor [*i.e.*, Thiokol]" described in appellant's 18 July 1996 letter, *supra*, do not constitute "an excusable delay and consequently, does not provide a basis upon which to extend the delivery schedule nor does it provide a basis for an equitable adjustment in the price to this contract. We fully expect [appellant] to perform in accordance with the existing terms and conditions [of subject contract]" (R4, tab 5; AR4, tabs 49, 51; tr. 261; finding 28(a)).

31. By letter dated 6 August 1996 to IOC, Rock Island, Thiokol stated, *inter alia*, that "the ACO verbally advised Thiokol that he does not intend to approve any further expenditures" with respect to the LAAP Flex Line projects (AR4, tab 52). IOC, Rock

Island's denial, dated 21 August 1996, stated that "[t]he flex line projects have not been terminated. The letter you received placed total Government control on the expenditure of funds under the projects. If actions other than the purchase of equipment are required, obtain ACO approval before initiating any action incurring cost" (AR4, tab 55). In this regard, the evidentiary record does not show that Thiokol ever subsequently requested such ACO approval in connection with the then extant Flex Line projects. The contracting officer also acknowledged that the Government would not fund any new delivery orders for security, environmental, utility, etc. services for the period starting 1 July 1996 (*id*.). She reiterated that "[y]our facility [sic] use contracts are not terminated until June 30, 1997. Your continued submission of ARMS proposals and your requests to continue your own marketing efforts are supportable under the terms and conditions of the facility [sic] use contracts that are still in effect" (*id*.).

32. By submittal dated 16 September 1996, appellant stated that it "would be willing to produce the forgings at LAAP under an equipment lease with the government/Thiokol, but that it would be at additional cost" (R4, tab 9; AR4, tab 58; tr. 507). Appellant stated that the expected costs, including profit to "cover our significant risks," to itself produce the projectile forgings at the LAAP amounted to $5,434,546, or $1,920,659 more than its subcontract amount of $3,513,887 (*see* finding 15, *supra*) with Thiokol (R4, tab 9; AR4, tab 58; tr. 264-67, 313-14, 577). This represented an increase in the total contract price of approximately 39 per cent (*i.e*., $1,920,659/$4,914,504) (*id*.; finding 13). "Start up expense [material and labor] formerly covered by flex line [projects]" was estimated by appellant to be $494,129 (R4, tab 9 at Schedule A). Said start up expenses included 500 man-days of labor expended over an estimated 50-workday start up period (*id*. at Schedule A-2). Appellant also estimated that it would incur costs in the amount of $76,595 in connection with removal from layaway and [re-layaway] of nine additional items of production equipment needed by appellant to produce said forgings at LAAP (*id*. at Schedules G, G-1). Appellant estimated that it would require an additional 21 production days for "first article tests" and 96 days for production of the forgings (*id*. at Schedules B, C). By responsive letter dated 26 September 1996, the PCO, IOC, Rock Island again demanded that appellant proceed with contract performance informing appellant that "it remains your responsibility to make whatever arrangements are necessary to ensure the successful completion of [subject] contract. There is no intent on the part of the [Government] to recognize any request for equitable adjustment based on increased costs that may be incurred by [appellant]" (R4, tab 10; AR4, tabs 59, 61). The PCO also stated that in the event appellant "fail[s] to make timely delivery of the first article, it will be necessary to issue a 'show cause' letter"(*id*.).

33. By letter dated 10 October 1996, appellant requested an extension for the First Article submission from 15 October to 14 November 1996, in order to review a quotation received from Chamberlain whereby Chamberlain proposed to manufacture the forgings for appellant (R4, tabs 11, 18; AR4, tabs 59, 63; tr. 282, 286-87, 316-18, 578). Chamberlain's quote had been received by appellant on 4 October 1996 and involved a "total cost of

approximately $900,000 more than Thiokol's price" (R4, tab 18 at 3). This represents an increase in the total contract price of approximately 18.3 per cent (*i.e.*, $900,000/$4,914,504) (*id.*; finding 13). By letter dated 15 October 1996, the PCO authorized only the requested 30-day extension that was subsequently embodied in bilateral Modification No. P00002, dated 18 October 1996, to the contract (R4, tabs 13-16). IOC, Rock Island was aware that the First Article could not be produced by the 14 November 1996 extended date (*id.*; tr. 277-78, 282, 286, 318, 603-05, 610-11, 627-28).

