ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Technocratica	)	ASBCA Nos. 47992, 47993
	)	48054, 48060
Under Contract Nos. N62745-91-C-2150	)	48061
N62745-91-C-2153	)	

APPEARANCE FOR THE APPELLANT: Ms. Sherry Cossyphas
Owner
Athens, Greece

APPEARANCES FOR THE GOVERNMENT: Susan K. Raps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE HARTMAN

Appellant asserts that the government: delayed performance of work on both its contracts when its workers were not allowed to enter the military base where the contracts were being performed; improperly withheld monies due it under invoices for Contract No. N62745-91-C-2153; and improperly terminated its contracts for default. Only entitlement is before the Board for decision as to ASBCA Nos. 48054, 48060 and 48061.

FINDINGS OF FACT

Appellant, Technocratica, entered into two contracts with the Naval Facilities Engineering Command (NAVFAC) (Mediterranean) on 21 December 1992 to build new structures at the Naval Support Activity (NSA), Souda Bay, which is located on a military base in Crete, Greece owned and used by the Greek Air Force where the U.S. Department of the Navy is simply a "tenant." The first contract, No. N62745-91-C-2150 (2150), was for the construction of locker/shower rooms and a weight room adjacent to an existing gymnasium. The second contract, No. N62745-91-C-2153 (2153), was for construction of a racquetball court south of the existing gymnasium. (R4, ASBCA No. 48060 (48060), tab 1, § 01011, ¶¶ 1, 2, 3; R4, ASBCA No. 48054 (48054), tab 1; tr. 169, 190-91, 197, 221-22, 226-27; compl., ASBCA No. 47992 (47992), ¶ 1; answer, 47992, ¶ 1; compl., ASBCA No. 47993 (47993), ¶ 1; answer, 47993, ¶ 1).

The parties' contracts incorporated by reference a number of standard contract clauses, including Federal Acquisition Regulation (FAR) 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989), 52.233-1 DISPUTES (APR 1984), and 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984). In addition, the contracts set forth a number of clauses "standard" to NAVFAC. (*E.g.*, R4, 48054, tab 1 at 000026-30; R4, 48060, tab 1, § 01011; tr. 234, 246)

The contracts contained identical NAVFAC clauses authorizing assessment of liquidated damages and requiring the receipt of a performance guarantee. The former stated:

> (a) If the Contractor fails to complete the work within the time specified in the Contract, or any extension thereof, the Contractor shall pay to the Government as liquidated damages the sum in Drachma equivalent to $200 U.S. Dollars, at the rate of exchange prevailing at the time the liquidated damages become assessable, for each day of delay.
> (b) If the Government terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned by the Government in completing the work.
> (c) If the Government does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed.

(Emphasis in original) The latter stated in pertinent part:

> 11.1 Submittal Time: The bidder whose bid is accepted shall furnish a performance guarantee within ten (10) days after the contract forms are presented to him for signature. . . .
>
> 11.2 Form of Performance Guarantee: The bidder whose bid is accepted shall furnish a performance guarantee in the form of a cashier's check . . . in the amount of eight percent (8%) of the Contract price, which will be cashed and deposited in the account of the U.S. Government. . . .
>
> 11.3 Forfeiture: The performance guarantee may be forfeited whenever the work is terminated in whole or in part under the provisions of Clause, "Default (Fixed-Price Construction)" of the Contract Clauses. In such case the

> Contractor shall be liable for the costs arising from the continued prosecution of the work by a new contractor or otherwise, plus any liquidated damages for delay which are specified . . . .

(R4, 48054, 48060, tab 1, § 01011, ¶¶ 5, 11; tr. 248-51, 254-55)

The contracts also contained identical NAVFAC clauses regarding payments and security requirements. The former provided in pertinent part:

> (a) Payments made in accordance with the Clause entitled "Payments Under Fixed-Price Construction Contract" of the Contract Clauses, shall be made on submission of itemized requests by the Contractor . . . .
>
> (b) The obligation of the Government to make any of the payments required under any of the provisions of this Contract shall, in the discretion of the Contracting Officer [(CO)], be subject to (1) reasonable deductions on account of defects in material or workmanship, and (2) any claims which the Government may have against the Contractor under or in connection with this contract. . . .

The latter provided in pertinent part:

> SECURITY REQUIREMENTS: . . . Names and photographs of all personnel to be employed in the performance of the work at the site shall be submitted to the [CO] at least seven (7) days prior to commencement of the work. Contractor personnel shall be restricted from entering operational buildings or areas without the specific authorization of the [CO].

(R4, 48054, 48060, tab 1, § 01011, ¶¶ 44, 66; tr. 176, 218, 234, 246)

The racquetball contract stated that it was to be completed no later than 200 calendar days after the date of notice of award or according to NAVFAC's Assistant Resident Engineer in Charge of Construction (AREICC) on 24 July 1993. The locker room contract stated that it was to be completed no later than 250 calendar days after date of notice of award or, according to the AREICC, on 12 September 1993. About 90 days after award, on 25 March 1993, the AREICC sent Technocratica a letter requesting an

"updated progress schedule" for the racquetball contract with "narrative analysis of the actions [it] plan[s] to take to get on a schedule" because NAVFAC was:

> concerned over the lack of timely progress by your firm on the subject contract. This contract provides for all work to be completed by 24 July 1993. As of the date of this letter the work is 4% complete while 42% of the time has elapsed.

The same date, 25 March 1993, the AREICC sent Technocratica another letter requesting an identical update for the locker room contract because NAVFAC also was:

> concerned over the lack of timely progress by [Technocratica] on the subject contract. This contract provides for all work to be completed by 12 Sept. 1993. As of the date of this letter the work is 2% complete while 31% of the time has elapsed.

(R4, 47993, tab 16; R4, 48060, tab 1 at § 01011, ¶ 4; R4, 48061, tab 3; compl., 47992, ¶ 1; answer, 47992, ¶ 1; compl., 47993, ¶ 1; answer, 47993, ¶ 1)

By letter dated 9 April 1993, Technocratica advised NAVFAC that: it had rained on 16 working days; its excavated area flooded and rendered the site unworkable for several days after each rainfall; it anticipated receiving additional time to perform its racquetball contract due to excessive rain during the period; and it would accelerate its performance by increasing its workforce and extending its working hours. The same date, Technocratica further advised NAVFAC by letter that: it performed work on the locker room contract as permitted by the weather and delays allegedly arising from obstacles it encountered; it believed it was entitled to contract extensions for those reasons; and it planned to augment its work force, extend work day time, and work weekends to meet target completion dates. (R4, 48061, tab 4; R4, 47993, tab 17; tr. 157, 160).

By letters dated 15 April 1993, the AREICC notified Technocratica that, if it wished a time extension, it must submit a formal request with proper documentation justifying the time requested. The AREICC added that applications based on unusually severe weather should be supported by official weather reports because "bad" weather must exceed averages for the period in question (R4, 47993, tab 17; R4, 47992, tab 13; *see* tr. 199-200).

Approximately three weeks before the completion date which was deemed to be contractually specified for the racquetball contract, on 1 July 1993, the senior CO located at Souda Bay, the ROICC himself, sent Technocratica a letter stating:

> You are notified that the Government considers your lack of progress a condition that is endangering timely completion of the referenced contract. Our records indicate that approximately 23 percent of the work is complete while 88 percent of the contract completion time has elapsed.
>
> Therefore, unless this condition is cured within 10 calendar days after receipt of this notice, the Government may terminate for default under the terms and conditions of the DEFAULT . . . clause of this contract.

