

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ahmed S. Al-Zhickrulla Est.) ASBCA No. 52137
)
Under Contract Nos. DAKF12-91-C-8143)
DAKF12-91-C-8192)
DASA01-91-C-0009)
DASA01-91-D-0006)
DASA01-91-D-0011)

APPEARANCE FOR THE APPELLANT: Mr. Ahmed S. Al-Zhickrulla
Owner and President

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
MAJ Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant timely appealed a contracting officer’s final decision denying its claim in the total amount of 10,017,564.00 Saudi Rials (SR) (\$2,670,682.56 based on an exchange rate of 3.75 SR to one U.S. Dollar incorporated in the contracts as the exchange rate) arising out of eight contracts.* A hearing was held in Juffair, Bahrain, at which appellant was represented by Donald J. Kinlin, Esq., Thompson, Hine, LLP, Dayton, Ohio. Mr. Kinlin withdrew as counsel of record shortly after the hearing. The Government filed its post-hearing brief. Appellant has not filed a post-hearing brief, although the Board granted appellant additional time for filing the brief per its request. Only entitlement is before us.

FINDINGS OF FACT

Contracts and Claims Background

1. In early 1991, ARCENT-SA (Army Central Command - Saudi Arabia), Dhahran, Saudi Arabia awarded appellant eight contracts for the lease of heavy equipment in support of the Army’s operations during Desert Shield/Desert Storm, including Contract No. DASA01-91-C-0009 (“C-0009”); Contract No. DASA01-91-D-0006 (“D-0006”); Contract No. DAKF12-91-C-8143 (“C-8143”); Contract No. DASA01-91-D-0011 (“D-0011”); Contract No. DAKF12-91-C-8192 (“C-8192”). (R4, tabs 1 to 5) The only contract

* Our jurisdiction in the appeal is based on 41 U.S.C. § 605(c)(5).

documents in the record for these contracts, as originally constituted, were provided by appellant in 1998 and included only the cover page of the respective contracts and/or the Schedules pages (R4, tabs 1 to 5, 35; ex. J-2). Contract Nos. DASA01-91-C-0001 (“C-0001”), DASA01-91-C-0002 (“C-0002”), and DASA01-91-C-8150 (“C-8150”), were also referenced in appellant’s request for payment (R4, tab 34). However, there were no contract documents in the record for these three contracts.

2. On 10 January 1992, appellant wrote ARCENT-SA Contracting Office, stating that per appellant’s records, it had not been paid in full for the above referenced eight contracts (R4, tab 31). Each of the contracts was identified in this letter, but there were no amounts claimed as due and unpaid, either with respect to each of the identified contracts or in a total amount for all the contracts. Appellant stated therein that the total amounts of the contract prices were different than the amounts appellant received from the Army.

3. According to appellant, appellant had orally informed various Government officials at various times starting in 1991 and extending to sometime in 1998 that there was a balance due on the contracts and was told to wait, or told that the Government would check into the matter (tr. 1/80, 112-15, 144-148, 2/193-95). Although the contracting officer in Saudi Arabia during the period of 1 August 1991 to 22 May 1992 recalls having met with appellant’s owner and president on a number of occasions, he did not recall any discussion concerning amounts still due for services provided on his various contracts (ex. J-1). Moreover, as contracting officer, he was primarily responsible for processing claims and closing out contract files, and would not have responded to oral requests for payments in the manner suggested by appellant. Rather, he would have directed appellant to submit written requests with supporting documentation, just as he told appellant to do with respect to another unrelated claim for damages to several dozers. Appellant’s owner and president admitted that the contracting officer had told him to put his request for payment in writing in the box at the contracting office. Nevertheless, during the period of 1991 to sometime in late 1998, appellant never submitted any request for payment in writing to the Government other than the 10 January 1992 letter because, according to appellant, it had been performing services under other, unrelated contracts with the Government, was too busy with much to do during this time, and did not want to bother the Government officials (tr. 2/189, 192-93, 196-97). However, according to appellant’s business manager, appellant did not file a claim between 1992 and 1998 because the Government had not told him to submit a claim. He acknowledged that he knew how to file a claim in 1991 and had done so on another unrelated matter and understood his rights to appeal an adverse decision to the Board (tr. 1/115, 148-49).

4. By letter dated 5 May 1998, appellant’s president informed the ARCENT-SA contracting office, Riyadh, Saudi Arabia, that per appellant’s records, “we have still claim [sic] pending against some of our contracts for different types of equipment” (R4, tab 33). This letter listed the eight contracts and the types of equipment leased under those contracts. There were no amounts claimed nor was there any description of the basis for

the asserted Government liability. In response to an apparent request by the Government, appellant submitted what it purported to be an invoice dated 5 June 1998, in which appellant once again listed the eight contracts and identified specific amounts as balances owed by the Government on each of the identified contracts. (R4, tab 34) The asserted balance due on all eight contracts was 10,017,564.00 SR. Although the claimed amounts were identified for each contract, there was no particularization as to the basis and how appellant determined the amount asserted as due appellant. Further, there was no certification of the claim as required by the Contract Disputes Act of 1978.

5. By cover letter dated 4 July 1998, appellant provided the Government a packet of documents which, according to appellant, supported its claimed balance due on the above identified eight contracts (ex. J-2). The documents supplied by appellant with this letter were subsequently incorporated in the Government's Rule 4 submission as tabs 1 through 31 and tab 33. All the documents in the record dated prior to July 1998 were furnished by appellant and were incomplete. (See also finding 1) Appellant provided only a few of the relevant modifications, delivery orders, receipt reports, invoices, and payment records.

6. Upon the Government's receipt of appellant's documents, the contracting officer conducted a search of all ARCENT-SA contract files attempting to locate any Government controlled records with respect to the subject contracts (R4, tab 38; ex. J-2). This attempt to locate such files was unsuccessful, as were also searches of records in Kuwait and Fort McPherson, Georgia, the higher contracting authority. Therefore, by letter dated 13 September 1998, the contracting officer informed appellant that he had personally searched for Government controlled records dealing with any of the contracts in question and had not been able to find any record of the contracts or any related documents (R4, tab 36). He further stated that:

I can only assume based on the significant time that has passed from the contract completion dates to the date of inquiry, that the contracts were properly closed by a warranted Contracting Officer and subsequently destroyed in accordance with U.S. Government rules and regulations.

The contracting officer concluded that in absence of the records, he would "have no choice but to deny your request in total." Nevertheless, the contracting officer encouraged appellant to search its own records for additional documents relating to these contracts.

7. While the record is not clear as to whether appellant found further documents from its own files at that time, appellant informed the contracting officer on 30 September 1998 that its claim invoice was based on contract documents in its possession, and requested a meeting with the contracting officer and the ARCENT-SA commanding officer to discuss the matter (R4, tab 37). There is no evidence that appellant provided any further documents at this time. Therefore, the contracting officer issued a "final decision" in

which he stated that the Government would not pay any additional monies on appellant's request for additional compensation on these eight contracts (R4, tabs 38 to 39). This was not a formal final decision as that term is understood in Government contracting and did not contain any findings of fact or determinations of the Government's position with respect to the claim, nor did it contain any statement of the contractor's rights to appeal. Moreover, there had not been any formal claim and certification as required by the Contract Disputes Act of 1978 at the time this decision was issued. The contracting officer also noted that in some cases appellant's own documents establish that the Government had settled and paid some claims after the period of performance.