34. By letter dated 18 October 1996, IOC, Rock Island notified Thiokol that the Flex Line Manufacturing Project (CLIN 2052AW, Contract No. DAAA09-87-Z-004) and Delivery Order Nos. 0010 (Flex Line Prove Out) and 0011 (Flex Line Enhancement) under BOA No. DAAA09-95-G-0004 "are terminated completely for the Government's convenience" except for, *inter alia*, "Project 5942496" which involved Erie Press Co. and the sum of $2,333,079 (AR4, tab 65; tr. 138-39, 410-12, 447; findings 3(a-b), 10-11). IOC, Rock Island stated that "[t]hese projects should be closed and cost adjustments made to allow the excess funding to be returned as soon as possible" (AR4, tab 65). The contracting officer testified that said projects were terminated for the Government's convenience because "Thiokol had laid off all their employees, and there was no one left to finish out these projects" (*id.*; tr. 365-68, 375). We also note that an earlier 26 September 1996 message from the "Deputy for Ammunition" stated that "Congress [was] in the process of rescinding $4.5M of FY 95 Flex Line funds. . . . Based on Congress' planned rescission, FY 95 Flex line prove out funds are to be terminated for convenience . . ." (AR4, tab 62). The evidentiary record does not establish whether said "planned" rescission subsequently occurred.

35. By letter dated 21 October 1996 to the PCO, IOC, Rock Island, appellant requested Special Priorities Assistance "in obtaining timely deliveries of items needed to satisfy rated orders" under the DO-A6-rated M804A1 contract involved herein (R4, tab 17; tr. 236). Appellant's request for "special assistance" was based upon the fact that the Government "is terminating Thiokol's Facility [sic] Contract after notice by [appellant] that [its] offer was predicated on the Thiokol Facility [sic] Contract" (R4, tab 17).

36. At the 22 October 1996 meeting of the parties, appellant stated that "the problem was caused by inordinate interference by the Government with [appellant's] subcontractor, Thiokol," including, *inter alia*, the removal of Thiokol's "emergency assignment" for the Y-Line at LAAP. Appellant requested "monetary and schedule relief such that the contract can be performed without negative financial and reputation loss" (R4, tab 18; tr. 316-17, 332-34).

37. By letter dated 31 October 1996, the PCO, IOC, Rock Island, responded to appellant's request for Special Priorities Assistance stating that "[s]ince your letter did not state the specific type of assistance required, I assume that your intent was to seek

assistance identifying an alternate source of supply since I have no authority to require Thiokol to perform in accordance with the terms of your purchase order" (R4, tab 19; tr. 580). Since appellant had received "a quotation from Chamberlain Manufacturing Corporation, it would appear that your needs have been satisfied and that no further assistance is required" (R4, tab 19).

38. By letter to IOC, Rock Island dated 7 November 1996, appellant, by way of "clarification", defined its earlier request for Special Priorities Assistance as including:

> [y]our guidance and intervention to resolve the delivery dispute existing between Thiokol and [appellant] created by your office in its termination of Thiokol's facility [sic] contract for convenience. As an example of the assistance that you are fully authorized and capable of providing, the Army could disclose its intent to reimburse Thiokol in its termination settlement for the facility [sic] contract for Thiokol's increased costs incurred performing the contract.
>
> Is your office willing to take full responsibility for the increased costs and delay which will result from the acceptance of the Chamberlain quote?
>
> Negotiation of a new contract schedule extending the period of [appellant's] contract performance offers [appellant] the opportunity to conclude an agreement with Chamberlain, provided that additional funds from either the Army or Thiokol are made available.