(R4, 47992, tab 67; ex. G-7; tr. 209-10) By letter dated 9 July 1993, Technocratica advised:

> Initially there were certain possibly excusable delays due to weather and differing site conditions reflected in our "daily reports to inspector." Those delays were, however, not very significant in comparison with the reinforcement shop drawing approval procedure events, described . . . which have caused our contract to progress minimally past 11 May 93.
>
> By transmittal no. 03300 submitted to your office on 8 March 93 we provided shop drawings for the reinforcing steel required by paragraphs 1.4.2.a and 1.4.2.1 of section 03300, page 4, of the specification introduced in the solicitation by means of amendment 0003 dated 3 Sept. 1992.
>
> Starting with our daily report to inspector no. 71 we indicated the need for approval action on our above referenced submittal.
>
> On 6 April 1993, approximately one month later, the referenced shop drawings were returned to us for resubmittal after your rectifying a design drawing ambiguity concerning the size of the grade beams (50cm vs. 1m height) and requiring reinforcement splicing/overlapping at the location shown on the design drawings and not as alternately shown on our shop drawings. No other comments were included in that first review.
>
> By transmittal number no. 03300A, dated 10 April 93, we resubmitted shop drawings for the reinforcing steel.

By action taken 5 May 93 resubmittal of the shop drawings was again required for the reasons mentioned in the reviewer's comments block of the Constractor's [sic] Submittal Transmittal form.

By transmittal no. 03300-B dated 11 June 93 we resubmitted for the third time shop drawings for the reinforcing steel which were again required to be resubmitted "showing every bar of reinforcement in the Drawings and in the schedules, giving tag numbers of each bar on the Drawing and in the schedules."

We believe that the time taken by the submittal review process was unusually inordinate considering the fact that our submittals were not in fact reviewed at all, as indicated by the reviewer's comments.

. . . .

It is clear in our opinion that the requirement of "showing every bar of reinforcement in the Drawings . . ." does not emanate from the contract.

On the contrary, we believe that such information should have been provided by the original design documents prior to bidding and not by the construction contractor after contract award. Our providing design services to render your drawings adequate for construction is not part of our contractual responsibilities.

Despite the above, we have engaged a design firm to provide the information you require by means of an electronic computer with plotter, and these design documents were promised to be delivered to us on 12 July 93 at which time we will resubmit them for your approval of the steel reinforcement.

We respectfully submit that the apparent delay in the completion of the subject contract is not due to either failure or refusal on our part to prosecute the work with diligence. On the contrary, we are very interested and motivated to

> complete the contract expeditiously following resolution of the design problem with the reinforcement, ...

(Emphasis in original) (R4, 47992, tab 19; *see* R4, 48061, tab 6; tr. 160) On 12 July 1993, the AREICC returned to Technocratica its second invoice for payment on the racquetball contract because, "[w]ith the exception of the lean concrete, all of the work is directly related to reinforcing steel" for which there is no "approved submittal" (R4, 47993, tab 22). By letter dated 14 July 1993, the AREICC advised Technocratica:

> Your transmittal No. 03300 was received by this office on 12 April 1993, and as mentioned in your letter, was returned to you approximately one month later from the reviewer. Contract Section 1300 paragraph 1.5.3 b. states that up to 20 working days is required for the review stage, so your submittal review fell within this time frame.
>
> Your submittal No. 03300 consisted of the contract drawings with your company's block reprinted over the government's block, and apparently did not include the bending schedule that was submitted with your resubmittal No. 03300 A. The reviewer's comments were that they could not understand or follow your bar bending schedule, and 3300 A was returned to you for correction and resubmittal, again within the time frame allowed.
>
> Your submittal 03300 B was received by this office on 14 June 1993, and forwarded to the reviewer, and was again returned for resubmittal for the same reasons that 03300 A was returned. It is not understood why you did not make the required corrections. The reviewers comment concerning the drawings and bar bending schedule is interpreted as <u>every</u> bar of the <u>same size</u> is to be given tag numbers. Obviously, if there were 10 bars, for example, all of the same size and dimension, 10 different drawings would not be required.
>
> Exception is taken to your statement "Our providing design services to render your drawings adequate for construction is not part of our contractual responsibilities." You are indeed responsible to meet the requirement of Contract Section 01300, Submittals, as well as the Submittal requirements of each Section of the contract specifications. . . .

> This is a performance specification that is required for the contractor to provide data, and the fact that you elected to submit the contract drawings is unacceptable. Paragraph 1.4.2 of Section states "Reproductions of contract drawings are unacceptable."
>
> Further exception is taken to your statement, "We respectfully submit that the apparent delay in the completion of the subject contract is not due to either failure or refusal on our part to prosecute the work with diligence." When you first submitted your reinforcing steel submittal on March 8, 1993, 36% of the contract time had elapsed, and considering the allowed time for review, 50% of the contract time had elapsed before concrete could be placed, and in this case, a resubmittal was required.
>
> Since the time that the grade beams and columns were placed, very little progress has been made. As of this date, 94% of the contract time has elapsed, and only 18% of the work has been accomplished. The government does not consider that the work under subject contract has been prosecuted with diligence.

(R4, 47992, tab 20; ex. G-9) By letter dated 15 July 1993, Technocratica replied as follows:

> 1. Our first submittal no. 03300 did not contain any contract drawings. The drawings and schedule submitted were our own as evidenced by the reviewer's comment on sheet 2 of our drawings "No lapping here. See Design Drawing" and the reviewer's correction of the height of the grade beam from "0.50" to "1.00". We are attaching a copy of the pertinent portions . . . of our drawing for ready reference. The fact that a bending schedule was submitted with our first submittal is evidenced by the fact that it was disapproved. . . . A complete set of the seven page bending schedule is available.
>
> . . . .
>
> 2. Our second submittal no. 03300-A consisted again of our own construction drawings and schedule incorporating the comments of the first submittal's reviewer. This time the

> reviewer commented that: "The method you have submitted your bar bending schedule cannot be understood or followed. Please resubmit in a proper way, giving tag number for each bar in the schedule and in the drawings."
>
> It is noted that for the first submittal there was no mention that the bending schedule could not be understood or what a "proper way" for a schedule was, or what contract specifications required our providing reinforcement design calculation results.
>
> 3. With our third submittal no. 03300-B we submitted the very design drawings of the contract, in liew [sic] of our own as we had done previously, for the purpose of facilitating the reviewer's understanding and following of the bending schedule. Previous comments were incorporated on these drawings but we refrained from performing not in contract work, ... We did consider then and do consider now those efforts to constitute a design function.
>
> . . . .
>
> 4. Attached are drawings and schedule forming our 4th submittal no. 03300-C which were obtained through paid services of a design firm.

(R4, 47992, tab 21)

On 28 July 1993, four days after the deemed completion date for the racquetball contract, the ROICC sent Technocratica a letter asking it to show cause, *i.e.*, whether its failure to perform was due to causes beyond its control, and without fault or negligence on its part (*see* R4, 47992, tabs 22, 23; ex. G-7). Shortly thereafter, on 5 August 1993, the ROICC sent Technocratica a letter asking it to submit a revised schedule showing how it planned to complete work upon the locker room contract (*see* R4, 47993, tab 23).

By letter dated 7 August 1993, Technocratica responded to the show cause notice issued for the racquetball contract as follows:

> [W]e have been alleging difficulties in producing acceptable concrete enforcement shop drawings and placing the reinforcement itself in accordance with the contract design documents. That position may or may not have received due credibility in the past.

> When on 6 August 93 our 4th shop drawing submittal (no. 03300-C) was returned to us "Approved as Noted", we observed with interest that the steel reinforcement was changed by the Government . . . , i.e., a 25% reduction in steel bars. . . .
>
> We also noted that all three types of ties had been altered from the original design.
>
> We believe that you might agree that:
>
> 1) The shop drawing approval process is not the vehicle for effecting contract modifications.
>
> 2) Our previously unacceptable position that the amount of steel in the . . . columns was excessive is now vindicated.
>
> For the above reasons we hope that you will determine that the delay in obtaining reinforcement shop drawing approval in order to continue with the structure was not due to our fault or negligence and that it had its roots elsewhere, and that you will allow the contract to be completed by us now that the reinforcement design obstacle has been removed.

