ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
United Pacific Insurance Company	)	ASBCA No. 53051
	)	
Under Contract No. F28609-95-C-0036	)	

APPEARANCES FOR THE APPELLANT: Gary A. Wilson, Esq.
Salil P. Patel, Esq.
Duane Morris LLP
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
William M. Lackermann, Jr., Esq.
Senior Trial Attorney
MAJ Brian T. Varn, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision denying appellant's claim for an equitable adjustment in the amount of $3,591,362.62.[1] The underlying contract was for work to renovate Buildings 2401, 2402 and 2403 at McGuire Air Force Base, New Jersey. The original contractor, Castle Abatement Corp. (Castle), was terminated for default and United Pacific Insurance Company (UPI),[2] as surety to Castle, entered into a takeover contract with the Air Force for completion of the contract. Both entitlement and quantum are at issue. We dismiss a substantial portion of the appeal for lack of jurisdiction and deny the remainder.

BACKGROUND

Portions of UPI's claim sought recovery for alleged changes which arose during Castle's performance. The Air Force filed a motion to dismiss on jurisdictional grounds those claim items that arose before the takeover agreement, and argued further that UPI was not entitled to recover under the principle of equitable subrogation because of the U.S. Supreme Court's decision in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255

(1999). We dismissed the pre-takeover agreement claim items but held that our jurisdiction to resolve equitable subrogation claims remained intact. *United Pacific Insurance Co.*, ASBCA No. 53051, 01-2 BCA ¶ 31,527 (*UP 1*).[3] In light of the Federal Circuit's decision in *Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002), we revisit the latter holding *infra*.

FINDINGS OF FACT

The Programming Process and the Contract with Castle

1. Contract No. F28609-95-C-0036, in the amount of $3,152,174, was awarded to Castle as low bidder on 21 September 1995. The substance of the contract and the underlying solicitation was the same, calling for work to renovate Buildings 2401, 2402 and 2403. (R4, tabs 1, 4) Buildings 2402 and 2403 had previously been used as temporary administrative offices (tr. 1645-46). The contract's basic requirement, as set out in CLIN 0001, was for "[a]ll work to renovate Bldg 2401" and was "inclusive of CLINs 0001-0005AH." CLIN 0001AA was for "[c]onstruction costs for renovation of Bldg 2401," which had a cost limitation of $300,000, and which Castle priced at $297,400. CLIN 0001AB was for "[r]epair costs for renovation," which Castle priced at $563,861. CLINs 0002 through 0005AH were estimated quantities to be priced at fixed unit prices. The not-to-exceed total for CLINs 0001-0005AH was $878,033.50. Work for Buildings 2402 and 2403 was set out as optional requirements in virtually the same manner as work for Building 2401. Building 2403 (CLINs 0006 through 0010AH) was Optional Requirement No. 1 and Building 2402 (CLINs 0011 through 0015AH) was Optional Requirement No. 2. Castle priced the not-to-exceed total for Building 2403 work at $1,074,623.50 and Building 2402 work at $1,196,517. Optional Requirement No. 3 (CLIN 0016) was for "[a]ll work to construct building connectors from Bldg. 2402, 2401 and 2403." The connectors were to be evaluated by prorating the amounts between the buildings "to ensure the combined amount [for CLINs 0001AA, 0006AA and 0011AA] does not exceed the cost limitation of $300,000." The process of prorating was to apply one-half of CLIN 0016 to CLIN 0001AA, with the remainder split between CLINs 0006AA and 0011AA. Castle priced the connectors at $3,000. Castle priced CLINs 0006AA and 0011AA at $297,423. Thus, the price for CLIN 0001AA with the addition of the prorated connector cost was $298,900, and the price for CLINs 0006AA and 0011AA with the prorated connector cost was $298,173 each. (R4, tab 1 at 1-13 of 46) The reason for including various items as options was to prevent redesigning and repackaging the entire effort if statutory limits were exceeded. By not buying certain options, a contract within statutory limits could still be awarded. (Tr. 1326-27) Since statutory limits were not exceeded, the contract total included all optional items.

2. The contract incorporated by reference the following clauses: FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989); FAR 52.233-1 DISPUTES (DEC 1991); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.246-12 INSPECTION

OF CONSTRUCTION (JUL 1986); FAR 52.246-12 WARRANTY OF CONSTRUCTION (APR 1984); and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). Also incorporated was FAR 52.236-6 SUPERINTENDENCE BY THE CONTRACTOR (APR 1984) which requires a full-time superintendent on-site at all times. (R4, tab 1 at 15, 25, 26 of 46)

3. The contract specification included the following relevant provisions:

MECHANICAL
SECTION 15400
PLUMBING, GENERAL PURPOSE

. . . .

D. Operational Test

Upon completion of and prior to acceptance of the installation, the Contractor shall subject the plumbing system to operating tests to demonstrate satisfactory functional and operational efficiency. Such operating tests shall cover a period of not less than 8 hours for each system and shall include the following information in a report with conclusion as to the adequacy of the system:

1. Time, date, and duration of test.

2. Water pressures at the most remote and the highest fixtures.

3. Operation of each fixture and fixture trim.

4. Operation of each valve, hydrant, and faucet.

5. Pump suction and discharge pressures.

6. Temperature of each domestic hot-water supply.

7. Operation of each floor and roof drain by flooding with water.

8. Operation of each vacuum breaker and backflow preventer.

9. Complete operation of each water pressure booster system, including pump start pressure and stop pressure.

. . . .

MECHANICAL
SECTION 15556
FORCED HOT WATER HEATING SYSTEM USING WATER

. . . .

3.14 TESTING AND CLEANING

A. Pressure Testing

The Contractor shall notify the Contracting Officer 15 days before the tests are to be conducted. The tests shall be performed in the presence of the Contracting Officer. The Contractor shall furnish all instruments and personnel required for the tests. Electricity, steam, and water will be furnished by the Government. All test results shall be accepted before thermal insulation is installed. The entire low temperature heating system, including heat exchanger, radiators and fittings, shall be hydrostatically tested and proved tight under a pressure of 45 psig for a period of four hours.

. . . .

ELECTRICAL
SECTION 16415

. . . .

3.16 TESTS

After the interior-wiring-system installation is completed, and at such time as the Contracting Officer may direct, the Contractor shall conduct an operating test for approval. The equipment shall be demonstrated to operate in accordance with the requirements of this specification. The test shall be performed in the presence of the Contracting Officer. The Contractor shall furnish all instruments and personnel required

> for the tests, and the Government will furnish the necessary electric power. No part of the electrical distribution system shall be energized prior to the resistance testing of that systems [sic] ground rods and submission of test results to the Contracting Officer. Test reports shall indicate the location of the rod and the resistance and the soil conditions at the time the test was performed.

(R4, tab 3 at 15400-1, -27, -28, 15556-1, -19, 16415-1, -21)

4. Air Force Instruction 32-1032, 11 May 1994, Planning and Programming Real Property Maintenance Projects Using Appropriated Funds (APF), implemented relevant Air Force policy at the time of the solicitation for Contract No. F28609-95-C-0036. Minor construction projects are defined therein as military construction projects with an approved cost of $1,500,000. Minor construction projects costing $300,000 or less may be funded from the Air Force's operations and maintenance (O&M) appropriation. Examples of minor construction projects include construction of a new building or system, an expansion of a building, conversion to a new primary function, and repair-type work which exceeds 70 percent of replacement cost. (Ex. G-16 at 4) Accordingly, prior to issuing the solicitation Air Force personnel determined that Building 2402[4] would be the most expensive part of the contract. An analysis was performed and it was concluded that the work on Building 2402 would not exceed 70 percent of replacement cost. (App. R4 supp. C, tab 212; tr. 1351-55) Classification of the work was necessary because the contract was a combination of repair and construction and the statutory limit of $300,000 on minor construction work funded with O&M funds needed to be tracked (tr. 1232). It was Air Force policy to have bidders break down their bids to show minor construction costs (tr. 1364-65).

5. The contract work was treated as three projects for funding purposes under Air Force policy, with separate work orders and project numbers. Funds for the contract work were reserved individually and ultimately funded with separate procurement requests. O&M funds were reserved and allocated as follows: Building 2401 - $97,000 and $298,900; Building 2402 - $213,000 and $298,200; and Building 2403 - $213,000 and $298,200. (R4, tabs 6, 7) A McGuire employee consulted with Air Mobility Command to determine if construction of the connectors might create a situation where Buildings 2401, 2402 and 2403 had to be treated as one building for programming purposes. He was told that as long as the connectors were not "conditioned space"[5] they remained separate buildings. (Tr. 1344-45) Accordingly, McGuire programmed the contract as three separate projects with three separate statutory limits on minor construction (tr. 1359).

6. The $3,000 price placed on the connectors by Castle was significantly less than the Government estimate of $134,000 and the other bidders' bids of $344,000, $290,000 and $260,000 (R4, tab 17). Castle was asked to confirm its bid with particular emphasis on

the connectors and it did so (R4, tabs 19, 20). One of the bidders filed a bid protest, which was withdrawn prior to award of the contract (R4, tab 23; tr. 1582-83).

7. UPI issued performance and payment bonds to Castle. The bonds expressly bound UPI to the Government, and thus the Air Force, under the contract for the penal sum. The Government was not a party to the bonds. Other than issuance of the bonds, there is no evidence of UPI's participation in the contracting process or that UPI was in a position to be part of the contracting process. The penal sum of the performance bond was $3,152,174 and the penal sum of the payment bond was $1,576,087. (App. R4 supp. A, tab 1) Castle and UPI entered into an indemnity agreement in which Castle pledged to UPI as collateral, *inter alia*, "[a]ll rights, actions, causes of action, claims and demands of the undersigned in, or arising from or out of, [the contract] or any extensions, modifications, changes or alterations thereof or additions thereto" (app. R4 supp. B, tab 2, ¶ 4(b)).

8. Changes were made to the contract between December 1996 and June 1997 through Modification (Mod.) Nos. P00003-P00006 which increased the price by $394,857.96 to $3,452,106.96 (R4, tabs 41, 45, 47, 48) and extended the completion date to 29 August 1997 (R4, tab 47).

Castle's Performance, Financial Difficulties and Events Leading to Default

9. Notice to proceed was issued on 16 October 1995. Castle was given 10 days to commence work and 300 days from 16 October 1995 to complete the contract. (R4, tab 27) Castle was thus to complete by 11 August 1996.

10. On 22 March 1996, Castle submitted a progress schedule (Revision 5). Percentages of completion were projected as follows:

	Percentages by Building		
Work Elements	Bldg. 2401	Bldg. 2402	Bldg. 2403
Bonds	.30	.40	.40
Mobilization	1.20	1.50	1.50
Demolition	2.18	2.76	2.76
Asbestos Abatement	.60	1.70	2.40
Sitework	.96	1.22	1.22
Concrete	1.84	2.33	2.33
Masonry	2.30	5.10	4.40
Metal	.70	1.40	1.40
Carpentry	.70	3.66	1.14
Thermal/Moisture	.14	.18	.18
Doors/Windows	2.70	3.40	3.40
Finishes	3.00	4.00	4.00
Specialties	.42	.54	.54
Furnishings	.24	.33	.33
Mechanical	4.80	5.60	5.66
Electrical	4.00	4.10	4.10
Total	26.08%	38.22%	35.70%

(R4, tab 31)

11. During contract performance, the Air Force construction inspector was Mr. Robert Jaques. Mr. Jaques tried to visit the site everyday. His visits lasted from 15 minutes to an hour. (Jaques dep. at 10, 21-22, 103) He reported the contractor's progress to the contracting officer and progress payments were made based on Mr. Jaques' estimate of progress (tr. 1663-64). He understood his responsibilities to include reporting deficiencies in contractor performance to the project superintendent or manager, and then to the contracting officer (Jaques dep. at 71-72). He did not check electrical work or plumbing insulation before the walls were sheetrocked. He considered that to be the responsibility of quality control, which in Mr. Jaques' view was the contractor's job. (Jaques dep. at 118-19)

12. Castle's slow progress caused concern (exs. A-14 through -17). In May of 1996, Castle had only completed 17.5 percent of the work when its progress schedule showed it should have been 66.73 percent complete. Mr. Jaques requested that the contracting officer obtain a written explanation from Castle. (R4, tab 150) On 11 August 1996, Castle was only 27 percent complete (Jaques dep. at 129).