(R4, tab 21)

39. On 13 November 1996, appellant informed IOC, Rock Island that it had received another quote from Chamberlain to perform the M804A1 contract involved herein on "a 100% subcontract basis . . . [however,] the cost impact on [appellant] is still several hundred thousand dollars." (R4, tab 22; AR4, tab 67; tr. 289, 318, 581, 631) Appellant stated further that it was "diligently pursuing negotiations with both Chamberlain and Thiokol in an attempt to find a solution whereby [appellant] could perform the contract, assuming you were able to modify the delivery schedule" (R4, tab 22; AR4, tab 67). Appellant then reiterated its request for the "assistance" it had requested, *supra*, in its 7 September 1996 letter including, *inter alia*, the Government's acknowledgment that appellant was entitled reimbursement for the extra costs occasioned by Thiokol's refusal to perform its subcontract to produce the forgings, etc. for the M804A1 (*id*.; finding 38).

40. By letter dated 19 November 1996, the PCO, IOC, Rock Island notified appellant that the Government would not accept responsibility for any increased costs associated with the M804A1 contract involved herein (R4, tab 23; tr. 582). Moreover, the Government declined to intervene in the delivery dispute between appellant and Thiokol stating that appellant "was solely responsible for the selection of its subcontractors and is responsible for their performance. . . . This issue is one that Dayron is responsible for resolving with its subcontractor(s)" (R4, tab 23).

41. The PCO, IOC, Rock Island also faxed a Show Cause letter to appellant on 27 November 1996 for appellant's failure to deliver a First Article by the contractually established date of 14 November 1996 (R4, tabs 24-25; tr. 289-90, 582). Appellant was given 10 days from its receipt of said Show Cause letter to demonstrate that its failure to deliver the First Article "arose out of causes beyond your control and without fault or negligence on your part" (R4, tabs 24-25). Appellant was also afforded the opportunity, without waiver of the Government's right to terminate for default, to "submit . . . a proposal for extending the delivery schedule. If you choose to do so, you must state in writing a reasonable schedule for the delivery of all items required under the contract, and offer a definite sum of monetary consideration to the Government" (*id*.). The PCO stated that such a proposal, if received within the said 10-day period, would be "evaluated by the contracting officer in the course of determining whether to terminate the [M804A1] contract for default" (*id*.).

42. Thiokol, by letters dated 4 and 5 December 1996 to appellant, provided a "proposed response to the Show Cause letter, *supra*, received by [appellant] under [the M804A1] contract" (R4, tab 26; AR4, tab 68). Thiokol advised appellant that, *inter alia*, if the Government insisted that appellant perform the contract, then appellant "should . . . [negotiate] [a] new and reasonable delivery schedule . . . request waiver of the First Article requirements . . . [and] advise the IOC that it will proceed with contract performance and preserve its right to file a claim for an equitable adjustment in the contract price" (*id*. at 5).

43. Appellant responded to the Show Cause notice by letter dated 12 December 1996 (R4, tab 27; tr. 291-93). Appellant stated, *inter alia*, that it "cannot be held liable for acts of the Government in its sovereign or contractual capacity. . . . [T]he Government's termination of Thiokol's facilities contract and flex-line projects for its own convenience, with knowledge of the contract's criticality to [appellant's] performance of the M804 [sic] Projectile contract, places the burden and responsibility for program delays on the Government, not [appellant]" (R4, tab 27; AR4, tab 69). Appellant's proposal in response to the Government's Show Cause letter, *supra*, was to subcontract the entire effort to Chamberlain Corporation, provided that the Government would "agree to all" of the following conditions:

1. Approve [appellant's] 100% subcontract to Chamberlain and changing the place of performance to Chamberlain's Scraton [sic], PA plant.

. . . .