8. By letter dated 11 January 1999, appellant once again asserted its request for payment and stated that the settled claims were for damaged and/or missing equipment, not for the unpaid periods of performance that it was now seeking (R4, tab 40). Appellant stated that the contracting officer's reference to the settled and paid claims in his "final decision" referred to a claim for a damaged forklift and for missing water tankers and damage to water tankers. Appellant stated, however, that it would provide details for each contract for which appellant claimed that it had not been paid for the full performance period.

9. Following additional correspondence between the parties, meetings, and a telephone conference, the contracting officer issued a final decision on 28 January 1999 denying appellant's claims in the total amount of 10,017,574.00 SR (sic, 10,017,564.00 SR) (R4, tab 41). In his decision, the contracting officer stated that "[w]hile your claim is uncertified, I believe now your intent is to file a claim [under the Contract Disputes Act of 1978] for compensation for the related contracts." The contracting officer further stated that the Government had been unable to adequately state what contract terms were contained within the contracts since the contracts were no longer in existence and were presumed to have been closed and destroyed in accordance with applicable regulations. According to the contracting officer, the only documents relating to the disputed contracts

were partial extracts from these contracts provided by appellant in July 1998, over seven years after the contracts were completed. Indeed, appellant's documents indicated that appellant had signed releases for three of the eight contracts. (R4, tab 41)

10. On 31 March 1999, appellant submitted a certification of its claims to the contracting officer (ex. A-7). The certification, in the format prescribed under the Contract Disputes Act, referenced the above cited eight contracts, and asserted claims in the total amount of 4,470,365.00 SR, rather than the 10,017,564.00 SR claimed in its correspondence of 5 June 1998 (R4, tab 34). Appellant appealed the contracting officer's final decision of 28 January 1999 to the Board on 8 April 1999. In its notice of appeal, it referenced only five of the eight contracts under which it had previously asserted its claim, *i.e.*, DASA01-91-C-0009, DAKF12-91-C-8192, DAKF12-91-C-8143, DASA01-91-C-0011, and DASA01-91-C-0006. We note that the cited contract number ("C-0011") differs from the corresponding numbered contract ("D-0011") in finding 1, above. The correct contract number in dispute in this appeal is listed in finding 1. In its complaint, appellant asserted an entitlement to 4,470,365.00 SR plus interest on its claims running from 11 January 1999, the date appellant asserted its claims under the Contract Disputes Act. According to the contracting officer's final decision and paragraph 46 of appellant's complaint, Contract Nos. C-0001, C-0002, and C-8150 were settled shortly after the period of performance for these contracts, and appellant did not dispute that these contracts were settled.

11. After the appellant filed its appeal and its complaint, the Government, through its Third Army, Army Forces Central Command contracting office at Fort McPherson, Georgia (AFCENT-Main), conducted further searches for records of these contracts, including searches at the Government warehouse at Fort Gillem, Georgia, where the Government kept excess records, and at Forces Command Headquarters (ex. J-3). These searches resulted in recovery of some documents from partial files for Contract Nos. C-0009, C-8192, and D-0011. These documents included: (1) some documents relating to a settled claim for damaged equipment under Contract No. C-0009, which was unrelated to the instant appeal, and a contract close-out form, dated 28 April 1992, signed by appellant stating that all actions had been completed, that all invoices had been paid in full, and that there were no pending claims or pending amounts due under the contract, and a Contract Completion Statement form stating that all actions under the contract had been completed and final payment was made and disbursed (supp. R4, tab 105, ex. J-3); (2) dated invoices submitted by appellant during the period of March through June 1991 under Contract No. C-8192 with matching DD Form 250s several payment records indicating payment for these invoices, and a Contract Completion Statement form stating that all contract actions had been completed (supp. R4, tabs 118-127; exs. J-3, 4); (3) several delivery orders, a contract modification terminating for default a delivery order under Contract No. D-0011, a log indicating the dates and amounts of payments, a comptroller checklist for contract close-out, and a Contract Completion Statement form stating that all actions were complete, that the contractor had been paid in full, there were no claims pending against the

Government, and that the contract was closed (supp. R4, tabs 106-118; ex. J-3; tr. 2/213-213). Since some of these contracts' documents contained Fort Bragg, North Carolina fund cites, the Government conducted searches at the Fort Bragg finance offices for any related documents. None were found. The Government found no other files relating to the appealed contracts. There were no computer databases for contracts awarded during the 1991 time period, and no electronic storage of individual contract information. We find that the Government exercised all possible diligence in its search for records and in assisting appellant to perfect its claim. Attempts to locate potential eyewitnesses identified in the contract documents that were discovered during the search were unsuccessful, either because potential witnesses were no longer associated with the military and could not be located, or when found, had no specific recollection of these contracts. Two witnesses who were located had been contracting officers that closed out two contracts, D-0011 and C-8192. However, they had no specific recollection of the contracts, and only recalled general contracting procedures from that time period, relying on what they found in current Government contracts files. (Supp. R4, tabs 117-28; ex. J-4; tr. 2/212-13) At the time they closed out the contract files, they reconciled invoices with corresponding Material Inspection and Receiving Reports (DD Form 250s), final invoices with payment vouchers, and contract disbursement worksheets. Appellant subsequently submitted additional documentation to the Board as part of its supplemental appeal file submission (app. supp. R4, tabs 46 to 85).

12. By Notice of Hearing, dated 24 July 2001, the Board set the hearing for this appeal to begin on Sunday, 11 November 2001, in Bahrain. Appellant filed an amended complaint on 14 September 2001 in which it reduced the amount of its claim from 4,470,365.00 SR to 3,552,365.00 SR, plus interest. However, as a result of the attacks on the World Trade Center in New York, and the Pentagon in Washington, and the Worldwide Caution issued by the U.S. Department of State on 28 September 2001, the hearing was postponed to Monday, 8 April 2002, such hearing to be held in Bahrain. Shortly before the hearing on 8 April 2002, appellant supplied additional documents to the Government, which together with the belatedly discovered documents, were filed with the Board on 15 March 2002, as supplementary appeal file. (Supp. R4, tabs 100 to 129)

13. Then, during the hearing in Bahrain, appellant submitted additional documents in support of its claimed unpaid balances on these contracts prepared for the hearing (exs. A-1 through -5; tr. 1/26-31, 122-23). These contained a "Statement of Invoices" and "Statement of Cheques Received" under each of the respective contracts with copies of alleged invoices which purported to summarize its claim and the bases for its claimed entitlement to certain sums that, according to appellant, had not been paid during contract performance. These alleged invoices were labeled "Claim Invoices," were undated, and prepared in a different format on letterhead stationery different than the letterhead stationery on which appellant's invoices were prepared and submitted to the Government in 1998 reflecting alleged invoice submissions during the performances of the contracts. None of the invoices submitted by appellant in its 1998 submission were labeled "claim invoices." The

“claim invoices” asserted amounts due based on appellant’s review of its records. Appellant subtracted the payment amounts it asserted that it had received from the Government under the contracts from appellant’s computation of the amount which it calculated as due based on the contract prices specified in each contract’s Schedule for the period covered by each contract, beginning with the date of contract award and ending on the last date of the contract term. In determining the last date of the contract term, or performance completion date, appellant included the completion date of option periods without regard to whether the options were exercised. Appellant also calculated the amounts alleged to be due without regard to whether the Government had possession of all the equipment identified in the Schedule for the full term, including option periods.