(R4, 47992, tab 22) In another letter dated 17 August 1993, it notified the ROICC regarding the locker room contract that: it was not allowed to proceed with concrete pouring on or about 7 July 1993 because its submittal for formwork and reinforcement was deemed "incorrect"; there was no specific explanation as to what was "incorrect"; it retained a "design firm to provide the information you require consisting of five drawing sheets of computer plotter work" and submitted the information and a bar schedule for review; upon receipt of information concerning the approval status of this submittal, it will prepare and immediately submit a meaningful schedule indicating the steps it will take to complete "the remaining work by 30 Oct 1993"; and it "can make no progress" until it knows when it "will be allowed to place concrete" (R4, 47993, tab 23).

The ROICC, by letter dated 16 August 1993, replied to Technocratica's show cause response on the racquetball contract that: the contractor was not required to provide a design, as asserted; its submittal of 3 March was disapproved because of incorrect lapping of the rebars and an incorrect depth of the grade beam; no bar bending schedule was submitted at that time; its 10 April submittal was returned disapproved because of numerous errors and omissions on the bar bending schedule, which could not be followed; its 11 July submittal contained the corrections noted by the reviewer with the exception of corrections to the bending schedule and was again returned disapproved; its 15 July submittal included a corrected version of the bending schedule and the

submittal was approved; and the reviewer's change in rebar size should not have impacted its progress. The ROICC concluded his letter as follows:

> Since you have not proved that your failure to perform is due to causes beyond your control, and without fault or negligence on your part, the ROICC intends to pursue termination proceedings for default under the terms and conditions of the DEFAULT (FIXED-PRICE CONSTRUCTION) clause of the [racquetball] contract.

(R4, 47992, tab 23; R4, 48061, tab 7)

The AREICC and others at Souda Bay, including the ROICC, recommended the racquetball contract, which was only about 25% complete, be terminated for default. The CO who was authorized to terminate that contract, the Chief of Contracts, Mediterranean, however, declined to do so. He preferred not to have to reprocure if there was "a chance that [Technocratica] would . . . complete the contract within a reasonable time." According to the ROICC, after "review of . . . the negative impacts of going through that whole default reprocurement[,] the decision was made to let [Technocratica] muddle through a little bit longer and see how things went." (Tr. 178-79, 194, 215-16, 234-35; *see* R4, 47992, tab 23; R4, 48061, tab 7)

On 8 September 1993, four days before the completion date deemed specified for the locker room contract, the AREICC advised Technocratica: the ROICC had received its letter of 17 August; a contractor is responsible for ensuring that no work is begun until submittals have been returned "approved;" permission for it to pour cement was denied because it did not have an approved reinforcing steel submittal; submittals were returned to it within the period specified in its contract; and, "to avoid additional delays in the future, it is suggested that [it] forward [its] submittals for review in a timely manner" (R4, 47993, tab 24). On 14 September 1993, two days after the completion date deemed specified for the locker room contract, the AREICC sent Technocratica a letter advising: "100 percent of the contract time has elapsed;" to date, it has "completed only 8 percent of the work;" and within 10 days it "should submit in writing a revision of [the] progress schedule to show a realistic completion date and procedures or steps required to accomplish the work by that date" (R4, 47993, tab 27). The next day, by letter dated 15 September 1993, the AREICC notified Technocratica:

> In reviewing the progress status of [the racquetball] contract, it is noted that 100 percent of contract time has elapsed. To date you have completed only 27 percent of the work. Your progress chart reflects that you should now be 100 percent complete.

> It is requested that you submit in writing a revision of your progress schedule to show a realistic completion date and procedures or steps required to accomplish the work by that date. A reply is requested within ten (10) days outlining your revised plan to complete this project. Failure to submit a revised progress schedule will result in this office not processing any further payments.

(R4, 47992, tab 25; R4, 48061, tab 8) In his letters requesting revised progress schedules for both contracts, the AREICC did not state liquidated damages were accruing or that NAVFAC deemed the contractually specified completion dates to continue to be in effect (R4, 47992, tab 25; R4, 47993, tab 27; R4, 48061, tab 8).

Technocratica responded to the locker room contract letter by submitting a progress schedule indicating its contract work would be completed on 31 March 1994 (*see* R4, 48061, tab 45). The record in these appeals does not contain a copy of any reply by the ROICC to Technocratica's revised progress schedule.

During fall 1993, Technocratica continued to perform work on both the racquetball and locker room contracts. On 1 October 1993, Technocratica asked the ROICC to clarify NAVFAC's intent regarding thermal insulation on the racquetball contract and the ROICC responded five days later (R4, 47992, tabs 26, 27). On 7 October 1993, the ROICC advised Technocratica that, "[f]or all future requests to work outside regular hours," it should "submit applications 48 hours before the work is scheduled to begin, together with a plan of the work to be performed" to enable the ROICC "to make the necessary arrangements for inspection of the work" (R4, 47992, 47993, tab 28). Three days later, on 10 October 1993, the ROICC notified Technocratica that "220V circuit breakers are not currently available for UL listed panel boards" and therefore the "two subject contracts must be modified" (R4, 47992, 47993, tab 29). During the latter half of October, Technocratica requested and received permission from the ROICC to work on the locker room contract on Saturday, 16, 23 and 30 October and on Sunday, 31 October 1993 (R4, 47993, tabs 30, 31; R4, 47992, tabs 30, 31, 33, 34). Technocratica's daily report for the racquetball contract dated 26 October 1993 stated it was performing masonry work with three workers and two of its workers had experienced a "delay at gate" entering the base (R4, 48054, tab 2). On 15 November 1993, the ROICC advised Technocratica of two local suppliers for UL listed panelboards (R4, 47993, tab 32; R4, 47992, tab 36).

By letter dated 18 November 1993, Technocratica notified the ROICC in writing that the names of four reinforcement installers approved to enter the base about a month earlier had been dropped from the list of those allowed to enter the base; the four demand

payment for days they arrived at the base to work and were not allowed to enter; and the four will no longer work for Technocratica due to base access problems. According to Technocratica,

> [w]hen the above or similar events occur, the consequences are far reaching because they upset all previous programming, planning, and coordination of the various trade teams. For example, with the . . . reinforcement installers, a four day period had been allowed for tying the reinforcement for the ground floor roof slab. Because of the above events, it took the superintendent himself and temporary available help approximately one month. And although the carpenter team expected that their tools, i.e., forms and scaffolding, would be tied up for approximately one month at our job site, it now turns out that they will be unavailable to them for two months preventing them to work elsewhere. This creates friction between us and them and the other trade teams which are waiting for the carpenters to remove the forms in order that others can proceed with their own work.

Technocratica added that: "clearance had not yet been granted" for its English speaking representative even though his required information was submitted on 20 October 1993; an unnamed individual had told Technocratica it takes "two months" for employee base access clearance; and if this is so, it would "be a change to the terms of our contract" which "states a minimum of seven days." (R4, 47992, tab 37; R4, 47993, tab 33; R4, 48054, tab 3; R4, 48060, tab 3)

During December 1993, and January and February 1994, Technocratica continued to perform work on both its racquetball and locker room contracts. Technocratica sought and received permission to perform contract work on four Saturdays. It submitted names of additional employees for entry clearance, and experienced problems with electrical and masonry workers being denied access to the base on 25, 26, and 28 February 1994. It also corresponded with the ROICC regarding the purchase of electrical panels, problems with the locker room contract specification for building doors, a Navy excavation pit hindering erection of scaffolding by its plasterer for the racquetball contract, the corridor connecting the gym to the racquetball court, and requirement for masonry construction joints. (R4, 47993, tabs 36, 37, 39, 40 through 43; R4, 47992, tabs 39 through 46; R4, 48060, tab 6)

On 18 February 1994, almost seven months after the specified completion date for the racquetball contract, the AREICC asked Technocratica to submit within five working days "a current progress schedule, including a procurement schedule of all of the

remaining items in the [racquetball] contract." The AREICC stated that Technocratica had discussed with a manufacturer in January racquetball wall and ceiling panels, which have a four to five week lead time for delivery, but not ordered those items to date. (R4, 47992, tab 47)

Four days later, on 22 February 1994, about five months after the completion date for the locker room contract, the AREICC sent Technocratica a letter stating:

> Your invoice number 07 was submitted to this office on 21 February 1994 with a Progress Schedule indicating 31 March 1994 as the contract completion date, and approximately 30% of the work is complete.
>
> Your invoice is returned and it is again requested to submit another "realistic" Progress Schedule. You are reminded that your contract completion date is 22 September 1993. Approval of any Progress Schedule beyond that date is not to imply that the contract completion date is extended beyond 22 September 1993. [1]

(R4, 47993, tab 45)

By letter dated 7 March 1994, Technocratica notified the ROICC that its glass partition supplier "informs us that in his opinion the drawing A-2 Floor Plan and relevant elevation 1 may be in error" because in "his experience in Canada . . . racquetball doors open into the court and not out of the court." The next day, the AREICC responded that he "will submit to the A/E for review, the manufacturers [sic] recommendation for the required submittals" and he "feel[s] that the door swing recommended by the manufacturer will be approved." (R4, 47992, tabs 49, 50)

On 22 March 1994, Technocratica submitted "a procurement schedule of the remaining items" on the racquetball contract, except for wall and ceiling panels which it asserted were not properly "identified in the contract." Technocratica stated that a "critical path schedule showing the sequence of construction for the remaining work elements is being prepared assuming that a technical specification regarding the wall paneling . . . is forthcoming." (R4, 47992, tab 51) On 28 March 1994, Technocratica

[1] NAVFAC does not explain in its brief, and no explanation is apparent from the record before us, why the AREICC would deem 22 September, rather than 12 September, 1993 to have been the contractually specified date for completion of the locker room contract in February 1994.

submitted a Request For Information (RFI) to the ROICC regarding the racquetball panels (R4, 47992, tabs 53, 57).

By letter dated 2 April 1994, the AREICC responded to Technocratica's "procurement schedule." He stated that "[t]he specifications appear to be clear enough for you to provide an acceptable product under subject contract" and, "[i]f you feel that you will incur costs due to any alleged faulty specifications, you may file a claim under the Disputes Clause." He stated Technocratica was "252 days in liquidated damages on a contract that allows 200 days for completion" and "directed [it] to proceed diligently to complete this contact." He added that "[f]ailure to do so will result in Default action against you." (R4, 47992, tab 54) A few days later, the AREICC responded to Technocratica's RFI by stating:

> The subject facility consists of an ordinary construction shell and a specified interior. There are standards for the interior set by the Racquet Ball Federation which govern and are strictly applied by the Association of Racquet Sports Manufacturers and Suppliers.
>
> . . . .
>
> You were advised in my letter of 18 Feb. 1994 that the specifications governing the construction of the Racquet Ball court must be strictly adhered to, especially the requirements of the manufacturer and installation. No improvisation or substitute will be accepted.

(R4, 47992, tab 57)

By letter dated 5 April 1994, the AREICC notified Technocratica that:

> On inspection of your contracts on the Racquetball Court and Shower-Lockers/Weight Room, it was noted that no work has been performed for the past two days. In view of the fact that you are in liquidated damages on these projects, it is not understood why there is no work in progress.
>
> Every updated progress schedule that you have provided this office has fallen short on the dates that you predicted that work would be completed.

> You are directed to contact this office immediately and explain why work has stopped, and discuss your intentions on completing these projects.

(R4, 47992, tab 55; R4, 48061, tab 9) Six days later, by letter dated 11 April 1994, the AREICC further notified Technocratica:

> Subsequent to my letter of 5 April . . . , it is noted that no work was performed all week on any of your projects, including the Racquetball Court and the Shower Locker and Weight room. This could result in the Government terminating your contracts for ABANDONMENT.
>
> You are directed to contact this office immediately in regards to your work stoppage.

(R4, 47992, tab 58; R4, 47993, tab 47; R4, 48054, tab 4; R4, 48061, tab 10; ex. G-10)

By letter dated 11 April 1994, Technocratica advised the ROICC that its owner had been in Athens expediting "equipment acquisition," its superintendent had been summoned to Athens to appear in court, the already cured lightweight concrete could not be primed for installation of asphalt felt until Saturday 9 April 1994 because of rain, and "[d]uring the entire past week one leadman [had] worked on clean-up and backfilling of trenches at the job sites." Technocratica added that "better planning on our part would have insured visible progress" and "[t]he slack will be picked up by increased effort during the current week for at least the Lockers contract." (R4, 47993, tab 48). In another letter three days later, which again discussed the specification for racquetball court panels, Technocratica further advised:

> Pleased be assured that we are extremely interested and motivated to complete the contract at the earliest possible time; and although we share in the delayed status of the project by not causing the specifications problems to surface earlier, we should hope that the contract record hopefully reflects that all delays are not due to our actions or inactions.

(R4, 47992, tab 59)

From mid-April through June 1994, Technocratica continued its performance of the racquetball and locker room contracts. (*See* R4, 47992, tabs 60, 61; R4, 47993, tab 49; R4, 48060, tabs 7 through 10; R4, 48061, tabs 11, 12, 13) On 16 May 1994, the

Navy's CO informed Technocratica with respect to both the racquetball and locker room contracts that:

> Due to the recent increase in construction activity, I have observed more accumulation of debris at the various sites. This is not in compliance with the terms of subject contract.
>
> . . . .
>
> Please be advised that due to the close proximity of station functions and very limited space in which to operate, cleanliness of all areas is crucial, therefore, in accordance with your contract you are directed to maintain your construction sites in a safe and hazard free manner, free of all construction/demolition debris, waste and trash. It is expected that this will be accomplished on a daily basis. . . .

(R4, 48061, tab 49)

During late spring, NAVFAC appointed a new Chief of Contracts, Mediterranean. He was located in Naples, Italy, was responsible for facilities and construction contracting in the Mediterranean, North Africa, and Middle East, and possessed authority to terminate Technocratica's contracts. (Tr. 237-39) In addition, the headquarters organization for NAVFAC's chief of contracts (the Engineering Field Activity, Mediterranean) received a new commanding officer shortly after the arrival of the new contracts chief. Subsequent to his arrival in the Mediterranean, the new commanding officer for the contracts chief, a captain, had an "in-brief" with his own newly appointed commanding officer, a two-star admiral who was "owner of naval operational facilities throughout the Mediterranean." During this initial meeting, the two-star admiral "raked" the captain "over the coals." He asked the captain "point blank why he shouldn't be fired." The admiral had "been out" making first visits to bases and said he had seen "Roman ruins, half built structures with no activity." The admiral cited Souda Bay as an installation with "Roman ruins." At the time, the only partially-built facilities at the Souda Bay base were the locker room and racquetball court being built by Technocratica. (Tr. 29, 245)

On 20 May 1994, Technocratica submitted its Invoice No. 8 for the racquetball contract seeking payment of 1,079,00 Drachma for, among other items, earthwork, concrete, reinforcement, plumbing, masonry, plastering, insulation, windows, painting, electrical, and mechanical work (R4, 48061, tabs 11, 12) By letter dated 31 May 1994, the AREICC returned to Technocratica Invoice No. 8 "without processing" because:

> The contract completion date is 24 July 1993, and according to your progress schedule, you are to complete the contract on August 15, 1994, which would amount to 392 days of Liquidated Damages. The assessment of the Drachma equivalent of $200 per day, the amount of Liquidated Damages under subject contract, exceeds the amount remaining to be paid under the contract.
>
> If you have justification to substantiate a time extension, you may submit a claim for Equitable Adjustment.

(R4, 47992, tab 61; R4, 48054, tab 5; R4, 48061, tab 12)

On 7 and 8 June 1994, Technocratica's blacksmith was refused entry to the base upon the grounds his name was not on the list of individuals approved for entry. By letter dated 9 June 1994, Technocratica requested that the blacksmith's name be reinstated on the entry list. Shortly thereafter, Technocratica sent the ROICC another letter stating:

> In response to our letter of 9 June 94, you furnished us a listing of the TECHNOCRATICA employees allowed to enter the base for work under our contracts.
>
> We noted that the name of plasterer, Georgios MITSOTAKIS, was not in the listing, although we had applied for base entry clearance for him as early as 18 Feb 1994.
>
> The above fact tends to substantiate Mitsotakis' allegation that he did not show up to perform his plastering subcontract back in April 1994 because he was not allowed to enter the base.
>
> In order to confront Mr. Mitsotakis with facts contradicting his allegation and claim against us, we request that you furnish us with any evidence you may have that MITSOTAKIS was permitted to enter the base during any time period following our above application which you received on 22 Feb 94.

