ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
S.A.S. Bianchi Ugo fu Gabbriello	)	ASBCA No. 53800
	)	
Under Contract No. DACA90-98-C-0010	)	

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OPINION BY ADMINISTRATIVE JUDGE PAGE

S.A.S. Bianchi Ugo fu Gabbriello (Bianchi) was awarded a construction contract by the government for work in Livorno, Italy. The parties agreed that payment would be made in Italian Lire (IL), deposited by means of electronic funds transfer (EFT) into the bank account initially specified by Bianchi. After receiving its first progress payment, Bianchi notified the government that future payments were to be made to a different bank and account. The government, acting through its agent bank, NationsBank (now Bank of America), made the second progress payment to the designated successor bank and account. However, Bank of America sent Bianchi's third progress payment to the initial bank, which subsequently refused to release the funds to Bianchi due to their "unsettled relationship." The contracting officer (CO) denied Bianchi's claim for progress payment no. 3 in the amount of IL 140,680,896 plus interest, although the CO did not specifically address Bianchi's claim for legal fees of IL 30,000,000 allegedly incurred in suits with suppliers and subcontractors. The contractor timely appealed to the Board. The parties elected to have the appeal adjudicated pursuant to Board Rule 11, Submission Without a Hearing. In addition to the Rule 4 appeal assembly, the parties submitted initial, reply and supplemental briefs, and responses to jurisdictional issues raised *sua sponte* by the Board; the record closed 1 June 2005. Entitlement only is before the Board. The appeal is sustained in part and denied in part.

FINDINGS OF FACT

The United States Army Corps of Engineers, Europe district, located in Wiesbaden, Germany awarded Contract No. DACA90-98-C-0010 to Bianchi on 23 March 1998. The fixed-price contract, in the amount of IL 1,296,000,000 required the provision of roofs on aboveground tanks and installation of overflow protection devices at various locations in Livorno, Italy. (R4, tab 1, *see esp*. 19-22)

Relevant standard contract clauses incorporated by reference include FAR 52.232-17 INTEREST (JUN 1996), requiring the government to pay interest to the contractor upon meritorious claims; FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAY 1997), imposing an interest penalty upon the government for failure to timely pay proper invoices; and FAR 52.233-1 DISPUTES (OCT 1995) (R4, tab 1 at 30).

Additional SPECIAL CONTRACT REQUIREMENTS include FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997), which obligates the government to "make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer." (R4, tab 1 at 41) The contract mandates in CHOICE OF LAW (OVERSEAS) (LOCAL CLAUSE 52.0000-4005) that the contract be "construed and interpreted in accordance with the substantive laws of the United States of America," and expressly requires the contractor to "waive any right to invoke the jurisdiction of local national courts" and "accept the exclusive jurisdiction" of the ASBCA and the United States Court of Federal Claims over "any and all disputes" arising under the Disputes clause (*id.* at 59). In accordance with CORRESPONDENCE IN ENGLISH (LOCAL CLAUSE 52.0000-4073), all correspondence from the contractor to the government shall be "submitted in English or with an English translation"[1] (*id.* at 65). The contractor was advised that all matters related to administration of the contract "will be the responsibility" of the designated contracting officer's representative (COR) by CONTRACT ADMINISTRATION (LOCAL CLAUSE 52.0000-4017) (*id.* at 61).

Several FAR provisions dealing with EFT were then in effect but not made part of the contract. Consistent with FAR 32.1101 Policy, ¶ (d)(1), which provides that payment by EFT is permitted but not mandatory for contracts awarded outside the United States and Puerto Rico, EFT is not required in Bianchi's contract.

The Transatlantic Programs Center (TAC) of the United States Army Corps of Engineers in Winchester, VA began in March 1997 to process disbursements to contractors performing work for the Europe district (R4, tab 26 at 113, ¶ 2). TAC

[1] By virtue of this clause, we generally disregard those documents in the Rule 4 file that were provided in Italian without an English translation.

arranged for payments in various foreign currencies, including IL.[2] The actual disbursement of payments by TAC to Bianchi was made by wire transfer through the Bank of America. (R4, tab 26 at 1)

Bianchi initially had requested that its progress payments under the contract be made by means of EFT to Bianchi's account at Cassa di Risparmio di Firenze (Cassa di Risparmio). However, by letter dated 12 May 1999, Bianchi notified the government's COR that the "payments of our invoices relative to this contract" henceforth were to be sent to a specified account at the Banco di Napoli "instead of" its former account at Cassa di Risparmio. Bianchi provided the necessary information pertaining to the newly designated bank and account to effectuate the wire transfer. (R4, tab 2) By letter dated 26 May 1999, Bianchi in addition to notifying the government also provided instructions regarding the change in bank and account designation to Bank of America, including the "codes necessary to make the electronic funds transfer" to its successor account at Banco di Napoli. That letter recounted a telephone conversation between the contractor and Mr. Leiter of Bank of America regarding the change from Cassa di Risparmio to Banco di Napoli. (R4, tab 3 at 77)

On 25 May 1999, Bank of America made payment on behalf of the government in the amount of IL 174,734 for Bianchi's invoice for progress payment no. 2. This was done by means of EFT to Bianchi's recently designated account at Banco di Napoli. (R4, tab 4) Bianchi in June 1999 again notified both the government and Bank of America of the change, emphasized deposit of payments to the Banco di Napoli and not the Cassa di Risparmio, and reiterated the information necessary to make the appropriate EFT (R4, tab 6). These repeated instructions reinforced Bianchi's earlier, specific instruction to the government that it wanted "to receive the payments of our invoices relative to this contract [at Banco di Napoli] instead of CASSA DI RISPARMIO DI FIRENZE" (R4, tab 2 at 75, emphasis in original).

We find that Bianchi's notices to the government regarding transfer of funds to Banco di Napoli, rather than Cassa di Risparmio, were both adequate and timely made prior to the contractor's submission of its invoice for progress payment no. 3. The contractor authorized the electronic transfer of funds after 12 May 1999 only to its account at Banco di Napoli, which the contractor's letters stated clearly was to be used exclusively for such transfers. That the changed procedures were in effect is evidenced

[2] The initial contract for disbursement was between the Defense Supply Service-Washington and NationsBank Overseas Division (R4, tab 43). Contract administration was transferred from Defense Supply Service-Washington to the Defense Finance and Accounting Service (DFAS) on 27 February 1997 (R4, tab 44). The name of NationsBank was changed to Bank of America on 2 August 1999 (R4, tab 46). For consistency, we refer to the institution as Bank of America.

by the government's properly made progress payment no. 2 on 25 May 1999 to Banco di Napoli in accordance with Bianchi's instructions, which established the parties' revised course of dealing with respect to the electronic transfer of funds (R4, tab 4).