Claims for Unpaid Invoices

14. The Government awarded appellant Contract No. C-0009 for the lease of six each D8 Dozers with Ripper Attachments, on 3 February 1991, for a base period of 3 February 1991 through 3 April 1991, with an option period of 4 April 1991 through 2 June 1991 (R4, tab 3). The record in this appeal contains an undated invoice in the amount of 360,000.00 SR for the lease of the dozers for the period of 3 February 1991 through 2 March 1991 (R4, tab 28). There were no DD Form 250s in the record indicating the date appellant delivered these dozers to the Government. In its complaint dated 10 June 1999, appellant included Contract No. C-0009, as one of the contracts subject to its appeal, and asserted that under this contract, the Government had made only one payment in the amount of 306,000.00 SR as payment for 30 days (5 March through 3 April 1991) even though the Government had possession of the equipment through 2 June 1991. According to its complaint, appellant had submitted two additional invoices (306,000 SR and 612,000 SR) totaling 918,000.00 SR, which amount remained due appellant under this contract. However, in its amended complaint dated 14 September 2001, appellant did not include Contract No. C-0009 as one of the contracts subject to the appeal, and did not contain any factual allegations relating thereto. According to appellant’s business manager, when appellant prepared its claim for unpaid invoices, it was not aware that appellant’s owner had previously signed a release closing out that contract. (R4, tab 34; tr. 1/127-29) Indeed, appellant had no records relating to Contract No. C-0009 in its offices in Saudi Arabia. Appellant discovered this prior release as a result of the Government’s response to appellant’s discovery request which contained partial files for Contract No. C-0009. As a result, appellant was no longer seeking recovery for the alleged unpaid invoice relating to Contract No. C-0009.

15. Contract No. D-0006, was an Indefinite Quantity type contract for the lease of 50 Diesel Forklifts of various sizes (R4, tab 4). This contract was awarded on 4 February 1991, for a base period of 4 February through 2 August 1991, with an option period of 3 August 1991 through 30 September 1991. The initial record submission in this appeal contained only three pages of a total of 48 pages in the contract, and did not contain any contract clauses or other provisions relevant to the performance requirements of the

contract. However, appellant subsequently produced an additional 35 pages of this contract in its supplemental submission to the appeal file. (App. supp. R4, tab 46) Paragraph F.5.1 provided that the desired delivery schedule was within three to six days after the delivery order, the required delivery schedule was two to three days after the delivery order, and appellant's proposed delivery schedule corresponded to the Government's required delivery schedule for the base period. Appellant's proposed delivery for the option period corresponded to the Government's desired delivery schedule for that period. There were no modifications in the record indicating that the Government had exercised the option.

16. The record also contains eight delivery orders issued under this contract. Delivery Order No. 00001, issued on 4 February 1991 for 22 diesel forklifts of various sizes provided for a period of performance of 4 February 1991 through 2 August 1991 (R4, tab 6). Delivery Orders Nos. 0003 and 0004 were issued on 23 September 1991 (R4, tab 17). Delivery Order No. 0003 was for 30 forklifts, ordered on the basis of the number of days. No performance schedule was noted in this delivery order. Delivery Order 0004 merely cited an amount of 1,884,996.00 SR for diesel forklifts, but did not specify the number of forklifts or days ordered and did not contain any performance period. Delivery Order No. 0005, issued on 27 September 1991, was for 22 forklifts of various sizes ordered by the number of days. (R4, tab 21) No performance period was specified. Delivery Order No. 0007, issued 2 October 1991, was for 34 forklifts of various sizes on the basis of days ordered (R4, tab 22). No performance period was specified. Delivery Orders Nos. 0008 and 0009 were issued on 22 and 28 October respectively (R4, tabs 23 - 24). The Government ordered diesel forklifts of various sizes under these delivery orders, with each order specifying the performance period for the forklifts of that size, extending from 23 October 1991 through 6, 13, and 30 November 1991. Delivery Order No. 0010 was issued on 1 December 1991, for four rough terrain 4-ton forklifts for the period of 1 through 31 December 1991 (R4, tab 25). All of these delivery orders were one-page documents in the record, and none indicated whether or not the forklifts ordered had been inspected, received, or accepted. On 20 December 1991, the Government issued a modification to Delivery Order No. 0008, which extended its period of performance for one of the line items by nine days and increased the amount of the delivery order (R4, tab 27). There were no other modifications in the record authorizing any extensions of the contract term beyond the 30 September 1991 completion date for the option period specified in the contract.

17. Appellant submitted 37 invoices under Contract No. D-0006 (R4, tab 10). These invoices were dated from 11 March 1991 through 9 January 1992, 28 of which were accompanied by corresponding DD Form 250s. The earliest DD Form 250 was signed by the Government on 8 April 1991 for eight diesel forklifts of various sizes. The remaining DD Form 250s were signed by the Government between 7 May 1991 and 7 December 1991 for various quantities of diesel forklifts of various sizes for various periods of performance. Appellant's 11 March 1991 invoice covers the supply of 18 forklifts of various sizes for various performances periods beginning on 9 February 1991 and extending

to 11 March 1991. Appellant's 19 March 1991 invoice covers eight additional diesel forklifts of various sizes for various performance periods extending from 17, 20, and 23 February 1991 to 18, 20, and 24 March 1991. None of the remaining invoices and DD Form 250s in the appeal file related to appellant's supply of diesel forklifts for the period prior to 9 February 1991. (R4, tab 10) Appellant has not asserted that any of these invoices was unpaid.

18. After filing the appeal, appellant produced five additional invoices which were received by the Board in August 1999 as supplemental documentation to the record (app. supp. R4, tabs 47 to 51). Only one of these invoices was dated, and that one was dated 8 May 1991 for forklifts provided during the period of 9, 10, and 11 April to 8, 9, and 10 May 1991 (app. supp. R4, tab 50). The other invoices were undated and characterized as "claim invoices" and totaled 348,965.00 SR. There is no evidence whether these additional invoices had ever been submitted to, or received by the Government prior to appellant's supplemental submission to the record in this appeal.

19. During the hearing in this appeal, appellant presented a number of exhibits that purported to summarize its claims and the bases for its claims to entitlement to certain sums that, according to appellant, had not been paid during contract performance. Appellant's Statement of Cheques Received under contract D-0006 shows a total of 2,706,625.00 SR received by appellant from the Government's payment of 18 invoices, beginning with 10 March 1991 and continuing periodically through 2 August 1991 (ex. A-1; tr. 1/25-27). Although there is no accurate correspondence to the dates of the invoices identified on the Statement of Cheques Received submitted by appellant during the hearing and the appeal record containing appellant's prior submission of documents, 14 of the identified invoices in the Statement of Cheques Received corresponded to invoices submitted by appellant for the appeal file, one invoice is undated, although it corresponded to the invoice previously submitted, and one invoice identified in the Statement of Cheques Received corresponded with an invoice in the supplemental appeal file submitted by appellant (ex. A-1; R4, tab 10; app. supp. R4, tab 50). Two of the invoices identified on the Statement of Cheques Received, i.e., 58,950.00 SR, 30 June 1991, and 48,390.00 SR, 2 August 1991, did not correspond to any invoices in the appeal file. There were an additional 20 invoices under Contract No. D-0006 in the appeal file totaling a sum in excess of 4 Million SR. Appellant has not asserted that it was not paid under any of these invoices or the invoices identified in its Statement of Cheques Received.