On 16 June 1994, Technocratica requested that 13 names of employees be added to the list allowed entry to the base. Two days later, on 18 June 1994, Technocratica notified the ROICC that:

> Suddenly, starting on 18 June 1994 and without prior notice to us . . . , you denied base entrance to our Foreman, Paul Bouzakis, who has been working for TECHNOCRATICA under our contracts with you for at least the last two years.
>
> . . . .
>
> [Technocratica's owner] checked the base entry listing with the gate sentries and the name of Paul Bouzakis could not be found on the listing. No explanations could be given by the sentries for the above event.
>
> Mr. Bouzakis costs TECHNOCRATICA 17,000 drx. per diem. This amount will accumulate daily, until such time that he be allowed to enter the base to work or we be formally notified that he is no longer allowed to enter the base to work under our contracts.
>
> A formal claim in a sum certain will be submitted as soon as all costs and effects of the arbitrary base entry denials to our employees are calculated in connection with contract . . . .

(R4, 47993, tabs 50 through 53; R4, 48060, tabs 7 through 10)

At approximately the same time, by letter dated 13 June 1994, Technocratica notified the ROICC it was requesting the racquetball contract be modified to provide additional time and the issue of liquidated damages be deferred until contract completion because: while it had requested a digging permit on 30 December 1992, a permit was not issued until after 20 January 1993; due to lack of a permit and the discovery of unforeseen underground cables, its excavating was delayed by a total of 22 calendar days; the project site was not workable for 37 calendar days due to flooded and muddy conditions arising from the rainy weather; the contract documents were defective with respect to concrete reinforcement, which delayed it 128 calendar days; racquetball court panel specifications additionally were defective and delayed it by an unspecified number of months; and it was delayed by at least 60 calendar days as a result of its employees being denied access to the base. The contractor added that "the entire contract period has been affected by sequential causes of delay that are certainly not ours." (R4, 47992, tab 64; R4, 48054, tab 6; R4, 48061, tab 14).

By letter dated 28 June 1994, a CO located at Souda Bay in the office of the ROICC, advised Technocratica that: his office was responsible for retaining sufficient funds to cover reprocurement costs should default actions make reprocurement necessary; no further progress payments could be made under the subject contract "due to a lack of progress and accumulation of extensive liquidated damages"; a 6-day time extension would be granted for its excavation delay claim; no time extension would be granted for its weather delay claim; no time extension would be granted for its claim of defective racquetball court panel specifications; no time extension would be granted for its claim of delay based on denial of base access; and a 75-day time extension would be granted for its claim of delay based on change to the steel reinforcement design causing resubmission of its submittal. The CO added that a "modification to the [racquetball] contract will be issued reflecting this change" in performance period, but the record here does not include any such modification. (Tr. 210; R4, 47992, tab 66; R4, 48054, tab 7; R4, 48061, tab 15)

On 6 July 1994, the AREICC advised Technocratica that one worker's name was not on the base entry list because it had deleted the name itself from the list, three other worker names were not on the list because their names had been submitted only two days earlier to the ROICC, *i.e.*, within an insufficient period of time for their paperwork to be processed, the blacksmith's name had been on the list and it was not known why he would be denied access, and the name of Georgios Mitsotakis (another employee) was also on the base entry list, confusion occurred because there were two people with the same name and different identification numbers, and Technocratica's "Georgios Mitsotakis" was denied access because his identification number did not match that of the "Georgios Mitsotakis" who appeared on the list. (R4, 47992, tab 68; R4, 48054, tab 8)

Two days later, on 8 July 1994, the ROICC requested that Technocratica's Invoice No. 11 under the locker room contract, which was based upon 47.3% completion, be paid, except for a "10% RETAINAGE FOR BEING BEHIND SCHEDULE" (ex. A-6). The same day, the senior CO located at Souda Bay, the ROICC himself, sent Technocratica a letter with respect to the locker room contract stating:

> Since you have failed to perform the subject contract within the time required by its terms, the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question . . . .

(R4, 47993, tab 58; ex. G-8)

On 20 July 1994, in response to the ROICC's 8 July 1994 letter regarding the locker room contract, Technocratica stated : it had experienced delay with respect to excavation; the site was unworkable for 37 days due to weather conditions; it also had experienced delay with reinforcement steel submittals; it experienced various problems with base entry; it denies that the delay in completion is due to its fault or negligence; and is "very much interested and motivated to complete all" of the locker room contract work by 15 November 1994 (R4, 47993, tab 62; R4, 48060, tabs 14, 16).

On 26 July 1994, a CO at Souda Bay returned to Technocratica its Invoice No. 9 on the racquetball contract dated 21 July 1994. The CO stated that the invoice was being returned "unprocessed" because the "liquidated damages exceed the amount remaining to be paid under subject contract" and a required certification was not attached. (R4, 47992, tab 69; R4, 48061, tab 16)

Two days later, on 28 July 1994, the senior CO located at Souda Bay, the ROICC, notified Technocratica with respect to the racquetball contract:

> Since you have failed to cure the conditions endangering performance under subject contract as described to you in the Government's letter of **1 July 1993,** the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question . . . within 10 calendar days after receipt of this notice.

(Emphasis added) (R4, 47992, tab 70) On 3 August 1994, another CO advised Technocratica with respect to its locker room contract that "[y]ou have failed to meet every schedule you have submitted to this office;" you "have now submitted another schedule that is impossible to meet;" and, "[i]n view of the above, and your continued unsatisfactory performance, the Government is pursu[]ing default action under [] the terms of the contract" (R4, 47993, tab 63; R4, 48060, tab 17).

On 4 August 1994, Technocratica submitted a claim to the ROICC for payment of all sums withheld from invoices under its racquetball contract, plus interest in accordance with the Contract Disputes and Prompt Payment Acts. It stated that: with respect to its

Invoice No. 7 dated 24 March 1994, the ROICC paid only 558,900 of 1,021,000 Drachma sought, "withholding approximately 45% of the invoiced amount;" the ROICC effected a "100% withholding" of the amount for Invoice Nos. 8 and 9; and FAR 52.232-5 only "authorized . . . a maximum of 10% withholding from each invoice." (R4, 47992, tab 71; R4, 48061, tab 17) Two days later, on 6 August 1994, Technocratica sent the ROICC another claim with respect to its racquetball contract regarding delays experienced by its workers in gaining entry to the base where the contract was being performed (*see* R4, 48061, tab 19; compl., 48061, ¶ 10). On 13 August 1994, Technocratica submitted to the ROICC a similar claim for delay arising from base entry problems experienced by its employees for the locker room contract. (R4, 47993, tab 64; R4, 48060, tab 18) "For the delay cost" arising from base entry problems, Technocratica sought a monthly compensation of 250,000 Drachma for its superintendent and 500,000 Drachma for its manager/owner "for those months by which the contract was delayed," and "payment of the sums demanded of [Technocratica] by [its] workers as reflected in the contract file" (*id*.).

On 1 September 1994, NAVFAC's Chief of Contracts, Mediterranean, issued final decisions and contract modifications terminating Technocratica's racquetball and locker room contracts for "default." The final decisions both stated that they were being issued "for failure to proceed diligently with the work and complete by the contract completion date." (R4, 48060, tab 18; R4, 48061, tab 21) No final CO decisions were ever issued assessing liquidated damages against Technocratica on either contract (tr. 192-93, 251-52, 256-57).