On 4 June 1999, Bianchi submitted invoice no. 93/99 for progress payment no. 3 in the total amount of IL 140,680,896 to the Europe district (R4, tab 5); the district approved payment of that invoice on 15 June 1999 (R4, tab 7). The Europe district on 28 June 1999 certified payment of that request by Bank of America to Bianchi's account at Banco di Napoli (R4, tab 8) using the routing information provided previously by Bianchi. Also on 28 June 1999, the Europe district authorized Bank of America to purchase the IL owed Bianchi for $75,965.71 at an exchange rate of 1,851.9/$1.00 (R4, tab 9). TAC on the same date furnished Bank of America with government checks to purchase the IL. TAC's transmittal letter, directed to the attention of Mr. Leiter at Bank of America, stated the funds were "for immediate EFT payment" to Bianchi at the Banco di Napoli and specified that bank's routing and Bianchi's account numbers (R4, tab 10 at 87). According to its 19 June 2000 letter, Bank of America on 1 July 1999 "erroneously sent" IL 140,680,896 to Cassa di Risparmio instead of transferring it to Bianchi's designated account at Banco di Napoli (R4, tab 35).

By letter dated 6 July 1999, Bianchi notified the government that Bank of America had "wrongly tra[n]sferred" invoice payments totaling IL 140,680,896 to "the old Bank" Cassa di Risparmio, despite instructions from both Bianchi and the government to send payments to Bianchi's successor account at Banco di Napoli. Bianchi asserted it would suffer "real damage" by this error, fearing it would not receive the funds due to disagreements between Bianchi and Cassa di Risparmio. (R4, tab 12) Bianchi's letter of 15 July 1999 to the government advised that the payments had been misdirected to Cassa di Risparmio despite the contractor's 12 May and 23 June 1999 instructions to the government that all payments should be sent to Bianchi's account at Banco di Napoli. The contractor stated that it had not received any communication from Cassa di Risparmio, and asked the government to make the payment owed to Bianchi. (R4, tab 13) Bianchi repeated its request for payment of its invoice no. 93/99 to the government on 20 July 1999 (R4, tab 14).

By means of facsimile, Bank of America on 9 August 1999 requested that Cassa di Risparmio return the IL 140,680,896 to Bank of America's account with Credito Italiano, Milan (R4, tab 19). On 21 September 1999, Bank of America informed the government that Cassa di Risparmio would not "return/release the funds due to Bianchi's 'unsettled relationship'" with Cassa di Risparmio. Bank of America forwarded a message to the government from Cassa di Risparmio dated 17 September 1999 informing Bank of America that "funds were credited to the position of Bianchi sas, also in accordance with our customer's instructions before receiving the request of restitution." (R4, tab 22 at 103-04)

TAC's letter of 23 September 1999 to Bianchi acknowledged that it had received the contractor's request for EFT to be made to Banco di Napoli instead of Cassa di Risparmio. TAC advised that the government's agent bank, Bank of America, had however, transferred the IL 140,680,896 progress payment due Bianchi to Cassa di Risparmio. The contractor was told that Cassa di Risparmio had informed Bank of America that the funds had been credited to Bianchi's account and would not be returned due to Bianchi's "unsettled relationship" with Cassa di Risparmio. The government noted that "all previous payments . . . were made by wire transfer to your bank account at the Cassa di Risparmio di Firenze." Bianchi was admonished that while attempts would be made to process payments in accordance with the contractor's changed banking instructions, "this office requires sufficient advance notice to ensure that such changes are passed on to and are understood by our agent bank." The letter concluded that it was the government's position that the payment had "already been legally made to an open account" in Bianchi's name, and offered Bianchi no remedy. (R4, tab 23 at 107)

An attorney acting on behalf of Bianchi replied on 12 October 1999, and drew the government's attention to key factual errors in TAC's 23 September 1999 letter. It was noted that the government had notified Bank of America of the successor account prior to the disputed payment, and that Bank of America properly had made progress payment no. 2 to Bianchi at Banco di Napoli, one month before the contested progress payment was misdirected to Cassa di Risparmio. (R4, tab 25 at 111) The lawyer advised the government that Cassa di Risparmio had closed Bianchi's accounts at that bank before the mistaken payment was made, and that the "relevant sums have never been legally credited" to Bianchi. The attorney reiterated that the government remained responsible for making the progress payment to Bianchi, plus interest as required by the contract. (*Id.* at 112)

Internal government memoranda of 6 and 9 December 1999 chronicle the disputed payment sought by Bianchi (R4, tab 26). TAC advised the Europe district that the failure to remit funds to Bianchi's designated account at Banco di Napoli did not result from government error, "but rather from an apparent administrative error by the Bank of America." (*Id.* at 113) TAC raised several issues, including whether Cassa di Risparmio had actually deposited funds into Bianchi's account or improperly processed or permitted an attachment of the funds by a third party. TAC questioned whether international law might apply, and offered assistance while deferring to the Europe district to resolve the matter. (*Id.* at 114) TAC concluded that this was "not a disbursing problem, but . . . a contractor problem" (*id*. at 115).