13. Castle began to experience significant financial difficulty that caused UPI to take a more active role. On 3 December 1996, Mr. Frederick M. Zauderer, Vice President and Claims Counsel for Reliance National, wrote to Castle that UPI was "very concerned" about Castle's nonpayment of subcontractors in the total amount of $400,000 and claims against Castle's bonds. Mr. Zauderer demanded that Castle resolve these issues within 10 days. He stated that UPI was considering establishing reserves for the claims. The letter notes a copy to Andrew J. Ruck, Esq., UPI counsel. (R4, tab 100) Mr. Zauderer made all of the surety's decisions relevant to this appeal (tr. 113).

14. In a 6 December 1996 letter to Castle, also copied to Mr. Ruck, Mr. Zauderer took exception to Castle's representation that it had paid one of its subcontractors and referenced discussion about "bounced" checks (R4, tab 102). During this period, UPI orally requested that the current payment to Castle be held "pending investigation" (R4, tab 76). On 11 December 1996, Mr. Ruck wrote to Mr. Saul Lefkowitz, Air Force contract specialist (tr. 1150),[6] and consented to payment to Castle (R4, tab 39). However, by letter of 13 December 1996 Mr. Ruck wrote to Mr. Lefkowitz and requested that Payment Request No. 8 be withheld (R4, tab 40). This request was withdrawn by letter of 23 December 1996 (R4, tab 42). For reasons that are not clear on this record, two checks were issued to Castle for Payment Request No. 7--16 December 1996, in the amount of $150,977.31, and 3 January 1997, in the amount of $150,043.70 (R4, tabs 78, 80, 90).

15. Defense Finance and Accounting Service (DFAS) asked Castle to return $150,043.70 by letter of 24 November 1998 and asked UPI to return the same amount by letter of 10 December 1998 (R4, tabs 90, 91). UPI refused by letter of 23 December 1998 (R4, tab 92).

16. By letter of 8 January 1997, Mr. Ruck reported to Mr. Zauderer on an investigation of Castle. Regarding the contract at issue, Mr. Ruck reported that Castle was 68.95 percent complete, and concluded it was one of two projects warranting immediate attention. (R4, tab 105 at 6, 10) The contracting officer was not informed of this conclusion (tr. 1646-47).

17. By letter to Castle of 6 February 1997, copy to Mr. Ruck, Mr. Zauderer reminded Castle of subcontractor claims and again demanded resolution within 10 days (R4, tab 107). On 5 March 1997, in response to a 26 February 1997 letter from a Castle subcontractor, Mr. Zauderer informed the subcontractor UPI was investigating its claim of nonpayment against Castle (R4, tabs 108, 109). In another 5 March 1997 letter, Mr. Zauderer requested from Castle specific information about various claims (R4, tab 111). By letter of 25 April 1997, Mr. Zauderer provided Castle with a list of outstanding payment claims which showed claims totaling $302,143.38 on the instant contract and asked for an update (R4, tab 114).

18. On or about 30 April 1997, First Community Bank approved a $1,000,000 line of credit for Castle (R4, tab 115).

19. On 21 May 1997 in a letter to Castle, Mr. Zauderer forwarded summonses and complaints filed against Castle in litigation instituted by a Castle subcontractor, and in which UPI was a named defendant. He demanded that Castle resolve the matter immediately. (R4, tab 120) By FAX dated 21 May 1997, Castle forwarded to UPI spreadsheets showing claims in excess of $300,000 on the instant contract (R4, tab 121).

20. On 27 May 1997, Castle wrote to First Community Bank regarding its initial draw of $685,664.90 and the subcontractors to which that sum would be paid:

> As per your conversation with Mr. Fred Zauderer from [UPI], and in accordance with an agreement between our bonding company and [Castle] and Castle Construction & Management Services, Inc., herein we are requesting to disburse as an initial draw down from our Line of Credit, the following payments . . . .

(R4, tab 123). At or about this time Mr. Zauderer informed the contracting officer of the loan and the disbursements. Both the Air Force and UPI were trying to work with Castle and continue the contract. (Tr. 458)

21. On 30 May 1997 Castle, as borrower, UPI as subordinator, and First Community Bank, as lender, entered into a Subordination Agreement wherein UPI agreed to subordinate its security interest to the bank's security interest. The agreement was intended to induce the bank to make a lending transaction with Castle. (R4, tab 124)

22. By letter of 17 June 1997, Castle informed UPI that it needed financial assistance from UPI if it was to continue performance of the contract. Castle stated that it would abandon performance if assistance was not forthcoming. (R4, tab 49) On 17 June 1997, UPI and Castle entered into an interim financing agreement whereby UPI agreed to advance $350,000 to Castle (R4, tab 126).

23. Contract Progress Report No. 33, for the period ending 24 June 1997, shows the percent of the total job and each individual task completed as follows:[7]

Work Elements	% Completed	% of Total Job	% of Task
Bond	.98	0.98	100
Mobilization	3.73	3.73	100
Demolition	7.10	7.56	94
Asbestos Abatement	4.18	4.41	95
Site	2.44	3.02	81
Concrete	6.14	7.68	80
Masonry	9.25	9.86	94
Metal	2.97	3.27	91
Carpentry	6.55	7.36	89
Thermal	0.51	0.64	80
Doors/Windows	7.11	11.10	64
Finishes	5.34	10.59	50
Specialties	0.00	0.76	0
Furnishings	0.00	0.80	0
Mechanical	13.49	14.87	91
Electrical	10.12	13.37	76
TOTAL	79.91	100.00	

(R4, tab 97 at 65) Mr. Jaques approved the report. UPI was aware of the report and the estimate of 79.91 percent completion at or about the time of the report (tr. 93, 99).

24. On 30 June 1997, Castle sent a FAX to Mr. Zauderer thanking him for wiring funds to cover Castle's payroll and seeking $42,227.96 to cover payroll taxes (R4, tab 132). There is no evidence UPI paid Castle's payroll taxes, although UPI's payments under the contract continued into July 1997 (R4, tab 359, admission 11; app. R4 supp. B, tab 15). Mr. Zauderer was motivated to cut-off funding to Castle and trying to rehabilitate Castle when he uncovered what he believed to be evidence that Castle's president was "robbing his own company" (tr. 458).

25. In an 8 July 1997 letter, Mr. Ruck, counsel to UPI, forwarded a copy of Castle's 17 June 1997 letter to Ms. Kathleen DeMito, the contracting officer. He informed Ms. DeMito that UPI did not intend to render further assistance to Castle. (R4, tab 50) In a 15 July 1997 memorandum to Headquarters, Air Force Materiel Command, referencing this information, termination authority was requested on behalf of Ms. DeMito, and a show cause notice was issued to Castle (R4, tabs 51, 52). Thereafter, by letter to its employees of 15 July 1997, received that date by Mr. Ruck, Castle announced that it was abandoning performance (R4, tab 53). Termination authority was received on 17 July 1997 and the contract was terminated for default on 21 July 1997 because of Castle's abandonment of performance (R4, tabs 54, 55). There is no evidence of an appeal or lawsuit filed by Castle

contesting the termination for default. We find Castle did not contest the termination for default.

26. At the time of termination progress payments had been made to Castle as follows:

Application No.	Amount of Payment
1	$ 35,022.00 (R4, tab 69)
2	454,553.81 (R4, tab 70)
3	59,770.00 (R4, tab 71)
4	192,283.00 (R4, tab 72)
5	660,380.52 (R4, tab 73)
6	457,064.70 (R4, tab 74)
7	150,977.31 (R4, tab 78)
7	150,043.70 (R4, tabs 75-77, 79, 80; finding 14)
8	162,021.57 (R4, tab 81)
9	346,962.24 (R4, tab 82)
10	120,692.73 (R4, tab 83)
11	76,392.25 (R4, tab 84)
12	116,962.05 (R4, tab 87)
Total	$2,983,004.36

The contract completion percentage reported by the Air Force was 79.91 percent (finding 23).

The Takeover Agreement and Work Thereunder

27. Mr. Zauderer relied on the Air Force's 79.91 percent completion estimate in entering into the takeover agreement (tr. 93, 99). He testified that he did not make an inspection of the site prior to entering into the takeover agreement (tr. 426). UPI did not obtain a signed contract, bids or a fixed-price from a prospective completion contractor (tr. 427). It obtained the services of Lattimer & Associates, LLP (L & A) (app. R4 supp. B, tab 4; tr. 56-61, 718-20). L & A was to complete the contract work and handle all claims (app. R4 supp. B, tab 4). L & A was formed in July 1997 by Mr. Clyde Lattimer and its purpose was to do work for UPI and other bonding companies (tr. 718-19). C. M. Lattimer & Son Construction Company, Inc. (Lattimer) was a bonded construction company formed some 20 years ago and owned by Clyde Lattimer, his wife and son Scott. Mr. Clyde Lattimer felt it best to keep it separate from L & A. (Tr. 712, 718) The agreement between L & A and UPI is documented by the following 6 August 1997 two-page, unsigned letter from Mr. Clyde Lattimer to Mr. Ruck:

> I think it would be much simpler if the following format and items were to be issued as a contract to us. First of all,

Lattimer and Associates would manage all work on this project and complete the work in accordance with the contract documents and change orders that have been issued by the government, as well as handling and negioating [sic] claims, for all four projects.

Item 2. Employees on the project will be paid by Lattimer and Associates with a markup of 39% on top of raw cost. The 39% will pay for workman's compensation, general liability, FICA, state and federal unemployment insurance and other items necessary to be paid to the state and federal government. All other payments, such as payments to subcontractors, vendors, and suppliers will be paid by Lattimer and Associates with a markup of 1.25% on these items. This 1.25% is to pay cost of the insurance, which I have previously sent copies of a letter to Fred. Subcontractors employed by Clyde N. Lattimer and Son or Lattimer and Associates will either work on a lump sum basis or on a time and material basis as determined by the type of work they are doing. As for payments to the Supervisory people of Lattimer and Associates, they will be billed as follows:

Clyde and Scott Lattimer will be billed at $95 per hour, for each hour worked plus out of pocket expenses, such as automobile expenses, meals and so forth.

Project Managers and accounting personnel will be billed at the rate of $75 per hour which is an all inclusive rate. No additional expenses or charges will be incurred on these numbers.

Secretarial work will be billed at $35 per hour.

Lattimer and Associates will provide and pay all insurance required for this project. Subcontractors are to provide their own insurance in accordance with the contract documents.

Project Superintendents will be paid for at the rate of $68 per hour. This is a fully loaded rate, including insurance, taxes, vehicles, health insurance, and so forth.

> All of the above rates are fully loaded rates with workman's compensation, general liability, pickup trucks, cars, and other expenses related to these employees.
>
> The Bonding Company has agreed to fund this project with payroll and other deposits into Lattimer's account at the time the moneys are being dispersed. If the money is not transferred Lattimer will meet the payroll and will be allowed to charge interest until the money has been received.
>
> Lattimer and Associates will not be responsible for any incorrect work done on the project prior to its coming there or during the completion phase of this work. There are so many records that are missing that no one could be sure as to exactly what has been changed and what has not. We are going to limit our liability, and are not taking responsibility for the accuracy of what we are doing, in terms of change orders, etc. In addition we require that the bonding company would pickup all legal cost should any of these jobs go to litigation, arbitration, etc.
>
> Lattimer will also review phases of work that have not been subbed out and try to find contractors to perform this work. We will review these numbers with Fred Zauderer. If the numbers appear to be too high, it would be our intent to do the work on a time and material basis. The judgment will be discussed with Fred as work consists.
>
> Accounting will be kept by individual jobs and turned over to Fred Zauderer at least on a monthly basis. I believe this is an accurate statement as to what we intend on doing and I would like to see the contract written on this basis. Thank you.

(App. R4 supp. B, tab 4) There is no evidence, and we find, that no formal contract was ever written.