20. In preparation for the hearing in this appeal, appellant had prepared a "Statement of Invoices" setting forth the bases for its claim under Contract No. D-0006 (ex. A-1; tr. 1/26-31, 122-23). According to this "Statement of Invoices," appellant had submitted four invoices totaling 348,965.00 SR, the amount appellant claimed due in its amended complaint (see also finding 12). Each of these "unpaid claim" invoices was based on the alleged delivery of equipment to the Government on 4 February 1991, the date of the contract award, except the last "claim invoice," which was alleged to be based on periods in

November 1991 between its last paid invoice and the date the equipment was returned to appellant prior to the “initial period.” We are unable to determine from the record what appellant meant by “initial period” in this “claim invoice.” The final “unpaid claim” invoice was based on Delivery Order 0005. However, there were four additional delivery orders issued after Delivery Order 0005, and appellant’s manager testified that he did not know what they were for, and also that he did not know whether any modifications had been issued on this contract. (R4, tabs 22 to 25; tr. 1/158) There were no DD Form 250s reflecting the dates for the delivery of equipment, nor was there any other evidence indicating the Government’s receipt of the equipment (tr. 1/31-32, 35-37, 41, 47-49). Unlike the invoices which appellant acknowledged to have been paid, these “unpaid claim” invoices were printed on different style letterhead stationery and were undated (see also finding 13; ex. A-1).

21. The Government awarded Contract No. D-0011, an Indefinite Quantity contract, to appellant on 11 February 1991 for the lease of a minimum quantity of 22 Electric Forklifts of various sizes for a base period of 180 days and for an option period of 75 days under separate CLINs (R4, tab 55; ex. A-2). The base period ran from 11 February 1991 to 9 August 1991, and the option period ran from 10 August 1991 to 30 September 1991.

22. During the period of contract performance, extending from early 11 February 1991 to 30 September 1991, appellant submitted 22 invoices, all of which were dated except for two, and all of which were submitted on identical letterhead stationery (R4, tab 11). These were all supported by DD Form 250 which appeared to conform to the periods for which these invoices were submitted.

23. On 5 June 1998, appellant submitted an invoice for amounts it claimed due under the eight contracts identified in finding 1 (R4, tab 34). The amount claimed due for Contract No. D-0011 was 1,392,360 SR. According to appellant’s complaint, appellant had submitted eight invoices under Contract No. D-0011 totaling 1,823,800.00 SR which were not paid by the Government despite the fact that the Army had possession of the equipment during the contract period. This amount alleged to be due appellant under this contract remained the same in appellant’s amended complaint dated 14 September 2001. During the hearing in this appeal, appellant asserted 1,801,960.00 SR as due under this contract. (App. supp. R4, tabs 59 to 63, 66; ex. A-2; tr. 1/52-53, 55, 57-58, 61-62)

24. In its July 1998 packet in support of its claim submitted to the Government, appellant provided three of the 46 pages of Contract No. D-0011, three delivery orders, two payment vouchers, and 18 invoices with matching DD Form 250s (finding 4; R4, tabs 5, 7, 11, 13, 16, 19). Appellant did not assert at the hearing that any of these invoices in its July 1998 packet was unpaid (A-2).

25. Appellant submitted to the Board further documentation relative to its appeal in August 1999. Appellant included in this submission 39 of the 46 pages of Contract No. D-

0011, two additional delivery orders, one contract modification, and ten additional invoices (app. supp. R4, tabs 55 to 68; ex. A-2). The invoices in this August 1999 submission were on letterhead stationery different than the invoices submitted during the contract period, were undated, and identified as "CLAIM INVOICE FOR ELECTRIC FORKLIFT." (See finding 13) There is no evidence that appellant had submitted these invoices to the Government prior to its submission of supplemental documentation to the Board in August 1999, or that the Government had received any of these invoices prior to that time.

26. At the hearing, appellant submitted a one-page "Statement of Cheque [sic] Received" and a "Statement of Invoices" which had been prepared for presentation at the hearing and which summarized appellant's receipt of Government payment on invoices submitted by appellant and appellant's claim for unpaid invoices under Contract No. D-0011 (ex. A-2). The "Statement of Cheque [sic] Received" reflects that appellant received 1,749,200.00 SR in payment of 18 invoices beginning with an invoice submitted on 18 March 1991 covering the period of 19 February 1991 to 18 March 1991, and ending with invoice no. 18 submitted on 30 September 1991 covering the period of 1 September 1991 to 30 September 1991. This compilation failed to include an invoice dated 15 July 1991 for 241,920.00 SR (R4, tab 11). This 15 July 1991 invoice had been altered to reflect that appellant was due 172,800.00 SR. We are unable to find, based on our review of the record, an explanation for this difference, and why appellant's Statement of Cheques Received, does not accurately reflect the invoices submitted and payments made thereunder.

27. According to this "Statement of Invoices," appellant had submitted eight claim invoices under Contract No. D-0011 totaling 1,801,960.00 SR (ex. A-2). Although appellant admitted that it had been paid on invoice No. 1 for the period of 19 February 1991 through 18 March 1991, the amount appellant claimed due on this invoice was 97,400.00 SR for the period of 12 February through 18 February 1991. According to appellant, the equipment was delivered to the Government on 12 February 1991, the date the contract was awarded and the beginning date of the base period of that contract (tr. 1/50-52). Although the record reflects the date of award and the base period, there is no documentary evidence, such as the DD Forms 250, in the record supporting the paid invoices, to establish the date the Government received this equipment. In the "claim invoices" Nos. 2 through 6, appellant sought the difference between electric forklifts it provided for which it admitted that it was paid, and the remainder of the 22 forklifts specified in the contract that appellant asserted were provided for each of the contract months for which the claim invoices were allegedly submitted. "Claim invoices" Nos. 7 and 8 were for the periods of 14 August to 30 September 1991, and 1 May to 29 July 1991, respectively, corresponding to two delivery orders identified as Delivery Order No. 0003, one dated 29 April 1991 and the other dated 14 August 1991 (supp. R4, tabs 56 and 58). These delivery orders were terminated for default because appellant was unable to deliver the equipment ordered by the delivery orders (supp. R4, tabs 108, 113). Appellant's business manager testified that he did not realize that the delivery orders had been terminated and was not sure whether the equipment had actually been delivered (tr. 1/169-70).

28. At the time of the close-out of Contract No. D-0011, the comptroller prepared a close-out checklist, which included a form letter sent by the contracting officer, by facsimile, to appellant requesting appellant to verify that there were no outstanding claims pending on the contract (supp. R4, tabs 104, 117; tr. 2/215-18, 236). The form letter stated that the Government had determined that all actions under the contract were completed and that all invoices had been paid in full. Contractors generally returned these form letters signed with their responses as to whether or not there were any claims pending. There is nothing in the record regarding this particular contract to establish whether or not appellant returned that form letter. However, the record contains a "Contract Completion Statement" form, DD Form 1594, signed by the ARCENT-SA comptroller and the contracting officer on 12 May 1992, which stated that all action under Contract No. D-0011 had been completed, that the contractor was paid in full, that there were no claims pending against the Government, that the commitments, obligations and disbursements were equal, and that the contract was closed out. (Supp. R4, tab 110; tr. 2/218)

29. The Government awarded Contract No. C-8143 to appellant on 5 January 1991 for the lease of five each Five-Ton Flatbed Cargo Trucks for a base period of 90 days and for two option periods of 90 days each (R4, tab 1; supp. R4, tab 69; ex. A-3). The base period ran from 5 January 1991 through 4 April 1991, and the option periods ran from 5 April 1991 through 3 July 1991, and 4 July 1991 through 30 September 1991. The contract price for the base period was 168,750.00 SR, and the price for each option period was 168,750.00 SR. The Government never exercised the options (tr. 1/179-80).