On 3 October 1994, this Board received notices of appeal from the final decisions terminating Technocratica's contracts for default and docketed the appeals as Nos. 47992 (racquetball contract) and 47993 (locker room contract). About 3 weeks later, on 25 and 26 October 1994, the Board received from Technocratica notices of appeal based on the CO's failure to issue a decision on its 6 and 13 August 1994 claims for costs arising, respectively, from base entry problems experienced by its workers on the racquetball and locker room contacts, which were docketed as Nos. 48054 and 48060. On 28 October 1994, the Board received another notice of appeal from Technocratica based on the CO's failure to issue a decision upon its 4 August claim seeking payment of all sums withheld on the racquetball contract, which was docketed as No. 48061.

On 21 June 1995, at the request of Technocratica, the Board dismissed all five appeals without prejudice pursuant to Rule 30 because Technocratica was seeking to recover business records which had been taken from its office that it deemed necessary to the prosecution of its Board appeals and was unable to state when it may be able to proceed with its Board appeals. During the summer of 1995, the Navy reprocured both contracts without using an invitation for bid. The Navy went "sole source," modifying another existing contract being performed at the base to accomplish the work remaining

on Technocratica's contracts at issue here. (Tr. 206-07, 253-54) No final CO decisions ever issued assessing excess reprocurement costs with respect to Technocratica's two terminated contacts (tr. 192, 252).

In June of 1998, Technocratica sought reinstatement of all five appeals dismissed pursuant to Board Rule 30 and the Board reinstated each appeal under its earlier docket number. The parties thereafter filed complaints and answers, and conducted discovery.

During July of 2002, the Board held a hearing on all five appeals. Technocratica's owner, Harry Cossyphas, presented seven witnesses besides himself, each of whom testified about difficulties workers experienced entering the base. While those witnesses described generally some delays in entering, or denials of access to, the Greek Air Force base where the contracts were being performed, none "specifically" addressed delays to performance of work upon the contract's "critical" path or the submission of identifying information necessary for the workers to obtain admission to the base. (Tr. 37-38, 76-137) Mr. Cossyphas also testified regarding base entry problems, but did not specifically identify any delay to the critical path of either project arising from any of the base entry problems identified (tr. 39-70). The Navy presented testimony from five witnesses, who included the AREICC, ROICC, and Chief of Contracts who terminated the contracts for default. Both the AREICC and ROICC testified the Navy retained 10% from each invoice submitted by Technocratica for work completed from the first invoice submitted because Technocratica was "behind schedule" (tr. 176, 218, 234). While the ROICC also testified Technocratica "was on notice" it was at risk of default termination after summer of 1993, he did not cite any correspondence of his office from August 1993 through March 1994 stating that liquidated damages were accruing against Technocratica. Rather, he simply testified it was "a continuous dialogue with the letters . . . sent only being the crescendo of our frustration." (Tr. 216-17) The Chief of Contracts testified, among other things, that the 10% retained from invoices did not constitute an "offset" for liquidated damages, but "a protection for the Government for the total, total cost" of performing the two contracts (tr. 256-57).

The Board established a schedule for the submission of post-hearing briefs, but Technocratica sought and obtained extensions of time within which to submit its brief due to the health of Mr. Cossyphas, its representative, who was preparing its brief. Mr. Cossyphas died before he was able to submit a brief on behalf of Technocratica in these appeals. Technocratica subsequently substituted Sherry Cossyphas as its representative. She elected to waive the submission of a post-hearing brief and to proceed with the appeals based upon the record created. NAVFAC thereafter submitted a post-hearing brief addressing issues it deemed Technocratica to have raised at trial and in its pleadings, which we cite as "gov't br."

DECISION

Technocratica appeals two final CO decisions, both terminating its contracts for default, and three deemed denials by the CO of its claims, two for equitable adjustments based on problems its workers experienced entering the base where the contracts were being performed, and one for payment of sums withheld or retained by NAVFAC under one of its contracts. We address Technocratica's appeals separately.

ASBCA No. 47992 – Racquetball Contract Default Termination

A default termination is a drastic sanction, which should be imposed and sustained only upon "good grounds and on solid evidence." *E.g*., *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). Government contract provisions authorizing termination of a contract for default are a species of "forfeiture" and are to be strictly construed. *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969); *King v. United States*, 37 Ct. Cl. 428, 434 (1902). Forfeitures are not favored in law, and one who asserts that there has been a "forfeiture" generally is held to the very letter of its authority. *King*, 37 Ct. Cl. at 436; *B.V. Constr., Inc*., ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,350. The government bears the burden of proving that its termination of a contract for default was proper. *E.g., Lisbon Contractors, Inc.*, 828 F.2d at 765.

NAVFAC contends in this appeal that it properly terminated Technocratica's contract to construct a racquetball court for default (gov't br. at 20-23). It asserts it is "clear that Technocratica was in default when terminated, and was highly unlikely to ever complete the . . . racquetball contract project[] at NSA Souda Bay" (gov't br. at 23).

As found above, NAVFAC did not default terminate Technocratica's racquetball contract until 1 September 1994, 10 to 13 months after the contract's completion date.[2]

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[2] Technocratica's racquetball contract provided that it had 200 days or, according to the AREICC's 25 March 1993 letter, until 24 July 1993 to complete the contract work. In its answer in this appeal, NAVFAC denies "24 July 1993" was the contract completion date (compl., ¶ 1; answer, ¶ 1), but does not assert in either its answer or brief what it deems the contract completion date to have been (answer, ¶¶ 1- 20; gov't br. at 1-24). In the CO's final decision terminating the racquetball contract dated 1 September 1994, the contract completion date Technocratica is stated to have missed is also not specified. NAVFAC's CO stated more than 11 months after 24 July 1993 that Technocratica was entitled to 81 additional days to perform contract work due to changes made in reinforcing steel and excavation delays, thus suggesting Technocratica had until 13 October 1993 to complete

While the ROICC recommended that the contract be terminated for default in August 1993, the CO possessing authority to terminate the contract declined to do so because the CO preferred not to go through the process of reprocuring if there was a chance the contractor might "complete the contract within a reasonable time." After review of the negative impacts of having to reprocure, the "decision was made to let [Technocratica] muddle through a little bit longer and see how things went." During the following 12 months, September 1993 through August 1994, Technocratica continued to perform work on the racquetball contract with NAVFAC's knowledge and express consent.

Where the government elects to permit a delinquent contractor to continue performance past the contract completion date, it surrenders its contractual right to terminate for default if the contractor has not abandoned performance and a reasonable time has elapsed for issuance of a termination notice. To find a governmental election to waive default, two elements are necessary – (1) a failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) the contractor relying upon that failure and continuing to perform the contract with the government's knowledge and implied or express consent. *Olson Plumbing & Heating Co. v. United States*, 602 F.2d 950, 956 (Ct. Cl. 1979); *DeVito*, 413 F.2d at 1153-54.

The waiver doctrine is seldom applicable to construction contracts, such as Technocratica's, because those contracts generally contain clauses which entitle (1) the contractor to receive payment for work performed after the specified completion date and (2) the government to recover liquidated damages for late completion. *Brent L. Sellick*, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,194-95; *Corway, Inc*., ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804. The rationale for not applying the waiver doctrine is that, where a contract contains such provisions, detrimental reliance by the contractor cannot usually be found merely from a period of government forbearance and continued contract performance. *John R. Glenn*, ASBCA No. 24028, 80-1 BCA ¶ 14,428 at 71,133; *Brent L. Sellick*, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,195.

However, as we explained in *B.V. Constr., Inc*., ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,350-51, this Board has applied the waiver doctrine to construction contracts containing such clauses where there is a manifestation by the government that it no longer considered the contract completion date enforceable. For example, in *Corway,*

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contract work, but the record does not show that the CO modified the contract to extend the completion date to that date. In its complaint in another appeal, ASBCA No. 48054, Technocratica alleges that, on 5 August 1994, the CO issued a modification extending the racquetball contract completion date by 81 days, to 13 October 1993, and in its answer NAVFAC admits this allegation. (Compl., ¶ 4; answer, ¶ 4) As we explain below, for purposes of our decision, it makes no difference whether the contract completion date was 24 July or 13 October 1993.