Bianchi submitted to the Europe district a certified claim dated 16 December 1999 for the government's failure to properly pay progress payment no. 3 (R4, tab 27). The claim included a chronology of events (*id.* at 120-22), and enclosed some documents in

Italian (*id*. at 124-29)[3]. The contractor advised the government that its continued failure to pay the third progress payment caused Bianchi grave damage, including "serious difficulties" with subcontractors and suppliers that were filing suit against the contractor. Bianchi sought IL 140,680,896, the amount of progress payment no. 3 sent to Cassa di Risparmio, the recovery of legal fees of IL 30,000,000 associated with proceedings brought against Bianchi by suppliers and subcontractors, and interest. (*Id.* at 122)

By memorandum dated 7 January 2000, TAC updated the Europe district regarding its investigation into the EFT payment made by Bank of America to Cassa di Risparmio. Commenting upon the issue presented by Bianchi's misdirected payment, TAC stated it had "never faced such an issue before," observed that the "existence of error or delay (in payment to the contractor)" had yet to be established, and contended that the government's debt had been paid. TAC noted that disbursing officers and the government's banking contractor typically "do not involve themselves in what is basically a commercial issue." (R4, tab 28 at 130) TAC asked for additional information relating to the transaction, including the date and name of any person making a commitment to the contractor to change accounts; whether the CO was notified of the change; what communications had occurred among Cassa di Risparmio, Bianchi, and the disbursing officer; and whether Bianchi was pressing the issue. (*Id.* at 131)

TAC by letter dated 11 January 2000 wrote Bank of America regarding Bianchi's claim concerning the contested wire transfer. (R4, tab 29) The government sought the bank's assistance in obtaining information from Cassa di Risparmio regarding Bianchi's account there, including whether the account was open when the wire transfer occurred (*id.* at 133). TAC noted that Cassa di Risparmio's statement in its message to Bank of America dated 17 September 1999 that the funds were "credited to the position of Bianchi" did not constitute sufficient information (*id.* at 134). TAC asked Bank of America to advise whether the transfer was credited to Bianchi's account at Cassa di Risparmio in accordance with Bank of America's routing instructions, and what laws governed Cassa di Risparmio's refusal to allow Bianchi's access to the account or to return the funds to Bank of America. TAC noted that it had no experts in international or Italian law pertaining to the issues raised, and solicited Bank of America's assistance in resolving Bianchi's claim. (*Id.*)

Bank of America responded to TAC by letter dated 3 February 2000, and placed its comments in the context of the United States and German commercial banking rules under which the EFT was made (R4, tab 30 at 135). Bank of America contended that, "Despite the fact that we, erroneously, did not transfer the funds to Banco Di Napoli S.P.A. at Pisa, but to Cassa di Risparmio di Firenze (as in the past), the transfers were

[3] As noted in footnote 1, we generally disregard for decision-making purposes all documents in the Rule 4 file that were provided in Italian without an English translation.

executed in favor of Bianchi" (emphasis supplied). (*Id.*) Bank of America stated that as "Cassa di Risparmio di Firenze made no efforts to return the funds to us, the remitting bank," it "must assume that the rightful beneficiary's account was credited," and that if there were, "for whatever reason, a dispute between SAS Bianchi and Cassa di Risparmio di Firenze, neither the [government] nor [Bank of America] is in obligo [sic]. The US Government (US Army) has fulfilled its just obligation to pay their invoices." (*Id.*) Bank of America advised that it was certain that Cassa di Risparmio would not respond to questions without the order of an Italian court (*id.* at 136). Concluding its letter with the offer of full cooperation, Bank of America advised it could see no legal basis for Bianchi to hold the government liable for nonpayment "when the funds are in the books of Cassa di Risparmio in S.A.S. Bianchi's favor." (*Id.*)

The Europe district on 3 February 2000 wrote Bianchi seeking additional information regarding the contractor's account at Cassa di Risparmio, including additional documentation in a certified English translation. It asked for supporting correspondence that the Cassa di Risparmio account was closed or inaccessible to Bianchi, and any documents pertaining to legal action taken by Bianchi against Cassa di Risparmio. To further its evaluation of Bianchi's claim, the government asked the contractor to explain what happened to the funds sent to Cassa di Risparmio, and whether there were other Bianchi loans or accounts to which the funds were applied. (R4, tab 31)

The Europe district on 4 February 2000 replied to TAC's memorandum of 7 January 2000 (R4, tab 32). Among other information provide to TAC, it advised that the CO had concurred with the change of account to Banco di Napoli on 18 May 1999. TAC was informed that the CO had decided an administrative change to the contract was unnecessary "to change the electronic funds transfer (EFT) address" (*id.* at 137), as the contract did not contain an EFT clause and provided only that payments would be made to Bianchi by the Europe district (*id*. at 138).

TAC by memorandum dated 17 February 2000 notified the DFAS contracting officer of a contractor deficiency in the government's contract with Bank of America. TAC asserted that the bank's misdirection of the EFT in the Bianchi contract, acknowledged by Bank of America's 3 February 2000 letter, resulted in a potential loss to Bianchi as the "abortive payee." DFAS was also advised of Bianchi's claim. (R4, tab 33 at 147) TAC provided DFAS with additional information regarding the payment error including a chronology of events (*id.* at 148-53).

On 4 April 2000, Bianchi responded to the Europe district's 4 February 2000 request for additional information about the Cassa di Risparmio account (R4, tab 34). It provided documents "extracted from the legal proceedings" between Cassa di Risparmio and Bianchi, and offered an English translation of the documents (*id.* at 154-61). Bianchi told the government that the debt alleged by Cassa di Risparmio did not stem from the account into which Bank of America electronically deposited the funds (*id.* at 154).

Rather, Bianchi contended, Cassa di Risparmio had instituted proceedings against Bianchi (*id.* at 154) following the revocation of the contractor's line of credit (*id.* at 159) and had alleged the "right to take action to protect the credit" of Cassa di Risparmio (*id.* at 160). The English translation provided by Bianchi stated that Cassa di Risparmio on 4 June 1999 had closed Bianchi's account into which the questioned funds were transferred by Bank of America. (*Id.* at 159-61)

The government provided no evidence to rebut that Bank of America "erroneously sent" Bianchi's payment on 1 July 1999 (*see* R4, tab 35 at 163), after the alleged closure of Bianchi's account by Cassa di Risparmio on 4 June 1999.

Bank of America on 19 June 2000 contacted an Italian attorney seeking assistance with respect to Bank of America's legal position (R4, tab 35 (referenced enclosures not submitted as part of Rule 4 file)). That attorney concluded that while Bianchi may have a claim against Cassa di Risparmio, the government could defend against an action by the contractor (R4, tab 36). Italian law was cited for the proposition that "if payment of a sum is made to a third person which is not authorized by the creditor to receive it, the debtor's payment obligation is considered fulfilled if the creditor benefits from the payment." (*Id.* at 165). The attorney contended that additional payment to Bianchi by either Bank of America or the government would result in undue enrichment of the contractor, which Bank of America may not be entitled to recover (*id*. at 165-66).

