ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Charitable Bingo Associates, Inc.	)	
d/b/a/ Mr. Bingo, Inc.	)	ASBCA Nos. 53249, 53470
	)	
Under Contract No. NAFTH1-97-T-0001	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

Appellant, a professional operator of bingo games, entered into a contract with an Army Morale, Welfare and Recreation Fund to manage and operate such games at various Army installations. The contract was terminated for the convenience of the Fund, although the bingo games that appellant had managed and operated continued under the management of the Fund. Alleging that the termination for convenience was improper, appellant asserts claims for breach of contract and for additional termination costs. Both entitlement and quantum are before us. We sustain ASBCA No. 53249 in part and deny ASBCA No. 53470.

FINDINGS OF FACT

A. *The Contract*

1. By date of 10 December 1996, Army's Morale, Welfare and Recreation Fund at Ft. Gordon, GA, a nonappropriated fund instrumentality, awarded Mr. Bingo, Inc. Contract No. NAFTH1-97-T-0001 to "[p]rovide Non-Personal Services," which was more particularly described as furnishing "all management, supervision, personnel,

equipment, and supplies, [and] to provide for the operation and management of the Fund's bingo program located at Fort Gordon, GA" (R4, tab 1 at 1-3). The contract term was "ten (10) years from the effective date," or until 10 December 2006, and could be renewed for an additional five years at the option of the Fund (*id*. at 2).

2. At the time of contract award, Mr. Bingo, Inc. was a closely held South Carolina corporation doing business under the name of Mr. Bingo, Inc. During performance, by date of 5 June 1998, Mr. Bingo, Inc. amended its articles of incorporation to change its name to Charitable Bingo Associates, Inc., and that change was reflected in Modification No. P0006 (*see* finding 43), wherein the contractor was identified as Charitable Bingo Associates, Inc. d/b/a/ Mr. Bingo, Inc. (tr. 55). At all times relevant to these appeals, Jimmy L. Martin, Sr. was the sole shareholder, and served as chairman of the board of directors and president of the corporation. (R4, tab 53, tab 54 at 1-2) He has been involved in the recreational gaming business with different types of games, including bingo, since 1970 (tr. 54-55). Mr. Bingo, Inc. was in the business of developing, managing and operating bingo games for profit (Joint Stipulations (J.S.), ¶ 2).

3. The contract contained various standard clauses found in nonappropriated fund instrumentality contracts, including clause I-2, NONAPPROPRIATED FUND INSTRUMENTALITY (SEP 1984). It provided:

> The Nonappropriated Fund Instrumentality (NAFI) which is party to this contract is a nonappropriated fund instrumentality of the Department of the Army. NO APPROPRIATED FUNDS OF THE UNITED STATES SHALL BECOME DUE OR BE PAID [TO] THE CONTRACTOR OR CONCESSIONAIRE BY REASON OF THIS CONTRACT. This contract is not subject to The Contract Disputes Act of 1978.

(R4, tab 1 at 22) (capitalization in original) The contract also contained clause I-25, DISPUTES (SEP 1984), which provided in pertinent part:

> (a) This contract is subject to the rules and regulations promulgated by the Secretary of Defense and [the] Secretary of the Army for NAF Contracting.
>
> (b) The contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).
>
> . . . .

> (f) . . . . For Contractor-certified claims over $50,000, the Contracting Officer must within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.
>
> . . . .
>
> (h) The Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Service[s] Board of Contract Appeals with[in] 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.

(*Id*. at 27-28)

4. The contract also contained clause I-6, GRATUITIES (SEP 1984). It allowed for termination upon a finding that the contractor had offered or given a gratuity to obtain a contract or favorable treatment under a contract, and stated that "[t]he rights and remedies of the NAFI provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract" (*id*. at 22).

5. The contract also contained clause I-28, TERMINATION FOR CONVENIENCE (SEP 1984), which provided:

> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the NAFI. If this contract is for supplies and is so terminated, the Contractor shall be compensated in accordance with AR 215-4, Chapter 7, Section IV. To the extent that this contract is for services, and is so terminated, the NAFI shall be liable only for payment in accordance with the payment provisions of this contract for service[s] rendered prior to the effective date of termination.

(*Id*. at 28)

6. By bilateral Modification No. P00003 dated 1 December 1997, the parties added two standard clauses to the original contract. The first was clause I-43, INDEFINITE QUANTITY-TYPE CONTRACT, which provided in part:

> a. This is an indefinite-quantity contract for the services specified, and effective for the period stated in the delivery order or schedule herein. The quantities of supplies and services specified in the schedule are estimates only and are not purchased by this contract.
>
> b. Delivery or performance shall be made only as authorized by orders issued in accordance with the ordering clauses. The contractor shall furnish to the NAFI, when and if ordered, the services specified in the schedule up to and including the quantity designated in the schedule.
>
> c. Except for any limitations on quantities in the delivery-order limitations clause or in the schedule, there is no limit on the number of orders that may be issued. The NAFI may issue orders requiring delivery to multiple destinations or performance at multiple locations.

The second clause added was clause I-44, ORDERING. It provided in part:

> a. Any supplies or services to be furnished under this contract shall be ordered by issuance of individual delivery orders by an authorized DOD NAF Contracting Officer. . . .
>
> b. All delivery orders are subject to the terms and conditions of this contract. In the event [of] conflict between a delivery order and this contract, the contract shall control.

(R4, tab 11 at 3-4)

7. The contract also contained specifications. Section B.1.1, STARTUP COST/PERCENTAGES, contained the original formula for appellant's payments to the Fund. By bilateral Modification No. P00002 dated 1 January 1997, the parties substituted a new section B.1.1, providing that "[t]he NAFI shall receive monthly a guaranteed payment of $40,000.00 per month or 10% (TEN PERCENT) of the gross revenue whichever is greater" (R4, tab 8 at 2). This formula remained until 1 December 1997, when the parties altered it in bilateral Modification No. P00003, which changed section B.1.1 to provide in part:

> The NAFI shall receive monthly 10% (ten percent) of the gross revenue for the first 90 (ninety) calendar days of bingo play. After the first 90 (ninety) calendar days of bingo play

> the NAFI shall receive monthly a guaranteed payment of $40,000.00 per month or 10% (ten percent) of the gross revenue, whichever is greater.

(R4, tab 1 at 2, tab 15 at 2) The record contains evidence that both parties understood the December 1997 formula, with its reduced obligation for the first 90 days, as a mechanism to provide appellant with some relief for the start-up costs that it would incur as new installations were added to the contract (tr. 154-55).

8. In addition to the payment provisions in finding 7, respondent had amended the original solicitation before bidding closed. Amendment 002 effective 18 November 1996 added a new paragraph C.5 that required that "[a] minimum of sixty five percent (65%) of the gross receipts shall be paid out to the bingo participants in prizes. All prizes published by the contractor shall be awarded regardless of number of participants" (capitalization deleted) (R4, tab 6). Significantly, paragraph G.2, ACCOUNTING REQUIREMENTS, called for daily determination of revenue. It provided that "[u]pon completion of each daily bingo program the percentage of the gross sales as offered in Part I, Section B, will be deposited by the Contracting Officer or the COR in the bank," and those officials in turn were required to forward documentation of the revenue to the Fund's Financial Management Division. (R4, tab 1 at 12)

9. Specification section C.1.3.2 provided that "[t]he contractor shall be responsible for all Federal, State and local Taxes" (*id.* at 5).

10. Specification section C.1.11, CONTRACTOR'S EQUIPMENT, provided:

> Ownership title to the Contractor's improvements, fixtures, inventory and other installed equipment identified in the contract shall remain with the contractor (all additional equipment and alterations to the Government building, i.e. air condition [sic], insulation, permanent walls, doors, windows, raised floors, etc. will become integral parts of the facility and US Government property with this contract without any obligation by the US Government.)

(*Id.* at 7)

11. Specification section F.1, CONTRACT PERIOD, contained paragraph F.1.1, which reiterated that "[t]his contract, is for ten (10) years from the effective date." Paragraph F.1.3, CONTINUITY OF SERVICE, provided that "[u]pon expiration of this contract, a successor, either the Fund or another contractor, may continue these services,

and the successor, be it the Fund or another contractor, will need phase-in time." (*Id.* at 11)

12. Specification section H.2, NONMONOPOLISTIC, provided in part that:

> The Fund reserves the right to operate concession or privilege stands of its own and will retain all revenue from these concessions . . . . Nothing in this contract shall be construed to constitute the granting of a monopoly to the Contractor for the furnishing, installing and operation of the Bingo Program, and the Fund reserves the right to make similar contracts with other individuals or firms.