4. Change the delivery schedule to 6,000 per month, commencing 6 months after your approval to proceed.

5. The Government agrees to entitlement under a Request for Equitable Adjustment to be submitted later by [appellant] to include its subcontractors. Quantum will be determined later, but will not exceed $975,000, including subcontractor claims, based on the assumption that Chamberlain will value Thiokol's raw material inventory at 90% of Thiokol's cost.

(*Id*.; tr. 292-93, 320-21, 583) Appellant's equitable adjustment request amounted to approximately a 19.8 per cent increase to its original contract price (*i.e*., $975,000/$4,914,504). The evidentiary record herein does not establish that such an increase was commercially senseless or exorbitant. Appellant did not advise IOC, Rock Island that it would proceed with contract performance while preserving its right to file a claim for an equitable adjustment (*id*.; finding 42).

44. By letter dated 19 December 1996, the Government notified appellant that appellant's contract herein was terminated for failure to meet the scheduled delivery date for the First Article (R4, tab 28; tr. 290). The decision to terminate appellant's M804A1 contract for default was made by the PCO after:

> [w]e reviewed the situation and the terms of the contract, and along with their excuses that they submitted, reasons for the delay, and — to see if there were any progress payments outstanding that would have to be liquidated. We had to determine whether [appellant] would be essential to manufacture the 804 and determine what the lead time would be if we went to someone else, and if someone else was available to manufacture it.
>
> . . . .

> Time was getting short for these things to get the rounds to the troops for training – purposes of training – training rounds needed to maintain the proficiency of the troops in the field.

(Tr. 632-34, 639-40). The PCO testified that an absence of funding for various Thiokol projects at LAAP did not "impact, if at all, [his] decision to terminate [appellant] for default" because "[appellant is] the prime contractor. Thiokol's the subcontractor. It's their -- [appellant's] responsibility to obtain a subcontractor to perform whatever they were going to manufacture, whatever component" (tr. 636-37, 646-47). The PCO testified that while he was aware of appellant's intent to use various items of Government owned property, it did not factor "a great deal," if at all, into his decision to terminate for default (tr. 643-45). The PCO also testified that he was not aware of any problems related to Government-owned property that factored into his aforesaid default termination decision (tr. 627-46).

45. On 13 January 1997, appellant stated that it was aware that it could have performed the contract, "using Chamberlain as our subcontractor for 100% of the work, and to then sue Thiokol for damages. . . . [Appellant] cannot afford (nor should we be expected) to absorb a $500,000 to $600,000 loss on this contract and gamble on the court awarding those damages in a suit against Thiokol" (R4, tab 29; AR4, tabs 69-70; tr. 294-95).

46. By letter to appellant, dated 14 January 1997, the PCO, IOC, Rock Island issued a confirmation of its 19 December 1996 notice of default termination (R4, tab 30). The PCO stated, *inter alia*,"[appellant] was solely responsible for the selection of its subcontractors and is responsible for their performance, which adequate subcontractors for the required forgings exist and that these subcontractors are willing to sell to [appellant], and that the only issue is the cost associated with the performance of such a subcontract. This issue is one that [appellant] is responsible for resolving with its subcontractor(s)" (*id*.; R4, tab 31; AR4, tab 71; tr. 592-93). Modification No. P00003 was issued on 22 January 1997 confirming the total default termination of subject contract (R4, tab 31).

47. Appellant filed its notice of appeal herein on 30 January 1997 (R4, tab 32).

48. Section 194 of the ARMS Act of 1992 provides, *inter alia*:

> (a) **In General**. In the case of each Government-owned, contractor-operated ammunition manufacturing facility of the Department of the Army that is made available for the ARMS Initiative, the Secretary of the Army may, by contract, authorize the facility contractor –
>
> (1) to use the facility for one or more years consistent with the purposes of the ARMS Initiative; and

(2) to enter into multiyear subcontracts for the commercial use of the facility consistent with such purposes.