Bianchi on 3 November 2000 wrote the Europe district emphasizing that it had been waiting since 4 April 2000 for a response from the government regarding the disputed payment (R4, tab 37). The contractor furnished another chronology of events regarding the misdirected payment (*id.* at 168-70), and again provided information on the change of its designated EFT account from Banco di Napoli to Cassa di Risparmio (*id.* at 172-86).

Government counsel replied on 28 November 2000, informing Bianchi that a final decision of the contracting officer (COFD) would be issued not later than 31 December 2000 (R4, tab 38). The letter advised that the government would rely in part upon the legal opinion furnished by the Bank of America (*id.* at 187).

The contractor's response of 11 December 2000 disputed Bank of America's legal position, noting that Bianchi was in the midst of litigation with Cassa di Risparmio, and rejected any conclusion that Bianchi was indebted to Cassa di Risparmio. Bianchi again sought payment for the disputed progress payment no. 3, and advised it looked forward to receiving the COFD. (R4, tab 39) The government notified Bianchi on 9 January 2001 that issuance of the COFD would be again delayed because the government was seeking a legal opinion from an Italian attorney through the United States Department of Justice (R4, tab 40). Bianchi once more wrote the government on 30 May 2001, asserting that it

had yet to receive the COFD and advising that the government's delay was causing considerable damage to the firm (R4, tab 41).

By letter dated 19 November 2001, an Italian attorney provided the government with an opinion on Bianchi's claim (R4, tab 42). While the opinion discussed the various parties involved and possible outcomes (*id., passim*), it expressed no opinion regarding causes of action by Bianchi against the government or the government against Bank of America, acknowledging these were governed by American law. (*Id.* at 207)

The COFD, which carries the handwritten date of 1 February 2002 below the signature block of the CO (R4, tab 47 at 12), noted that the material facts underlying the claim were not in dispute (*id.* at 9). It stated that the government had made payment to Bianchi's account, "albeit at a different bank than you instructed" and that this "does not in itself give rise to a requirement" that the government again pay the contractor (*id.* at 9-10, ¶ 16). The CO decided that progress payment no. 3 was made "to an open Bianchi account"; that Bianchi did not allege that the government affected the manner in which Cassa di Risparmio used the funds; and that Bianchi did not show that "Cassa di Risparmio illegally used or kept the funds from payment No. 3" (*id.* at 10).

The CO noted that Bianchi may have been inconvenienced by the deposit at Cassa di Risparmio, but that Bianchi had made "no showing that you have been financially damaged thereby" (R4, tab 47 at 10, ¶ 18). The CO denied the claim entirely, advising that if Bianchi believed that Cassa di Risparmio had "unlawfully converted the funds" then it was Bianchi's "responsibility to obtain appropriate legal remedies from that bank." (*Id.* at 10) The COFD was received by Bianchi on 13 February 2002; the contractor's appeal timely was mailed from Italy on 7 May 2002 and received by the Board on 13 May 2002.[4]

DECISION

At the outset, we hold that in accordance with the choice of law provision in the contract, the subject dispute between Bianchi and the government is governed by the substantive law of the United States and the Contract Disputes Act, 41 U.S.C. §§ 601-13 (*see* R4, tab 1 at 59). The government's contention that the underlying dispute is between Bianchi and Cassa di Risparmio, not the contractor and the government, is consistent with the opinion the government obtained on Italian law. However, all disputes under this contract are governed by the law of the United States; the jurisdiction of the Board in this appeal is derived from the CDA, as are the remedies we grant. This appeal addresses only whether Bianchi has a remedy at law under the subject contract

[4] In its complaint dated 21 September 2002, Bianchi also sought damages arising from a second contract, No. DACA90-96-D-0043. Appellant no longer pursues those claims here, which it states have not been presented to a CO. (App. br. at 8, n.3)

with the government. The Board lacks jurisdiction over other disputes that may lie elsewhere among the parties and the several banking institutions that are not parties to this contract. *See* 41 U.S.C. § 601(4) ("the term 'contractor' means a party to a Government contract other than the government"). The government's arguments regarding the applicability of foreign law are unpersuasive, as is its contention that the dispute before us is really between Bianchi and Cassa di Risparmio.

There are two matters to be decided in this appeal. The first issue before us is whether the government's deposit of IL 140,680,896 in Cassa di Risparmio instead of Banco di Napoli discharged its duty to make progress payment no. 3 to the contractor. The second issue is Bianchi's assertion that it is entitled to recover legal fees incurred in litigation with its suppliers and subcontractors after the government failed to make progress payment no. 3 to its account at Banco di Napoli.

1. The Government's Alleged Failure to Make Progress Payment No. 3

The essential facts of this portion of Bianchi's claim, uncontroverted but differently interpreted by the parties, are these: (1) the government was obliged to make progress payment no. 3 to the contractor, as required by FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) which was incorporated by reference into the contract; (2) Bianchi effectively on 12 May, 26 May and June 1999 notified the government that all future payments were to be made to its account at Banco di Napoli instead of Cassa di Risparmio and provided the necessary routing codes to make those transactions; (3) the government's second progress payment to Bianchi was made on 25 May 1999 to the contractor's account at Banco di Napoli, not Cassa di Risparmio, evidencing that the government and its agent Bank of America were aware of the changed account designation; (4) Bianchi requested progress payment no. 3 on 4 June 1999 from the Europe district; (5) the government approved that invoice on 15 June 1999 and on 28 June 1999 certified payment of IL 140,680,896 by the Bank of America to Bianchi at Banco di Napoli, using the revised routing codes earlier provided; and (6) Bank of America on 1 July 1999 erroneously sent that amount by EFT to Cassa di Risparmio, instead of to Bianchi's account at Banco di Napoli as directed by both the government and Bianchi.

a. Positions of the parties

Bianchi argues that the government remains liable for progress payment no. 3 and applicable interest because the government failed to deposit the funds with Bianchi's sole authorized financial institution at Banco di Napoli, and that the electronic transfer to Cassa di Risparmio did not discharge the government's obligation (app. br. at 1-2, 8-14). The contractor asserts that the EFT to Cassa di Risparmio did not satisfy the government's debt, even if Bianchi was named as the payee, because Bianchi had "revoked any authority [Cassa di Risparmio] may have had to receive payment on behalf

of Bianchi" (*id.* at 9). Bianchi directs our attention to provisions of CORPUS JURIS SECUNDUM (C.J.S.) (2003) and case law dealing with legal requirements for acts constituting payment, both in terms of the correct entity and place for receipt. Although these are not precedent binding upon the Board, appellant urges that we adopt the reasoning of that treatise and those courts, which consistently hold that neither attempted payment of one's creditor by depositing money in an unauthorized financial institution, nor delivery of the funds to a former agent of the creditor whose authority timely has been withdrawn, will be sufficient to discharge the debtor's obligation (app. br. at 9-12).