28. Mr. Clyde Lattimer made several site visits, at least one of which was two or three weeks before the termination for default (tr. 724). According to Mr. Clyde Lattimer the site was a "disaster" (tr. 724-25). He had a conversation with a Castle employee, Mr. Peter Chero, within a week after the termination. Mr. Chero informed him that Castle's president had been told to "get rid of everybody because he was terminated." (Tr. 725) Mr. Clyde Lattimer's description of the site as a disaster does not reconcile with the professional videotape of the site he caused to be made in August 1997 (app. R4 supp. C,

tab 214). Mr. Clyde Lattimer also testified Mr. Zauderer was on a pre-takeover agreement site visit and that he pointed things out to Mr. Zauderer during the initial site visit (tr. 720, 791). Ms. DeMito testified that before takeover Mr. Zauderer toured the job site "many times," including a visit with one of the Lattimers (tr. 1618).[8] There is thus a conflict between the testimony of Mr. Clyde Lattimer and Ms. DeMito, and the testimony of Mr. Zauderer as to whether Mr. Zauderer made a site visit prior to the takeover agreement (*cf.* finding 27). In addition to the believability inherent in corroborated testimony, we think it sufficiently improbable that Mr. Zauderer did not visit the site before the takeover agreement that we find the recollections of Ms. DeMito and Mr. Clyde Lattimer to be more probative than Mr. Zauderer's on this point. We find that Mr. Zauderer visited the site before takeover.

29. The takeover agreement, which was drafted *in toto* by UPI's counsel (tr. 1631), was executed on 5 August 1997 as Mod. 8 (R4, tab 56). Castle was not a party. Relevant provisions include the following:

> WHEREAS, the GOVERNMENT desires to effect the completion of the work covered by the CONTRACT in order to expedite completion and to avoid the delay and inconvenience of reletting; and
>
> WHEREAS, SURETY is willing and desires to complete or to procure the completion of the CONTRACT in accordance with the terms of this AGREEMENT, as a measure of cooperation with the GOVERNMENT, and to minimize excess costs, and keep such within the monetary limits of its bonds; and
>
> WHEREAS, under its performance bond, SURETY is willing to cause the CONTRACT to be completed in accordance with the provisions of this AGREEMENT, provided that in so doing it will receive the contract balance as hereinafter set forth;
>
> WHEREAS, the parties acknowledge that as of the date of Contractor's termination the Contractor had been paid through Payment Application No. 12 for work performed through June 15, 1997, the following:
>
> FIXED PRICE PORTION OF CONTRACT
>
> Contract Price $3,057,249.00

Net Change Orders (P0003,4,5,6)	394,857.96
Adjusted Contract Price	$3,452,106.96
Amount Paid To Contractor	2,629,237.67*
Unpaid Contract Balance	$ 822,869.29

*The amount and quantities are subject to verification and adjustment by the parties at a future date if the amount proves to be incorrect.

ESTIMATED QUANTITY PORTION OF CONTRACT

Building No. 2401

Contract Price Estimates (Item Nos. 0002 thru 0005)	$16,772.50
Amount Paid (See Exhibit "A")	6,840.00
Estimated Contract Balance	10,132.50

Building No. 2403

Contract Price Estimate	$21,472.50
(Items Nos. 0007 thru 0010)	
Amount Paid (See Exhibit "B")	9,640.00
Estimated Contract Balance	$11,832.50

Building No. 2402

Contract Price Estimate (Item Nos. 0012 thru 0015)	$56,680.00
Amount Paid (See Exhibit "C")	26,100.00
Estimated Contract Balance	$30,580.00

("Contract Balance").

NOW, THERFORE, in reliance upon the matters set forth above and in consideration of SURETY'S promise to complete through Lattimer & Associates, 228 North Route 73, Berlin, New Jersey, the work required by said CONTRACT in accordance with the terms and conditions of the CONTRACT,

including all plans and specifications referred to therein, and all change orders issued pursuant thereto, and in consideration of the mutual covenant set out below, the GOVERNMENT and SURETY further agree as follows:

1. SURETY will cause the performance of all the duties and obligations of CONTRACTOR by the Completing Contractor, as contained in said CONTRACT, including all Contract documents as described therein, and all change orders issued pursuant thereto, and will have the work of CONTRACTOR completed in strict accordance with the terms and conditions of said CONTRACT, pursuant to performance bond provisions.

2. The GOVERNMENT agrees that it will pay direct to SURETY, as the same shall become progressively payable in accordance with the payment provisions of the CONTRACT, all sums now due and payable and to become due and payable upon the CONTRACT, including all unearned Contract balances, all earned retainage percentages, all earned but unpaid estimates and any and all money contracted to be paid hereunder, as would be or would have been payable to the original contractor, if there had been no declared default, provided however, that:

a. The costs and expenses incurred in the performance of the work to be paid to SURETY shall include its accountant, attorney, consultant and engineering fees, if any, incurred by SURETY in discharging its obligations under SURETY'S performance bond given in connection with the CONTRACT; and

b. The unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due the government by the contractor, except to the extent that such unpaid earnings may be required to permit payment to SURETY of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the CONTRACT; however, nothing in this AGREEMENT shall prevent payments of the claims consented to be paid in Paragraph 2c.

c. F.A.R. 49.404(e)(3) provides that:

If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings, unless the assignee consents to the payment in writing. For an assignment to have occurred, it must comply with the Assignment of Claims Act 1940 as amended and its implementing regulations found in F.A.R. 32.8. The GOVERNMENT is aware of SURETY'S position that the conditions set forth in F.A.R. 32.8 have not been satisfied by any alleged assignee, and that under applicable case law, no assignment could be effectuated after knowledge by United States Air Force of the Principal's alleged default on the project without the discharge of SURETY'S obligations pro tanto and the SURETY under the present circumstances, has a priority to unpaid earnings over any alleged assignee. The GOVERNMENT is aware of SURETY'S position that the above-quoted language from F.A.R. 49.404 (e)(3) is inapplicable and contrary to law, and no consent to payments from unpaid earnings shall be required by any alleged assignee before payment to SURETY.

d. This AGREEMENT shall not waive or release the GOVERNMENT'S right to claim liquidated damages for delays in completion of the work, except to the extent that such delays, if any, may be excused under the provisions of the CONTRACT; and SURETY is likewise entitled to such extensions of contract time as are provided for under the CONTRACT and is to be relieved of any delays excused under the CONTRACT.

e. In no event shall SURETY be entitled to be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging any liabilities it may have, if any, under the payment bond of the original Contractor.

. . . .

5. Administration and inspection of the project will remain with the GOVERNMENT and its agents/engineers in accordance with the terms of the original CONTRACT.

. . . .

7. The GOVERNMENT acknowledges that SURETY, in entering into this AGREEMENT does not acknowledge the validity of the GOVERNMENT'S assessment of any liquidated damages by the GOVERNMENT or any other action taken by the GOVERNMENT, except as provided herein. Furthermore, in entering into this AGREEMENT, SURETY does not thereby waive prejudice, that in any way adversely affect any claim that it, as SURETY, or the Contractor might have against the GOVERNMENT.

. . . .

9. The GOVERNMENT agrees that SURETY'S right to proceed to complete the CONTRACT shall not be terminated nor SURETY charged additional liquidated damages if further delay in completing the work arises from conditions or events which are excusable under the original CONTRACT and that SURETY shall be entitled to such additional compensation or equitable adjustment and time extensions as are recognizable under the original Contract Documents.

10. SURETY expressly reserves all prior rights including but not limited to the Government's overpayment to the Contractor, equitable liens and rights to subrogation that would be the United States', the laborers' or materialmen's or the contractor's under the CONTRACT or at law or equity, as well as its own rights dating back to the execution of the performance and payment bonds, including, but not limited to those rights and remedies that may accrue during the completion of the CONTRACT. No waiver of such rights is agreed to or implied or intended regardless of any provisions of this TAKEOVER AGREEMENT to the contrary. Any disagreement between the GOVERNMENT and SURETY shall be considered a dispute within the Disputes Clause contained within the CONTRACT and SURETY shall be entitled to exercise such rights as are afforded by the Disputes Clause and the Contract Disputes Act of 1978, as amended.

11. All terms and conditions of the original CONTRACT shall be and remain the same.

> 12. The parties hereto do not intend by any provision of this AGREEMENT to create any third-party beneficiaries nor to confer any benefit upon or enforceable rights or otherwise upon anyone other than the parties hereto.

(R4, tab 56)

30. The arrangement between L & A and UPI was effectively on a time and materials basis (tr. 719-21; finding 27). L & A's arrangements with its subcontractors were predominantly on a basis other than fixed price (tr. 435).

31. Two videotapes (videos) were made of work at the site. One was made at UPI's behest by a professional videographer at the time of L & A's commencement of work (app. R4 supp. C, tab 214). The other was taken by L & A's job superintendent, Mr. Jack Marks, in increments as the job progressed, commencing 21 August 1997 and continuing to October 1997 (app. R4 supp. A, tab 74; tr. 596). We consider the Tab 214 video to best illustrate the jobsite at termination. As such, it is representative of job progress at the time of the takeover agreement, what Mr. Jaques, UPI and L & A would have seen at that time, and how realistic the Air Force's estimate of progress was. We consider the Tab 74 video to best illustrate job progress after takeover. As such, it is representative of Castle work corrected by L & A, difficulties that were not apparent from a site visit and the actual performance of the completion work by L & A.

32. Castle had not complied with contract requirements in certain areas and had taken actions which could only have been motivated by an intent to conceal and deceive (tr. 603-24; app. R4 supp. A, tab 74; R4, tab 331). In assessing the extent to which this occurred we have relied heavily on the testimony of Mr. Marks, L & A's job superintendent (tr. 576-77), as to specific shortcomings. Mr. Marks testified as follows on concealed Castle deficiencies which required corrective work.

(A) Castle had not run all the electrical wiring through studs but had placed some of the wiring on the outside of the studs and then nailed sheetrock over it (tr. 579-80). There were lumps in the walls where this was done (tr. 580).

(B) Castle had installed some electrical boxes with wires that dropped down four or five feet and were not connected to anything. Castle then sheetrocked the walls, concealing this condition. (Tr. 582)

(C) Castle had done similar things with some outlets, switches and thermostats (*id.*).

(D) Pipes were not properly insulated and the walls sheetrocked, thereby concealing the condition (tr. 606, 619).

(E) Joint leakage occurred in domestic water plumbing improperly installed in a janitor's closet and one other place in Building 2401, which had no other domestic water leaks (tr. 657, 661). While the defective work was concealed, there is no direct evidence and we cannot reasonably imply that Castle sheetrocked over the pipes to conceal the defects.

Mr. Jaques was not aware of Castle's deception (Jaques dep. at 92-97, 117-18). None of the foregoing is visible on the Tab 214 video.

33. Mr. Marks was unable to estimate how much of the overall work was corrective, *i.e.*, fixing work done improperly by Castle, and how much work was the completion of contract work left unfinished by Castle (tr. 649-50, 652-53).

34. Mr. Chero was an employee of Castle who went to work for L & A after the takeover (tr. 631). Mr. Chero executed a statement dated 19 May 1998 on L & A letterhead stationery, notarized by an L & A employee (the Chero statement) (tr. 634-35), in which Mr. Chero states in relevant part:

MEMORANDUM

> During the construction of the above referenced project, I worked as a carpenter for Castle Construction and Castle Abatement.
>
> During this period we, including myself, were directed to perform construction work in a bad manner. (i.e.: closing up walls without any inspection being done, any testing being completed on the plumbing system, no pipe insulation or wall insulation being done.)
>
> In addition to myself, being Peter Chero, there were several other employees who were laid off or fired for refusing to do faulty work and/or knowing about it. One other person being, Richard Todd Keen, is currently working for Lattimer & Associates on another project.
>
> When asked by Lattimer & Associates at the time they took over the project, "Is there anything done improperly on the job?" I explained to them what I had previously mentioned and also electrical problems that I knew about. (i.e.: dropping 2 - 3 foot drops off each breaker out of the 2 main panels) This would give the appearance on the surface that the electrical was done in the walls we had previously closed up. This was not the

> case and every wall had to be torn apart in order to install the electrical as well as the previously mentioned items.