(*Id.* at 13)

13. Specification section H.3, REGULATIONS, provided that "[t]his contract and operations thereunder shall be subject to the provisions of all applicable Army Regulations or directives now in effect or hereafter promulgated" (*id.* at 13). Army Regulation 215-4, paragraph 1-13, provided in part:

> *a. Legal Reviews*. Complete files, including solicitation documents, contracts, and appeal documents (as applicable) will accompany each request for legal review.
>
> (1) The following will be submitted for legal review prior to issuance or execution:
>
> . . . .
>
> (d) Termination actions and supporting documentation.
>
> . . . .
>
> b. *Notice of legal sufficiency*. Legal counsel will inform the contracting officer, in writing, whether a proposed action is legally sufficient (or the details of any insufficiency) and a recommended course of action to overcome the insufficiency.

(Appellant's Post-Hearing Brief (app. br.) at 56) In addition, paragraph 7-24 of the same regulation provided in part:

> *a*. Terminations for convenience are normally used when the NAFI no longer has a need for the supplies or services under contract. The termination for convenience clause includes a provision for an equitable adjustment to the contractor for work already performed. . . .
>
> *a.1*. In the event a contract must be terminated for the convenience of the NAFI, the contracting officer will attempt to terminate the contract on a no-cost basis to either party. If this is not possible, the contractor will be required to submit a claim to the contracting officer in writing. A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portion of the contract, if any, including a reasonable allowance for profit. Fair compensation under an equitable adjustment is a matter of judgment and cannot be measured exactly. In any given case, a variety of methods to reach an equitable adjustment may be appropriate in arriving at a fair compensation (e.g., cost and price analysis). The use of business judgment and appropriate legal advice will be used by the contracting officer in negotiating an equitable adjustment. If an equitable adjustment cannot be negotiated, the contracting officer will make a final decision concerning the claim, in writing, and provide this to the contractor in a timely manner. . . .

(App. supp. R4, tab 146A)

14. By date of 23 April 1997, the parties entered into a second bilateral modification designated as Modification No. P00002 (*see* finding 7). They agreed to add a new provision to section B of the contract. The new section B.3, TYPE OF CONTRACT, provided that "[t]his is an indefinite-delivery/quantity (open-end) contract for **Concessionaire Bingo Services** as described herein for various military locations of the Installation Morale, Welfare, and Recreation Fund (IMWRF)." (R4, tab 11 at 2) (boldface in original)

15. By date of 23 April 1997, the Fund awarded delivery order No. NAFFW1-97-F-0020 to appellant to "operate & manage bingo program," which was more particularly described as "Provide Concessionaire Bingo Services" both at Hunter Army Airfield, GA (Hunter), and at Fort Stewart, GA (R4, tab 10 at 2). With respect to Hunter, the delivery order provided that appellant "agrees to be responsible for all interior clean up, decoration and any other interior improvements needed to make the

building suitable for bingo" (*id*.). The period of performance was "five (5) years from the effective date" of 1 June 1997 (*id*. at 1, 4).

16. By date of 11 August 1997, respondent issued delivery order No. NAFTN1-97-F-0090 to appellant to "operate and manage bingo program," which was again more particularly described as "Provide Concessionaire Bingo Services" at Fort Knox, KY (R4, tab 13 at 1, 2). The period of performance of this delivery order was "five (5) years from the effective date" of 29 August 1997 (*id.* at 1, 6).

17. The parties have stipulated, and we find, that the contract "was not a contract for goods or supplies provided to the NAFI" and that it "required the contractor to underwrite at its own risk and without reimbursement, the full cost of contract performance" (J.S., ¶¶ 14, 15). We further find that the contract contained no guarantee that appellant would realize a profit, and that any profit or loss on the portion of the contract that it performed was realized by appellant through the daily operations of the business (tr. 896-98).

B. *Performance*

1. *Fort Gordon*

18. The Army has operated bingo in MWR activities since at least 1951, although not as a contractor-operated program (app. supp. R4, tab 7A at 3). During the 1990's, the Army experienced major reductions in support for NAFIs, and NAFI managers were encouraged to "think[] outside the box" and partner with local community entrepreneurs to generate additional revenues (tr. 249, 268). At Fort Gordon, NAF officials decided in April 1996 that it would be financially advantageous for the Fund to contract out the bingo program, with a view to doubling its profits (app. supp. R4, tab 31A; tr. 251-52). We find that the bingo program at Fort Gordon had not theretofore been successful. It had poor equipment, had average attendance of 110 players per night for the three nights per week that it operated, and generated little revenue. Management responsibility for the games was vested in the manager of the noncommissioned officers' (NCO) club, who lacked expertise and could not devote the time, resources and energy to the program because of his many other duties. (Tr. 70, 253-55, 318)

19. The parties have stipulated, and we find, that "[t]he bingo games at Fort Gordon were always the MWR's bingo games, not Mr. Bingo's games" (J.S., ¶ 37; *see also* tr. 263, 265).

20. To promote the bingo games, appellant advertised in newspapers and compiled mailing lists (tr. 65-66). In addition, appellant contracted with residents of the community to serve as "coordinators," transporting groups of patrons from the

surrounding area onto the installation, typically paying each coordinator five to fifty dollars per patron transported, depending on the game and location (tr. 65, 178-79).

21. Inside the bingo hall itself, appellant employed an operating system that had three principal components: (a) runners who worked on the floor marketing bingo faces, which have dollar values, to the customers; (b) a paper pit, in which a clerk assigns the bingo faces to the runners; and (3) a separate money pit, to which the runners carry the proceeds from the sale of the bingo faces that they have sold on the floor (tr. 70-74, 176). A critical feature of the system was the segregation of the two pits for internal control purposes. Accordingly, the paper pit and the money pit "do not know what each other is doing in the course of the evening, so therefore this is a security system to make sure that the runners turn in all the money" (tr. 72). In addition, to protect the Fund, one contracting officer's representative counted the disbursement of paper during the evening, while another was stationed in the money pit to observe the inflow of proceeds (tr. 74). We find that appellant did not have a patent or trademark on its operating system, that control mechanisms are taught at seminars offered at trade shows on the bingo business, and that the system that appellant brought was set forth in books and taught at seminars (tr. 133, 175, 177, 423).

2. *Fort Stewart and Hunter Army Airfield*

22. Before appellant commenced performance, Fort Stewart was having serious financial problems with its MWR funds (tr. 267). In FY 1997, the last full fiscal or calendar year before appellant's arrival, net income before depreciation at Ft. Stewart was $343,571, which represented a decline of $80-100,000 from the previous year (tr. 472-73, 487; app. supp. R4, tab 139A). Patrons went elsewhere because neither Fort Stewart nor Hunter had dedicated facilities for bingo; the games were conducted at a community center at Fort Stewart and at the officers' club at Hunter, and were cancelled when other programs took priority (tr. 473). The club managers operated the games, with staffs of four to five at each installation (tr. 473, 476). Neither Fort Stewart not Hunter had a money pit or a paper pit and runners circulating on the floor (tr. 477).

23. Following execution of the relevant delivery order (*see* finding 15), appellant began operations at both Fort Stewart and Hunter on or about 1 June 1997, implementing the same operating system at these two installations that it employed at Fort Gordon (tr. 80-81, 472; *see* finding 21). Appellant added personnel, using 8 to 9 employees at Fort Stewart and 15 at Hunter (tr. 476). At Hunter, appellant also renovated a building at its own expense, increasing the capacity for the games there (tr. 477). The financial results at both installations exceeded the expectations of the MWR management (tr. 479). Net income before depreciation at Fort Stewart increased to $593,376 in FY 1998, and $1,148,828 in FY 1999 (app. supp. R4, tab 139A; tr. 487).

3. *Fort Knox*

24. In or about July 1977, the contracting officer at Fort Gordon alerted Mr. Martin to the possibility of expanding the contract to Fort Knox (tr. 83). The bingo program at Fort Knox was "very small," comparable to conventional charitable bingo elsewhere (tr. 89). After an evaluation, Mr. Martin concluded that the isolated location of Fort Knox presented challenges not posed either by Fort Gordon, Fort Stewart or Hunter (tr. 84). Nonetheless, the surrounding area was "one of the best gambling areas probably in the U.S.A. because you can draw from Tennessee, Ohio, Indiana, West Virginia" (tr. 84-85), and he expressed interest. Thereafter, the Fund management "had a meeting with community leaders there, including two state representatives, and explained to them the bingo philosophy that Fort Knox was going to have so that it would not hurt the local charities. That we were going to play the bigger games at Fort Knox." (Tr. 85)

25. On 13 August 1997, two days after execution of the Fort Knox delivery order (*see* finding 16), an official of a local charity in the Fort Knox area complained to an inspector of the Kentucky Division of Charitable Gaming that appellant's contemplated operation would include payouts in excess of the $5,000 limit permitted by state law (app. supp. R4, tab 53A at 1). Another charity also complained about the existing Fort Knox bingo program (*id*.). On 10 September 1997, the garrison commander met with a congressman, several state legislators and community representatives, advising them that appellant would be playing big games, busing patrons in from the surrounding areas and would not be competing with the small games operated by local charities (supp. R4, tab 64; tr. 206).