Specifically, Bianchi references 70 C.J.S. PAYMENT § 6 (TO WHOM PAYMENT MAY BE MADE) (2003), arguing that "A payment discharges a contractual obligation to pay only where the payment is made 'to the creditor [here, Bianchi] or to someone else to whom he directs payment to be made [here, BN]'" (app. br. at 10). Bianchi draws parallels between its repeated notices to the government that payment was to be made to Banco di Napoli instead of Cassa di Risparmio, and the decision in *Orliac v. Winebow, Inc*., 595 F. Supp. 470 (S.D.N.Y. 1984), which deals with the consequences of the revocation of an agent's authority to receive funds on behalf of a creditor. That court ruled that the debtor remained liable where, despite its timely receipt of two telexes directing that payment was to be made to the creditor and not its former agent, the debtor nonetheless paid the agent. (App. br. at 11-12)

Bianchi argues that because it three times had instructed the government to send payments made after 12 May 1999 to Banco di Napoli and not Cassa di Risparmio, the holding in *Jones v. Bussell*, 255 P. 303 (Idaho 1927) is "squarely on point" (app. br. at 10-11). In that case, a debtor deposited the amount owed naming the creditor as payee at a particular bank without having first secured the creditor's permission to do so. The bank applied the funds to the creditor's unrelated indebtedness, and refused to release the money. The court rejected the debtor's argument that payment properly had been made, finding that the unauthorized deposit did not satisfy the underlying debt. The court determined that a "mere deposit by a debtor in a bank to the account of his creditor, of money due the latter, is not a payment, unless the creditor consents to the deposit. . ." (*id.* at 304), citing *Hill v. Arnold*, 42 S.E. 475 (Ga. 1902). (App. br. at 10-11)

With respect to the government's failure to deliver progress payment no. 3 to Banco di Napoli as directed by the contractor, appellant cites the following excerpt from 70 C.J.S. PAYMENT § 8 (PLACE) (2003): "When the place of payment is fixed by agreement, express or implied, payment must be made at the place agreed on unless both parties consent that it be made elsewhere." Bianchi relies upon *Taylor v. Merrill Lynch, Piece, Fenner & Smith, Inc*., 245 A.2d 426, 426-27 (D.C. 1968) for the proposition that, in addition to naming the correct payee, a payment must be properly delivered. (App. br. at 10) In *Taylor*, a securities dealer issued a check drawn from plaintiff's account pursuant to the unauthorized instructions of the plaintiff's estranged wife. The dealer did so without informing the plaintiff before making the transaction, and sent the check to an

address other than the one at which it corresponded with the plaintiff. The court found the dealer liable even though the check had been made payable to the owner of the account, and held that "Generally, payment of a debt so as to extinguish it may be made only to the creditor or to someone to whom the creditor directs payment to be made," (245 A.2d at 426-27).

The government's arguments in support of its position that it properly discharged its debt to Bianchi for progress payment no. 3 may be summarized as follows: Bianchi was named as payee, and Cassa di Risparmio was a proper recipient for the payment; appellant has not proven that it did not benefit from the deposit to Cassa di Risparmio; and the underlying dispute is between the contractor and Cassa di Risparmio, not with the government. (Gov't br., *passim*) With respect to its first contention, the government contends that the issue before the Board is "whether the payment to Bianchi's bank account – albeit not the requested bank account – fulfilled the Government's obligation to make payments under the contract" (gov't br. at 7). The government denies that Cassa di Risparmio was "an unauthorized creditor" because appellant "specifically authorized [Cassa di Risparmio] for receipt of payment at the outset of the contract" (gov't reply br. at 3). The government takes the position that appellant "later requested that an alternate account at [Banco di Napoli] be used for payment" (*id*. at 4) [emphasis supplied]. The government asserts that it "was never notified that [Cassa di Risparmio] was no longer a valid funds recipient" on Bianchi's behalf (gov't br. at 8) (emphasis supplied). Although the government cites decisions in support of its position, it correctly acknowledges that these factually may be distinguished. Analogizing Cassa di Risparmio's refusal to release the electronically transferred funds to Bianchi, the government cites *Technocratica*, ASBCA Nos. 46567 *et seq*., 99-2 BCA ¶ 30,391 (*id.*). That appeal was denied and payment found properly to have been made despite the subsequent misdirection of the funds by the contractor's authorized representative (99-2 BCA at 150,219). With respect to the issue of whether the right payee was named, the government contrasts the instant appeal with *Central Nat'l Bank of Richmond v. United States*, 91 F. Supp. 738 (Ct. Cl. 1950), where the government's erroneous disbursement to the assignor instead of the assignee was found not to have discharged the debt. It argues that the situation before us is "not an instance of the wrong party being paid: the bank account was Bianchi's" and that although this "was not the desired account . . . nonetheless the beneficiary was the correct payee." (Gov't br. at 8)

The government distinguishes the instant appeal from *United States Army Responsibility Under Joint Payment Agreement*, B-226540, 66 Comp. Gen. 617 (1987), *recon. denied*, B-226540.2 (1988 WL 227938). There, the Comptroller General (CG) found that the government did not discharge its debt to the subcontractor where it paid only the prime contractor, in contravention of a joint payment agreement that required a subcontractor as joint payee (*id.* at 620). The government argues that its ignorance of any dispute between Cassa di Risparmio and Bianchi distinguishes the CG's determination from this appeal in that it "did not make payment to an improper party," and asserts that

because the government "made payment to a Bianchi bank account, [it] has not breached its obligation to make payment under the contract." (Gov't br. at 9)