(R4, tab 331)

35. Mr. Zauderer, Mr. Clyde Lattimer and Mr. Marks deny that the information in the Chero statement was imparted prior to or at the time of takeover, although Mr. Marks concedes that Mr. Chero told him during his first walk-through that, in effect, Castle was incompetent (tr. 346, 631-34, 799-800). Additionally, Mr. Clyde Lattimer testified that Mr. Chero telephoned him in July 1997 (tr. 725; finding 28), but that he didn't learn of any deception by Castle until after takeover when plumbing problems first were discovered (tr. 799). Mr. Marks' field reports indicate that plumbing problems were first discovered on 14 August 1997 (ex. A-1 at 367). However, the 6 August 1997 letter (finding 27), specifically states that L & A "will not be responsible for any incorrect work done on the project prior to its coming there." We think it is more than coincidence that the disclaimer addresses the substance of Mr. Chero's information. Further, the content of the Chero statement asserts that L & A asked Mr. Chero if there was anything done improperly. Given the timing of Mr. Clyde Lattimer's telephone conversation with Mr. Chero, we find it more probable than not that such information would be sought before, not after, making a commitment. We find that Mr. Chero provided information to L & A prior to takeover.

36. The working relationship between L & A and the contracting officer was very difficult early in performance, but it improved. Her relationship with UPI was always "up front" and "cordial." (Tr. 1635) Shortly after takeover weekly meetings were initiated and carried on throughout the project so as to timely address issues and prioritize actions (tr. 1402-03). In the field the working relationship between Mr. Marks, Mr. Jaques and Mr. Robert Santoro, the McGuire engineer working directly on day-to-day performance issues, was good (tr. 1305, 1398).

37. Beneficial occupancy was taken as follows: Building 2402--June 1998; Building 2401--November 1998; Building 2403--November 1998 (tr. 1651-52).

The Claim

38. On 12 April 2000, UPI filed a properly certified Request for Equitable Adjustment (the claim) (ex. A-1; complaint, ¶ 11). The claim originally included 9 elements. After the Board's decision in *UP 1*, the following elements remained:

1. Overpayment	$1,957,108.00
2. Delay (198 x $501)	99,198.00
3. Excess Superintendence (Delays)	104,988.00
4. Improper Contract Payment	116,962.00
5. Superintendence (Change Orders)	40,492.00

6. Patently Defective Work	340,937.00
7. Contract Balance	175,745.00
Total	$2,835,430.00

(Ex. A-6) In addition, UPI included an alternative claim theory, asserting that the contract was an illegal contract, and now seeking recovery of $3,525,757.25 (app. br. at 12-13).

Overpayment

39. The overall completion of the job was 79.91 percent based on Progress Report No. 33 (finding 23). Appellant claimed this was grossly inaccurate and a substantial overpayment was made to Castle (ex. A-1).

40. Appellant presented testimony that the job was 20-30 percent complete (tr. 761, 847-48). The Air Force presented evidence the job was 79.91 percent complete (tr. 1263-67; Jaques dep.). We make no finding on the issue in view of our determination as to jurisdiction.

Delay and Excess Superintendence (Delays)

41. L & A never prepared a schedule during performance (tr. 952). There is no evidence that UPI prepared a schedule during performance. We find there was no schedule prepared by appellant at any time relevant to performance. There is no evidence L & A employees were ever in a "standby" status, and we so find. We also find that UPI's superintendent and project managers were salaried (tr. 629, 955).

42. UPI's claim contains a chart entitled "Delay Claims - Chronological Summary," with all periods of delay shown in red. The chart lists five causes: 1) Deletion of design requirements; 2) Additional asbestos; 3) Incorrect elevations; 4) Patently defective work; and 5) Finish details. (Ex. A-1 at 157) Portions of the original claim were dismissed by *UP 1*. The remaining claim is for L & A's extended overhead. (Ex. A-1 at 159; tr. 872-73) UPI seeks $99,198 representing 198 days of delay at $501 per day (ex. A-1 at 162). UPI explains the excess superintendence claim as follows: "[t]he weekly salary of a superintendent was $520 calculated at $65 per hour times 8 hours per day. Multiplying $520 times 162 days of delays and adding 10 percent for overhead, 10 percent for profit and 3 percent bond costs equals $104,988 in excess superintendence costs" (app. br. at 19). Mr. Zauderer testified in very general terms about the causes of delay (tr. 123-28). He testified that UPI was "forced to pay for extra superintendent time" (tr. 129). Mr. Zauderer's role was as UPI's claims executive (tr. 30-31). There is no evidence of his participation in the management of the work or other role from which he would have gained personal knowledge of the effect of various Government actions on job progress. We find his testimony as to delays unpersuasive.

43. Mr. Scott Lattimer testified that the most significant delay was caused by Air Force tardiness in providing a finish schedule. According to Mr. Lattimer they could not "start finishing a room until February 19, 1998." He also identified paint, defective work (presumably Castle's defective work), and trying to get answers to questions as factors causing delay. (Tr. 873-75) When asked if he had done a critical path analysis to determine whether the alleged delays were on the project's critical path, he testified that any delay was critical (tr. 874). However, he also testified that L & A had never prepared a schedule (tr. 949, 952). Various correspondence was attached as exhibits to the claim to document requests by L & A and Castle to the Air Force to obtain a finish schedule (ex. A-1 at 171-214). The correspondence indicates that L & A received the finish schedule on or about 8 December 1997 (*id*. at 213). The excess superintendence part of the claim is a one-page narrative listing a litany of delay causes with no documentary support attached or referred to (ex. A-1 at 247). Mr. Santoro testified that the Air Force provided timely responses to L & A and that there were no delays. He also testified that the finish schedule did not impact job progress because it addressed the "last thing to really be completed in the project." (Tr. 1405-06, 1426, 1429) The Board takes particular note that UPI did not cite to the testimony of Mr. Marks regarding the length of the delay (app. findings of fact at 8-9; app. br. at 18-19; app. reply br.). Mr. Marks could not estimate how much work was completion work and how much was for correcting Castle's deficient work (tr. 649-53). There is also no probative evidence of additional pay to Mr. Marks because of delays. The Board finds that because of the lack of a schedule, expert testimony, evidence on reasonable times to complete particular tasks, evidence comparing reasonable times with experiences on this job, and personal knowledge testimony as to specific events, combined with the intermingling of evidence of corrective work with completion work, appellant has failed to meet its burden of proof on compensable delay.

Improper Contract Payment

44. By letter of 27 May 1997, Castle requested that the contracting officer, Ms. DeMito, mail all future payments to UPI, attention Mr. Zauderer (app. R4 supp. A, tab 33). Ms. DeMito thereafter called Mr. Zauderer and told him that once the invoice left McGuire that McGuire had no control over it and that she could not guarantee that payment would be sent to UPI. She informed him a novation agreement would be necessary to change the address, and he did not want to sign a novation agreement. Mr. Zauderer did not inform Ms. DeMito that Castle's default was imminent. He did not ask for the payment to be withheld, he wanted the payment processed. She was never asked to modify the contract to change the remittance address, which was Castle Abatement Corp., 60 Heckel St., Belleville, NJ. (R4, tab 1 at 2, blocks 14, 16; tr. 136-37, 1609-11, 1680-83) The contract was not modified to make UPI a party or to make UPI the recipient of future payments until execution of the takeover agreement (R4, tabs 1, 30, 33, 41, 45, 47, 48, 55, 56).

45. Mr. Lefkowitz informed Mr. Zauderer by memorandum of 26 June 1997 that payment no. 12, in the amount of $116,962.05 was being released and "I have requested

payment be mailed to your office" (app. R4 supp. A, tab 34). DFAS nonetheless sent the payment to Castle (tr. 135-36).

Superintendence (Change Orders)

46. During performance under the takeover agreement, the parties entered into Mods. 9-13 and 15. Each provided for changes to the contract work and adjusted the contract price. Each contained a release, as follows:

Mods. 9-12 (Change Proposals 14, 22)

> IN CONSIDERATION OF THE MODIFICATION AGREED HEREIN AS COMPLETE AND EQUITABLE ADJUSTMENT FOR THE CONTRACTOR'S PROPOSAL, INCLUDING SUBCONTRACTORS AND SUPPLIERS, THE CONTRACTOR HEREBY RELEASES THE GOVERNMENT FROM ANY AND ALL LIABILITY UNDER THIS CONTRACT FOR FURTHER EQUITABLE ADJUSTMENT ATTRIBUTABLE TO SUCH FACTS AND CIRCUMSTANCES GIVING RISE TO THIS PROPOSAL, EXCEPT THAT THE CONTRACTOR AND THE GOVERNMENT HEREBY SPECIFICALLY UNDERSTAND AND AGREE THAT:
>
> (1) THE CONTRACTOR DOES NOT RELEASE AND HEREBY RESERVES ITS RIGHT, IF ANY, TO MAKE CLAIM FOR EXTENDED OVERHEAD INCLUDING BUT NOT LIMITED TO SITE SUPERVISION AND PROJECT MANAGEMENT, IN ANY WAY RESULTING FROM THIS MODIFICATION; AND (2) THIS RELEASE RELATES TO AND IS SPECIFICALLY LIMITED TO THE MATTERS CONTAINED IN THIS MODIFICATION AND IS NOT A RELEASE OF ANY OTHER CLAIM THAT THE CONTRACTOR MAY HAVE AGAINST THE GOVERNMENT.

Mod. 13 (Change Proposal 25)

> (C.) THE NEGOTIATED PRICE FOR THIS ACTION INCLUDES THE COSTS FOR PROJECT SUPERINDENTENT AND MANAGER AND EXECUTION OF THIS MODIFICATION RELEASES THE GOVERNMENT FROM FURTHER CLAIMS FOR THESE SPECIFIC COSTS. THEREFORE IN CONSIDERATION OF THE ABOVE MODIFICATION AGREED TO HEREIN AS COMPLETE AND

EQUITABLE ADJUSTMENT FOR THE CONTRACTOR'S PROPOSAL, INCLUDING SUBCONTRACTORS AND SUPPLIERS. THE CONTRACTOR HEREBY RELEASES THE GOVERNMENT FROM ANY AND ALL LIABILITY UNDER THIS CONTRACT FOR FURTHER EQUITABLE ADJUSTMENT ATTRIBUTABLE TO SUCH FACTS AND CIRCUMSTANCES GIVING RISE TO THIS PROPOSAL.

Mod. 15 (Change Proposal Addendum 3A)

IT IS THE INTENT OF BOTH PARTIES THAT THIS AGREEMENT SETTLES ALL REVISIONS/ADDITIONS OF THE SAME TYPE UP TO THE EFFECTIVE DATE OF THIS AGREEMENT AND FURTHER SETTLES ALL TYPE REVISIONS/ADDITIONS TO BE ACHIEVED BY THE CONTRACTOR THROUGH THE END OF THE CONTRACT. EXECUTION CONSTITUTES A RELEASE OF THE GOVERNMENT BY THE CONTRACTOR OF CLAIMS RELATED TO THE AFORESAID ISSUE(S). IT IS FURTHER UNDERSTOOD AND AGREED THAT THE PRICE ADJUSTMENTS, IF APPLICABLE, PROVIDED HEREIN CONSTITUTES COMPENSATION IN FULL ON BEHALF OF THE CONTRACTOR AND ITS SUBCONTRACTORS AND SUPPLIERS FOR ALL COSTS AND MARKUPS DIRECTLY OR INDIRECTLY ATTRIBUTABLE TO THE CHANGE(S) DESCRIBED HEREIN, INCLUDING ALL EXTENDED OVERHEAD, IMPACT ON OTHER WORK AND TIME ADJUSTMENTS, AND FOR ALL DELAYS RELATED THERETO AND FOR PERFORMANCE OF THE WORK WITHIN THE STATED TIME.

(R4, tabs 57-63) None of the modifications extends the time of performance.