26. Following execution of the delivery order, appellant began operations at Fort Knox on 29 August 1997, again employing the same operating system as at the other installations (J.S., ¶ 43; tr. 207; *see* tr. 87-88, 578; *see also* finding 21).

27. By letter to the United States Attorney dated 19 September 1997, the director of the Kentucky Division of Charitable Gaming asserted that appellant's operations at Fort Knox "may not be a violation of Kentucky law, [but] it appears that the situation should be tracked" and requested that he designate a contact person (app. supp. R4, tab 57A).

28. Shortly after commencing operations at Fort Knox, appellant experienced problems in promoting its games. Mr. Martin testified that some officials at the Fort did not believe that it should be holding bingo games and in consequence:

> [W]e'd submit ads for the Troop which is the name of the [Fort's] paper. They would refuse to run the ads. We would do promotional things with charity, they would refuse to

> come and do the photo-opps and to do the things that they had promised us they would do.
>
> They put rumors out that we were breaking the law, that we were racketeering, and everything you could imagine got out in the community that we were doing wrong. When, in fact, we were doing everything legally, above board. We were running a good bingo operation for them.

(Tr. 94-95)

29. By letter to the Chief of Staff, Armor Center and Fort Knox, dated 17 August 1998, the United States Attorney for the Western District of Kentucky stated that "'Mr. Bingo' has no license to conduct charitable gaming in the Commonwealth of Kentucky, and appears to be operating in violation of several of Kentucky's criminal and regulatory provisions governing gambling." He advised that his office "plans to take all appropriate legal steps to terminate the operation of 'Mr. Bingo' unless 'Mr. Bingo' immediately complies with all applicable Kentucky laws and immediately seeks a license to conduct gaming in the Commonwealth." (R4, tab 19) By letter to the United States Attorney dated 16 October 1998, the commanding general of the U.S. Army Community and Family Support Center (CFSC) stated that, because of the concerns raised, "the Assistant Secretary of the Army (Manpower and Reserve Affairs) has directed a comprehensive policy review of bingo operations Army wide" (app. supp. R4, tab 93A).

C. *Termination for Convenience*

30. By letter to appellant dated 2 February 1998, the Fort Gordon contracting officer alluded to "numerous congressional inquiries concerning the bingo program" at each of the installations and stated that "[d]ue to the political volatility of the situation it may become necessary to terminate the contract under clause I-28" (*see* finding 5). Referring specifically to the portion of the clause relating to termination of a services contract (*see id*.), he added:

> Since there are no payment provisions to this contract, a thirty (30) day notice of termination will be issued if–in–fact higher authority determines that the contract must be terminated or if the general public is restricted from participation. If the contract is terminated the NAFI's liability will be negligible and no compensation shall be awarded.

> We hope this letter will assist you in programming your requirements so that any loss that you may suffer due to termination will be minimal.

(R4, tab 16)

31. By date of 5 November 1998, Patrick T. Henry, Assistant Secretary of the Army (Manpower and Reserve Affairs) issued an action memorandum for the Commander, CFSC that provided:

> The management and operation of Army MWR programs must be above reproach. To meet this high standard, the Army must ensure that limits on patronage of MWR programs are appropriate. Accordingly, I am directing a change in the Army's policy on patron access to MWR bingo activities.
>
> Effective January 4, 1999, general public access to bingo activities is prohibited. Access to bingo activities will be limited to members of the military community and their bona fide guests. For purposes of this policy, "military community" and "bona fide guest" shall be construed as defined in the Glossary of AR 215-1 (29 September 1995), except that "military community" excludes civilian members of the local community who are not bona fide guests.
>
> In addition, contractor-operated bingo programs are prohibited. In no case may a contractor control or sell bingo cards or manage awards of bingo prizes. Notwithstanding this prohibition, nonappropriated fund activities may contract for bingo-related services (*e.g.* bingo "callers") on a fixed price basis.
>
> This memorandum applies only to bingo activities. It does not affect the provisions of Department of Defense Instruction 1015.10 under which commanders may request authority to open other Category C MWR operations to the general public.

(R4, tab 20)

32. We find that Secretary Henry was within his authority in making this change in Army policy (tr. 554-55, 593, 595). His action memorandum was confined to a policy change and did not direct the termination of appellant's contract (tr. 540, 542, 564, 635, 645, 649-52, 664, 688-90). Secretary Henry lacked any contracting officer responsibility, authority or warrant (tr. 594-95, 688). In his understanding, if the contract could be continued in conformance with the new policy, that was acceptable (tr. 665). He testified that his intention when he signed the action memorandum was that "the [policy of] general patronage be changed, and that the lawyers of the Department of the Army [would] work out whatever resolution is necessary with Mr. Bingo to comport with this memo" (tr. 645).

33. In November 1998, Peter Isaacs, the chief operating officer of CFSC had e-mail exchanges with relevant commanders as follows:

- By e-mail dated 2 November 1998, Mr. Isaacs advised the garrison commanders at Forts Gordon, Stewart, Hunter and Fort Knox reciting that "we have been instructed to revise Army bingo policy to restrict patronage to authorized MWR patrons and bona fide guests only," together with a "Bingo Talking Points" attachment, which e-mail yielded strong responses from two addressees (app. supp. R4, tab 99A);

- By e-mail dated 19 November 1998 to Army major commands, Mr. Isaacs "transmit[ed] clarification to Army policy regarding operation of bingo programs in MWR facilities," noting that contractor-operated bingo programs were prohibited and that such contracts "must be terminated [no later than] 4 Jan 99" (app. supp. R4, tab 113A at 1-2); and

- By e-mail dated 20 November 1998 to the garrison commanders at Forts Gordon, Stewart, Hunter and Fort Knox, Mr. Isaacs attached a message "announcing change to Army Bingo policy effective 4 Jan 99. Para 5 will cause you to terminate contracts with Mr. Bingo." Mr. Isaacs added that he would know more soon, and that he "perceive[d] there may [be] some latitude for exception to this policy for existing contracts if patron access can be limited to authorized MWR patrons and bona fide guests." He proposed a meeting at CFSC to develop "a coordinated position for renegotiating or terminating contracts." (R4, tab 114A at 3)

Considering the foregoing e-mails and other evidence of record, we find that Mr. Isaacs: (a) lacked contractual authority (tr. 565, 906); (b) did not make the decision to terminate the contract for convenience (tr. 906-07); and (c) did not direct the contracting officer to do so (tr. 540, 948-54).

34. On 3 December 1998, CFSC held a meeting at its headquarters to discuss the effect of Mr. Henry's memorandum on appellant's contract with the contracting officers from Fort Gordon, Fort Stewart and Hunter, and Fort Knox (tr. 901-02). All three "adamantly" opposed terminating appellant's contract (tr. 382).

35. By memorandum dated 3 December 1998 to the chief of staff for personnel and installation management of the Army Forces Command and the Army Training and Doctrine Command, Community and Family Activities, Mr. Isaacs advised that CFSC would:

> [T]ake the lead on terminating the existing operations contracts with Mr. Bingo at Forts Knox, Gordon and Stewart. This decision is predicated on achieving consistency in settlement negotiations and necessity to use a Contracting Officer whose contract warrant is of sufficient magnitude. In no way does this decision impugn the capabilities or competency of the installation contracting officers who awarded these contracts. Termination of these contracts will be accomplished for the convenience of the Government.
>
> . . . It will be necessary for installation contracting officers to immediately modify their Mr. Bingo contracts and appoint Ms. Paula J. [Davis], NAF Contracting Directorate . . . as the Termination Contracting Officer (TCO) for these specific contracts effective 3 Dec 98. Ms. [Davis] will officially notify contractor that contracts will be terminated NLT 4 Jan 99 and commence to arrange for settlement negotiations.
>
> . . . Effective today no one other than Ms. [Davis] will be authorized to communicate with officials of Mr. Bingo regarding termination . . . .