The government also seeks to avoid liability because Bianchi allegedly has not proven that it did not benefit from the funds transferred in the contractor's name to Cassa di Risparmio (gov't reply br. at 3-4). It relies upon Cassa di Risparmio's statement that it "'credited [the payment] to the position of Bianchi sas, also in accordance with our customer's instructions'" (gov't br. at 8) (citing R4, tab 22 at 103-04). The government asserts that "Bianchi obtained a financial benefit from [the transfer to Cassa di Risparmio], even if that benefit was to offset a loan or applied to a debt owed by Bianchi" (gov't reply br. at 2). The government states that it "had no reason to believe that Cassa di Risparmio would not act properly as Bianchi's bank" and that Bianchi "maintain[ed] an account with the bank and the funds were indeed received" (gov't br. at 8).[5]

Finally, the government attempts to distance itself from the controversy by characterizing it as "center[ing] between Bianchi and its bank's disposition of the funds in Bianchi's account" (gov't br. at 8). The government maintains that it "has no interest in the legal relationship between its contractor and [Cassa di Risparmio]," or "in what happens to the funds once the Government makes the payment to the payee" (*id*. at 9). The government urges there is "some factual similarity to" *Reliance Insurance Co. v. U.S. Bank of Washington*, 143 F.3d 502 (9th Cir. 1998). There the bank prevailed over a surety's claim where the bank, "without fraud, has received progress payment from the government" (gov't br. at 8). The government argues that because "Bianchi was the payee, and the transfer was made to Bianchi's account" and there was no evidence of fraud, that "the Government has met its obligation for payment under the contract" (*id*. at 9).

[5] The government contends that appellant did not respond to a request for production of documents seeking "information regarding Appellant's bank accounts and agreements between the Appellant and those banks" and urges that we draw adverse inferences therefrom. (Gov't reply br. at 4) The government does not disclose a request for the Board's assistance in resolving a discovery dispute, nor a motion to compel production. *See* Board Rules 15. Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents and 35. Sanctions. Because we do not decide the appeal on the basis of whether Bianchi maintained an account at Cassa di Risparmio at the time Bank of America erroneously deposited the progress payment there on 1 July 1999, we decline to impose sanctions and remind the parties of the Board's authority to intervene in, and resolve, discovery disputes.

b. Burden of Proof regarding Progress Payment No. 3

Bianchi argues it should prevail because the government failed to meet its affirmative burden of proof to show its debt was discharged by payment by supplying evidence that the EFT was made to an authorized agent of the contractor, citing *Desjardins v. Desjardins*, 308 F.2d 111, 116 (6th Cir. 1962). (App. br. at 13) That decision notes that, under relevant practice, "payment is an affirmative defense to be pleaded by the one resisting the claim" (*id.* at 116). The government's briefs do not address appellant's assertion under Fed. R. Civ. P. 8(c) that the government here bears the burden of proving payment as an affirmative defense (gov't briefs, *passim*).

The contractor correctly states the parties' relative burdens; the party raising an affirmative defense bears the burden of proof. *Bridgestone/Firestone Research, Inc. v. Automobile Club de L'Ouest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001) citing Fed. R. Civ. P. 8(c); *accord* Board Rule 6(b) requiring the government to set forth "any affirmative defenses available." *See Jimenez, Inc.*, ASBCA No. 52825, 01-1 BCA ¶ 31,294 at 154,502 citing *McGraw-Hill, Inc. v. United States*, 623 F.2d 700, 708 n.12 (Ct. Cl. 1980) (burden of proof is on the party asserting an affirmative defense). With the government's acknowledgment that it was obligated to Bianchi for progress payment no. 3 (gov't br. at 7), the burden shifts to the government to prove payment was effectively made as an affirmative defense. Fed. R. Civ. P. 8(c). *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 at 571, n.26 (3rd ed. 2004) (under "federal practice, payment is an affirmative defense" and the burden of proof is upon the party resisting the claim); *accord Snidow v. Woods*, 96 S.E. 2d 157, 159 (Va. 1957) ("Payment is, of course, an affirmative defense and 'where an indebtedness or obligation to pay has been established, the burden of proving payment is on the party who alleges it'") (citations omitted).

Because the government did not give money to Bianchi directly, the government must prove it correctly gave the funds to the contractor's authorized agent. *Accord Taylor v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 245 A.2d 426, 427 (D.C. 1968) ("One making payment to an agent has the burden of showing that the latter had express or apparent authority to receive such payment on behalf of a creditor" citing *Snidow*, 245 A.2d 160 (Va. 1957)). *See also* 70 C.J.S. PAYMENT, BURDEN OF PROOF § 73 GENERALLY (2005) at 63, "[W]here payment is made to a person other than the creditor, the debtor has the burden of showing that the person to whom payment was made was authorized to receive the payment." This is true where the payment is made by the transfer of something other than money, including an order for payment of money or check. *See* 70 C.J.S. § 74 PAYMENT OTHERWISE THAN IN MONEY (2005) at 63-64. That is equally true for payment by means of the electronic transfer of funds.[6]

[6] Appellant's briefs, *passim*, note that FAR 52.232-33 MANDATORY INFORMATION FOR ELECTRONIC FUNDS TRANSFER PAYMENT provides at ¶ (g) that, in the event that

c. Discussion

In determining whether Bianchi can recover for progress payment no. 3, we note that there is sufficient guidance in American law for determining whether a debt has been discharged, as demonstrated by the authorities relied upon by the parties. We disagree with both the government's legal argument and certain of its critical factual underpinnings; the cases it relies upon readily can be distinguished from this appeal. For example, key factual assertions by the government are that it was "never" informed by Bianchi that Cassa di Risparmio was no longer an authorized funds recipient for the contractor (gov't br. at 8, gov't reply br. at 2) and that Banco di Napoli was merely an "alternate" account for making electronic payment to Bianchi (gov't reply br. at 3). However, these important contentions are unsupported by the record. Bianchi's letter of 12 May 1999, the first of three repeated and similar notices, stated unequivocally the contractor's direction that future payments were made to Banco di Napoli "instead of" Cassa di Risparmio. We hold this change effectively made Banco di Napoli the only financial institution authorized to accept contract payments on behalf of Bianchi. Appellant timely, repeatedly and effectively provided the necessary routing codes for the government to make the EFT to Banco di Napoli. By doing so, the contractor established a new course of dealing for the parties by designating a new agent for receipt of an EFT under the contract, to which the government acquiesced.