(b) **Facility Contractor Defined**. . . . [t]he term "facility contractor" . . . means a contractor that, under a contract with the Secretary of the Army –

(1) is authorized to manufacture ammunition or any component of ammunition at the facility; and

(2) is responsible for the overall operation and maintenance of the facility for meeting planned requirements in the event of an industrial emergency.

Pub. L. No. 102-484, 106 Stat. 2315, 2347-49, 10 U.S.C. § 2501 note (*repealed by* Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, October 30, 2000, Pub. L. No. 106-398, § 344(d), 114 Stat. 1654A-160)

49. The applicable FAR "Subpart 45.3—PROVIDING GOVERNMENT PROPERTY TO CONTRACTORS" provides, *inter alia*:

45.300 Scope of subpart.

This subpart prescribes policies and procedures for providing Government property to contractors.

45.301 Definitions.

. . . .

"Facilities," as used in this subpart . . . means property used for production, maintenance, research, development, or testing. It includes plant equipment and real property . . . .

"Facilities contract," as used in this subpart, means a contract under which Government facilities are provided to a contractor or subcontractor by the Government for use in connection with performing one or more related contracts for supplies or services. . . . Facilities contracts may take any of the following forms:

. . . .

(b) A facilities use contract providing for the use, maintenance, accountability, and disposition of facilities.

. . . .

45.302 Providing Facilities.

45.302-1 Policy.

(a) . . . . Agencies shall not furnish facilities to contractors for any purpose, including restoration, replacement, or modernization, except as follows:

(1) For use in a Government-owned, contractor-operated plant operated on a cost-plus-fee basis.

(2) For support of industrial preparedness programs.

. . . .

(5) As otherwise authorized by law or regulation.

48 C.F.R. 45.300-45.302-1(a)(5) (1995)

DECISION

Appellant seeks conversion of the termination for default of its contract into one for convenience because the Government allegedly caused its failure to timely deliver by interfering with its purchase order for projectile forgings. The Government insists that appellant caused the delay by deciding not to enforce its purchase order with Thiokol even though Thiokol still had the capability to produce the projectile forgings as necessary to support the production schedule.

The Government has the burden of proving that its default termination herein was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Once this requirement is satisfied, the burden shifts to appellant to establish that its failure and refusal to perform was due to excusable causes beyond its or its subcontractor's control and without its or its subcontractor's fault or negligence, was caused by the Government's material breach or that the contracting officer's exercise of discretion was unreasonable or arbitrary and capricious. *Lisbon Contractors, Inc., supra*; *Brenner Metal Products Corporation*, ASBCA No. 25294, 82-1 BCA ¶ 15,462; *Darwin Construction Co., Inc. v. United States*, 811 F.2d 593, 596-97 (Fed. Cir. 1987).

Appellant's First Article submission was due on 14 November 1996 (findings 13, 33, 41). Appellant failed to deliver said First Article submission by that date (*id*.). Instead, appellant's response to the Government's "show cause" letter expressly and unequivocally conditioned its performance of the contract, *inter alia*, upon the Government's agreement to recognize appellant's (including its subcontractors) right to an equitable adjustment in the contract price not to "exceed $975,000" (finding 43). This 12 December 1996 refusal to proceed with contract performance unless the Government agreed to meet its equitable adjustment demand was consistent with appellant's prior stated positions wherein it refused to proceed with contract performance unless the Government agreed to recognize entitlement to an equitable adjustment that ranged in amounts from $1,920,659 to "approximately $900,000" to "several hundred thousand dollars" (*id*.; findings 28(a), 32-33, 36, 38-39). Appellant maintained its position in spite of the Government's demands that appellant proceed with contract performance and the Government's consistent refusal to recognize appellant's entitlement to an equitable adjustment stemming from Thiokol's refusal to perform its subcontract (findings 27, 30, 32, 36, 40). In this regard, the evidentiary record does not show that any substantial production work with respect to either the M804A1 projectile contract or with respect to the Flex Line projects was actually performed after 20 June 1996, the date that Thiokol told its employees to "go home" (findings 20-45). Appellant's efforts were thereafter directed at identifying alternative means and the costs associated therewith for the performance of the forgings, etc. portion of the M804A1 contract (*id*.).