30. In its 5 June 1998 "Invoice" covering the alleged amounts due on each of eight contracts, appellant asserted that 237,750.00 SR was due appellant under Contract No. C-8143 (finding 4; R4, tab 34). No details were included in this invoice other than the balance alleged due on that contract. In appellant's amended complaint, appellant alleged that the Government had not paid appellant 112,500.00 SR for the lease of the five five-ton flatbed cargo trucks under this contract, although the Government had possession of those trucks during the contract period. According to the amended complaint, the total figure was based on two unpaid invoices, each in the amount of 56,250.00 SR. Appellant's amended complaint correctly asserted that contract provided for a base period of 90 days running from 5 January 1991 through 4 April 1991, and that there were two option period of 90 days each. However, appellant did not assert the period during which the Government had possession of those trucks, nor did it allege that the option periods had been exercised.

31. Since the Government had no records concerning this particular contract, all records concerning both the contract and invoices were provided by appellant, either on 4 July 1998 in its submission of the claim to the Government, or as part of the supplementation of the record in connection with processing its appeal filed with the Board on 15 March 2002, immediately prior to the hearing in Bahrain on 8 April 2002 (findings 5, 12). In its 4 July 1998 submission of documents in support of its claim, appellant provided

an undated invoice in the amount of 56,250.00 SR for the period of 5 February 1991 to 5 March 1991 for a total quantity of 150 days, that is, five trucks for 30 days each (R4, tab 8). Appellant submitted four undated additional invoices, each in the amount of 56,250.00 SR, as part of its supplementary appeal file submission in March 2002, none of which were stamped as having been received by the Government (supp. R4, tabs 70-73). Each of these was on a different style letterhead than the earlier submission and was labeled as "Claim Invoice for Cargo Trucks," and stated "We are pleased to submit you [sic] the claim invoice for cargo truck in the base period under contract# DAKF12-91-C-8143," and stated the specific period covered by the invoice. The first covered the period of 5 January 1991 through 4 February 1991 for five trucks. The second covered the period of 6 March 1991 through 4 April 1991. The third covered the period of 6 March 1991 through 4 April 1991. The fourth covered the period of 6 March 1991 through 4 April 1991. It would appear that these last three invoices were copies of the same invoice since they were identical and covered the same period. During the hearing in this appeal, appellant submitted three undated invoices. (Ex. A-3) One invoice appeared to be identical to the invoice it submitted on 4 July 1998, in its submission of documents in support of its claim, was stamped as having been received by the Government on 4 March 1991, and covered the period of 5 February 1991 to 5 March 1991. Another invoice appeared to be identical to an invoice submitted on or about 15 March 2002 covering the period of 6 March 1991 through 4 April 1991 (app. supp. R4, tab 72). One other invoice submitted at the hearing covered the period of 5 January 1991 through 4 February 1991.

32. Appellant had not provided any documentation showing when payment was received on these invoices, although its "Statement of Cheque [sic] Received" under this contract stated that appellant had received 56,250.00 SR for the period of 5 February 1991 through 5 March 1991 (ex. A-3 at 23; tr. 1/64). According to appellant, it delivered the five trucks to the Government on 5 January 1991, the date of contract award (tr. 1/62-63). Appellant's business manager testified that appellant had obtained the trucks under a subcontract and had paid the subcontractor for the trucks for the entire base period beginning with 5 January 1991 (tr. 1/63-64). The amount of unpaid invoices under this contract was alleged to be 112,500.00 SR for two months, that is, 5 January 1991 through 4 February 1991, and 6 March 1991 through 4 April 1991, each for 56,250.00 SR (tr. 1/64-65). The record did not contain any DD Form 250s for the trucks under this contract.

33. The Government awarded Contract No. C-8192 to appellant for the lease of six D8 Dozers with Ripper Attachments, without operator and two Mobile Rough Terrain 40-ton Cranes on 21 January 1991 (R4, tabs 2, 12; app. supp. R4, tab 74; supp. R4, tab 117). The only copy of a portion of the contract was provided by appellant, initially two pages provided by appellant on 4 July 1998, and subsequently 39 pages provided by appellant on 15 March 2002 shortly before the hearing (findings 5, 12; R4, tab 2; app. supp. R4, tab 74). The base period for the lease was 21 January 1991 through 20 April 1991, with an option period of 21 April 1991 through 19 July 1991. The contract provided in paragraph F.5 for delivery not later than four days after contract award. By contract Modification No. P0001,

dated 21 April 1991, the Government exercised its option and extended the lease for four dozers and two mobile cranes from 21 April to 27 May 1991. (R4, tab 12)

34. In its 5 June 1998 invoice, appellant claimed that balance due appellant on the dozer Contract No. C-8192, was 1,447,500.00 SR (R4, tab 34). In appellant's 4 July 1998 submission of additional documents allegedly in support of its claimed balance due, appellant included three invoices in the total amount of 983,300.00 SR (R4, tabs 9, 14, 26; supp. R4, tab 118). The first, in the amount of 229,500.00 SR, bore a stamp indicating its receipt by the Government on 4 March 1991 (R4, tab 9). According to this invoice, this was the amount due for the lease of equipment for use by the 1st Armored Division and the 3rd Armored Division for the period of 5 February 1991 to 4 March 1991. The second invoice was dated 8 May 1991 and covered the period "thru 28 April 1991, the final Bill for above contract." The third invoice, dated 10 December 1991, with a date stamp indicating its receipt by the Government on 10 December 1991, was titled "CLAIM INVOICE FOR ENG, EQUIPMENT RETURN BEFORE OPTION PERIOD COMPLETE." (R4, tab 26) This claim invoice was based on equipment that the Government had returned to appellant on 27 May 1991, which was before the conclusion of the originally specified option period of 19 July 1991, but was the expiration date of the contract term as extended by the Government. In appellant's 14 September 2001 amended complaint, appellant asserted that although the Government had paid appellant 896,200.00 SR, appellant had submitted seven invoices totaling 1,267,100.00 SR which had not been paid notwithstanding the alleged Government possession of the equipment leased under Contract No. C-8192.

35. Appellant provided eleven additional invoices on 17 August 1999 as part of its supplemental submission to the appeal file (app. supp. R4, tabs 75 to 85). At the hearing in April 2002, appellant submitted a package of twelve invoices under this contract (ex. A-4). There were some invoices that were common or duplicate to both August 1999 and April 2002 submissions, some invoices in its August 1999 submission that were not contained in its April 2002 submission, and some invoices in its April 2002 submission that were not contained in its August 1999 submission. These invoices in both submissions were all undated and some in both submissions were entitled "claim invoices." There were nine "claim invoices" in the August 1999 submission and seven "claim invoices" in the April 2002 submission which were prepared on letterhead stationery different than the invoices that were not identified as "claim invoices," and which were different than the dated invoices which appellant submitted to the Government on 4 July 1998. (Finding 13) Nevertheless, according to the appellant's evidence at the hearing, seven of these invoices had not been paid (ex. A-4).

36. Appellant noted that there were undated invoices which were paid by the Government (app. supp. R4, tabs 79, 80, 83; ex. A-4; tr. 1/72-73, 76). However, each of these had a corresponding dated invoice for the same equipment for the same period and for the same amount, and each invoice was supported by a DD Form 250 (supp. R4, tabs 119, 120, 123). One of the invoices, dated 1 April 1991, contained a note stating that "as per our

meeting with Major Beniot that Two (2) Dozzer [sic] job is terminated and two will be still in operation” (supp. R4, tab 120). The undated invoice in appellant’s supplement to the appeal file that corresponded to the 1 April 1991 invoice, covered the same equipment for the same period of time, for the same organization, 1st Armored Division, was prepared in a slightly different format and addressed to Major Wands rather than Major Benoit, and did not contain the same note with respect to the terminated dozers.