(R4, tab 24 at 1) We find that, in this memorandum, Mr. Isaacs summarized the results of the meeting held on the same date (*see* finding 34) (tr. 559), and that the directive that CFSC would "take the lead" was consistent with the practice followed by the agency where local garrison contracting officers lacked the appropriate level of authority (tr. 558-59).

36. Effective 11 December 1998, Ms. Davis, as TCO, issued unilateral Modification No. P0005, which provided in pertinent part:

> 12a. Contract Number NAFTH1-97-T-0001 for the operation of bingo programs for the Nonappropriated Fund instrumentalities (NAFIs) located at Fort Gordon is hereby terminated, in whole, under the contract clause entitled "Termination for Convenience," . . . effective the close of business on January 4, 1999.
>
> . . . .
>
> 12c. Contractor shall take the following steps relative to cessation of work:
>
> (1) Stop all work relating to this contract effective the close of business on January 4, 1999;
>
> . . . .
>
> (4) Leave all Fund-furnished equipment at the facility located at Fort Gordon. The Contractor and Termination Contracting Officer (TCO) shall assess and determine which Contractor-provided bingo equipment and supplies will be left at the facility. Contractor-provided equipment includes but is not limited to bingo equipment and supplies, and/or any other items not specifically listed. An inventory list of those items to remain at Fort Gordon and those to be removed will be prepared. Reimbursement costs for Contractor-provided items retained shall be reflected in the Contractor's settlement proposal.

(R4, tab 27 at 2) Effective the same date, she issued virtually identical modifications terminating for convenience delivery orders NAFTN1-97-F-0090, applicable to Fort Knox, and NAFFW1-97-F-0020, applicable to Fort Stewart and Hunter (R4, tab 26 at 2, tab 28 at 2; *see* findings 15, 16). The latter two modifications both recite that the terminations were accomplished under the Termination for Convenience clause (*id*.).

37. By letter to appellant's president dated 11 December 1998, the TCO transmitted the modifications terminating the contract and delivery orders, advising appellant that "[t]hese contracts are being terminated for the convenience of the Fund, and are based on a change in Army policy" (R4, tab 29).

38. The TCO testified that, upon her appointment to that position, she had:

> three options: to not adhere to policy; to terminate for convenience; or to terminate for default.
>
> Q And you chose to terminate for convenience. Why did you choose to terminate for convenience?
>
> A Well, I thought the policy was clear in terms of requiring -- no longer allowing contractor-operated bingo. In order to meet the NAFI's needs, which is to follow policy, I terminated the contract.
>
> Q When you say "NAFI's needs" - -
>
> A In the best interest of the NAFI.
>
> Q Pardon me?
>
> A In the best interest of [the] NAFI. We have a policy to follow. To do that, I have got a contractor that I need to terminate.

(Tr. 977) Ms. Davis testified repeatedly on direct and cross examination that, after rejecting the option of terminating for default over a payment issue relating to Fort Knox (tr. 904-05, 958-62, 977-78), she chose the option of terminating for convenience based on her own independent judgment (tr. 905-07, 942-54, 975-77). We find this testimony credible. We further find no credible evidence that the termination was accomplished in bad faith.

39. Mr. Martin testified, and we find, that, following termination at Fort Gordon, Fort Stewart and Hunter, appellant completed an inventory and "turned over everything to [the Fund] on [January] fifth. And on the fifth they opened up with everything there exactly like I was playing on the fourth except me. I was the only thing that was terminated" (tr. 118). At Fort Knox following the termination, the bingo program was discontinued (tr. 119).

40. We find that, following termination at Fort Gordon, Stewart and Hunter, the prohibition in Mr. Henry's action memorandum regarding general public access was disregarded in practice. The garrison commander at Fort Gordon issued an undated memorandum to Charles Large, director of community activities, interpreting Mr. Henry's restriction to "bona fide guests" (*see* finding 31) to mean that an "authorized patron may invite no more than two (2) bona fide guests up to 3 (three) times per week. Any guest(s) must accompany the authorized patron. The authorized patron and guest(s)

will sign-in prior to participating in any bingo game." (App. supp. R4, tab 122A at 1) Mr. Large testified that he did not know "how much that was kept up with. I know that we tried to meet the intent of the sign-in process, and we would have the folks when they came in . . . sign in. Obviously, we were interpreting that as loosely as we could." (Tr. 300) Mr. Martin testified that "[t]he numbers of participants, the same players" continued after termination (tr. 118), and Mr. Large testified that attendance was "[s]till about the same" as before termination when he left his position in November 2001 (tr. 305). At the time of trial, the Fort Gordon website announced that the patronage policy was: "No one under 16 permitted. Photograph identification and Social Security Number required for admittance." (App. supp. R4, tab 158A at 1)

41. By date of 12 May 1999, appellant's claims representative submitted to respondent a termination settlement proposal in the amount of $107,330,671.97 (R4, tab 32 at 3). Appellant amended this proposal by date of 21 July 1999, seeking an additional $420,951.63 (R4, tab 35).

42. By letter to appellant's claims representative dated 26 May 1999, the TCO wrote to schedule an audit of appellant's termination settlement proposal to take place at appellant's facility (R4, tab 34 at 1). The audit, which was confined to appellant's records, was performed by CFSC auditors the following month, but they needed further backup documentation (tr. 920). Appellant provided documentation in August 1999, and the parties held one day of negotiations on 20 October 1999, reaching agreement on six categories of costs in the termination settlement proposal (tr. 923-25; R4, tab 39 at 2).

43. Effective 4 November 1999, the parties entered into Modification No. P0006 providing for the "partial settlement and partial payment" of the contract. They incorporated into the modification their partial settlement agreement, whereby the Fund agreed to pay appellant $271,835 "in full satisfaction of any and all remaining matters regarding these six categories" of its claim, as follows:

Category	Amount
Supplies	$134,080
CPA Fees	$ 58,383
Admin Charges (1)	$ 26,886
Admin Charges (2)	$ 30,591
Advertising	$ 7,620
Architectural Fees (Ft. Knox)	$ 14,275
Total	$271,835

(R4, tab 54 at 2) In Article IV, the parties agreed that:

> This Partial Settlement Agreement constitutes a full release and accord and satisfaction by the Contractor of any and all claims, demands, or causes of action, actual or constructive, arising under or relating to these six categories under the contract. The Contractor unconditionally waives any charges against the Fund under these five categories; provided, however, that (i) the category designated as "Supplies" is restricted only to those specific subcategories which have NOT been identified with an asterisk on Attachment 1 to this Partial Settlement Agreement (those subcategories marked with an asterisk are "Equipment" items that are to be negotiated and settled at a later date); (ii) the Contractor retains all legal rights and remedies with respect to all subcategories in Appendix H to the Contractor's Termination Settlement Proposal not specifically designated as "Supplies" in Attachment 1, i.e., "Equipment," to this Partial Settlement Agreement; and (iii) the Contractor retains all legal rights and remedies with respect to all other settlement categories arising under this contract.

In Article V, the parties provided that "[t]his full release and accord and satisfaction includes the Fund's obligations under the contract or due to its termination concerning these six categories. The parties agree that all obligations under the contract regarding these six categories are concluded." (*Id*. at 3)

44. By date of 3 March 2000, appellant's counsel submitted a supplemental termination settlement proposal in the amount of $14,134,101 (R4, tab 39 at 18). In response, the TCO advised appellant's counsel by letter dated 14 March 2000 that she was "at a loss as to the purpose of the document." She asked whether it was "an additional amendment to your settlement [that] will bring the total settlement amount up to $121,885,724.60; or is it a revised settlement proposal [for] $14,134,101.00, less the $271,835.00 payment made on November 1, 1999?" (R4, tab 40 at 1) By letter to the TCO dated 20 March 2000, appellant's counsel responded that "this most recent submission is intended to revise and replace the initial settlement proposal. Our entire settlement proposal now stands at $14,134,101.00, minus the $271,835.00 partial payment made on November 1, 1999." (R4, tab 41 at 1)

45. In its supplemental termination settlement proposal, appellant computed the $14,134,101 that it sought as follows:

Costs Incurred Prior To Termination	$ 8,874,220
Settlement Costs	$ 390,120
Profits	$ 4,703,334
Other Termination Costs	$ 7,388,629
Gross Amount Due	$21,356,303
Less Prior Payment (Includes income and partial payment of $271,835)	$<7,222,202>
Net Amount Due	$14,134,101

(R4, tab 39 at 6)