Appellant's failure to timely deliver its First Article submission and its refusal to proceed with contract performance unless the Government agreed to appellant's demands for an increase in the contract price (findings 13, 21-45) establish a *prima facie* case of default. *See Brenner Metal Products Corporation*, *supra* 82-1 BCA at 76,618-20 and cases cited therein; *CCB Industries, Inc.*, ASBCA No. 48009, 96-2 BCA ¶ 28,414. Whether appellant had the right to refuse to perform the work absent a price increase guarantee from the Government "depends on the seriousness of the Government's breach, both the nature of the breach and the impact on the contractor's ability to perform." *Brenner Metal Products Corporation, supra* at 76,620.

Appellant's stated reasons for failing to timely submit its First Article and proceed with its contract performance are based upon various Government actions taken with respect to appellant's subcontractor, Thiokol. Appellant argues that the Government rendered performance impossible when it allegedly canceled Thiokol's Facilities Use Agreement, on or about 19 June 1996, by notifying Thiokol that the Government requests for proposals to perform MIIF maintenance, environmental, etc. services at LAAP for the upcoming 1 July 1996-30 June 1997 period were canceled, by notifying Thiokol that all new expenditures under the three Flex Line projects were subject to the prior approval of the contracting officer and by revoking the emergency assignment for the Y-Line. Further, appellant also contends that the Government's termination of the Flex Line projects constituted a violation of the Government's alleged commitment to modify and upgrade the

equipment on the Flex Line to a condition ready for the production of the metal forgings for the M804A1 projectile thereby rendering appellant's timely performance impossible. Appellant also argues that the Government violated or otherwise breached its duty of good faith, fair dealing and cooperation both when it refused to ensure the reasonableness of Chamberlain's actions toward appellant and by ignoring appellant's requests for special priorities assistance. Moreover, appellant contends that the Government waived its right to default terminate appellant when it encouraged appellant's performance despite its knowledge that appellant could not meet the First Article submission date of the contract.

We have carefully reviewed the circumstances of appellant's failure to timely provide the First Article submission and its refusal to perform unless its demands for an equitable adjustment in its contract price were agreed to by the Government. We conclude that appellant's refusal to perform was not excusable or beyond its control. The evidentiary record does not establish that this Government action rendered appellant's performance objectively impossible or commercially impracticable.

Initially, we reject appellant's argument that the Government waived its default termination remedy when it encouraged appellant's performance despite knowledge that appellant could not timely submit the First Article. Appellant's response to the 19 November 1996 Show Cause notice inextricably conditioned appellant's performance of the work upon the Government's agreement to pay up to $975,000 as an equitable adjustment associated with the unavailability of Thiokol (findings 41, 43). The Government granted appellant's only quantified request for a time extension (finding 33), timely afforded appellant the opportunity to thereafter submit an additional proposal to further extend the delivery schedule (finding 41) and timely terminated appellant for default one week after appellant again conditioned its further performance on the Government's agreement to recognize entitlement to an equitable adjustment (findings 43-44). Under these circumstances, we cannot conclude that the Government waived its right to default terminate appellant's contract herein. *See DeVito v. United States*, 413 F.2d 1147, 1153-54 (Ct. Cl. 1969).