37. According to the “Statement of Invoices” prepared by appellant for the hearing in this appeal, appellant had been paid 902,100.00 SR for the period of 5 February 1991 through 27 May 1991, and was due from the Government a total of 1,246,700.00 SR. This amount alleged to be due appellant was supported by the seven “claims invoices” in appellant’s April 2002 submission during the hearing (ex. A-4). Although appellant acknowledged receipt of payment for the lease of six dozers for the period of 5 February 1991 through 4 March 1991 for the first invoice appellant submitted, appellant’s first two “claim invoices” were for six dozers and two 40-ton cranes for the period of 24 January 1991 through 4 February 1991. According to appellant, these invoices covered the period beginning with 24 January 1991 because this was the beginning of the base period specified in the contract and was the date the equipment was delivered to the Government (tr. 1/70-71). “Claim Invoice” No. 2 included a charge for two cranes for the period for which appellant had not previously submitted any invoice for the two cranes (app. supp. R4, tabs 75 to 88; ex A-4; tr. 1/71). There were no DD Form 250s, or other documentary evidence in the record, indicating that the equipment had been delivered to the Government, or the date of delivery. Moreover, there is no evidence why appellant delivered equipment on 24 January as it asserts as the beginning date of the contract base period, when the contract stated that the base period ran from 21 January 1991 through 30 April 1991.

38. Appellant’s “claim invoices” Nos. 3 and 4 were for the lease of cranes during the period of 5 February through 4 March 1991, and 5 March through 17 March 1991 respectively (ex. A-4). According to appellant, in the case of “claim invoice” No. 3, appellant provided two cranes for the period of 5 February through 4 March 1991. There is no evidence in the record that appellant submitted any invoice for these cranes for this period prior to its submission of these “claim invoices” in 1999 as part of appellant’s supplemental submission to the appeal file. “Claim invoice” No. 4 was for lease of one crane for the period of 5 March through 17 March 1991. This invoice had not been submitted to the Government prior to 1999 as part of its supplemental submission to the appeal file. Appellant had previously invoiced an amount of 26,650.00 SR for one crane for the same period and had been paid that amount. Both the “claim invoice” and the prior invoice were undated. According to appellant, the amount claimed in its “claim invoice” No. 4 was due because the contract had provided a requirement for the lease of two cranes which were in the Government’s possession, and appellant had only been paid for the lease of one crane. (Tr. 1/71-73) There were no DD Form 250s supporting the delivery of two cranes for this period. Further, according to all of appellant’s “claim invoices” the Government had two cranes from 24 January 1991 through 28 April 1991 (ex. A-4).

However, according to the record in this appeal, prior to appellant's 1999 supplemental submission to the appeal file, appellant had invoiced the Government for only one crane for the period of 5-17 March 1991, and had been paid 26,650.00 SR for the lease of that crane (app. supp. R4, tab 79; ex. A-4).

39. "Claim invoice" No. 5, in the total amount of 279,300.00 SR, was for two dozers and two cranes, for the period 18 March 1991 through 28 April 1991 (app. supp. R4, tab 82; ex. A-4). Appellant admitted that it had invoiced and been paid 295,800.00 SR for four dozers for the period of 5 March 1991 through 28 April 1991 (app. supp. R4, tab 80; ex. A-4; tr. 1/73). Appellant had also been paid for two dozers for the period of 5 March 1991 through 17 March 1991. Although Contract No. C-8192 called for six dozers for the base period, and although appellant had invoiced and been paid for six dozers for the base period extending from 5 February 1991 through 4 March 1991, and for two dozers covering the period of 5 March 1991 through 17 March 1991, and four dozers for the period 5 March 1991 through 28 April 1991, except for the "claim invoice" No. 5, there was no explanation in the record for the absence of invoicing and payment for two dozers for the period of 18 March 1991 through 28 April 1991.

40. According to appellant's "Statement of Invoices" for Contract No. C-8192, Invoice No. 6, in the amount of 73,950.00 SR, was for two dozers supplied by appellant to the Government for the period of 29 April 1991 through 27 May 1991 (ex. A-4). Prior to its submission of its exhibits during the hearing, there was no invoice that specifically corresponded to the invoice listed in appellant's "Statement of Invoices" for this contract. Undated "claim invoice" No. 6, submitted as evidence during the hearing, was in the amount of 73,950.00 SR (ex. A-4). This "invoice" provided in pertinent part, that it was a "claim invoice for the equipment supply [sic] to the 3rd Armored Division 2 ea rough terrain 40 tons crane from" The "FROM" and "THRU" dates have been removed by white out, and handwritten entries have been made for the period of 21 April 1991 through 27 May 1991. However, in the "Details" section of the "invoice," the description of the provided services provided that two dozers were provided for the period of 21 April 1991 through 27 May 1991. Although this specific "claim invoice" had not been submitted to the Government (or to the Board) prior to its submission as an exhibit during the hearing in April 2002, it appeared to be an altered duplicate of a "claim invoice" submitted by appellant as part of its supplemental appeal file documents in August 1999. (App. supp. R4, tab 84) The two invoices, both undated, were on identical letterhead stationery, which stationery was different than the stationery used for its previous invoices, contained the same language with respect to the items for which the invoice was submitted, both in the introductory paragraph and in the item description section (*see also* finding 13 regarding the different letterhead invoices and "claim invoices"). The amount asserted in the "claim invoice" submitted in August 1999 was 94,350.00 SR, and the covered period had been changed from the typed 4 May 1991 through 28 May 1991, to a handwritten entry indicating the period as 21 April 1991 through 27 May 1991 in one place and as 21 May 1991 through 27 May 1991 in another place (app. supp. R4, tab 84). In appellant's April 2002 submission of

the invoice as a trial exhibit, the original dates had been whited out, and the handwritten dates conformed to the handwritten dates in its August 1999 submission, and the amount claimed due in the earlier submission had been whited out, and a new amount of 73,950.00 SR had been inserted by handwriting (ex. A-4; app. supp. R4, tab 84). As we found above, the Government exercised the option to extend the contract from 21 April 1991 to 27 May 1991 for four dozers and two cranes (finding 33). Appellant had previously submitted an invoice on stationery different than the stationery used in its “claim invoices” for the lease of four dozers and two cranes for this option period, and according to appellant’s “Statement of Invoices” appellant had been paid for these four dozers and two cranes leased by the Government during this option period (app. supp. R4, tab 83; ex. A-4).

41. Appellant’s “claim invoice” No 7 was in the amount of 611,000.00 SR (ex. A-4). This undated “invoice,” prepared on letterhead stationery different than the stationery used in the invoices submitted to the Government during the contract performance, was for six dozers and two cranes allegedly provided to the Government for the period of 28 May 1991 through 19 July 1991 (app. supp. R4, tab 85; ex. A-4). As we found above, the contract was extended by option from 21 April 1991 to 27 May 1991 for four dozers and two cranes (findings 33, 40). According to appellant’s amended complaint, paragraphs 31 and 32, the Government again extended the contract from 28 May 1991 through 19 July 1991, and retained possession of this equipment during this period. However, appellant’s business manager testified that the Government returned the equipment to appellant on 27 May 1991 (tr. 1/78). This conclusion is supported by appellant’s invoice of 26 June 1991 in which appellant stated that this was the final invoice for this equipment under Contract No. C-8192 and that “All Equipment Has been returned to the contractor” (app. supp. R4, tab 123). Appellant asserts that it is entitled to be paid for these six dozers and two cranes for the full option period of 21 April 1991 to 19 July 1991, because that was the option period set forth in the contract and because appellant had paid its supplier for this equipment for that period (tr. 1/78-79).