47. According to Mr. Scott Lattimer, L & A incurred additional expense of $40,492 for the cost of project manager's and superintendent's time under the modifications which the Air Force would not allow. The calculation is based on a summary of hours spent on various tasks. Scott Lattimer testified that L & A was directed instead to file a claim. (Tr. 877-79; ex. A-1 at 277) Ms. DeMito testified that had she known the employees were salaried, she would have considered the costs part of L & A's overhead (tr. 1640-41).

48. The claim identifies Exhibit B as support for the costs for a project manager and superintendent. That exhibit does not identify them by name. (Ex. A-1 at 272-73) Exhibit B, included as Appendix A to this opinion, is a chart showing project manager time for 25

change proposals commencing 17 October 1997 and concluding 10 September 1998 (ex. A-1 at 277). The chart shows 181 project manager hours at $75 per hour and 291 superintendent hours at $65 per hour, plus 10 percent overhead, 10 percent profit and 3 percent for bonds. L & A was not bonded (tr. 981). As the period is from 17 October 1997 to 10 September 1998, we find Mr. Marks was the superintendent and that he was the onsite supervisor throughout the job (tr. 576-77). He was a salaried employee (tr. 629). There is no evidence that Mr. Marks was paid additional amounts attributable to changes. His salary was paid by L & A (ex. A-12) and L & A billed UPI for superintendent costs (exs. A-5, -12; tr. 1556). We find Mr. Scott Lattimer was the project manager (tr. 827, 954-55). Scott Lattimer was salaried and his salary was paid by Lattimer, not by L & A (tr. 955). He visited the site intermittently (tr. 827). His time was not identified with a particular project and the 6 August 1997 letter states his time was to be billed at $95 per hour (tr. 1464-65). There was generally inadequate support for billings to L & A (tr. 1557). UPI has presented no credible evidence, such as billings from Lattimer to L & A, of additional payments for work done by Scott Lattimer arising from the change proposals during the relevant periods. Moreover, Scott Lattimer's total testimony on his involvement with this part of the claim was as follows:

> Ours were the costs as broken down, starting with Exhibit B . . . which shows, basically, calculations for the superintendent and the project manager. Those two times--they really weren't days, but they are hours involved with these change orders for this project.

(Tr. 878) The DCAA audit did not verify incurrence of costs by L & A for either the superintendent or project manager attributable to change orders (tr. 1470).

49. A review of the change proposals listed in Exhibit B reveals the following relevant points:

Change Proposal No. 1 (light switches) (Mod. 9) - no indication of total hours; 35 percent labor burden; 15 percent home office overhead; no subontractor costs; no reservation of claims (R4, tabs 268, 280);

Change Proposal No. 2 (no Mod.) - for Addendum 26 which was not performed by UPI/L & A (R4, tabs 270, 273);

Change Proposal No. 3 (doors) (Mod. 10) - no indication of total hours; 35 percent labor burden; 15 percent home office overhead; no subontractor costs; no reservation of claims (R4, tab 285);

Change Proposal No. 4 (finish schedule, ceiling tiles) (Mod. 10) - no indication of total hours; 35 percent labor burden; 15 percent home office overhead; 10 percent

general conditions; 10 percent profit; no subcontractor costs; no reservation of claims (ex. A-1 at 285-86);

Change Proposal No. 4 (ceiling tiles) (Mod. 10) - 75 hours superintendent time @ $68; 45 hours project manager time @ $75; 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; no reservation of claims (ex. A-1 at 295-96);

Change Proposal No. 4 (ceiling tiles) (Mod. 10) - 0 project manager and superintendent hours, claim for same reserved (ex. A-1 at 299, 302);

Change Proposal No. 5 (roof changes) (Mod. 9) - nothing identifiable as Change Proposal No. 5 in record;

Change Proposal No. 6 (store fronts) (Mod. 10) - 8 hours superintendent time @ $68; 5 hours project manager time @ $75; 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; no reservation of claims (ex. A-1 at 295, 297).

Change Proposal No. 7 (ceramic tiles) (Mod. 10) - 8 hours superintendent time @ $68; 2 hours project manager time @ $75; 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; no reservation of claims (ex. A-1 at 293-94);

Change Proposal No. 8 (electric) (Mod. 11) - 0 hours superintendent and project manager time (exhibit B shows 4 hours for both); 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; claim for project manager and superintendent reserved (ex. A-1 at 277, 298-99);

Change Proposal No. 9 (power plan) (Mod. 11) - 0 hours superintendent and project manager time (Exhibit B shows 8 hours for both project manager and superintendent); 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; claim for project manager and superintendent reserved (R4, tab 313);

Change Proposal No. 10 (wall paper) (Mod. 9) - 0 hours superintendent and project manager time (Exhibit B shows Change Proposal No. 10 with 32 hours for project manager, 56 hours for superintendent); 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; claim for project manager and superintendent reserved (ex. A-1 at 277, 298-99);

Change Proposal No. 11 (west vestibule) (Mod. 10) - 0 hours superintendent and project manager time (exhibit B shows 2 hours for project manager, 4 hours for

superintendent); 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; claim for project manager and superintendent reserved (ex. A-1 at 277, 311-12);

Change Proposal No. 12 - no cost (ex. A-1 at 277);

Change Proposal No. 13 (basement finishes) - nothing identifiable as Change Proposal No. 13 in record; no correlation with a modification; exhibit B claims 8 project manager hours @ $75 (*id.*);

Change Proposal No. 14 (electrical floor plan changes) (Mod. 11) - proposes a credit; exhibit B claims 8 hours project manager time @ $75 (R4, tab 316; ex. A-1 at 277);

Change Proposal No. 15 (wallpaper painting areas) - nothing identifiable as Change Proposal No. 15 in record; no correlation with a modification; exhibit B claims 2 project manager hours @ $75 (ex. A-1 at 277);

Change Proposal No. 16 (planter deletion) - no cost;

Change Proposal No. 17 (platform deletion) (Mod. 11) - credit proposal; exhibit B claims 8 hours for both superintendent and project manager (ex. A-1 at 277, 313-14);

Change Proposal No. 18 (porcelain pavers) (Mod. 11) - claims 1 hour for superintendent and 2 hours for project manager, but no labor cost; claim for project manager and superintendent reserved (ex. A-1 at 277, 316-17);

Change Proposal No. 19 (exhaust fan) (Mod. 12) - claims 1 hour for both superintendent and project manager; 35 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no subcontractor costs; claim for project manager and superintendent reserved (ex. A-1 at 277, 318-19); Mod. 12 states that the exhaust fan was provided at no cost per 14 June 1998 Lattimer letter (R4, tab 60);

Change Proposal No. 20 (cabinets and handrail) - credit proposal; cannot correlate to a modification; exhibit B claims16 project manager hours and 2 superintendent hours (ex. A-1 at 277);

Change Proposal No. 21 (fire alarm control panel) - cannot correlate to a modification; exhibit B seeks 3 project manager hours and 1 superintendent hour (*id.*);

Change Proposal No. 22 (fire protection devices) (Mod. 12) - 10 superintendent hours and 4 project manager hours claimed; 15 percent overhead; 10 percent profit; 3 percent bonds; reservation of claims (ex. A-1 at 322-23);

Change Proposal No. 23 (courtyard deletion) - nothing identifiable as Change Order Proposal No. 23 in the record; cannot correlate to a modification; exhibit B claims 4 project manager hours (ex. A-1 at 277);

Change Proposal No. 24 (Unicor installers) - no cost (*id.*);

Change Proposal No. 25 (extra's letter) (Mod. 13) - 96 hours superintendent time @ $68; 8 hours project manager time @ $75; 39 percent insurance and taxes; 15 percent overhead; 10 percent profit; 3 percent bonds; no reservation of claims (ex. A-1 at 277*;* R4, tabs 61, 340).

None of the change proposals show Lattimer as a subcontractor.

Patently Defective Work

50. Some Castle work requiring correction was not concealed by Castle. Specifically, almost all of the chilled water valves were installed upside down, causing leakage (tr. 607-09). Other work was not completed. For example, chairs were not installed for handicapped sinks, requiring L & A to cut into existing walls (tr. 606-08). Vents had to be cut in masonry at some places, although Mr. Marks could not estimate how many (tr. 618, 651). Some ducts did not have fire dampers (tr. 617). An airhandling unit was damaged due to freezing (tr. 650). The foregoing are visible on the Tab 74 video. Additionally, although concealment appeared to have been attempted, Mr. Zauderer observed bulges where sheetrock was installed directly over electrical wires (tr. 145).

51. Regarding improperly sized pipe insulation, it was agreed that where improperly sized insulation could be removed and replaced in the ceiling where there was no demolition involved, the correction was to be made. However, if there was improperly sized plumbing insulation (as contrasted with no insulation at all) in the walls requiring demolition and replacement of existing sheetrock, the Air Force waived correction. (Tr. 691-92)

52. Shortly after Mr. Marks' arrival at the site, domestic water tests were done in Buildings 2402 (14 August 1997) and 2403 (13 August 1997). Both buildings passed the tests. (Tr. 656) Field reports prior to the tests do not show any work on domestic water by L & A (ex. A-1 at 364-67).

53. Mr. Jaques testified that he was unaware of the following elements of Castle's work which are identified in UPI's claim as patently defective, with the reasons set out in parentheses: incomplete wiring inside a wall (not visible, testing only done for final inspection); wires not placed through studs and sheetrocked over (he did not see it); thermostat wiring buried behind walls (did not see, testing only done for final inspection); different sized pipe insulation (did not see); uninsulated pipes and gaps in insulation

sheetrocked over (did not see); frozen coils for window unit or other coils requiring replacement (not aware); and damaged MC cable (not aware). (Jaques dep. at 91-98)

54. Mr. Jaques' approach to inspection was to check for the proper materials (*e.g.*, no metal studs where wooden studs were required); inspect where work was actually in progress; and to determine the status of work (Jaques dep. at 111-13). He did not inspect before walls were sheetrocked because inspection on systems behind walls was, in his view, to be done only for final inspection. His technical surveillance did not include quality control, which is the contractor's responsibility. His surveillance included workmanship and he would only observe at tests during performance when requested. In order for electrical to be tested it was necessary for the system to be energized, and it generally is not energized until it is complete. (*Id.* at 111-24) He was never present for field tests (Jaques dep. at 192-93). He was not aware that Lattimer had spent "a considerable amount of time" correcting upside-down valves, although he "had heard that some valves had to be turned" (*id*. at 195).

Contract Balance

55. UPI submitted an undated, unsigned voucher asserting the right to a contract balance of $175,745.62 (ex. A-1 at 750).

56. According to the contracting officer, issues remain between the Air Force and UPI with regard to a credit for BC cable, delivery of "as-built" drawings, and a release, which UPI has not provided (tr. 1641-42). She also maintains that a double payment was made to Castle (findings 14, 26) that should be included in determining the contract balance (tr. 1706-07, 1710).

57. UPI has admitted that it has not provided a release as set out at FAR 52.232-5(h)(3) (R4, tab 359 at 3).

Contracting Officer's Decision and Appeal

58. On 12 September 2000 the contracting officer issued her decision denying UPI's claim. The decision only raises the lack of a release as the reason for denying UPI the contract balance. (R4, tab 66)

59. UPI filed its timely Notice of Appeal on or about 18 September 2000 (R4, tab 67).

DECISION

UPI seeks recovery for seven claim elements alleging that its cost of performance was increased because of delays, changes, overpayment to Castle, and improper inspection.

In the alternative, UPI seeks quantum meruit recovery based on an illegal contract theory. UPI asserts that it has standing to bring and we have jurisdiction to resolve this appeal in its entirety. The Air Force asserts that we have been divested of jurisdiction over certain portions of this appeal by *Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002) (*Fireman's Fund*). The Air Force further argues that UPI's claim lacks factual and legal merit. We address jurisdiction, the illegal contract theory, and the individual claim elements in that order.

Jurisdiction and the Overpayment Claim

Except for appeals arising directly from work under a takeover agreement where the surety is a contractor, our assumption of jurisdiction in appeals from performance bond sureties has generally been based on the principles of equitable subrogation:

> The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.