We reject appellant's assertion that the Government's cancellation of its requests for proposals from Thiokol to perform MIIF maintenance, environmental, etc. services during the 1 July 1996-30 June 1997 period independently constitutes an interference or material breach that made contract performance impossible. Appellant has not established that the Government's cancellation action was the product of an improper motive of the contracting officer. Indeed, Thiokol's 20 June 1996 decision to tell its employees to "go home" was characterized by appellant on at least one occasion as a "business decision" (findings 21, 29). In fact, the Government concluded that Thiokol's proposals to perform MIIF maintenance, environmental, etc. services at LAAP during the upcoming 1 July 1996-30 June 1997 period were "excessive in price" (*i.e.*, approximately six million dollars higher than the Government's estimate) (findings 14, 16-19). On the record before us, this so-called "get tough" decision appears to be the product of an

arms length bargaining process and, in our view, is a decision that properly falls under the ambit of the contracting officer's exercise of discretion. Certainly, neither the Government nor Thiokol was bound to accept the arbitrary price determination of the other party with respect to the performance of MIIF maintenance, environmental, etc. services for the 1 July 1996-30 June 1997 period (findings 3(a), 6(b), 6(e), 8). And appellant did not condition its performance of the M804A1 contract upon any guarantee that Thiokol could perform said services for remuneration at its own unilaterally mandated price(s) throughout the term of said M804A1 contract (findings 8-10, 13-14). In fact, Thiokol was only bound to perform said services for the one-year period of 1 July 1995-30 June 1996 (findings 6(e), 8). One of the risks assumed by the parties herein was that the arms length bargaining process between the Government and Thiokol with respect to the performance of said services during the upcoming 1 July 1996-30 June 1997 period might not result in an agreement (findings 6(e), 14, 16). On the record before us, we conclude that the Government properly afforded Thiokol the opportunity to propose performing said services. The Government's decision to not accept Thiokol's proposal does not appear to us to have been made in bad faith and did not constitute a material breach of its M804A1 contract with appellant.

We also reject the contention that requiring Thiokol to obtain the contracting officer's approval in advance of new expenditures under the three Flex Line projects independently rendered appellant's performance of the M804A1 contract impossible. In this regard, Thiokol never tried to obtain approval for further expenditures under the three Flex Line projects (findings 19, 24, 31). Instead, Thiokol simply told its workers to "go home" on 20 June 1996 (finding 21). Whether the contracting officer would have approved new expenditures under said Flex Line projects is problematic speculation, at best, and does not fall within our province. Moreover, neither appellant nor Thiokol conditioned its performance of the M804A1 contract upon the performance of the three Flex Line projects (findings 3(a-c), 6(b), 9, 11-13, 15). We conclude that the imposition of this approval requirement by the Government did not constitute an interference or material breach that rendered contract performance impossible.

In a similar vein, we reject appellant's argument that the Government's 18 October 1996 termination of Thiokol's three Flex Line projects constituted an interference or material breach that independently rendered appellant's contract performance impossible. Thiokol appears to have effectively left these projects on 20 June 1996 (findings 18, 21, 24, 31). As of that time, most of the equipment originally identified for use on the M804A1 contract had been activated (finding 20). Neither Thiokol nor appellant conditioned their performance of the M804A1 contract upon their continued performance of the three Flex Line projects (findings 3(c), 4, 7, 9, 13, 15). Indeed, the contemporaneous documentary record does not adequately explain the role that these three Flex Line projects played with respect to Thiokol's performance of its portion of the M804A1 contract scope of work (findings 1-3(a, c), 4, 6(d), 9, 11-13, 15, 17, 20-23, 26, 28(a), 29, 32).

Appellant's contentions that the Government violated a duty to ensure that potential subcontractors acted reasonably with regard to appellant and ignored appellant's requests for special priorities assistance are equally devoid of factual merit. The evidentiary record, far from establishing unreasonableness on the part of said third-party, independent entity (*i.e.*, Chamberlain) (findings 13, 23, 28(a-b)), actually shows that appellant and Chamberlain ultimately were able to successfully negotiate with respect to Chamberlain's potential performance of the M804A1 contract work (findings 33, 37-39, 43, 45-46). Moreover, the evidentiary record belies appellant's accusation that the Government "ignored" appellant's 21 October, 7 November and 13 November 1996 requests for special priorities assistance (findings 35, 37-40). In fact, the Government's responses were appropriate under the then existing circumstances (*id*.). It is appellant that mistakenly ignores its Disputes clause obligation to continue work and the contractually agreed-upon vehicles for seeking relief (*i.e.*, the Changes and Government Property clause) when it argues that a "special priorities assistance" duty on the part of the Government obliged the Government to acknowledge, on those dates, responsibility for any and all claimed extra costs either incurred by appellant in connection with the M804A1 contract or by Thiokol in connection with the Facilities Use contract (*id*.; findings 2, 13). The Government's response to these demands in the form of a refusal does not either equate to "ignoring" said demands or constitute a breach by the Government of its implied duties of good faith, fair dealing and cooperation.