It is insufficient for the government to rest upon the assertion, even where true, that Bianchi was named as payee of the EFT. In determining whether payment was effectively made to the contractor, we examine whether it was made "at the time and place required by the contract," either "to the creditor in person, or to his authorized representative." 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1235 (1964). We are unpersuaded that the decisions cited by the government buttress its position that it successfully discharged its debt to the contractor. To the contrary, these decisions each found that payment which later went awry nonetheless had been effectively made for one reason: the government had made payment in accordance with the parties' established course of dealing. That was not the case in the instant appeal. In *Technocratica,* ASBCA Nos. 46567 *et al.*, 99-2 BCA ¶ 30,391, the appeal was sustained and payment was found properly made by the government to the contractor's authorized representative despite his subsequent misdirection of the funds (*id*. at 150,219). In contrast, Bianchi successfully

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the contractor provides correct information and an erroneous EFT payment is made, the government is liable for making a correct payment, paying any prompt payment penalty due, and recovering any erroneously directed funds. However, this provision was neither mandated for nor included in this contract pursuant to FAR 32.1101(d)(1) Policy that at the time of award permitted but did not require payment by EFT for contracts awarded outside the United States and Puerto Rico. We do not consider FAR 52.232-33 in reaching our decision.

revised payment procedures by its May and June 1999, notices to the government that Cassa di Risparmio was no longer its authorized EFT agent. The government's acknowledgment of and consent to the changed procedure are evidenced by progress payment no. 2 having been made as directed to Banco di Napoli. Also unhelpful to the government is its reliance upon *Central Navigation & Trading Company, S.A.*, ASBCA No. 23909, 82-2 BCA ¶ 15,947. Effective payment took place there upon the tender to the contractor of a check in foreign currency despite the contractor's inability belatedly to cash the check due to political unrest, as the procedure reflected the parties' established course of dealing. (*Id*. at 79,048-052) We distinguish that contractor's loss from Bianchi's inability to obtain the monies paid by the government to Cassa di Risparmio, as the latter transaction contravened Bianchi's explicit instructions to the government whereas the former did not.

We also disagree with the government's interpretation of the CG's determination in *United States Army Responsibility Under Joint Payment Agreement*, B-226540, 66 Comp. Gen. 617 (1987), *recon. denied*, B-226540.2 (1988 WL 227938). The CG found that payment was not made where the government failed to comply with the protocol adopted by the parties; similarly, because payment was not made to the institution authorized by Bianchi, the government's debt has not been discharged here. That the government was ignorant of any controversy between Bianchi and Cassa di Risparmio is irrelevant. Similarly, the government's dependence upon *Reliance Insurance Co. v. U.S. Bank of Washington*, 143 F.3d 502 (9th Cir. 1998) is also misplaced. That litigation determined the competing interests of a contractor versus those of the surety seeking subrogation after the bank/creditor had used the funds to offset the contractor's debt. Again, unlike this appeal, that decision turned upon a finding that the receiving bank had been paid in accordance with procedures established by the government and the contractor.

Additionally, *Central Nat'l Bank of Richmond v. United States*, 91 F. Supp. 738 (Ct. Cl. 1950), better supports Bianchi than the government as it also emphasizes the government's obligation to follow established payment procedures, especially where these timely were changed. That court found that the government, "having received timely notice of the [revised payee] paid [the initial payee] at its peril"; held that "an erroneous payment is . . . no bar to the rightful claimant"; and ruled that the government "could not arbitrarily, without notice to the legal holder of the claim, pay money over to a third party." (*Id.* at 741) "Pay[ing] money over to a third party" is precisely what the government, through its agent Bank of America, erroneously did in this appeal.

The government failed to meet its affirmative burden of proving effective payment of its debt by showing it tendered funds to either Bianchi or the sole financial institution Bianchi authorized to receive an electronic transfer of funds. The actions of the government's agent Bank of America in sending the money intended for Bianchi to an unauthorized recipient did not extinguish the government's liability for progress payment

no. 3. We hold that because the government failed to follow established procedures for making progress payments, its debt remains and Bianchi is entitled to progress payment no. 3 as well as interest pursuant to the Contract Disputes Act, 41 U.S.C. § 611.[7]

2. Recovery of Alleged Legal Expenses from Suits by Suppliers and Subcontractors

a. Positions of the Parties

In addition to payment for progress payment no. 3, Bianchi seeks to recover IL 30,000,000 in legal fees allegedly incurred in defending against suits by suppliers and subcontractors. Appellant argues that it is entitled to these either as breach damages because those expenses were the direct result of the government's failure timely to make payment, or as an equitable adjustment because the costs are related to the underlying contract. (App. suppl. br. at 7-16) Among the government's rebuttal arguments are that these expenses are not authorized by statute or regulation, nor are they permitted by the terms of the contract. (Gov't suppl. br. at 4-7) The government contends these legal costs are consequential damages that are too remote and speculative to be recovered as a matter of law (*id.* at 9). The government also asserts that the Board lacks jurisdiction over this portion of the appeal because the "claim was not submitted as a breach of contract, rather, simply as a failure to make payment" (*id.* at 8).

b. Jurisdiction

We consider first the government's jurisdictional argument because, if sustained, we need not consider the issue further. The Contract Disputes Act clearly requires that a claim previously have been presented to the CO for decision before an effective appeal is made. 41 U.S.C. § 605(c)(5); *Essex Electro Engineers, Inc. v. United States,* 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *Gold Tree Technologies, Inc.*, ASBCA Nos. 54158, 54159, 05-1 BCA ¶ 32,856 at 162,803. We examine the scope of Bianchi's claim as submitted to the CO in determining whether the appeal exceeds the boundaries established therein. If the appeal goes beyond the claim, the Board has no jurisdiction over the extraneous matter asserted. *Eaton Contract Services, Inc.,* ASBCA Nos. 52888 *et al.*, 02-2 BCA ¶ 32,023 at 158,266-67. However, jurisdiction will lie where the appeal presents a new legal theory of recovery, as long as the matter is predicated upon the same operative facts as the original claim. *Lockheed Martin Librascope Corp.*, ASBCA No. 50508, 00-1 BCA ¶ 30,635 at 151,249 citing *Trepte Construction Co.,* ASBCA No. 38555, 90-1 BCA ¶ 22,595. We find that while Bianchi's original claim dated 16 December 1999 focuses upon recovering the disputed progress payment no. 3, it also specifically seeks IL 30,000,000 in costs allegedly resulting from legal proceedings brought by suppliers and subcontractors. (R4, tab 27 at 122) Although the claim does not articulate breach as the basis for these fees, that