42. The Government’s records for this contract contained five dated invoices, each with the matching DD Form 250 (supp. R4, tabs 118 to 121, 123). These invoices were all submitted by appellant on letterhead stationery different than the letterhead stationery used in appellant’s subsequently submitted undated “claim invoices,” and according to both the Government’s payment records and appellant’s “Statement of Invoice” had been paid by the Government (supp. R4, tabs 118 to 121, 123, 128; ex. A-4; ex. J-4).

43. Appellant obtained the equipment it leased to the Government under subcontracts with several subcontractors, and according to appellant, was required to pay the subcontractors for the equipment during the time it was in the Government’s

possession (tr. 1/84-85, 94-110; ex. A-5). This included contractually specified option periods even though the Government did not exercise the full option periods authorized by the contracts or returned the equipment to appellant at the conclusion of the periods covered by the Government's exercised option periods. Except for five pages which are in English and purport to summarize the payments appellant made to the subcontractors, all the documents offered in evidence that purport to be subcontracts and payment vouchers to or from subcontractors were in Arabic with no English translations. These documents were all prepared by appellant on its own letterhead paper. There was no documentation from the subcontractors confirming the existence of any subcontract agreements, no invoices from any subcontractor, and no bank or other payment records, such as canceled checks, tending to establish payments made. Indeed, appellant's business manager testified that there were no subcontractor records to provide to the Government (tr. 1/124). Accordingly, we are unable to make any finding concerning the existence or the terms of the subcontracts, nor are we able to make any findings concerning appellant's alleged payments to subcontractors.

DECISION

Although the Government asserted, in its answer, the affirmative defense of laches with respect to appellant's single certified claim covering alleged unpaid invoices in all five contracts, it limited its affirmative defense to Contracts Nos. D-0006 and C-8143 in its amended answer and its post-hearing brief. As we found above, after appellant filed its appeal and complaint, the Government, in further searches of Government records, located some documents relating to Contracts Nos. C-0009, C-8192, and D-0011. We are not persuaded that these documents provided the Government with a sufficient basis for a full defense of appellant's claim, and are of the opinion that the Government's inability to locate any witnesses with first-hand knowledge of the performance and administration of the contracts may have further prejudiced its ability to defend these claims. However, we recognize that the Government, in its amended answer, modified and superseded its prior answer, to the effect that it limited its affirmative defense of laches to Contracts Nos. D-0006 and C-8143. *See, Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1365 (Fed. Cir. 2000), quoting 6 WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 1476 (2d ed. 1990) at 556-57:

A pleading that has been amended under Rule 15(a) [of the Federal Rules of Civil Procedure] supersedes the pleading it modifies. . . . Once an amended pleading is interposed, the original pleading no longer performs any function in the case . . .

..

Nevertheless, the gist of the Government's argument is that appellant delayed in filing its claim for over six years, and that the Government had shown (1) appellant's lack of diligence, or unreasonable and unexcused delay, and (2) prejudice to the Government through the impairment of its ability to defend due to loss of records, destruction of evidence, or unavailability of witnesses, citing *Home Entertainment International, S.A.*, ASBCA No. 50920, 98-2 BCA ¶ 29,959.

We agree that the doctrine of laches is settled law, and that the party asserting the doctrine must prove that the other party's delay in filing its claim was due to (1) lack of diligence, or unreasonable and unexcused delay, and (2) that the party asserting the defense of laches was prejudiced by the other party's delay in asserting the claim. *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 5 (Fed. Cir. 1985); *Home Entertainment International, S.A.*, *supra*, 98-2 BCA at 148,238; *Rudolf Bieraeugel, Stahl-und Metallbau, GmbH*, ASBCA No. 47145, 95-1 BCA ¶ 27,536 at 137,220, *aff'd*, 91 F.3d 167 (Fed. Cir. 1996) (table). Laches is generally defined as "slackness or carelessness toward duty or opportunity" and in a legal context, as "neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (*en banc*).

As we have found above, the Government awarded appellant eight contracts in early 1991 during the Gulf War. These contracts were for the lease of various types of heavy equipment under various contract types for various terms extending from January and February 1991 through as late as September 1991 in accordance with the Government's exercise of options to extend the respective contract terms. On 10 January 1992, appellant wrote the contracting officer stating that per its records, it had not been paid in full for these referenced contracts. However, there were no amounts claimed to be unpaid and due, either with respect to each of the identified contracts or in the total amount for all the contracts.

More than six years later, by letter dated 5 May 1998, appellant's president informed the contracting office that per its records, appellant still had a claim pending against these contracts. However, once again there were no amounts claimed nor were there any descriptions of the bases for the asserted Government liability. This asserted claim was not certified and did not contain any supporting documentation. In response to an apparent request by the Government, appellant by an "invoice" dated 5 June 1998, listed the eight contracts and identified the specific balances due on each of the eight contracts for a total amount of 10,017,564.00 SR claimed due. By letter dated 4 July 1998, appellant provided the Government a packet of documents purporting to support the claimed balance due on the eight contracts. Following the Government's denial of appellant's claim, which was still uncertified, appellant, on 31 March 1999, submitted a certification in the format prescribed by the Contract Disputes Act, referencing the previously asserted eight contracts, but reduced the total amount of its previously asserted claim of 10,017,564.00 SR to

4,470,365.00 SR claimed as due. As we found above, appellant appealed the contracting officer's final decision denying its claim. In its appeal, appellant referenced only five of the previously identified eight contracts. According to the contracting officer's decision and appellant's complaint, the alleged claims relating to three of the contracts had been settled after the period of performance of those contracts.

During the period of 1991 to late 1998, appellant continued to perform other unrelated contracts for the Government and had frequent contacts with Government officials, including various contracting officers. Moreover, both appellant's owner and president and appellant's business manager were told, and knew that appellant had to submit its claim in writing, and understood the appellant's rights to appeal an adverse decision to the Board. Accordingly, we hold that appellant's delay in submitting its claim to the Government was due to lack of diligence, or unreasonable and unexcused delay.

We further hold that the Government was prejudiced by the appellant's failure to submit its claim due to its lack of diligence and unreasonable and unexcused delay. Although appellant first asserted that an unspecified amount was due on eight contracts by letter dated 5 May 1998, it was not until 5 June 1998 that appellant specified the amounts alleged to be due on each of the eight contracts. It was not until 4 July 1998 that appellant provided the Government any documents that it asserted supported its claim for unpaid balances due on these contracts. All these documents were incomplete. Appellant provided only some partial portions of the contracts at that time, such as the cover pages of the contracts and/or the Schedule pages. There were only a few partial portions of the relevant contract modifications, delivery orders, receipt reports, invoices, and payment records.