Appellant contends that the Government's 19 June 1996 statement that Thiokol's Facilities Use contract would remain extant through 30 June 1997 in order for Thiokol to perform its subcontract for appellant was rendered nugatory by the Government's concurrent revocation of Thiokol's emergency assignment for the Y-Line portion of the LAAP production facility (finding 18). Whether the Government's unilateral revocation of Thiokol's emergency assignment necessarily precluded Thiokol from using the Y-Line production facility to perform its portion of the M804A1 contract is not, however, dispositive herein. It does not suffice to just establish the seriousness of "the nature of the breach" assuming there was one. *Brenner Metal Products Corporation, supra* 82-1 BCA at 76,620. The seriousness of the "impact" of the breach "on the contractor's ability to perform" is a mandatory component of the "exceptional circumstances" that must also be established by appellant (*id*.).

This, appellant cannot do. Appellant's 12 December 1996 proposal in response to the Government's Show Cause notice establishes that performance of the M804A1 contract was, in fact, feasible, rather than impossible (findings 43, 45). The maximum extra cost associated with appellant's proffered, substitute method of performance represented an increase of approximately 19.8 per cent of the original contract price (*id*.). Such an increase in the price of performance does not appear to be commercially senseless or exorbitant and does not equate to commercial impracticability. *See Raytheon Company v. White,* 305 F.3d 1354, 2002 U.S. App. Lexis 20204, at *34 (Fed. Cir. Sept. 24, 2002)*; D.W. Clark, Inc.,* ASBCA No. 45562, 94-3 BCA ¶ 27,132 at 135,246*; American*

Combustion, Inc., ASBCA No. 43712, 94-3 BCA ¶ 26,961 at 134,243 and cases cited therein. In this regard, we agree with the substance of Thiokol's advice to appellant (finding 42) that appellant's demands for extra compensation could have been pursued by appellant under the Changes and Government Property clauses while appellant honored its Disputes clause obligation to continue work as directed by the Government pending resolution of those demands. Appellant's refusal to continue performance was simply not justifiable under these circumstances. *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276-77, *reh. denied*, 186 F.3d 1379 (Fed. Cir. 1999); *CCB Industries, Inc., supra; Brenner Metal Products Corporation, supra* 82-1 BCA at 76,619-21 and cases cited therein).

In accordance with the foregoing discussion, the appeal from the termination for default herein is denied.

Dated: 25 November 2002

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

NOTES

[1] Thiokol's purchase order price to produce the M804A1 forgings for appellant appears to be $3,590,961 on another version thereof contained in the record herein (R4, tab 9; AR4, tab 58). Said purchase order price is also represented

at $3,513,887 in a summary document prepared by appellant (*id*.). These discrepancies as to the actual price of said purchase order are not addressed by the parties and are not otherwise explained in the record.

[2] The 14 June 1996 proposed plan of action is not contained in the evidentiary record but is alluded to in Thiokol's 10 June 1996 letter, *supra* (R4, tab 51).

[3] According to the IOC, Rock Island Production Engineer, Mr. Parris, the rotary furnace "didn't exist. . . . I can only assume they would have planned to use the new induction heater which I put in place. . ." (tr. 480-82, 510-11).

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. 50533, Appeal of Dae Shin Enterprises, Inc., d/b/a/ Dayron, rendered in conformance with the Board's Charter.

Dated:

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