[7] We express no opinion on the rights of the government *vis a vis* Bank of America.

assertion is a new legal theory of recovery founded upon the same operative facts initially presented to the CO and is not a new claim. The issue of whether Bianchi may recover the legal costs of defending against suppliers and subcontractors properly is before us.

c. Alleged Authority for Recovery of Legal Expenses

We next address whether the contractor has provided a sound basis for recovery of the asserted legal costs. In making its case, Bianchi cites statute, regulations and precedent in which a contractor has obtained legal fees under appropriate circumstances. (App. suppl. br. at 7-16) However, appellant has failed to show that any of these permit it to obtain the specific legal expenses it seeks. The Equal Access to Justice Act, 5 U.S.C. § 504, authorizes an award of fees and other expenses in connection with a CDA appeal under certain circumstances, and does not waive sovereign immunity to the extent that a contractor can recover fees for litigation with a nonparty. Each of the cases relied upon by appellant, in which the government was required to pay a contractor's legal expenses incurred in third party litigation, can readily be distinguished both legally and factually. In *Terteling v. United States*, 334 F.2d 250, 255-56 (Ct. Cl. 1964), the government was required to reimburse a contractor for legal fees incurred in a suit it had filed against property owners where the government failed to obtain gravel pit sites as obligated by contract and the government had acknowledged liability for these costs in *amicus curiae* brief filed in the third party litigation. In *CRF, a Joint Venture of CEMCO, Inc. and R.F. Communications, Inc.*, ASBCA No. 18748, 76-2 BCA ¶ 12,129 at 58,290, *rev'd in part on other grounds*, 624 F.2d 1054 (Ct. Cl. 1980), legal expenses incurred by a contractor in a third party suit were awarded where the contractor had intervened on the government's behalf to obtain government-owned property required for the contract that was in possession of a bankrupt subcontractor. In *Western States Management Services, Inc.*, ASBCA No. 37471, 89-2 BCA ¶ 21,600 at 108,754-55, the contractor recovered legal fees it had incurred in conjunction with contract administration that were permitted by the FAR, whereas those legal costs incurred prosecuting claims cannot be recovered. In *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,605-06, the Board held that legal fees were not precluded even where specific language was lacking in that contract, because indemnification provisions of the statute authorizing the project, and the contract required the government to assume the risk of all claims arising from construction and operation of the project. Nor has Bianchi proven that the specific legal costs it claims may be recovered pursuant to federal regulation as part of an equitable adjustment. *See generally* Karen L. Manos, *Allowability of Legal Costs*, 05-05 Briefing Papers 1, discussing the recovery of attorneys fees, consultant charges, and other costs by government contractors.

d. Breach of Contract and Recovery of Third Party Legal Expenses

Last, we determine whether Bianchi has shown that its legal costs incurred in defending against third-party subcontractors and suppliers may awarded as breach

damages for the government's failure to make progress payment no. 3. Bianchi alleges that such suits were foreseeable where the government's failure to make payments as required left the contractor unable to meet its obligations. (App. supp. br. at 12-16) Appellant attempts further to link the government's nonpayment with the subsequent third-party litigation by asserting that the crisis in Bianchi's business affairs unfolded shortly after the government failed to make progress payment no. 3 (*id.* at 15). The government counters that appellant cannot recover the asserted legal expenses as breach damages, as these particular damages were neither foreseeable at the time of contract award nor were they the natural and probable consequence of the breach. (Gov't supp. br. at 6 citing *Land Movers, Inc. and O.S. Johnson-Dirt Contractor (JV)*, ENG BCA No. 5656, 91-1 BCA ¶ 23,317.

To be recoverable, appellant must prove that the third-party litigation costs it asserts reasonably were the direct, foreseeable result of the nonpayment within the contemplation of the parties at the time the contract was made. If these were not, but were instead the result of "other independent and collateral undertakings, even though entered into in consequence and on the faith of the principal contract," then they are regarded as "too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." *Myerle v. United States*, 33 Ct. Cl. 1, 26 (1897); *Eaton Contract Services, Inc.*, ASBCA Nos. 52888 *et al.*, 04-1 BCA ¶ 32,536 at 160,917.

We are unconvinced by the record or appellant's arguments that these legal expenses either reasonably were foreseeable or within the parties' contemplation at the time the contract was made. Bianchi seeks to recover the costs of litigation that arose after it was unable to pay its bills, a more remote scenario than a debt to a supplier or subcontractor. While government contractors might not be expected to possess sufficient resources to fund performance of the entire contract without payment from the government, they nonetheless are expected to have a sufficient reasonable financial capacity in light of business custom and practice to carry out the work for a reasonable period of time. *Litchfield Mfg. Corp. v. United States*, 338 F.2d 94, 98 (Ct. Cl. 1964). In the instant appeal, "Even if the Government had paid the corporation promptly, there is no assurance that the funds would have diverted financial difficulties." *Ramsey v. United States*, 121 Ct. Cl. 426, 433 (1952). The government is correct that these legal costs sought by Bianchi are considered consequential damages, and cannot be recovered in a breach of contract claim.

CONCLUSION

We have considered all arguments advanced by the parties. The appeal is sustained in part and denied in part. Bianchi is entitled to its claim for progress payment no. 3 and CDA interest. The contractor's claim for legal expenses incurred in litigation

with its suppliers and subcontractors is denied. The appeal is remanded to the parties for determination of quantum in accordance with this decision.

Dated: 29 September 2005

REBA PAGE
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

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. 53800, Appeal of S.A.S. Bianchi Ugo fu Gabbriello, rendered in conformance with the Board's Charter.

Dated:

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