We found that upon receipt of these documents from appellant in July 1998, the contracting officer conducted a search of all ARCENT-SA contract files attempting to locate any Government controlled records with respect to the subject contracts. These attempts to locate such files in Saudi Arabia were unsuccessful, as were subsequent attempts to locate possible contract records in Kuwait and at Fort McPherson, Georgia, the higher contracting authority. Accordingly, the contracting officer notified appellant by letter dated 13 September 1998 that the Government had searched for records dealing with these contracts, had been unable to find any related documents, and that he assumed that since a significant time had passed since the contract completion dates that the contracts had been properly closed by a contracting officer and subsequently destroyed in accordance with U.S. Government rules and regulations. After appellant filed its appeal on 8 April 1999, the Government through its Third Army, Army Forces Central Command contracting office at Fort McPherson, conducted further searches for records of these contracts, including searches at the Government warehouse at Fort Gillem, Georgia, and the finance offices at Fort Bragg, North Carolina. Although these searches resulted in the recovery of partial files for Contract Nos. C-0009, C-8192, and D-0011, the Government did not find any other files relating to the subject contracts under appeal. There were no computer databases for contracts awarded during the 1991 time period, and no electronic storage of

individual contract information. As we found above, when appellant submitted its amended complaint, it did not include Contract No. C-0009 as one of the contracts in its appeal since appellant's owner had previously signed a release closing out that contract and appellant had no record regarding that contract in its offices in Saudi Arabia. We found that the Government expended considerable effort to locate records relevant to appellant's claim, and that notwithstanding its diligence, was unable to do so, except for the partial files relating to Contracts Nos. C-0009, C-8192, and D-0011.

As a result of the Government's inability to find any contract records relating to these contracts (except for the partial files relating to Contracts Nos. C-0009, C-8192, and D-0011), all the documents in the appeal record were supplied by appellant, either during its 4 July 1998 submission, or in its supplemental submissions to the record in August 1999, immediately prior to the hearing on 15 March 2002, and during the hearing on 8 April 2002. Moreover, we do not have any confidence in the documentation submitted by appellant because of the absence of too many relevant documents or limited portions of documents submitted, unexplained conflicts between documents in the record and what they purport to represent, and because the claimed amounts due on each of the contracts in this appeal are based on alleged undated invoices which were prepared on letterhead stationery different than the invoices submitted to the Government during the contract performance periods, and were subsequently submitted to the Government, either immediately prior to the hearing or during the hearing.

Government attempts to locate potential witnesses identified in the partial contract documents submitted by appellant were likewise unsuccessful, either because potential witnesses were no longer associated with the military and could not be located, or because they had no specific recollection of these contracts. There was no evidence that the Government's search lacked due diligence. Indeed, the Government did everything possible in its attempt to locate witnesses. The two witnesses that were located had no specific recollection of the subject contracts, although they were involved in closing out two of the contracts, and could only recall general contracting procedures from that time period. As a result, they relied, in part, on what they found in current contract files as submitted by appellant in its supplemental submissions.

Indeed, as reflected in our findings, appellant, itself, had difficulty articulating and proving any entitlement to recovery of possible unpaid invoices by its own lack of diligence in pursuing possible claims for alleged unpaid invoices in a timely manner. This was due, in part, because of its lack of records, including contracts, inspection and acceptance documents, complete and accurate original invoices and payment records, subcontracts, and subcontract invoices and payment records. Appellant seeking entitlement for unpaid services has the burden of proving that it delivered the equipment in accordance with the contract requirements, that it properly and timely submitted invoices for those services, and that such invoices were unpaid by the Government. This burden of proof "derives from the nature of the specific claims before this Board." *Systems & Computer Information, Inc.*,

ASBCA No. 18458, 78-1 BCA ¶ 12,946 at 63,069. Moreover, the fact that the Government presented no witnesses directly rebutting appellant's evidence concerning its alleged "claim invoices" does not make appellant's evidence compelling or substantial. *Sternberger v. United States*, 185 Ct. Cl. 528, 535, 401 F.2d 1012, 1016 (1968). Moreover,

"The substantiality of evidence must fairly take into account whatever in the record detracts from its weight."
Universal Camera Corp. v. Labor Board, 340 U.S. 474, 488 (1951). Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted nonopinion testimony. *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891); *Duwamish et al. v. United States*, 79 Ct. Cl. 530, 576 (1934).

Sternberger v. United States, 185 Ct. Cl. at 536, 401 F.2d at 1016. As we found and stated above, it was not until 4 July 1998 that appellant provided the Government with any documents that it asserted supported its claim for unpaid balances due on these contracts, which documents were incomplete and included only some partial portions of the contracts at that time, such as the cover pages of the contracts and/or the Schedule pages. While it is regrettable that the Government did not have records for each of these contracts, the burden was on appellant to establish its entitlement to the alleged unpaid invoices, not the Government's to rebut. We have not found the absence of appellant's records to be excused; we do not consider their absence as presumptive evidence that their contents would have harmed appellant. However, "we do not consider their absence as obviating [appellant's] normal burden of proof." *Systems & Computer Information, Inc.*, *supra* at 63,070.

As we found above, although appellant's appeal included the portion of its claim relating to Contract No. C-0009, appellant did not include this claim in its amended complaint, had no record relating to this contract in its offices in Saudi Arabia, and was no longer seeking recovery for the alleged unpaid invoice. It was not until the Government belatedly located some documents from partial files for this contract, which contained a release signed by appellant's owner closing out the contract, that appellant realized that it had signed the release on this contract and decided not to present evidence supporting this portion of its claim.

We also found that the Government belatedly discovered some documents from limited and partial files regarding Contracts Nos. D-0011 and C-8192. As we found above with respect to Contract No. D-0011, there was no evidence that the "claim invoices" appellant submitted immediately prior to the hearing and during the hearing had been submitted to the Government during contract performance or prior to the late stages of the

litigation. Moreover, there were conflicts in appellant's documents regarding invoices and payments received, there were "claim invoices" for equipment allegedly delivered, after two delivery orders had been terminated for default because appellant had been unable to deliver equipment ordered by those delivery orders. Appellant's business manager testified that he did not realize that these delivery orders had been terminated and did not know whether the equipment reflected by appellant's corresponding "claim invoices" had actually been delivered. Further, according to a document discovered by the Government from its limited and partial files for this contract, the contract had been closed out, there were no actions or claims pending, and the contractor had been paid in full. Appellant fares no better with respect to the portion of its claim relating to Contract No. C-8192. Again, as in the case of the other contracts, there were unaccounted duplicate invoices and claim invoices, omissions, conflicts between "claim invoices" and other invoices submitted previously, and alleged delivery of equipment without any proof thereof. For example, two of appellant's "claim invoices" contained charges for six dozers and two cranes. Although there were no DD Form 250s or other documentary evidence supporting the delivery of such equipment, appellant had previously only invoiced the Government for one crane. Further, appellant's "Claim Invoice" No. 7, included charges for six dozers and two cranes provided by appellant for the period of

28 May 1991 through 19 July 1991, notwithstanding the fact that the contract term ended on 27 May 1991 in accordance with the bilateral modification executed by the parties in which the Government exercised the option to extend the contract to 27 May 1991, and appellant's testimony that the Government had returned the equipment to appellant on 27 May 1991. We simply hold that the exaggeration, inherent improbability, self-contradiction, omissions in a purported complete account, imprecision and errors all breed disbelief concerning what equipment was delivered to the Government under Contracts Nos. D-0011 and C-8192, when it was delivered to the Government, the period during which the Government had possession of the equipment, and the amounts appellant was paid by the Government for this equipment.

Accordingly, we hold that appellant's claim as to Contract Nos. D-0006 and C-8143 is barred by the doctrine of laches and, as to Contracts Nos. C-0009, C-8192, D-0011, has not been proven, and deny the appeal.

Dated: 17 October 2003

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

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. 52137, Appeal of Ahmed S. Al-Zhickrulla Est., rendered in conformance with the Board's Charter.

Dated:

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