Memphis & Little Rock Railroad v. Dow, 120 U.S. 287, 301-02 (1887). A surety completing or financing to completion under a Miller Act performance bond may be subrogated to the rights of both the contractor and the Government which may entitle it to the retained funds and unpaid progress payments, *i.e.*, the contract balance. *Security Insurance Company of Hartford v. United States,* 428 F.2d 838 (Ct. Cl. 1970). This Board has long accorded standing to sureties under the right of subrogation. *See, e.g., Peerless Insurance Co*., ASBCA No. 28887, 88-2 BCA ¶ 20,730. However, the United States Supreme Court in *Department of the Army v. Blue Fox, Inc.,* 525 U.S. 255 (1999), cast doubt on our jurisdiction by noting that none of its earlier decisions in which sureties had been granted standing based on equitable subrogation involved waiver of sovereign immunity. The Court affirmed the long-standing principle that sovereign immunity, unless waived by Congress, is a bar to lawsuits against the Government, and asserted that its earlier decisions do not disturb that principle.

In *Insurance Company of the West v. United States,* 243 F.3d 1367 (Fed. Cir. 2001), a case arising in the Court of Federal Claims under the Tucker Act, the United States Court of Appeals for the Federal Circuit was called upon to interpret *Blue Fox*. The Federal Circuit concluded that the Tucker Act waived sovereign immunity and therefore the Tucker Act jurisdiction of the Court of Federal Claims was not altered by *Blue Fox*. Relying on *Insurance Company of the West*, we reasoned in *UP I* that, like the Court of Federal Claims, our jurisdiction was unaffected by *Blue Fox*. We must re-examine our earlier decision in light of *Fireman's Fund* and its holding that the waiver of sovereign immunity in the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, is not broad enough to encompass equitable subrogation.

The Board requested supplemental briefs on *Fireman's Fund*. We asked the parties to address whether that opinion divested us of equitable subrogation jurisdiction and, if so, whether the Court in *National Surety Corp. v. United States*, 118 F.3d 1542 (Fed. Cir. 1997) (*National Surety II*), held that *pro tanto* discharge is an element of equitable subrogation. UPI has relied heavily on *National Surety II* in its arguments on the overpayment issue: "[h]ad the Government adhered to its duty to the surety as set forth in *National Surety*, the balance left for the surety would have been greater . . . ." (App. br. at 15) We note at the outset that UPI's argument is, effectively, that the Air Force impaired collateral or an underlying obligation in the form of the contract balance. Thus, RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 42 (1995) (hereinafter "RESTATEMENT"), states:

> Impairment of Collateral
>
> (1) If . . . the obligee impairs the [collateral] the secondary obligation is discharged to the extent that such impairment would increase the difference between the maximum amount recoverable by the secondary obligor pursuant to its subrogation rights . . . and the secondary obligor's interest in the collateral.

UPI argues in its supplemental brief that "it is completely inappropriate as a matter of law to apply *Fireman's Fund* to the facts of this case" (app. supp. br. at 5). At the outset, we reject UPI's argument that the Court's holding in *Insurance Co. of the West* governs where the claims are post-takeover. That argument overlooks the differences between the Tucker Act and the CDA. UPI also argues that the claims presented in this appeal after *UP I* are not pre-takeover and therefore not barred by the Anti-Assignment Act, while *Fireman's Fund* dealt only with pre-takeover claims which are barred by that Act. The Air Force argues that the dissent in *National Surety II,* which reasoned that *pro tanto* discharge is distinct from equitable subrogation, should be followed, while contending that UPI still cannot establish its status as a contractor under the CDA.

In *National Surety Corp. v. United States,* 31 Fed. Cl. 565 (1994) (*National Surety I),* affirmed in part, vacated in part, and remanded by *National Surety II*, the Government had failed to withhold the ten percent retainage required by the contract. After the original contractor was terminated for default, the surety completed the contract under its performance bond and sought recovery of the retainage. The Court of Federal Claims held that the surety was a third party beneficiary and granted recovery for the retainage. In *National Surety II* the Federal Circuit disagreed with respect to whether the surety was a third party beneficiary, stating:

> National Surety argued at trial that, based on principles of suretyship and the doctrine of subrogation, it was entitled to the retainage security that was required to have been withheld from the contractor. We agree that this is the appropriate theory of liability.

Id. at 1545. The Court then cited with approval *Prairie State National Bank v. United States*, 164 U.S. 227, 233 (1896), where the Supreme Court held that the right of subrogation entitled a surety to be substituted to the rights of the United States with respect to contract retainage: "a stipulation . . . for the retention . . . raises an equity in the surety in the fund to be created . . . ." The Federal Circuit agreed that a surety has the right to subrogation in the security held by the Government and "[t]he subrogation right is equitable, in origin and in implementation." *National Surety II* at 1546. We conclude that the Court held that Government impairment of that security which results in the *pro tanto* discharge of a surety's obligation is an element of a surety's equitable subrogation rights in that the Government's wrongful payment diminished the funds constituting the contract balance to which the surety was subrogated. However, as both parties argue, and as we discuss, *infra*, *pro tanto* discharge may be viewed as a separate defense of the surety which is not dependent on equitable subrogation. In either case the question is whether impairment of the contract balance gives the surety standing under the CDA.

We first address our jurisdiction under equitable subrogation. In *Fireman's Fund* the Court plainly held there was no CDA jurisdiction over the pre-takeover claims of a performance bond surety arising from the doctrine of equitable subrogation. The Court repeated the oft-stated principle that a claim must be brought by a contractor for CDA jurisdiction to arise, and continued:

> Even if Fireman's Fund were equitably subrogated to any claim that Summit [the original contractor] may have had against the government, that did not make Fireman's Fund a party.

Fireman's Fund, 313 F.3d at 1351.

The Court then went on to remove any doubt as to whether the surety had standing, and the Board jurisdiction:

> To the extent [the surety] relies upon equitable subrogation and to the extent that doctrine works by operation of law (cf. *Ins. Co. of the West, 243 F.3d 1367*), the Anti-Assignment Act would not bar its claim. That, however, would not entitle Fireman's Fund to prevail, because it still does not satisfy the requirement of the Contract Disputes Act that to proceed under

> that Act, a party must have been a "contractor" with the United States, which Fireman's Fund was not with respect to its pre-takeover claims.

Id. at 1352. This holding defeats UPI's argument that *Fireman's Fund* is distinguishable because the Anti-Assignment Act does not come into play with post-takeover claims. The Court, as we understand its opinion, rested its conclusion solely on waiver of sovereign immunity, which would bar a surety's standing even where the Anti-Assignment Act did not.

UPI also argues that the overpayment claim does not fall into the category of the original contractor's pre-takeover claims, but arises from the Air Force's failure to exercise reasonable discretion. UPI cites *Balboa Insurance Co. v. United States*, 775 F.2d 1158 (Fed. Cir. 1985). As we understand that case, which was appealed from the United States Claims Court, predecessor to the Court of Federal Claims, the Court addressed the "reasonable discretion" issue within the context of the surety's equitable subrogation rights. If we do not have equitable subrogation jurisdiction, we cannot address that issue. Further, as noted, the Court in *Fireman's Fund* did not base its holding on lack of an assignment of the original contractor's claims as we did in *UP I* in dismissing the pre-takeover claims. Rather, it stresses the CDA requirements for standing and, as we understand the Court's holding, concludes that equitable subrogation rights do not equate to standing under the CDA.

Fireman's Fund does not close the door entirely here, because of another factual difference--the equitable subrogation overpayment claim of UPI arises not from UPI being subrogated to the rights of Castle, but from UPI being subrogated to the rights of the Government. However, under the facts at issue it is the reduction of the amount available for recovery under the doctrine of equitable subrogation that is disputed. We cannot conclude UPI is somehow a CDA party for this purpose. The CDA recognizes two parties to Government contracts--the contractor and the Government, 41 U.S.C. § 601(4)--and only contractors are expressly given the right to bring appeals to boards of contract appeals. 41 U.S.C. §§ 605(a), 606. The pre-takeover contracting parties in *Fireman's Fund* were the original contractor and the Government. If the surety there did not stand in the CDA shoes of the party with whom it had an express contractual obligation (the performance bond) and to whom the CDA has given the express right of appeal, we are not persuaded that the surety here should have greater claim to the right to file an appeal where equitable subrogation has it standing in the shoes of the Government, with which it had no express pre-takeover contractual relationship. Thus, we can find no rational basis to treat the filing of an appeal arising from denial of a claim based on subrogation to a Government right differently than a claim based on subrogation to a contractor's right, given that a performance bond was involved here and in *Fireman's Fund*.[9] We hold that we do not have CDA jurisdiction over equitable subrogation claims of sureties. Accordingly, we conclude we have no jurisdiction over the *pro tanto* discharge overpayment claim of UPI insofar as it may be presented under that doctrine.

UPI argues that *Fireman's Fund* is distinguishable because UPI is pursuing its own claim for overpayment, not that of Castle. Thus, both parties argue, in effect, that *pro tanto* discharge may be viewed as a suretyship defense with a life of its own, separate and apart from equitable subrogation. It is clear from the dissent in *National Surety II* that the argument was not presented by the parties in that case. *Id.* at 1552. That may explain why the majority did not address it and chose instead to resolve the matter under equitable subrogation principles. The two doctrines may be seen as separate branches of the suretyship tree, with one requiring notice while the other does not. *Security Insurance Corporation of Hartford*, ASBCA No. 51759, 00-2 BCA ¶ 31,021; 01-2 BCA ¶ 31,519. Indeed, the RESTATEMENT § 42, quoted *supra*, leaves some doubt as to whether subrogation rights are involved, or whether the decrease in the collateral (here, contract balance) available under subrogation rights serves merely as the measure of relief available. Further, there are a variety of suretyship defenses which may, if the surety has performed or made payment, give rise to a claim. *See* RESTATEMENT, §§ 37-49; *Security Insurance Corporation of Hartford,* ASBCA No. 51759, *supra*. However one views discharge as it applies to suretyship rights in other forums, the overriding issue here is whether the CDA waives sovereign immunity and provides jurisdiction to consider those rights.

We can find no basis to treat *pro tanto* discharge, and therefore the overpayment claim, any differently than equitable subrogation with respect to the waiver of sovereign immunity as articulated in *Fireman's Fund*. UPI contends that the Takeover Agreement (finding 29) provides it with a contractual right to pursue the overpayment claim. If UPI's argument is accepted, it would establish jurisdiction regardless of which doctrine one applied. Specifically, paragraph 10 states "SURETY expressly reserves all prior rights including but not limited to the Government's overpayment to the Contractor . . . ." According to UPI, this bridges the privity gap and gives it standing. The difficulty with UPI's argument is that it reserved *prior* rights, and it had no prior rights. It was not a party to the original contract, had no rights arising from the bonded contract between the Air Force and Castle, no third-party beneficiary rights, and there was no implied-in-fact contract that arose from the bonds. *National Surety II; Fireman's Fund Insurance Co. v. United States,* 909 F.2d 495, 499-500 (Fed. Cir. 1990); *UP I.*

The most fundamental reason for UPI's lack of standing and our lack of jurisdiction is that UPI's position effectively seeks discharge from its responsibilities under the performance bond, which was between it and Castle, not between UPI and the Air Force. The Government was expressly a third-party beneficiary for the penal sum of the bond for purposes of the contract, and this bound UPI to the Air Force. There was, however, no similar relationship flowing to UPI as the Government was not a party to the bond. (Finding 7) Payment and performance bonds create no contractual obligations for the Government unless an obligation is specifically undertaken. *Fireman's Fund Insurance Co. v. United States,* 909 F.2d at 499-500. Without such a contractual agreement there is no waiver of sovereign immunity under the CDA. We have previously rejected UPI's arguments

involving a contractual relationship with the Air Force under the indemnity agreement. *UP I.* Because of this, we have no jurisdiction and UPI has no standing.[10] The overpayment portion of the appeal is dismissed. Other claim items have similar standing issues, as we discuss, *infra*.