46. Appellant's supplemental termination settlement proposal contained income statements and other documents from another corporation owned by Mr. Martin named Great Games of North Augusta, Inc. (Great Games) (R4, tab 39, ex. 4; tr. 145). Inasmuch as the original audit was confined to appellant, the TCO concluded that a second audit was warranted. At trial, Mr. Martin testified that he had "no problem" with the view that "with a new claim comes a new audit" (tr. 238). A second audit was thereafter conducted by CFSC auditors, relating to the new proposal (tr. 927-28). By date of 28 April 2000, CFSC's internal auditors rendered their report. While the auditors found that $829,138 of appellant's supplemental termination settlement proposal had "valid cost support for payment consideration," they also concluded that: (a) appellant "apparently did not make sufficient 'sales and use' tax payments" in Georgia and Kentucky; and (b) there was evidence of two loans from appellant, one for $30,700 to Mr. Large, and another for $36,874 to a restaurant/bar owned by Mr. Large, together with revenue from a video poker game room owned or managed by Mr. Large "in some type of relationship with Mr. Jimmy Martin." (R4, tab 42 at 11, ex. F at 2; tr. 929, 962-63, 971-72)

47. As a result of the second audit, the CFSC procurement fraud advisor referred the auditors' conclusions regarding state tax payments and potential improper business relationships to the Army Criminal Investigation Division (tr. 929). By letter dated 15 May 2000, the TCO advised appellant's counsel of the referral, stating that "[i]n accordance with Federal Procurement policy and fund procedures, I must suspend further negotiations pending the results of the investigation" (R4, tab 43; tr. 929-30).

48. Appellant underwent a third and a fourth audit. The third audit was performed by the U.S. Army Audit Agency as part of the investigation by the Army Criminal Investigation Division, and resulted in a report issued in July 2001 concluding that appellant had overpaid the Army by $11,000 (tr. 965). The fourth audit was performed by the Defense Contract Audit Agency (DCAA) and was ordered by the TCO

in August 2001 to obtain a more expert, independent audit of appellant's supplemental termination settlement proposal to present respondent's position in this litigation, which was then underway (tr. 966-69, 973). DCAA issued its initial report on this fourth audit in April 2002 (tr. 969).

49. As a result of negotiations between the parties over the fourth audit, the TCO made a second payment to appellant on 7 November 2001 in the amount of $487,623 (ex. A-3 at 1; tr. 968). This payment was based upon appellant's supplemental termination settlement proposal (*see* findings 44-45) and was calculated as follows:

Proposal Settlement Item	Proposal Amount	Payment Amount
Costs Incurred Prior To Termination	$ 8,874,220	$8,320,587
Settlement Costs	$ 390,120	$ 123,651
Profits	$ 4,703,334	$ 76,947
Other Termination Costs	$ 7,388,629	$ -0-
Fixed Assets (Book Value)	$ Not Considered	$ 45,880
GROSS AMOUNT DUE	$21,356,303	$8,567,065
LESS PRIOR PAYMENT (Includes income and partial payment of $271,835)	$<7,222,202>	$<8,079,442>
NET AMOUNT DUE	$14,134,101	$ 487,623

(Ex. A-3 at 1)

D. *Claims and Appeals*

50. Appellant submitted three claims to the TCO, as follows:

(a) by letter dated 2 June 2000, appellant submitted a certified claim for $233,363 for equipment furnished under the contract (app. supp. R4, tab 19A);

(b) by letter dated 8 June 2000, appellant's counsel submitted a certified claim for $14,134,101, less the $271,835 partial payment made in Modification No. P0006 (*see* finding 43), and any amounts paid under the 2 June 2000 equipment claim, on its supplemental termination settlement proposal, which appellant asserted "had the effect of lowering the [earlier] Mr. Bingo settlement proposal [*see* finding 41] from $107,330,672 to $14,134,101" (R4, tab 46 at 1-2; *see also* tab 52); and

(c) by letter dated 22 June 2000, appellant submitted a certified claim for $27,143,692 in breach of contract damages "incurred as a direct result of the improper

termination for convenience," asserting chiefly that the termination was the result of bad faith (app. supp. R4, tab 21A at 1, 8).

51. By letter to appellant's counsel dated 1 August 2000, the TCO referenced all three claims and advised:

> In view of the ongoing investigation, the complexity of the issues you raised, and the high dollar value of your claims, I will require a reasonable amount of time to conduct a thorough analysis of the facts including the results of the investigation. This analysis is necessary in order to obtain the pertinent information needed for me to make a final decision.
>
> Therefore, in accordance with the provisions of the disputes clause, I will resume negotiations, if you are so inclined, or render a final decision, within two weeks after the investigation has been completed, or no later than six months from the date of this letter (February 1, 2001), whichever comes first.

(App. supp. R4, tab 22A at 1-2)

52. The TCO failed to act on appellant's supplemental termination settlement proposal claim (*see* finding 50(b)). After unsuccessfully petitioning the Board to order the contracting officer to render a decision, appellant filed a notice of appeal dated 31 January 2001, which we docketed as ASBCA No. 53249. In *Charitable Bingo Associates, Inc., d/b/a Mr. Bingo*, ASBCA No. 53249, 01-2 BCA ¶ 31,478, we denied the Fund's motion to dismiss, concluding that the contracting officer's failure to issue a final decision was the equivalent of a refusal to issue such a decision.

53. The TCO also failed to act on appellant's breach of contract claim (*see* finding 50(c)). By notice of appeal dated 27 July 2001, appellant invoked our jurisdiction and brought an appeal, which we docketed as ASBCA No. 53470.

54. At trial, appellant presented the following claims for breach of contract in ASBCA No. 53470, and for the termination settlement in ASBCA No. 53249:

ASBCA No. 53470

Breach of contract (Lost Profits)	Amount
Forts Gordon and Stewart plus Hunter (8 years)	$20,345,446

ASBCA No. 53249

Termination Settlement

Costs incurred prior to termination		$ 8,970,211
Settlement costs		$ 709,732
Pre-Termination profit		$ 4,610,688
Equitable adjustment		$ 6,912,109
	Subtotal	$21,202,740
Less prior payments		$ 8,567,091
	Total	$12,635,649

(Ex. A-2 at 11; tr. 25; app. br. at 83; app. reply at 28)

55. With respect to the components of the supplemental termination settlement proposal claim at issue in ASBCA No. 53249, the $8,970,211 in costs incurred prior to termination represent an increase over the $8,874,220 that appellant had sought in that proposal (*see* finding 45). In its audit, DCAA questioned $631,136 of this latter amount, leaving a difference of $8,243,084 (supp. R4, tab 87 at 8). The difference between the $8,970,211 that appellant now seeks and the amounts that DCAA now questions, however, aggregates $727,127. The difference between the parties is attributable to: (a) $4,104 in bonuses to appellant's employees; (b) $140,992 in donations by appellant to various charities; and (c) $582,031 in additional overhead (*id*. at 7-9; tr. 831-32, 835-41). With respect to the first two items, we find that: (a) the record contains no credible evidence of advance agreements pursuant to an established plan or policy of paying the bonuses; (b) the donations did not constitute participation in community service activities (Pre-filed testimony of Dorothy E. Doherty (Doherty prefiled test.) at 6-10; tr. 834). With respect to overhead, we do not find appellant's calculation persuasive inasmuch as: the allocation methodology was not reasonable, since Great Games (*see* finding 46), which conducted a separate video poker business, was used as appellant's home office, but there was no process for transferring the costs of its operations to appellant and other business entities for which it functioned; the expense allocation was used solely for this proposal and was not part of either appellant's or Great Games' normal accounting practice; the allocation base was cost of sales, but the cost of sales accounts did not represent the same types of costs in each entity (Doherty prefiled test. at 10-12; ex. G-3).

We further find DCAA's overhead allocation reasonable because it excluded costs on Great Games' books that were related only to Great Games, while retaining costs related to the operation as a whole; and because it used a revenue base that was more consistently booked in the accounting records (Doherty prefiled test. at 12).

56. With respect to settlement costs, the $709,732 that appellant seeks represents an increase over the $390,120 that appellant sought in the supplemental termination settlement proposal (*see* finding 45), which pertained to the period January 1999 through February 2000 (supp. R4, tab 87 at 10). DCAA had questioned $374,520 of the $390,120, leaving $15,600 unquestioned (supp. R4, tab 87 at 9). This unquestioned amount "consists entirely of labor through July 1999" (*id*. at 11), which includes six months of the post-termination period. With respect to questioned costs, DCAA raised multiple grounds "using the guidance in [Federal Acquisition Regulations (FAR)] 31.205-42" (*id*. at 10). These grounds included: incurrence after 21 July 1999, when the amendment to the original proposal (*see* finding 41) was submitted; incurrence for prosecution of a claim against the government; inclusion of lobbying expenses; lack of verification regarding allocability to settlement of the termination; lack of support; and commingling of legal fees with fees for other unrelated matters (supp. R4, tab 87 at 9; Doherty prefiled test. at 15-17). In choosing the 21 July 1999 cutoff date, DCAA relied upon FAR 31.205-42(g)(1)(i)(A) (Doherty prefiled test. at 15). The additional amount now claimed is said to represent termination settlement costs incurred for the period March 2000 to December 2001 (tr. 841-42). We find DCAA's evidentiary grounds for questioning the claimed costs persuasive.