Inc., ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804, we held the waiver doctrine applicable where the government permitted the contract completion date to pass without apparent concern, the contractor continued to perform contract work, and the government did not mention or assess liquidated damages. Similarly, several years later in *Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,472-73, we again held the doctrine applicable where the government permitted the completion date to pass without taking any action, did not unilaterally or bilaterally established a new completion date, and did not mention or assess liquidated damages.

While application of the waiver doctrine to a "construction" contract, such as Technocratica's, requires unusual circumstances, such circumstances exist here. As found above, after 24 July 1993, the perceived contract completion date, the ROICC recommended the contract be terminated for default. The CO with authority to do so, however, decided not to terminate, but allow Technocratica to "muddle through a little bit longer." The AREICC therefore sent Technocratica a letter dated 15 September 1993 stating that 100% of the contract time had elapsed, but only 27% of the contract work had been completed, and requesting that it submit a revised progress schedule showing a "realistic completion date and procedures or steps required to accomplish the work by that date." The AREICC did not state in his letter that NAVAC continued to deem the contractually specified completion date to be in effect or that liquidated damages were accruing. These actions by NAVFAC indicated it no longer considered 24 July 1993 (or any other day) to be the completion date, and constituted a manifestation it was electing to waive the contractually specified completion date. *See B.V. Constr., Inc.*, ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,351; *La Grow Corp.*, ASBCA No. 42386, 91-2 BCA ¶ 23,945 at 119,914.

Further, from August 1993 through March 1994, no NAVFAC CO mentioned in writing to Technocratica any accumulation of "liquidated damages." While NAVFAC appears to contend in its brief that its retention of 10% on seven Technocratica invoices constituted an imposition or withholding of "liquidated damages" incurred (gov't br. at 20), the Chief of Contracts, ROICC, and AREICC testified otherwise. Such retention was pursuant to FAR 52.232-5, and was being used to create an indemnity for the government and an incentive for Technocratica to complete contract work. *See Johnson v. All-State Constr., Inc.*, 329 F.3d 848, 854-55 (Fed. Cir. 2003). NAVFAC's repeated failure to mention liquidated damages therefore also indicates it was not forbearing from contract termination, but waiving the contractually specified completion date. *Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,472-73; *Corway, Inc.*, ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804.

After receipt of NAVFAC's request for a revised progress schedule with a new "realistic completion date," Technocratica submitted a revised schedule and continued performance of its contract work with NAVFAC's knowledge and consent. Thus, both

elements necessary for waiver were present – NAVFAC did not terminate the contract within a reasonable time after default and Technocratica continued to perform its contract work with full knowledge of NAVFAC based upon NAVFAC's treatment of the contract completion date as no longer being of the essence. Accordingly, we conclude NAVFAC elected to waive the racquetball contract's specified completion date. *See B.V. Constr., Inc.*, ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,350-51; *Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,472-73; *Corway, Inc.*, ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804.

Where a performance date has passed and the contract has not been terminated for default within a reasonable time, time does not again become "of the essence" until the government issues a notice that sets a new time for performance, which is both specific and reasonable from the standpoint of the performance capabilities of the contractor at the time notice is given. *E.g.*, *DeVito*, 413 F.2d at 1154; *B.V. Constr., Inc.*, ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,351. Thus, after waiving a contract completion date, the government cannot terminate a contract for default based upon a contractor's failure to make progress with or complete the contract work unless it reaches agreement on a new completion date with the contractor or establishes by specific notice a new completion date, which is reasonable based on the contractor's performance capabilities at the time that date is established. *ITT Corp. v. United States*, 509 F.2d 541, 548-50 (Ct. Cl. 1975); *Lanzen Fabricating, Inc.*, ASBCA No. 40382, 93-3 BCA ¶ 26,079 at 129,608-09.

There is no evidence in the record before us that NAVFAC established by specific notice a new completion date for the racquetball contract or agreed with Technocratica upon such a date. Accordingly, when NAVFAC terminated the racquetball contract for default on 1 September 1994, there was no legally enforceable contract completion date that could serve as a basis for a default termination. NAVFAC's termination of the racquetball contract for default was therefore improper. *See ITT Corp.*, 509 F.2d at 553-54; *DeVito*, 413 F.2d at 1154-56; *Motorola Computer Sys., Inc.*, ASBCA No. 26794, 87-3 BCA ¶ 20,032 at 101,415-17.

ASBCA No. 47993 – Locker Room Contract Default Termination

NAVFAC contends in this appeal that it also properly terminated for default Technocratica's contract to construct a locker room (gov't br. at 20-23). It again asserts it is "clear that Technocratica was in default when terminated, and was highly unlikely to ever complete the . . . project[] at NSA Souda Bay" (gov't br. at 23).

NAVFAC did not default terminate Technocratica's locker room contract until 1 September 1994, more than 11 months after the completion date for the contract. As found above, while NAVFAC advised Technocratica on 3 August 1994 it was pursuing

default termination proceedings, two days after the contract's 12 September 1993 deemed completion date, on 14 September 1993, the AREICC notified Technocratica that: "100 percent of the contract time has elapsed;" Technocratica has "completed only 8 percent of the work;" and it "should submit in writing a revision of [the] progress schedule to show a realistic completion date and procedures or steps required to accomplish the work by that date." In this letter, the AREICC did not state liquidated damages were accruing or would be assessed. He also did not state NAVFAC continued to deem the contractually specified completion date to be in effect.

The above actions by NAVFAC indicated it no longer considered 12 September 1993 to be the contract's completion date, and again constituted a manifestation that it was electing to waive Technocratica's contractually specified completion date. *See B.V. Constr., Inc*., ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,351; *La Grow Corp*., ASBCA No. 42386, 91-2 BCA ¶ 23,945 at 119,914. Moreover, based on the record, from September of 1993 through March of 1994, no NAVFAC CO or other official mentioned in any writing to Technocratica the accumulation or assessment of "liquidated damages," further indicating NAVFAC was not forbearing from contract termination, but waiving the contractually specified completion date. *See Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,472-73; *Corway, Inc.*, ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804.

In response to the AREICC's 14 September 1993 letter requesting a new revised progress schedule, Technocratica submitted a schedule indicating its contract work would be completed on 31 March 1994. Thereafter, Technocratica continued performance of work under the locker room contract with the full knowledge and express consent of NAVFAC.

Thus, both elements necessary for waiver are again present – NAVFAC did not terminate the contract within a reasonable time after default and Technocratica continued to perform contract work with NAVFAC's full knowledge based on its treatment of the contract completion date as no longer "being of the essence." Accordingly, we conclude NAVFAC elected to waive the locker room contract's completion date. *See B.V. Constr., Inc*., ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,350-51; *Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,472-73; *Corway, Inc.*, ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804.

As discussed above, where a performance date has passed and the contract has not been terminated for default within a reasonable time, time does not again become "of the essence" until the government issues a notice that sets a new time for performance, which is both specific and reasonable from the standpoint of the performance capabilities of the contractor at the time notice is given. *E.g.*, *DeVito*, 413 F.2d at 1154; *B.V. Constr., Inc*., ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,351; *see* FAR 49.402-3(c). There

is no evidence in the record that NAVFAC either established by specific notice or agreed with Technocratica upon a new completion date for the locker room contract. Accordingly, when NAVFAC terminated the contract for default on 1 September 1994, there was no legally enforceable contract completion date that could serve as a basis for a default termination. NAVFAC's termination of the locker room contract for default therefore also was improper. *See ITT Corp*., 509 F.2d at 553-54; *DeVito*, 413 F.2d at 1154-56.

ASBCA No. 48061 – Payment of Amounts Withheld

As found above, on 4 August 1994, Technocratica submitted a claim to the CO seeking amounts withheld from its payments under the racquetball contract. According to Technocratica, NAVFAC effected a "100% withholding" from its Invoice Nos. 8 and 9, and a "withholding [of] approximately 45% of the invoiced amount" with respect to its Invoice No. 7. Technocratica asserted that "Contract clause 52.232-5 . . . authorized [NAVFAC] a maximum of 10% withholding from each invoice," a right it believed had been exercised improperly from the beginning of contract performance. NAVFAC's CO never issued a final decision on the claim.