The Illegal Contract Claim

UPI contends that the contract was illegal and that an implied-in-fact contract between it and the Air Force arose from its ashes. UPI asserts that it should recover on a *quantum meruit* basis. The Air Force argues that the contract was not illegal. It also contends that UPI has no standing to pursue an illegal contract claim because it cannot show an implied-in-fact contract between it and the Air Force.

UPI's claim is premised on its argument that the contract involved only one building because the connectors made Buildings 2401, 2402 and 2403 interrelated to such a degree that their individual character was lost. If, as UPI believes, only one building was involved, the statutory limit on O&M funds was violated and the contract was illegal. It also argues that the $3,000 price for the connectors was a sham. UPI relies heavily on *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986), and the Court's statement that where the Government benefits from receiving goods or services under an invalid contract the contractor is entitled to recover on a *quantum valebant* or *quantum meruit* basis under an implied-in-fact contract theory. *Id.* at 393.[11]

Assuming, *arguendo*, that UPI's arguments on the facts regarding illegality are persuasive, it cannot establish the existence of an implied-in-fact contract between it and the Air Force. The real essence of UPI's contention is that it would not have entered into the bonding agreement with Castle if it had known that the underlying Air Force contract was illegal:

> Clearly no surety would have ever bonded an illegal Contract being improperly funded by the Government which was engaging in project-splitting and acceptance of an obvious unbalanced bid. The Government had a legal obligation to the Surety to ensure that the Contract on which it required a bond was a legal contract and the Surety which relied on the Government's entry into a legal contract must have the right to pursue its illegal Contract claim.

(App. reply br. at 5)

Following UPI's argument to what we believe is its logical conclusion, any obligation of the Government was implied-in-law, not implied-in-fact. We do not have

jurisdiction over quasi-contractual, implied-in-law agreements. *Eaton Corp.,* ASBCA No. 38386, 91-1 BCA ¶ 23,398. Nonetheless, we consider UPI's argument that there was an implied-in-fact contract between it and the Air Force.

The burden of proof to show compliance with the jurisdictional statute--here, the CDA--is on UPI. *Trauma Service Group v. United States,* 104 F.3d 1321 (Fed. Cir. 1997) (party invoking jurisdiction of the Court of Federal Claims has to show Tucker Act compliance). This means that UPI must establish the existence of an implied-in-fact contract:

> An implied-in-fact contract is one "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597, 67 L. Ed. 816, 43 S. Ct. 425 (1923); see also *Hercules, Inc. v. United States*, 516 U.S. 417, 424, 134 L. Ed. 2d 47, 116 S. Ct. 981 (1996). Like an express contract, an implied-in-fact contract requires "1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance." *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); see also *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984); *Russell Corp. v. United States*, 210 Ct. Cl. 596, 537 F.2d 474, 482 (Ct. Cl. 1976). When the United States is a party, a fourth requirement is added: The government representative whose conduct is relied upon must have actual authority to bind the government in contract. See *City of El Centro*, 922 F.2d at 820. In short, an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates mutual assent. See *Chavez v. United States*, 18 Cl. Ct. 540, 544 (1989). Implied-in-fact contracts, which are within the jurisdiction of the Court of Federal Claims, differ significantly from implied-in-law contracts, which impose duties that are deemed to arise by operation of law and are outside the jurisdiction of the Court of Federal Claims. See *Hercules, Inc.* 516 U.S. at 423; *Merritt v. United States*, 267 U.S. 338, 340-41, 69 L. Ed. 643, 45 S. Ct. 278 (1925); *Russell Corp*., 537 F.2d at 482.

City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998).

According to UPI, the facts which create the requisite elements -- meeting of the minds, offer, acceptance, mutuality of intent, consideration, authority -- are to be found in the contract between Castle and the Air Force: "Castle and United Pacific clearly performed work pursuant to the written Contract. Therefore, the Contract was a contract implied-in-fact as a matter of law" (app. br. at 21). The first flaw in UPI's argument is that the contract referred to is the contract between Castle and the Air Force. There is no evidence that UPI participated in negotiations with the Air Force or otherwise placed itself in a position through which a contract could have been formed by "conduct of the parties showing . . . their tacit understanding." *City of Cincinnati, supra*. (Finding 7) The parties to the implied-in-fact contract alleged here by UPI are UPI and the Air Force. If there were funding irregularities and an illegal unbalanced bid, they related to a contract to which UPI was not a party. The performance bond, under which the Government is a third-party beneficiary, did not create contractual privity, express or implied-in-fact, between UPI and the Air Force. *United States v. Seaboard Surety Company,* 817 F.2d 956, 961 (2d Cir. 1987), *cert. denied,* 484 U.S. 855 (1987). Nor are the surety's rights and obligations derived from a third-party beneficiary relationship which might conceivably give rise to some form of agreement between UPI and the Air Force. *National Surety II* at 1545 ("The surety's rights and obligations are not based on third-party beneficiary concepts . . . ."). Thus, the contractual elements necessary to a contract implied-in-fact that UPI would have us find as inherent in the contract between Castle and the Air Force and the bond are not established through Contract No. F28609-95-C-0036. Moreover, an express contract on the same matter is a bar to, not proof of, an implied-in-fact contract. *Trauma Service Group,* 104 F.3d at 1326.

UPI correctly represents that Castle and it did work under the terms of the contract, which was incorporated into the takeover agreement. The problem with this argument is that the work done by UPI was pursuant to the takeover agreement, about which UPI raises no issue as to legality, and "an implied-in-fact contract cannot exist if an express contract already covers the same subject matter." *Id.*

We conclude that, even if Contract No. F28609-95-C-0036 was illegal, and we have not so found, no implied-in-fact contract came into being between the Air Force and UPI. Accordingly, we hold we have no jurisdiction over UPI's illegal contract claim. That portion of the appeal is dismissed.

Delay and Excess Superintendence (Delays)

The first of UPI's delay claims seeks $99,198 for extended overhead of 198 days at $501 per day (finding 42). The excess superintendence claim is for 162 days of delay at $520 per day (*id.*). Viewed as a suspension of work, these elements of UPI's claim share as a predicate the need to prove the length of the delay, that the length of the delay was unreasonable, and that the delay was caused by the Government. *Wunderlich Contracting Co. v. United States,* 351 F.2d 956, 967 (Ct. Cl. 1965). We have found that UPI has not

met its burden of proof with respect to compensable delay (finding 43). For one thing, there never was a schedule with which to compare performance (finding 41). We cannot, for example, evaluate the effect of UPI's receipt of the finish schedule on 8 December 1997 (finding 43), except to say that Mr. Scott Lattimer's testimony that finish work could not begin until 19 February 1998 (*id*.) indicates a two month, unexplained lag. UPI has left us with a record like that in *Wunderlich Contracting Co*., 351 F.2d at 969, where the Court observed:

> Although we do not doubt that plaintiffs and their subcontractors encountered delays and difficulties in proceeding with the plans provided by defendant, all that plaintiffs have attempted to prove with respect to any of the major claims is the total amount of costs and the total delay experienced on the project. No satisfactory evidence has been presented to differentiate between reasonable and unreasonable government delays, or between delays attributable to defendant and delays unavoidably caused by extraneous circumstances. It is incumbent upon plaintiffs to show the nature and extent of the various delays for which damages are claimed and to connect them to some act of commission or omission on defendant's part.

We think the Court's rationale for denying the appellant's claim also applies here. Our holding *infra* that UPI is responsible under the performance bond for correcting Castle's work means that UPI is responsible for attendant delays. UPI was unable to provide a probative estimate of the amount of corrective work (finding 43). UPI has argued its case from the general testimony of Mr. Lattimer and Mr. Zauderer and the claim (app. br. at 18-19). This is, in our view, insufficiently probative to be persuasive. UPI's delay claims fail for a lack of proof.

Viewed as a claim under the Changes clause, UPI's claim also fails for lack of proof. There is no proof that Latimer paid Mr. Marks, the superintendent and a salaried employee, any additional money due to delays. The only specific cause of post-takeover delay claimed which is discernible from the record is for the finish schedule. UPI has failed to prove this delayed completion. Finally, there is no proof of a delay. (Finding 43)

Additionally, UPI's claim seeks extended overhead costs of $99,198. Such costs are only recoverable by resort to the Eichleay formula. *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). Before recovery can be had, a contractor must show that its forces were on standby. *West v. All State Boiler, Inc.*, 146 F.3d 1368 (Fed. Cir. 1998). UPI's forces were never on standby (finding 41). This portion of the claim is denied for this reason as well.

Improper Contract Payment

The facts here are that Castle asked that future payments be sent to UPI. Ms. DeMito called Mr. Zauderer and told him that the only way to assure that was through a novation agreement, which he declined. He did not want the payment withheld, and the payment was sent to DFAS with a request from the contracting office that payment be sent to UPI. DFAS, however, sent the payment to Castle. (Findings 44, 45) UPI argues that the Air Force became a stakeholder and violated its duty to UPI when it did not ensure that the payment was not sent to Castle. The Air Force argues that UPI does not have standing for this part of its claim because the matter arose prior to the takeover agreement.

UPI cites four cases in support of its position. One is a case filed in the Court of Claims--*American Fidelity Fire Insurance Co. v. United States,* 513 F.2d 1375 (Cl. Ct. 1975). The other three are cases filed in the Court of Federal Claims or its predecessor -- *Transamerica Premier Insurance Co. v. United States,* 32 Fed. Cl. 308 (1994); *International Fidelity Insurance Co. v. United States,* 25 Cl. Ct. 469 (1992); and *International Fidelity Insurance Co. v. United States* 41 Fed. Cl. 706 (1998). The cases do not, therefore, establish the jurisdiction of the Board to resolve "stakeholder" disputes under the CDA.

In *Balboa Insurance Co. v. United States,* 775 F.2d 1158 (Fed. Cir. 1985), the surety brought suit to recover progress payments which it alleged were improperly made to the principal, a defaulted general contractor. There, the Court stated that a surety's "traditional means" of asserting such a claim was under the doctrine of equitable subrogation. *Id.* at 1161. UPI has not established and we are not aware of any other basis for UPI's recovery of an improperly made progress payment. As we are shorn of jurisdiction over the surety's equitable subrogation claims by *Fireman's Fund*, we must dismiss this part of the claim for lack of jurisdiction.

Superintendence (Change Orders)

UPI seeks $40,492 for additional costs for L & A's superintendent and project manager arising from changes to the takeover agreement (Mods. 9-13 and 15). The releases for Mods. 13 and 15 are total and do not reserve a claim for the time of a superintendent or project manager (finding 46). Both were salaried (finding 41). UPI cites to the claim and testimony of Scott Lattimer as support. To say that the testimony is lacking in specifics would be a kindness. Mr. Lattimer's sparse and unspecific testimony is not enough to carry UPI's burden of proof. However, many of the change proposals are in the record and can be traced to one of the modifications to the takeover agreement (finding 49).

None of the change proposals show costs going to Lattimer, the company which employed Scott Lattimer (findings 48, 49). Mr. Clyde Lattimer testified it was his intention to keep the two entities separate (finding 27). Scott Lattimer testified that he was the project manager (finding 48). He visited the site intermittently (*id*.). However, UPI and L & A have produced no subcontract other than the 6 August 1997 letter. In that document, Scott Lattimer's time is to be paid at the rate of $95 per hour. However, project manager billings were made at the rate of $75 per hour. (Finding 48) Project manager's time, pursuant to the letter, is to be paid at the rate of $75 per hour (finding 27). UPI seeks recompense for project manager time billed by L & A at $75 per hour. We have found there is no probative evidence of payments resulting from Scott Lattimer's work on the change proposals (finding 48). As an employee of Lattimer, we would have expected billings to UPI for his time as project manager to be supported by bills to L & A from Lattimer. We cannot identify any such bills (*id*.). Between the lack of evidence as to Scott Lattimer's involvement with the changes and the discrepancies as to his employer and the rate he is to be paid, we find there is a lack of proof as to UPI's entitlement to the project manager hours claimed. Accordingly, we deny the claim as to project manager's hours.[12]

Mr. Marks was the site supervisor for L & A (finding 48). From this we think it reasonable to infer that he supervised the work resulting from the changes to the takeover agreement. The 6 August 1997 letter calls for superintendent time to be compensated at $68 per hour and, unlike Scott Lattimer, he is not named in the letter (finding 27). The record does contain proof that he was paid by L & A and that UPI was billed by L & A for superintendent's time (finding 48).