57. With respect to pre-termination profit, the $4,610,688 that appellant now seeks represents a reduction from the $4,703,334 that it sought in the supplemental termination settlement proposal (*see* finding 45). DCAA had questioned that latter amount in its entirety, stating that profit was already recouped through operations (supp. R4, tab 87 at 14). The reduced amount now sought constitutes a 51.4 percent estimated rate of profit projected over the full contract term against appellant's calculation of $8,970,211 in pre-termination costs (tr. 27-28).

58. With respect to the equitable adjustment, the $6,912,109 that appellant now seeks represents a reduction from the $7,388,629 that appellant sought in its supplemental termination settlement proposal (*see* finding 45). DCAA had questioned this amount in its entirety, characterizing it as "a request for a consulting fee based on anticipated revenue over the life of the contract" (supp. R4, tab 87 at 15).

59. With respect to prior payments, it is undisputed that such payments to appellant, consisting of the total revenue at each installation for the years 1997 and 1998, plus the two payments made by respondent in November 1999 and November 2001, aggregate $8,567,091. (App. br. at 98; supp. R4, tab 87 at 16)

DECISION

A. *Entitlement*

1. *Contentions of the Parties*

Appellant's entitlement arguments are grouped under the broad rubric that the Fund's convenience termination was improper and amounted to a breach of contract. Appellant explains that the termination was directed by Army officials and did not result from the personal and independent decision of the contracting officer. Appellant also urges that the contracting officer violated applicable regulations by failing to seek a legal review before termination. Appellant also tells us that the termination was defective because there was no finding that it was "in the best interest of the NAFI," as required by the contract. Finally, appellant contends that respondent breached the contract through several breaches of the duty of good faith and fair dealing. These latter breaches include the continued use of appellant's operating system after termination, the TCO's failure to consider less injurious alternatives to termination, and respondent's conduct of the termination settlement proceedings. (App. br. at 45-70)

Respondent disputes all of these contentions, asserting first that it properly terminated the contract for convenience, and urging that Assistant Secretary Henry's policy change (*see* finding 31) reflected legitimate concerns regarding the desirability of contractor-operated bingo and unrestricted patronage at the games. (Government's Post-Hearing Brief (resp. br.) at 47-51) Respondent also insists that the contracting officer exercised her independent judgment in the convenience termination (resp. br. at 51-56). Respondent further argues that the record discloses no evidence of bad faith by the Fund in the termination decision itself, in the settlement process, or in continuing to operate a bingo program thereafter (resp. br. at 56-63). Finally, respondent stresses that the contracting officer did not abuse her discretion under applicable standards (resp. br. at 63-66).

In evaluating these contentions, we are guided by established principles regarding the latitude afforded a contracting officer in determining whether to terminate for convenience. In *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964), the court held:

> [A] termination is authorized "whenever the contracting officer shall determine" that it is "in the best interests of the Government." The broad reach of that phrase comprehends termination in a host of variable and unspecified situations calling (in the contracting officer's view) for the ending of the

> agreement; the article is not restricted . . . to a decrease in the need for the item purchased. Under such an all-inclusive clause, the Government has the right to terminate "at will" [citations omitted]; and in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive.

See also Salsbury Industries v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991) (upholding a convenience termination to comply with an adverse bid protest decision with which the contracting officer disagreed). With respect to bad faith, "clear and convincing proof [is] necessary to overcome the presumption that the [TCO] acted properly and in good faith." *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1243 (Fed. Cir. 2002). With respect to a clear abuse of discretion, the test has four components, looking to: (1) whether the contracting officer acted with subjective bad faith; (2) whether the contracting officer had a reasonable, contract-related basis for the decision; (3) the degree of discretion vested in the contracting officer; and (4) whether there was a violation of statute or regulation. *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999); *Keco Industries, Inc. v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974). Appellant asserts that "[n]owhere has Mr. Bingo claimed that the TCO abused her discretion" in the termination decision itself (app. reply at 17).

2. *Independent Judgment of the Contracting Officer*

Appellant's first breach argument is that the termination was directed by Army officials who lacked contracting officer authority and hence was not the result of the contracting officer's personal and independent judgment. The asserted evidentiary premises of this argument relate to four communications from Mr. Isaacs in November and December 1998 which are said to constitute "written instructions to the Army commands where Mr. Bingo was performing that its contract would have to be terminated." (App. br. at 47) Appellant's legal argument looks to the formulation in *John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. 698, 705 (Ct. Cl. 1955), that a decision by a contracting officer who is following the direction of a superior is invalid because "the contract entitled the [contractor] to a decision by the contracting officer, and not by him or a superior who chose to supersede him for the occasion." Appellant also relies upon *New York Shipbuilding Corp. v. United States*, 385 F.2d 427, 436 (Ct. Cl. 1967), where the court held that "a contractor is entitled to a finding by the contractually agreed officer and that a decision by someone else is a nullity."

We reject the asserted evidentiary premises of this argument. Appellant's heavy focus upon Mr. Isaacs misses the point that it was Ms. Davis who made the decision to terminate (*see* findings 33, 36-38). The record contains credible evidence that she

exercised her independent judgment as the TCO (finding 38). Mr. Isaacs lacked contractual authority, did not make the decision to terminate, and did not direct the TCO to do so (finding 33). In addition, the documents cited by appellant do not constitute "written instructions" (app. br. at 47) to terminate the contract. In one of them – the 20 November e-mail – Mr. Isaacs announced Secretary Henry's policy change and opined that "there may [be] some latitude for exception to this policy for existing contracts" (finding 33). For his part, Secretary Henry, who made the policy decision (finding 31), did not direct the termination of the contract, either (finding 32).

In view of our conclusion that the evidence does not support appellant's argument that the termination was not the result of the contracting officer's independent judgment, we do not address the legal argument advanced in support of the argument.

3. *Legal Review Before Termination*

Appellant also urges that respondent breached the contract because the TCO failed to seek or obtain the legal review contemplated by paragraph 1-13 of AR 215-4 (*see* finding 13) before termination (app. br. at 56-57). Appellant insists that the failure to do so was a violation of the regulation, "which of itself renders the termination improper and a breach of contract" (app. br. at 57).

We reject this argument. It is true that the contract "and operations thereunder" were subject to Army Regulations (finding 13), and that, whether published in the Federal Register or not, "incorporated or referenced materials become part of the agreement for the purpose indicated." *New England Tank Industries of New Hampshire, Inc.*, ASBCA No. 26474, 88-1 BCA ¶ 20,395 at 103,172 n.30, *vacated and remanded on other grounds*, 861 F.2d 685 (Fed. Cir. 1988). Nonetheless, noncompliance with paragraph 1-13 of AR 215-4 does not equate to a breach of contract. In *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000), the court explained that:

> In order for a private contractor to bring suit against the Government for violation of a regulation, that regulation must exist for the benefit of the private contractor. [Citations omitted] If, however, the regulation exists for the benefit of the Government, then the private contractor does not have a cause of action against the Government in the event that a contracting officer fails to comply with the regulation.

On its face, the regulation imposes duties upon contracting officers and legal counsel to seek and render, respectively, legal opinions regarding contemplated terminations (*see* finding 13). As such, it specifies an internal operating procedure of the NAFI, which

was designed for the NAFI's benefit and not the benefit of its contractors. Hence, the TCO's failure to seek or obtain a legal review does not constitute an actionable breach.

4. *Finding That Termination Was "In the Best Interest of the NAFI"*

Appellant's third breach argument is that the TCO failed to "carefully consider and make an independent judgment on what was in the best interest of the contracting [*i.e.*, installation] NAFI's," as required by clause I-28 (*see* finding 5; app. br. at 58). According to appellant, the absence of "any determination and findings, or any other written justification," coupled with the TCO's "lightning speed [termination] on the very day of her appointment," constituted a material breach (app. br. at 57-60).