NAVFAC contends in its brief that its withholdings from payment for liquidated damages and "10% retentions for failure to make progress" were all proper. NAVFAC states that retentions of 10% were withheld from invoice payments under the terms of a standard clause in the parties' contract, FAR 52.232-5. It additionally states that the CO "properly refused to pay otherwise approved invoice amounts [in order] to offset accrued liquidated damages" due NAVFAC. (Gov't br. at 18-19)

Technocratica bears the burden of proving its affirmative claim against NAVFAC for all payments withheld by a preponderance of the evidence. *E.g.*, *Tri-State Services of Texas, Inc.*, ASBCA No. 38019, 89-3 BCA ¶ 22,064 at 110,990-91; *R.J. Crowley, Inc*., ASBCA No. 28730, 86-1 BCA ¶ 18,739 at 94,298. To the extent that Technocratica is contending NAVFAC improperly withheld 10% of its invoice payments from submission of its initial invoice, Technocratica has failed to prove its claim. The payments clause set forth in the contracts, FAR 52.232-5, expressly provides the CO may "retain a maximum of 10 percent of the amount of the payment" whenever "satisfactory progress has not been made" and gives the CO considerable discretion in deciding whether to retain monies and in what amounts, within the limit prescribed by the contract. To prevail, Technocratica must show that the CO abused his discretion. We have held that, even if the cause of the progress failure is a matter of dispute, it is not an abuse of discretion for a CO to consider the lack of progress as redounding against the contractor. *Fortec Constructors*, ASBCA No. 27480, 83-2 BCA ¶ 16,727 at 83,187. The preponderance of the evidence before us shows that, from the submission of Technocratica's first invoice, there was a basis for the CO to conclude "satisfactory progress" was not being made on

the racquetball contract. *See, e.g., Technocratica*, ASBCA Nos. 44347, *et al*., 94-1 BCA ¶ 26,584 at 132,288; *Fortec Constructors*, ASBCA No. 27480, 83-2 ¶ 16,727 at 83,186-87. Thus, NAVFAC was within its contractual rights to withhold 10% of the invoiced sums and no CO abuse of discretion has been shown.

Moreover, to the extent Technocratica is contending the CO is precluded from effecting a "100% withholding" from its Invoice Nos. 8 and 9 because the contract's payments clause only authorizes "a maximum of 10% withholding from each invoice," the U.S. Court of Appeals for the Federal Circuit has ruled otherwise. In *Johnson v. All-State Constr., Inc*., 329 F.3d at 854-55, the Court expressly held the payments clause, FAR 52.232-5, "does not contain explicit language defeating the government's common law set-off right" and the government therefore may decline to pay more than 10% of a contractor's invoice based upon its common law right to set off a claim for liquidated damages incurred.

Technocratica, however, is entitled to recover sums offset from contract payments for liquidated damages. Based on our holding above that Technocratica's contract was improperly terminated for default because NAVFAC waived the completion date and did not establish a new one, we hold that NAVFAC effectively disestablished the scheduled completion date for the contract and thereby waived its right to assess liquidated damages based upon that date. *D&S Roofing Co.*, ASBCA Nos. 28130, 29109, 85-2 BCA ¶ 18,114 at 90,947; *JEM Dev. Corp*., ASBCA No. 42872, 92-1 BCA ¶ 24,709 at 123,339; *see United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 242-43 (1914).

The assessment of liquidated damages is a government, not a contractor, claim. The interest provisions of the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq*. (CDA), accordingly, do not apply to amounts wrongfully withheld by the government. However, CDA interest does accrue on a claim submitted by a contractor for the remission of such withholdings. *Hunter Mfg. Co.*, ASBCA No. 34209, 87-2 BCA ¶ 19,903 at 100,690; *Hettich & Co., GmbH*, ASBCA No. 35239, 88-2 BCA ¶ 20,699 at 104,597-98, *aff'd in relev. part*, 873 F.2d 1451 (Fed. Cir. 1989). Thus, interest on liquidated damage sums offset accrues under the CDA from the date that NAVFAC's CO received Technocratica's 4 August 1994 claim seeking payment of all sums offset.

Technocratica is not entitled to recover Prompt Payment Act interest on monies withheld by NAVFAC based on its failure to make "satisfactory progress" and deemed incurrence of liquidated damages. As found above, Technocratica's contracts expressly permit NAVFAC to withhold a maximum of 10 percent of invoice payments whenever satisfactory progress has not been made (FAR 52.232-5) and to make deductions from invoice payments for "claims which the Government may have against the Contractor under or in connection with th[e] contract," such as the incurrence of liquidated damages

(NAVFAC clause). The Prompt Payment Act does not require payment of interest where, as here, there exists a dispute regarding "compliance with the contract." 31 U.S.C. § 3907(c); *Dillingham Constr. Pac. Basin, Ltd.*, ASBCA Nos. 53284, 53414, 03-1 BCA ¶ 32,098; *Information Sys. & Networks Corp*., ASBCA No. 46119, 96-1 BCA ¶ 28,059; *Jawitz*, ASBCA No. 33610, 87-3 BCA ¶ 20,011.

ASBCA Nos. 48054 and 48060 – Base Entry Delays

In these appeals, Technocratica contends it is entitled to "compensatory payment for its costs and loses [sic] caused by the Base Entry Clearance delays." Technocratica asserts that: its workers experienced "delays in gaining base access"; its "employees demanded of it payment for idle wages, i.e., [monies] for days that although they had appeared for work, entry to the base had been denied to them"; and the CO issued a "memorandum admitting the facts of delays in [it] gaining base access." (Compl., 48060, ¶¶ 8, 9, 12, 13, B1, C1; compl., 48061, ¶¶ 8, 10, B1, C1)

It is well-established that, when a claim being asserted by a contractor is based on alleged government-caused delay, the contractor has the burden of proving not only the extent of the delay, but that the delay was proximately caused by government action and that the delay harmed the contractor. *E.g., Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*). In sum, the contractor has the burden to show that it could have finished the contract work earlier and would have done so but for the government's delay. *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994). It is not sufficient, therefore, for a contractor to show that the government delayed completion of a segment of the work. Rather, it must establish that completion of the entire project was delayed by reason of the delay to the segment. *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000); *Kelso v. Kirk Bros. Mech. Contractors., Inc.* 16 F.3d 1173, 1177 (Fed. Cir. 1994); *Law v. United States*, 195 Ct. Cl. 370¸ 385 (1971).

Technocratica has not shown here that completion of the entire project, rather than simply one segment of its contract work, was delayed by base entry problems experienced by its workers or that NAVFAC, rather than itself, was responsible for the workers' base entry problems. It also has not shown the extent of delays in contract work it experienced as a result of the workers' base entry problems, that the Navy caused the base entry problems or that it has paid or is liable to pay workers for work not performed by the workers due to denial of access to the Greek Air Force base. Accordingly, Technocratica has failed to prove entitlement to any equitable adjustment in contract price based upon difficulties its workers experienced entering the base where the contract work was performed. *See, e.g., Servidone Constr. Corp. v. United States,* 931 F.2d 860, 861 (Fed. Cir. 1991) (to receive an equitable adjustment, a contractor must show liability, causation and resultant injury); *Technocratica,* ASBCA Nos. 46567, *et al.*, 99-2 BCA ¶ 30,391 at 150,225-27.

CONCLUSION

Appeal Nos. 47992 and 47933 are sustained, and the terminations for default are converted to terminations for the convenience of the government. Appeal No. 48061 is sustained in part, as discussed above, and remanded to NAVFAC for a determination of the monies due appellant. Appeal Nos. 48054 and 48060 are denied.

Dated: 13 June 2006

TERRENCE S. HARTMAN
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 Nos. 47992, 47993, 48054, 48060, 48061, Appeals of Technocratica, rendered in conformance with the Board's Charter.

Dated:

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