In addition to considering the sparse record citations argued by appellant, we have also reviewed the change proposals. We conclude from our review that 135 superintendent hours are not recoverable. The reasons are set out below.

1. The release for Mod. 13 is complete and without any reservation and there is no reservation of claims in the change proposal. Thus, the 96 superintendent hours in change proposal 25 are not reserved. The hours are not recoverable because a complete release bars additional compensation. *Northwest Marine, Inc.*, ASBCA No. 40505, 94-3 BCA ¶ 27,036.

2. The releases for Mods. 9-12 reserve "extended overhead including but not limited to site supervision and project management." However, the costs sought are direct costs, and change proposals 1-3, 6 and 7 contain no reservation for the 21 superintendent hours claimed through those change proposals. We think the reservations in the modifications are inadequate, standing alone, to reserve a request for direct costs. Accordingly, without claims reservations in the change proposals clarifying the "extended overhead" reservation, we hold the direct costs have not been reserved. The costs are barred by the release in the modifications. (Finding 46) *Northwest Marine, Inc., supra.*

3. There are no modifications resulting from change proposals 20 (2 superintendent hours) and 21 (1 superintendent hour). UPI seeks a total of 3 superintendent hours based on these proposals. As there is no modification or other evidence of changed work performed, we hold that UPI has not carried its burden of proof and is not entitled to recover.

4. There are no change proposals in the record supporting the claim for change proposal 5 (4 superintendent hours). Without the change proposal to show that L & A was actually proposing superintendent direct costs, we hold there is inadequate evidence to support UPI's claim. UPI has failed to carry its burden of proof for those claimed direct hours.

5. Change proposals 14, 17, 20, and 23 are either deletions of work or "no cost" proposals. Yet UPI claims a total of 10 superintendent hours for those change proposals. UPI does not attempt to explain how it can be that deletions of work and "no cost" proposals give rise to increased supervisory hours. We hold that UPI has failed to carry its burden of proof.

6. Change proposal 19 is noted as for no cost in Mod. 12, yet UPI claims 1 hour for the superintendent. We hold that the "no cost" description in the modification, combined with the general release language in the modification (finding 46), merge to constitute a failure to reserve the claim for superintendent and project manager hours. As such, the costs are barred by the release. *Northwest Marine, Inc., supra.* UPI has failed to carry its burden of proof.

Regardless of the fact that our review of the change proposals does not totally eliminate all of the claimed hours, there are overriding reasons to deny this portion of the claim. As noted earlier, UPI has not proved there was compensable delay. Thus, no costs for superintendence over a period longer than anticipated were incurred as a result of delay. Moreover, UPI was required by the contract to have a full-time superintendent, and Mr. Marks was salaried, not hourly (findings 2, 48). Thus, the fact that Mr. Marks supervised the work does not, *ipso facto*, establish the incurrence of additional cost as a result. There is no proof that additional salary was paid (finding 48). We note also that, as L & A was not bonded, the bonding costs of 3 percent were not incurred (*id.*). UPI has not met its burden of proof on the portion of its claim for costs of superintendence attributable to changes.

Patently Defective Work

UPI seeks recovery for patently defective work, which it appears to define as work to correct the work performed defectively by Castle. The Air Force argues that the defects complained of were latent and fraudulent. With one exception, we agree with the Air Force.

As noted *supra*, even UPI concedes that the site looks 80 percent complete in the Tab 214 video. As we have stated, we consider that video to best represent the site as Mr. Jaques would have seen it. We are unable to detect any patent defects. Moreover, the relevant contract provisions did not require Castle to test water and electric in the presence of the inspector until the systems were complete (finding 3). We do not think the record supports a finding that the defects were evident, except for the bulges in the wall where wiring had been placed over, instead of through, wall studs. Although not visible on the Tab 214 video, there is testimony to support this deficiency as patent. (Finding 50) However, there is nothing to support the extent of this condition or how expensive it was to repair.

Moreover, we have found that Mr. Zauderer toured the site before termination, and before entering into the takeover agreement. After its principal is default terminated a surety always has the option of refusing to perform and letting the Government sue it. *Seaboard Surety Co.*, 817 F.2d at 959. We think there is inconsistency between Mr. Zauderer's actions in agreeing to the takeover agreement here, which UPI drafted and under which it agreed to complete the contract without any exceptions for defective work (finding 29), and the magnitude of patent defects complained of in the claim. It seems unlikely that a surety that had observed "numerous items of patently defective work" (app. br. at 19) would propose and execute the takeover agreement here and then arrange for the work on a time and materials basis where L & A was not responsible for "incorrect work" (finding 27).

UPI's greatest obstacle is that it issued the performance bond to insure that the contract would be performed satisfactorily. That contract and the takeover agreement included the Warranty of Construction clause which, in paragraph (c), obligates the contractor to "remedy at the Contractor's expense any failure to conform, or any defect." Castle abandoned performance. Castle's termination for default was, therefore, performance-based and has not been contested. (Finding 25) Under these facts, the contracting officer's decision is final and conclusive and the propriety of the default is established. *Combined Arms Training Systems, Inc.*, ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617 at 142,891. Where, as here, a performance-based termination for default has been established, the surety becomes liable and stands in the place of the principal. *Seaboard Surety Co.*, 817 F.2d at 962. It seems antithetical to UPI's status as a Miller Act surety to argue that defective performance by its defaulted principal is a basis for recovery of damages from the obligee (here, Air Force). Indeed, we note that UPI cites no cases in support of its position. We deny this portion of the appeal.

Contract Balance

UPI asserts it completed the contract and is entitled to the contract balance. However, the Air Force argues, and we have found, UPI has not submitted the release required by FAR 52.232-5(h)(3) (finding 57).[13] That clause provides:

> (h) Final payment. The Government shall pay the amount due the Contractor under this contract after—
>
> . . . .
>
> (3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.

Payment of the contract balance would constitute final payment. Accordingly, we must deny UPI's claim for the contract balance.[14]

SUMMARY

The following claim items are dismissed for lack of jurisdiction:

1. The Illegal Contract Alternative Claim
2. Overpayment
3. Improper Contract Payment

The following claim items are denied:

1. Delay
2. Excess Superintendence (Delays)
3. Superintendence (Change Orders)
4. Patently Defective Work
5. Contract Balance

The appeal is dismissed in part and denied in part in accordance with the foregoing.

Dated: 4 June 2003

CARROLL C. DICUS, 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] Appellant's claim asserted an alternative basis for recovery based on an illegal contract and termination for convenience theory under which it sought $3,194,490.59.

[2] The Reliance Group was the parent of Reliance Holding Company, a publicly traded corporation that owned a group of insurance companies, which included UPI. Reliance National was the underwriting division of the Reliance Group. UPI was one of the companies authorized to write Federal surety bonds under Reliance Holding Company. (Tr. 31)

[3] UPI's appeal to the Federal Circuit was voluntarily dismissed. *United Pacific Insurance Company v. Roche*, No. 01-1596 (Fed. Cir. November 22, 2002).

[4] That building was the only one of the three to receive a new peaked roof (tr. 1352).

[5] Conditioned space is space built to house people. The connectors were walkways between the buildings not meant to house people. (Tr. 1346-47)

[6] Except to refer to his testimony regarding his function, we have found the testimony of Mr. Lefkowitz (tr. 1058-1193) to be lacking in probative value.

[7] We have extrapolated the percentage of completion for each individual task from Contract Progress Report No. 33.

[8] Ms. DeMito was not specific as to whether it was Clyde or Scott Lattimer.

[9] We recognize that *National Surety I* was an appeal taken from a deemed denial under 41 U.S.C. § 605(c)(5) and therefore at least nominally a CDA claim. However, there was no jurisdictional issue raised or argued in *National Surety II*, where equitable subrogation based on a Government right was involved on appeal. We note that the Tucker Act, 28 U.S.C. § 1491, gives the Court of Federal Claims "jurisdiction to render judgment upon any claim . . . founded upon . . . any Act of Congress . . ." and in *Insurance Company of the West*, *supra*, the Court interpreted the Tucker Act as waiving sovereign immunity.

[10] Except as specific findings may be necessary to resolve issues before us, we express no opinion as to the substance of UPI's rights under the doctrines of equitable subrogation and *pro tanto* discharge. We are rather persuaded that we are the wrong forum in which to address those rights.

[11] Our reading of *Amdahl* does not lead us to conclude that the Court found an implied-in-fact contract, so we treat the statement as *obiter dictum.* Moreover, it is unclear that a contract implied-in-law can be formed if the Government agent did not have actual authority, as would be the case here if the contract was illegally funded. *See Chavez v. United States*, 18 Cl. Ct. 540 (1989); Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 Cath. U.L. Rev. 605 (1991). In any case, UPI cannot establish other elements of an implied-in-law contract.

[12] As there are costs sought for proposals for which there is no modification, it may be that Scott Lattimer's time is for preparing proposals. That is ordinarily recovered through overhead costs. *Bridgewater Construction Corp.*, VABCA No. 2935, 91-3 BCA ¶ 24,274. UPI has produced no evidence that its overhead costs were increased by preparation costs for change proposals.

[13] The final voucher was also unsigned (finding 55).

[14] We offer no opinion as to whether UPI could recover after satisfying FAR 52.232-5(h)(3).

APPENDIX A

Change Proposal	Date	Description	Project Manager	Project Superintendent			
1	17-Oct-97	Raise light switches in bathrooms 2402 & 2403	1	1 75 65	$75	$65	$140
2	20-Oct-97	Adden 26 power 2401	8	0	$600	$0	$600
3	26-Nov-97	Adden 25 replace wood doors	6	4	$450	$260	$710
4	26-Nov-98	Ceiling tile revision	45	75	$3,375	$4,875	$8,250
5	19-Dec-97	roof changes	4	4	$300	$260	$560
6	17-Dec-97	Modify store fronts	5	8	$375	$520	$895
7	17-Dec-97	Ceramic tile revision in restrooms	2	8	$150	$520	$670
8	08-Jan-98	Modify Electrical Service building 2401	4	4	$300	$260	$560
9	08-Jan-98	Modify power plan 2401	8	8	$600	$520	$1,120
10	15-Jan-97	Revise wall paper	32	56	$2,400	$3,640	$6,040
11	16-Jan-98	Modify west vestibule	2	4	$150	$260	$410
12		Double credit mod 4	0	0	$0	$0	$0
13	11-Feb-98	2401 basement finish	8	0	$600	$0	$600
14	06-Mar-98	Electrical changes - RF1 memo #7 30 Jan 98	8	0	$600	$0	$600
15	17-Feb-98	Wallpaper painting areas	2	0	$150	$0	$150
16		Planter deletion			$0	$0	$0
17	24-Apr-98	Platform deletion	8	8	$600	$520	$1,120
18	11-May-98	Porcelain Pavers in lieu of quarry tile	2	1	$150	$65	$215
19	12-May-98	Exhaust fan basement 2403	1	1	$75	$65	$140
20	19-May-98	Revise custom cabinets & handrail	16	2	$1,200	$130	$1,330
21	14-Jun-98	Fire alarm control panel	3	1	$225	$65	$290
22	30-Jun-98	Additional Fire protection devises [sic]	4	10	$300	$650	$950
23	24-Jul-98	Courtyard deletion	4	0	$300	$0	$300
24		Unicor installers	0	0	$0	$0	$0
25	10-Sep-98	Extra's letter dated 18 Aug 98	8	96	$600	$6,240	$6,840
					$0	$0	$0
					$0	$0	$0
					$0	$0	$0
			181	291	$13,575	$18,915	$32,490
						10.00%	$3,249
							$35,739
						10.00%	$3,574
							$39,313
						3.00%	$1,179
							$40,492

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. 53051, Appeal of United Pacific Insurance Company, rendered in conformance with the Board's Charter.

Dated:

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