We reject this contention. In *Salsbury Industries*, *supra*, 905 F.2d at 1520-21, the contractor also argued that the contracting officer "never made the required determination that termination was in the best interest of the Postal Service." The court of appeals found no material factual dispute that the contracting officer had made such a determination because the stop work order, telex, confirmation letter and final decision all so reflected. (*Id.*) Here, the TCO transmitted the termination modifications to appellant the same day they were issued. She said in her transmittal letter that "[t]hese contracts are being terminated for the convenience of the Fund, and are based on a change in Army policy" (finding 37). The three modifications themselves all cite the TERMINATION FOR CONVENIENCE clause (finding 36). The TCO testified that she concluded that convenience termination was "[i]n the best interest of the NAFI" (finding 38). We see no warrant in the clause or elsewhere for encumbering the convenience termination process by requiring the "determination and findings, or . . . other written justification" (app. br. at 58) that appellant regards as necessary. The TCO plainly determined that termination was in the best interest of the Fund; "in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." *John Reiner*, *supra*, 325 F.2d at 442.

5. *Duty of Good Faith and Fair Dealing*

Appellant's final breach argument is that respondent disregarded its common law duties of good faith and fair dealing, and hence breached the contract. Appellant cites the continued use of Mr. Bingo's operating system (*see* findings 21, 39) by Fort Gordon, Hunter and Fort Stewart after termination, and those installations' failure to restrict patronage (*see* finding 40). (App. br. at 60-64) Appellant also contends that the TCO violated the implied duty to cooperate by failing to consider a less injurious alternative to termination (app. br. at 64-65). Appellant further insists that respondent has displayed a lack of good faith and fair dealing in the termination settlement proceedings (app. br. at 65-68). We address each argument in turn.

a. *Operating System and Patronage*

With respect to the continued use of its operating system at Fort Gordon, Hunter and Fort Stewart, appellant insists that, upon termination, respondent had "three proper options: (i) continue the Mr. Bingo program, provided that Mr. Bingo was fairly and fully compensated; (ii) revert to its pre-Mr. Bingo programs; [or] (iii) terminate bingo completely, which Fort Knox chose to do" (app. br. at 62).

We reject this argument for two reasons. First, appellant's menu of permissible options cannot be harmonized with the contract. This indefinite quantity-type contract (*see* finding 6) did not reasonably give rise to an expectation that respondent would only continue bingo under the three restrictive conditions that appellant advocates. The TERMINATION FOR CONVENIENCE clause (finding 5) put appellant on notice that respondent could end the contract before expiration of the full ten-year term (*see* finding 1). Nothing in the clause suggests, as appellant does (app. br. at 61), that the right to terminate would be restricted to situations in which "the Army no longer had [a need for] the requirement." In the CONTINUITY OF SERVICE clause, the parties agreed that "[u]pon expiration of this contract, a successor, either the Fund or another contractor, may continue these services" (finding 11). In the NONMONOPOLISTIC clause, they agreed that [n]othing in this contract shall be construed to constitute the granting of a monopoly to [appellant] for the furnishing, installing *and operation* of the Bingo Program, and the Fund reserves the right to make similar contracts with other individuals or firms" (finding 12) (emphasis added).

Second, contrary to the implication of its argument, appellant had no property right in the operating system. While the system proved effective during contract performance, appellant held no patent or trademark rights in it, and the system was laid out in books and seminars given at trade shows on the bingo business (finding 21). We accept the parties' understanding, as articulated in their stipulation, that "[t]he bingo games at Fort Gordon were always the MWR's bingo games, not Mr. Bingo's games" (finding 19). Upon termination, respondent could continue the games or not, as it wished.

b. *Less Injurious Alternative*

Appellant insists that the TCO breached the implied duties of good faith, fair dealing and cooperation (and the contract) by considering only three possible choices following Assistant Secretary Henry's change in policy. That is, while the TCO testified that she concluded that she could either terminate for default, terminate for convenience, or disregard Secretary Henry's policy change (finding 38), appellant says that she overlooked a "far less injurious alternative: to negotiate a buy out of the Mr. Bingo

contract." (App. br. at 65) Appellant relies upon testimony from the Fort Gordon contracting officer opining that he "would think it was an option" (tr. 381). (*Id*.)

We disagree. "It is not the province of [the Board] to decide *de novo* whether termination was the best course." *Salsbury Industries, supra*, 905 F.2d at 1521. The TCO's obligation was to consider whether termination for convenience was "in the best interest of the NAFI" (finding 5), and, inasmuch as she decided that it was, then, her "election to terminate is conclusive," absent bad faith or abuse of discretion. *John Reiner, supra*, 325 F.2d at 442.

c. *Termination Settlement Proceedings*

Appellant urges that, in various particulars, respondent breached the duties of good faith and fair dealing through "adversarial, hostile and dilatory" conduct in eight particulars during the termination settlement proceedings (app. br. at 66). We measure allegations of breach of these duties against the evidentiary standard requiring "clear and convincing proof . . . to overcome the presumption that the [TCO] acted properly and in good faith." *Am-Pro Protective Agency, supra*, 281 F.3d at 1243. Appellant also contends that these same particulars constitute arbitrary and capricious conduct. (*Id*.)

We do not agree that any of the cited instances constitutes a breach of the duty of good faith and fair dealing, or arbitrary and capricious conduct. Thus, we see no breach in the first instance, which relates to the TCO's failure to render a final decision on either appellant's 8 June 2000 supplemental termination settlement claim (*see* finding 50(b)), or on its 22 June 2000 breach of contract claim (*see* finding 50(c)). We regard the TCO's failure to render a decision as immaterial, given appellant's successful invocation of our jurisdiction (*see* findings 52, 53). In any event, the TCO did not simply refuse to act altogether; she furnished a specific date—"two weeks after the investigation has been completed, or no later than six months from the date of this letter . . . , whichever comes first"—by which she would render a decision (finding 51). The TCO's course complied with paragraph (f) of the Disputes clause (*see* finding 3).

Appellant's second, third and fourth cited breaches of the duty of good faith and fair dealing relate to the sixteen month investigation of appellant by the Army Criminal Investigation Division. Essentially, appellant complains that the TCO initiated the investigation, failed to allow appellant the opportunity to review the allegations and provide counter evidence, foreswore settlement negotiations on unrelated matters during the pendency of the investigation, and, along with other officials, failed to advise appellant that the investigators ultimately found no wrongdoing. (App. br. at 66-67)

Despite appellant's complaints, our findings reflect that the initiation of the investigation was not pretextual. The second audit had yielded evidence of the apparent

payment of gratuities, as well as apparent nonpayment of state taxes (finding 46). Viewing the situation as it was when the second audit was completed in April 2000 (*see id.*), the TCO acted reasonably in suspending negotiations. The apparent payments, if substantiated by further investigation, could constitute a violation of the contract's GRATUITIES clause (*see* finding 4) and raised the specter of a violation of 18 U.S.C. § 201 or other criminal statute; the apparent underpayment of state taxes could constitute a violation of specification section C.1.3.2 (*see* finding 9). We also conclude that the TCO acted reasonably in deferring further negotiations pending the outcome of the investigations. She wrote appellant stating that such a suspension was required by "Federal Procurement policy and fund procedures" (finding 47), and nothing in the record casts doubt on that course. *Cf.* FAR 49.106 (requiring TCOs of appropriated fund activities to discontinue negotiations upon suspicion of "fraud or other criminal conduct related to the settlement of a terminated contract").

Appellant's fifth and sixth cited breaches of the duty of good faith and fair dealing relate to the post-termination audits. Appellant contends that it was forced to undergo four audits, and that the TCO continued to refuse to negotiate while the DCAA audit was conducted. (App. br. at 67)

Each of these audits has a separate justification, and we conclude that none was pretextual. At trial, Mr. Martin agreed that "with a new claim comes a new audit" (finding 46). The first and second audits accordingly were generated by appellant's original termination settlement proposal (finding 42) and the superceding supplement to it (finding 46). The third audit was an outgrowth of the criminal investigation of appellant, which was itself the result of evidence disclosed in the second audit regarding the apparent payment of gratuities and the apparent nonpayment of state taxes (*see* findings 46-48). Finally, the record discloses that whether the fourth audit would be conducted was negotiated between the parties and was motivated by the TCO's desire for a more expert and independent assessment of appellant's proposal than she had theretofore been given (findings 48-49).

Appellant's final two cited breaches of the duty of good faith and fair dealing relate to: (a) the TCO's asserted failure to advise appellant, from the effective date of termination "to the present . . . of the amount the Government believes to be due Mr. Bingo;" and (b) the TCO's participation in only one day of negotiation (*see* finding 42) after the termination. (App. br. at 68) We cannot regard either instance as rising to the level of a breach. With respect to respondent's position regarding appellant's entitlement, that position was communicated multiple times during this litigation and is expressed succinctly in respondent's reply brief: "[s]ince the NAFI has fully compensated the Appellant in accordance with the contract's I-28 clause [*see* finding 5], no further compensation is warranted." (Resp. reply at 16) With respect to the day of negotiation, appellant's allegation disregards the parties' negotiations

regarding the fourth audit; those negotiations led to the second payment to appellant (finding 49). Appellant's allegations also disregard that the delay from March 2000 to July 2001, when the third audit was completed (finding 48), was occasioned by events traceable to appellant's conduct, including: the submission of the radically different supplemental termination settlement proposal, which necessitated a second audit (finding 46); the criminal investigation, which was triggered by apparent irregularities disclosed by the second audit (finding 47); and the suspension of negotiations during that investigation (*id*.), which suspension was a reasonable response to the matters disclosed by the second audit.

d. *Uniform Commercial Code*

Appellant urges that respondent's improper termination of the contract and failure to compensate appellant fairly "destroyed" appellant's reasonable expectation of "a long-term contract that would facilitate a fair return on its considerable investment" in violation of the good faith obligations in Uniform Commercial Code §§ 1-203 and 2-103(1)(b). (App. br. at 70) We have already concluded that this indefinite quantity-type contract (*see* finding 6) with a convenience termination clause (finding 5) and other clauses indicating that performance as the exclusive contractor for the full ten-year term was not a certainty (*see* findings 11, 12) does not support appellant's position. We have also found no credible evidence that the termination was accomplished in bad faith (finding 38) or otherwise improperly. Hence, we do not address this argument further.

B. *Quantum*

1. *ASBCA No. 53470: Breach of Contract*

We have already concluded that appellant has failed to establish a breach of contract for the termination action itself, or for the post-termination circumstances. Accordingly, appellant is not entitled to the $20,345,446 in lost profits claimed for breach of contract.

2. *ASBCA No. 53249: Termination Settlement*

a. *Measure of recovery*

In the quantum portion of ASBCA No. 53249, the parties first join issue regarding the applicability of the TERMINATION FOR CONVENIENCE clause. Appellant argues that the contract "possessed all of the characteristics of a concession contract and none of those of a services contract," and hence the limitations in the third sentence of the clause (*see* finding 5) do not apply. Respondent urges, however, that the contract was one for

services, and hence that the measure of recovery is prescribed by the third sentence of the clause. (App. br. at 86; resp. br. at 66-70)

We conclude that the Termination for Convenience clause prescribes the measure of recovery. The contract was primarily for services and incidentally for supplies. Under the original contract, appellant was to "[p]rovide Non-Personal *Services*" to furnish "all *management, supervision*, personnel, *equipment, and supplies*, [and] to provide for the *operation and management* of the Fund's bingo program" (emphasis added) (finding 1). We construe this formulation to mean that the parties contemplated that appellant was to provide managerial, supervisory and operational services, which is consistent with the evidence of the Fund's desire to obtain the services of a full-time professional to manage the theretofore unsuccessful games and replace the busy NCO club managers (findings 18, 22, 24). Other contractual provisions are consistent with this reading. Thus, specification section F.1.3 provided that, upon contract expiration, "either the Fund or another contractor, may continue these services" (finding 11). In Modification No. P00002, which the parties entered into four months after execution of the original contract, they described it as a "contract for **Concessionaire Bingo Services**" (finding 14) (boldface in original). In the delivery order for Hunter and Fort Stewart that they entered into in the same month, and in the delivery order that they entered into in August 1997 for Fort Knox, the parties provided that the contract was to "operate and manage bingo program," which they also described as providing "Concessionaire Bingo Services" (findings 15, 16). Clause I-43 described the contract as "an indefinite-quantity contract for the services specified" (finding 6). At trial, Mr. Martin provided insight into his own understanding of the nature of the contract, testifying that he was "running a good bingo operation" at Fort Knox (finding 28). While the parties thus recognized that appellant would be performing services, they also recognized that some supplies would be part of performance as well. In specification section C.1.11, the parties made provision for title to equipment (finding 10). Modification No. P0006 makes clear that appellant did furnish supplies (finding 43).

Given the nature of the contract, the limitations in the third sentence of the TERMINATION FOR CONVENIENCE clause govern the payment for services. That is, respondent is only liable to pay appellant "in accordance with the payment provisions of this contract for service[s] rendered prior to the effective date of termination" (finding 5), which was as of the close of business on 4 January 1999 (finding 36). Clause I-28 is thus comparable to the TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984) clause in FAR 52.249-4, which also "only permits payment for services rendered prior to the date of termination . . . . Thus, no convenience termination costs, such as . . . unabsorbed overhead and profit . . . are allowable." *Mills Trucking, Inc.*, ASBCA Nos. 50163, 50164, 97-1 BCA ¶ 28,907 at 144,115. The "fair compensation" principles of Army Regulation 215-4, paragraph 7-24 (*see* finding 13) do not apply to compensation for services, but only to supplies, for which payment is

governed by the second sentence of the TERMINATION FOR CONVENIENCE clause (*see* finding 5).

b. *Costs incurred prior to termination*

Three categories of expenses are at issue regarding costs incurred prior to termination: employee bonuses, charitable donations, and overhead (finding 55). The FAR does not govern this NAFI contract. Nonetheless, we find the FAR criteria regarding the allowability of bonuses and donations useful in the absence of other guidance. *Cf. Cellular 101, Inc.*, ASBCA No. 51578, 00-1 BCA ¶ 30,582 at 151,034 (treating the FAR definition of subcontractor as "instructive" in a NAFI contract). With respect to bonuses, we have not found credible evidence of advance agreements or an established plan or policy (*id.*). *See* FAR 31.205-6(f) (conditioning allowability of employee bonuses on "an agreement entered into . . . before the services are rendered or pursuant to an established plan or policy"). With respect to charitable donations, we have not found that they constituted participation in community service activities (finding 55). *See* FAR 31.205-1(e)(3), 31.205-8 (disallowing contributions or donations, except to the extent that they reflect "[c]osts of participation in community service activities" such as charity drives). With respect to overhead, we have not found appellant's calculations persuasive, but we have accepted DCAA's as reasonable (finding 55). Accordingly, we deny appellant's claim for costs incurred prior to termination.

c. *Termination settlement costs*

While we have found DCAA's evidentiary basis for questioning the claimed termination settlement costs persuasive (finding 56), we see no basis for entitlement as a contractual matter. The present claim embraces two periods: January 1999 through February 2000, and March 2000 to December 2001 (*id.*). With respect to services, the third sentence of the TERMINATION FOR CONVENIENCE clause limits recovery to payment for services "rendered prior to the effective date of termination" (finding 5), which was 4 January 1999 (finding 36). With respect to supplies, the second sentence of the clause invokes Army Regulation 215-4 (finding 5), but paragraph 7-24 of that regulation does not explicitly authorize the recovery of settlement costs (*see* finding 13), as do, for example, paragraphs (f)(2)(ii) and (f)(3) of the standard TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) clause found at FAR 52.249-2. In this regard, FAR 31.205-42, to which DCAA looked for guidance regarding this category of costs, appears to contemplate the explicit authorization for recovery of termination settlement costs that we are unable to find in either the clause in the present contract or in Army Regulation 215-4.

This leaves the matter of the $15,600 in termination settlement costs that DCAA did not question (*see* finding 56). Respondent tells us that appellant "should be

compensated" for this amount (resp. br. at 79). We conclude that this amount is in the nature of a stipulated sum that the parties have agreed appellant is entitled to recover and we sustain appellant's claim for termination settlement costs to the extent of $15,600.

d. *Pre-termination profit*

We have already found that appellant recouped any profit or loss on the portion of the contract that it performed through daily operations (finding 17) and deny this portion of the claim.

e. *Equitable adjustment*

DCAA questioned the claimed equitable adjustment on the ground that it represented "a request for a consulting fee" and appellant now asserts that it "is duplicative of the anticipated profits damages sought in [appellant's] breach of contract claim" (app. br. at 97; *see* finding 58). Regardless of the characterization, this component of the claim is beyond the recovery allowed under the contract's TERMINATION FOR CONVENIENCE clause.

CONCLUSION

ASBCA No. 53249 is sustained in the amount of $15,600 and is otherwise denied. ASBCA No. 53470 is denied.

Dated: 21 January 2005

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53249, 53470, Appeals of Charitable Bingo Associates, Inc. d/b/a/ Mr. Bingo, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals