ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ADT Construction Group, Inc.	)	
by Timothy S. Cory, Chapter 7 Trustee	)	ASBCA No. 55358
	)	
Under Contract No. DACA09-03-C-0009	)	

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

This appeal involves a contract for the design and construction of a munitions maintenance facility. The government terminated the contract for default and the contractor appeals that termination. In addition to a decision on the merits, we also decide appellant's motion for sanctions for spoliation of evidence.

The Board has previously decided appeals from affirmative contractor claims under the same contract and some of the findings and decisions made on those claims are relevant to the instant appeal and will be referenced and relied upon herein. In an appeal from the denial of ADT's first claim, the Board ruled that the government did not change the contract when it refused ADT's request to use an on-base site for fill. *ADT Construction Group, Inc.*, ASBCA No. 55125, 06-1 BCA ¶ 33,237 (*ADT I*), *subsequent determination*, 06-2 BCA ¶ 33,346 (*ADT II*), *recon. denied*, 07-1 BCA ¶ 33,501 (*ADT III*), *aff'd*, *ADT Construction Group, Inc. v. Geren*, 259 F. App'x 310 (Fed. Cir. 2007) (*ADT IV*). Following the contracting officer's partial denial of appellant's second claim and appeal, we found that the government had caused delays in ADT's work, that some delays were concurrent, granted time extensions, adjusted the contract completion date, and remanded to the parties for a negotiation of quantum. *ADT Construction Group, Inc.*, ASBCA No. 55307, 09-2 BCA ¶ 34,200 (*ADT V*). A quantum appeal, ASBCA No. 57322, has since been filed and also an Equal Access to Justice Act (EAJA) application both related to *ADT V*.

In addition to our prior decisions, the record in this case consists of the government's Rule 4 file and supplement (R4, tabs 1-361); appellant's Rule 4(b) file (app. supp. R4, tabs 501 to 684); and exhibits introduced at trial by appellant (app. exs. 1-46). An eight-day hearing was held in December 2010 and January 2011 and the transcript of that hearing (tr.) is part of the record. The parties have each filed initial and reply briefs. The record also includes Appellant's Motion for Sanctions for Spoliation of Evidence and Brief in Support along with Respondent's Opposition to Appellant's Spoliation Motion.

FINDINGS OF FACT

I. Solicitation and Contract

1. In April 2003, the U.S. Army Corps of Engineers (Corps or government) issued Request for Proposal (RFP) No. DACA09-03-R-0004, F-22 Munitions Maintenance Facility (MMF), Nellis Air Force Base, Clark County, Nevada. The solicitation was described as a "100% 8(a) competitive procurement." (R4, tab 7 at 27, 31) The RFP contemplated a firm-fixed price contract (R4, tab 7 at 51).

2. The RFP contained three line items: 0001–design of the new facility; 0002–construction of the facility; and 0003–site work. Also included were two option items: 0004–demolition of the existing building; and 0005–overhead electric cranes. The same line items and option items were included in alternative pricing schedules. Schedule A sought prices for completion of the project in 510 calendar days and Schedule B sought prices for completion in 450 calendar days. (R4, tab 7 at 34-37)

3. ADT Construction Group, Inc. (ADT or appellant) provided the government with a price and technical proposal on 21 May 2003 (R4, tab 10). In the proposal, appellant set out its construction team which included subcontractors, some of whom were deemed "named" and others were deemed "typical trade" subcontractors. They included Southland Industries, Las Vegas Paving, AAA Hoist & Crane, and Eagle Electric, among others. ADT described its approach, in part, as follows: "The expertise of the *design team* is extensive and will be combined with the construction experts of ADT and its subcontractors (many of whom are 'named subcontractors'[)], who have executed agreements for this Project with ADT." (R4, tab 10 at 1076, 1103)

4. Appellant submitted a final proposal in response to the RFP on 11 June 2003. The proposal included prices for the three line items and both option items for each of the alternative pricing schedules. The total price offered under Schedule A (completion in 510 calendar days) was $2,799,135. The total price offered under Schedule B (completion in 450 calendar days) was $2,691,475. (R4, tab 12)

5. On 17 June 2003, the government awarded fixed-price construction Contract No. DACA09-03-C-0009 to ADT. The award, based on the offer in Pricing Schedule B, was in the amount of $2,691,475 and allowed 450 calendar days for completion. (*ADT V*, finding 33) The contract technical specifications described the project as "a new single story conventional munitions maintenance facility" providing "work areas for munitions maintenance personnel to safely and efficiently inspect, assemble, and test munitions in support of the F-22 fighter flying mission." It included "four maintenance bays and a personnel support area...separated by reinforced concrete blast walls" and "all related features necessary to provide a complete and useable facility for its intended use." (R4, tab 7 at 243)

6. The contract stated, in part, at ¶ 11:

> PROGRESS PAYMENT REQUESTS made by the contractor pursuant to the provisions of contract clause, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS, shall be submitted on ENG FORM 93 to the billing office as designated on Block 26, Standard Form 1442, Solicitation, Offer and Award, back. ENG FORM 93 shall be submitted to that office on the 1st of each month in appropriate form and certified.

(R4, tab 7 at 39)

7. Under Special Contract Requirements, the contract included FAR 52.211-12, LIQUIDATED DAMAGES–CONSTRUCTION (SEP 2000). Subsection (a) of this clause provided that if the contractor failed "to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government" of $659.00 for each calendar day of delay until the work was completed or accepted. Subsection (b) stated that if the government terminated the contract, liquidated damages would continue to accrue and that such damages would be in addition to any excess costs of repurchase. (R4, tab 7 at 100)

8. The contract included the full text of FAR 52.211-13, TIME EXTENSIONS (APR 1984), which provided:

> Notwithstanding any other provision of this contract, it is mutually understood that the time extensions for changes in the work will depend upon the extent, if any, by which the changes caused delay in the completion of the various elements of construction. The change order granting the time extension may provide that the contract completion date will be extended only for those specific elements so delayed and

> that the remaining contract completion dates for all other portions of the work will not be altered and may further provide for an equitable readjustment of liquidated damages under the new completion schedule.

(R4, tab 7 at 130)

9. Incorporated by reference into the contract was FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) (R4, tab 7 at 83). Under subsection (b) of that clause, the government was to make progress payments monthly, or more frequently as determined by the contracting officer, "on estimates of work accomplished which meets the standards of quality established under the contract." The subsection further set out the information that would be required in requests for progress payments. Subsection (b)(2) stated that the contracting officer "may authorize material delivered on the site and preparatory work done to be taken into consideration." Subsection (c) required the contractor to certify that: (1) the amounts it requested were only for performance in accordance with the contract; (2) payments due subcontractors and suppliers from previous payments received had been made and that future such payments would be made; and (3) the request did not include any amounts that the prime contractor intended to withhold from a subcontractor or supplier. Subsection (d) obligated the contractor to pay interest to the government where it was found that payment was made for work that failed to conform to contract requirements and reduce subsequent requests for progress payments by an amount equal to the unearned amount. Subsection (e) allowed the government to retain up to ten percent of a progress payment if satisfactory progress had not been made.

10. Also incorporated by reference was FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 7 at 84), which provided as follows:

> (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the

Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if–

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include–

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of

delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

11. The contract incorporated FAR 52.233-1, DISPUTES (JUL 2002) under which all disputes arising under or related to the contract were to be resolved, and which provided in subsection (i) that "[t]he Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." (R4, tab 7 at 83)

II. Performance Chronology

12. The government issued a notice to proceed on 9 July 2003 which was received by appellant on the same day (R4, tab 14). Because the contract allocated 450 calendar days for performance, the notice to proceed established a 1 October 2004 contract completion date (*ADT V*, finding 33).

13. Rueben Vasquez was the president and owner of ADT until the company filed for bankruptcy (tr. 1/110). Jess Franco (Franco) was appellant's overall project manager on the F-22 facility project through the termination for default (tr. 2/15).

14. The project was awarded and administered by the Corps acting on behalf of the Air Combat Command (ACC) of the United States Air Force (AF). The Los Angeles District of the Corps, which includes offices in Los Angeles, California, Phoenix, Arizona and Las Vegas, Nevada, administered the contract. The Corps' Sacramento District provided engineering support and was primarily responsible for the technical review of ADT's design submissions. (*ADT V*, finding 3)

15. The Corps' project manager was Douglas Tillman (Tillman) who was located in Phoenix. Tillman was responsible for the project from concept development with the AF client through construction and project closeout. (*ADT V*, finding 4)

16. Dennis Long (Long) was project manager for ACC projects at Nellis AFB in Nevada and for Creech AFB and Hill AFB in Utah. He reported to Headquarters Air Combat Command at Langley AFB, Virginia. Roger Riddick (Riddick) was the administrative contracting officer (ACO) for the Corps beginning in October 2003 and was located in Las Vegas. Michael Weber (Weber) was the contracting officer's representative (COR) from the start of the project until early 2004. He was located in Las Vegas. (*ADT V*, finding 5; ASBCA No. 55307 (55307), tr. 5/81)

17. Ron Musgrave (Musgrave) replaced Weber as COR during the project and was also located in Las Vegas. Tina Frazier (Frazier) was the contracting officer (CO) on the project and she was located in Los Angeles. (*ADT V*, finding 6)

18. The End User of the project was the Air Force's 57th Equipment Maintenance Squadron. Master Sergeant Richard Egan (Egan) was the contractor's point of contact with the End User. (*ADT V*, finding 7)

19. Early drafts of the RFP allowed the project to be performed according to a "fast track" approach. Under this approach, construction can start on those portions of the work for which the design is complete while other portions are still under design. (*ADT V*, finding 10)

20. The government originally intended to use a design/build method of delivery, but, as early as March 2002, Tillman and Long were aware that the Department of Defense Explosives Safety Board (DDESB) had to approve the project. In August 2002, they found out that DDESB's approval would be based on the final design for the entire facility. They determined that a fast track approach could not be used and attempted to remove references to a fast track approach from the draft RFP. (*ADT V*, findings 8, 9, 11-16)

21. Despite the government's efforts, the solicitation that was issued erroneously contained references to a fast track approach (*ADT V*, findings 17-24). The solicitation contained clauses that were consistent with fast track and clauses that were inconsistent with a design-build methodology (*ADT V*, findings 25-27). At the hearing in ASBCA No. 55307, Franco stated that appellant intended to use a fast track approach by completing parts of the design and starting construction on those parts while other pieces of the project were still being designed (*ADT V*, finding 28). ADT's initial pricing and technical proposal indicated that appellant would be fast tracking design and construction of the project. The government conducted in-depth reviews of appellant's and the other proposals, and ADT later submitted its final price proposal with no changes in cost and

pricing. As noted above, the government awarded the project to ADT in June 2003, and issued a notice to proceed on 9 July 2003. "Neither the award document nor the notice to proceed included any language acknowledging or challenging the ADT plan in its proposal to use the fast-track method of design/build." The pricing schedule accepted allowed 450 calendar days for completion making the contract completion date 1 October 2004. (*ADT V*, findings 29-33)

22. On 31 July 2003, ADT submitted its initial design schedule. The schedule showed most of the design work starting on 1 August 2003. The 100% site/civil design was scheduled for completion on 18 September 2003. The 60% structural, the 60% architectural, 60% mechanical, 60% electrical and 60% fire suppression were all scheduled for completion on 11 September 2003. The total design was scheduled for completion on 12 December 2003. (*ADT V*, finding 51)

23. On 22 September 2003, ADT submitted a revised design schedule for the F-22 MMF. This amended schedule changed the completion date for the 100% site/civil design from 18 September to 29 September 2003. The scheduled completion of the total design was changed from 12 December to 24 December 2003. (*ADT V*, finding 62) The government provided no feedback or other input concerning ADT's 22 September design schedule revision (*ADT V*, finding 63).

24. Appellant submitted what it called the 60% design documents to the government on 1 October 2003. Despite the label, the design was further along than 60%. (*ADT V*, finding 64)

25. The parties held a design review conference on 23 October 2003 for the 100% site/civil design track, the 100% lightning protection system design track, and the 60% review of the other design tracks (*ADT V*, finding 76). ADT restated its intention to use a fast track approach (*ADT V*, finding 77). The parties also discussed the HVAC system to be used (*ADT V*, finding 79), and submission of revised drawings for DDESB (*ADT V*, finding 84). Appellant sent revised designs to the base engineering office on 4 November 2003 (*ADT V*, finding 85), which sent them to DDESB on 13 November 2003 (*ADT V*, finding 88).

26. In early February 2004, the government notified ADT that its lightning protection design and its water source heat pump for the HVAC system had been rejected (*ADT V*, findings 101, 103). Later that month, appellant had to revise the 100% site/civil design package to change the finish floor elevation (*ADT V*, finding 108).

27. Appellant presented the government with a revised 100% site/civil design on 18 March 2004 (*ADT V*, finding 112). The parties participated in a design review conference on 27 April 2004 (*ADT V*, finding 117). Thus, the government failed to provide appellant with compliance review comments on the revised design within 21

days of the 18 March 2004 submission or by 8 April 2004. It took 40 days, to 27 April 2004 (*ADT V*, finding 118). In section 01012, Design After Award, ¶ 1.10.3.1, the contract provided that the "contractor shall include on the schedule a 21 calendar day period for the government to conduct a compliance review for each submittal" (R4, tab 7 at 539).

28. On 6 May 2004, appellant presented the government with 100% design for the entire facility (*ADT V*, finding 119). Over the next three months, the government raised questions about matters such as the lightning protection system and the fire sprinkler design and requested revised drawings (*ADT V*, findings 122, 124-26).

29. The project's final explosive site plan was submitted to DDESB in late July 2004. DDESB gave the project "final safety approval" on 5 August 2004. (*ADT V*, findings 129-30)

30. The government issued a show cause letter to appellant on 9 August 2004. The letter stated that the government was considering terminating the contract for default because ADT had "failed to perform within the time required by the terms of the Contract." (*ADT V*, finding 131) Appellant responded on 19 August 2004 challenging the government's assertion that it had failed to timely perform and reminding the government that it had attempted to pursue a fast track approach from the start of the design process (*ADT V*, finding 132).

31. On 19 August 2004, Riddick notified appellant that DDESB had approved the explosive site plan and indicated that the government needed certain additional documents from ADT (*ADT V*, finding 133). Appellant then requested that the government approve its design so that it could finalize negotiations with subcontractors and lock in subcontractor prices (*ADT V*, finding 134).

32. In August and September 2004, government personnel were aware that appellant would be submitting a request for equitable adjustment (REA) and that, in order to modify the contract for the sum being proposed, congressional action would be required (*ADT V*, findings 136-37). ADT informed the government that it anticipated cost escalation as a result of government delays in the range of $1 million (*ADT V*, finding 138). The government was aware of construction cost escalation generally in southern Nevada (*ADT V*, finding 139). Franco testified that "we were basically about $1 million upside down in what the project was going to cost versus what we had originally bid" (tr. 2/22). By letter dated 29 September 2004, appellant submitted a request for a 125-day time extension for design delays and noted that the resulting increase in costs would be addressed in separate correspondence (*ADT V*, finding 144; R4, tab 95). Appellant or its representative provided additional information about the request in November 2004 and in April 2005 (R4, tabs 101, 169). Also in September 2004, the government considered terminating the contract for default, but eventually

decided to allow ADT to continue. During this time, the government understood that as a small business, appellant might not have the financial wherewithal to absorb the escalation that had occurred. (*ADT V*, findings 140, 142)

33. Appellant submitted its Contractor Quality Control (CQC) plan on 7 September 2004 which was rejected as incomplete two weeks later (*ADT V*, finding 141). The government informed ADT on 22 September 2004 that its design had been accepted for construction. Mr. Franco testified that this meant ADT could "start closing out subcontractor proposals, issuing letters of intent, and...closing out subcontractor...bids." (*ADT V*, finding 143) The next day, appellant submitted a revised CQC plan which was rejected. Appellant was then advised that the government considered it responsible for delays and liquidated damages would be assessed starting 2 October 2004. (*ADT V*, finding 144).

34. On 1 October 2004, appellant requested a notice to proceed with construction. The ACO, Riddick, responded that he did not know of any requirement that the government grant approval for the start of construction (*ADT V*, finding 145). ADT then believed it could initiate construction and start mobilization (*ADT V*, finding 146). Later in October 2004, appellant submitted another revised CQC plan which was rejected (*ADT V*, finding 147). The government issued a digging permit for the project site on 17 November 2004 (*ADT V*, finding 148). A few days later, on 22 November 2004, the government partially approved the revised CQC plan so that appellant could start earthwork. It was noted that no other work would be allowed until the complete CQC plan was approved. (*ADT V*, finding 150)

35. ADT submitted a certified claim on 29 April 2005. The claim sought $335,032.32 and six days of delay because appellant had to import fill from off the base. (*ADT I*, finding 17)

36. Between 15 June 2005 and 2 February 2006, the date of the termination for default, progress slowed on the F-22 Project (Appellant's Responses and Objections to Government's Proposed Findings of Fact (PFF&R) ¶¶ 53, 54, 113, 114). Joseph Andres was the government's scheduling and delay analysis expert in this matter (tr. 7/40-41). In his report, he stated that from 15 June 2005 to 2 February 2006, or 232 days, appellant performed productive work on only 41 days or less than 20 percent of the days. In those seven and a half months, appellant completed only 11 percent of the work. (R4, tab 350 at 18)

37. On 12 July 2005, ADT submitted a certified claim for pre-construction delays. Appellant sought a 278-day time extension, related relief from liquidated damages, and $826,725.16. Four delay events were cited: finish floor elevation; requiring 100% design; late notice of design approval; and, late issuance of excavation permit. (*ADT V*, finding 151). In the claim, appellant stated that it reserved "the right to submit

subsequent claims for other delays and cost impacts, particularly for delays and cost impacts during the construction phase" (55307, app. supp. R4, tab 2012 at 3).

38. The import fill claim was denied by the CO in August 2005 and ADT appealed to the Board (*ADT I*, finding 18).

39. On 17 August 2005, CO Frazier wrote to ADT expressing the government's concern over the lack of progress and establishing a new completion date as follows:

> This letter is to establish a new contract completion date for the subject contract of January 4, 2006 for the purpose of measuring the progress and performance of ADT Construction Group, Inc. on the subject contract. This completion date includes all work and site clean-up of F-22 Munitions Maintenance Facility. After the military evacuates Building 1041B, designated for demolition, your time for demolition and site clean-up will be from January 25, 2006 through May 12, 2006. ADT is hereby directed to provide a revised schedule by August 31, 2005 on how it plans to complete the project by the above dates.
>
> The Government is concerned over ADT's apparent inability to finish the project, and its recent lack of progress: ADT has accomplished virtually no work on site since June 15, 2005. ADT's own schedule, which was never accepted by the Government, shows the Munitions Maintenance Facility being completed on July 7, 2005, and an overall completion date, including demolition of Building 1041B, clean-up and demobilization, of September 22, 2005. With the Munitions Maintenance Facility nowhere near completion, it does not appear that ADT will be able to meet that date.
>
> The Government is mindful of the delay claim recently submitted, and assures ADT that it is actively analyzing the claim. In the meanwhile, ADT is reminded that under the Disputes Clause, it still has an obligation to proceed with diligent performance pending final resolution.
>
> This completion date is intended to establish a standard against which to measure ADT's progress. This will not prejudice ADT's right to claim for a time extension, nor does it

compromise the Government's right to assess liquidated damages from the original completion date of October 1, 2004.

(R4, tab 6)

40. Appellant responded to the government's 17 August 2005 letter on 23 August 2005. ADT stated that it understood the government had agreed to a new contract completion date of 4 January 2006 for purposes of measuring progress, that the time for demolition and site clean-up of Building 1041B was extended to 12 May 2006, and that ADT was directed to provide a revised schedule for complying with those new completion dates. Thus ADT stated:

> So that there is no misunderstanding, I want to be very clear in confirming ADT's assumptions concerning the new Contract completion dates and the new schedule requested of ADT. We are proceeding based on the following assumptions:
>
> 1. The Government will release the Progress Payment deduction, in the amount of $74,467.
>
> 2. The Government will not assess any liquidated damages so long as ADT complies with and meets the new Contract completion dates.... Of course, these dates are subject to extension based on events that may occur after August 17, 2005, which warrant a Contract extension.
>
> Please confirm immediately that our assumptions are accurate. We find the need to be explicit about these assumptions in light of the second to the last paragraph of your letter, which states that the new Contract completion dates do not "compromise the Government's right to assess liquidated damages from the original completion date of October 1, 2004." That statement is inconsistent with the establishment of the new Contract completion dates.
>
> There is one other point that is essential to know before we make the directed schedule submittal. The Government is currently withholding the entire payment amount from ADT's Progress Payment Request #008, notwithstanding the fact that this invoice reflected exactly the progress agreed to between both of our respective site representatives plus invoiced on-site

> stored materials.... This progress payment should be made immediately; in accordance with the agreed-upon assessment by site personnel, in order that we can pay our subcontractors for work performed.
>
> Assuming the Government promptly makes Progress Payment #008, promptly releases the Progress Payment reductions made to date and meets its other contractual obligations going forward, we can then move forward to complete the Project in accordance with the new Contract completion dates. I might add, in response to your concern about progress on the Project, since May of this Year, payments to ADT for the progress of the work of our subcontractors have either been significantly reduced, or in the case of Progress Payment #008 – completely withheld. The withholding of payments by the Government has prevented the job progressing.

(R4, tab 5)

41. By cover memorandum dated 27 September 2005, ACO Riddick sent CO Frazier an analysis by Peter Gauer of appellant's pre-construction delay claim. Gauer worked for the Corps in Riddick's office in Las Vegas, but we cannot determine on this record whether he was assigned to the project. With one exception not relevant here, the cover memorandum stated that Mr. Riddick concurred in Mr. Gauer's conclusions. The pertinent conclusion was that "167 non-compensatory calendar days should be added to the contract duration period to compensate the Contractor for loss time...which would change the contract completion date to March 16, 2005." More specifically, Mr. Gauer stated that the government had "some exposure" as to the following delays: (1) 100 days for the failure to catch a design error on the catenary lightning protection system; (2) 36 days for a change in the building elevation standards; and, (3) 31 days for delay in issuing the construction NTP. (R4, tab 212 at 1-3, 5, 8-9) The CO testified that she does not remember receiving the memorandum, analyzing it, or incorporating it into her findings on the pre-construction delay claim. She stated that if she had been made aware of the memorandum she would have taken it into account in her findings on both the pre-construction delay claim and the termination for default. She would not have gone to Mr. Gauer for input because she did not see him as part of the project. (Tr. 3/242-44) Nevertheless, Riddick was part of the project and it was Riddick who sent the analysis to Frazier. In any event, whether Gauer was part of the project or not does not matter since Frazier did not recall receiving the memorandum.

42. ADT submitted a "new construction schedule" on 31 October 2005. The cover letter stated that the schedule showed completion of the new structure by 4 January

2006 and demolition of the existing structure by 12 May 2006. It also indicated that because appellant had not received a response to its 23 August 2005 letter, it assumed that the assumptions and statements made in that letter were "accepted as is." (R4, tab 220) In his report, Mr. Andres, the government delay analysis expert, stated that the schedule submitted by appellant on 31 October 2005 did "not appear to be a plan or schedule as to how ADT was going to complete by 4 January 2006." He noted that the data date for the schedule was 9 July 2003, that the schedule did not include progress even for those activities that had been completed as of 31 October 2005, did not include design activities completed in 2004, and that many construction activities shown on the submission were scheduled to be completed on dates that had already passed. (R4, tab 350 at 9-10, tab 352, ex. 12) Mr. Andres further testified that ADT's submission did not comply with the CO's request for a schedule outlining how appellant would complete the project by 4 January 2006 (tr. 7/76-77).

43. On 21 December 2005, CO Frazier issued a second show cause letter. She noted that since she had established a projected completion date of 6 January 2006 [sic] in August 2005, that ADT had not "performed any significant construction work," that the project superintendent had been the only person on the job site on a daily basis, and that it was apparent appellant would not complete the F-22 project by 6 January 2006. She stated that because appellant had failed to perform and had been unable to restart construction work, she was considering terminating the contract pursuant to the default clause. ADT's lack of satisfactory progress endangered timely completion of the project and jeopardized the Nellis AFB mission. Frazier further stated that it would be necessary to establish whether the lack of progress occurred from causes beyond appellant's control and without its fault or negligence. She gave appellant ten days in which to present facts bearing on the question and noted that the failure to present any excuses might be considered an admission that none exist. (R4, tab 4) As of 21 December 2005, the CO did not believe the project would be completed by ADT because of finances (PFF&R ¶ 95).

44. Frazier did not recall receiving input from Tillman about the ADT claim including ADT's position that it was not allowed to fast track, even though Tillman was a member of the group of government employees who would have been expected to give input on the CO's final decision. No one told her that the fast track provision had been included in the contract by mistake. Except for finding entitlement to time (undetermined) but no money due to late notice of design approval, Frazier denied the pre-construction delay claim on 29 December 2005 and ADT appealed to the Board which docketed the appeal as ASBCA No. 55307. (*ADT V*, findings 152-54) In its complaint in ASBCA No. 55307, appellant described the relief sought in its 12 July 2005 claim ($826,725.16, 278 days, and relief from liquidated damages) as that resulting from government caused pre-construction delays "and all resulting impacts" (55307, compl. ¶ 18).

45. ADT responded to the government's second show cause letter on 16 January 2006. In general terms, appellant stated that delays to the project were the result of the government failing to live up to its contractual obligations. More specifically, ADT asserted pre-construction approval delays, delay in addressing the import fill and pre-construction delay claims, failure to make progress payments, other assorted delays, and the refusal to release withheld funds. Appellant also briefly mentioned a new request for equitable adjustment (REA) for "Government-caused impacts during the construction time frame." It said it was entitled to "approximately 342 days and an increase to the contract sum of approximately $1,020,000." The record does not contain any indication that appellant ever followed up on this REA by submitting a certified claim in a sum certain. In a concluding section titled "Conclusion and Path Forward," ADT questioned whether termination was a good idea; referenced a meeting scheduled for 20 January 2006 where the position of its surety would be outlined along with the steps that would be necessary to move forward with construction. Appellant would explain at that meeting how "if the right steps [were] taken by the Government, [ADT could] finish construction of the new facility within 100 days of the Government's release of funds; as long as no further actions detrimental to the Project occur." Appellant concluded by saying:

> We will continue to pursue completion of the Project, as diligently as we possibly can, given our current financial resources. We again ask that the Government do everything it can to assist us in completing the Project, while reserving its rights under the Contract and the Performance Bond.

(R4, tab 3 at 5-6, 15-16)

46. Frazier terminated the contract for default on 2 February 2006. She told ADT that, in the show cause notice dated 21 December 2005, she had requested "facts as to why [ADT had] failed to re-activate construction...and to perform any significant construction work in accordance with [the] current construction schedule." Frazier went on to state that appellant had "failed to improve [its] performance, or to offer any realistic plan or schedule which will accomplish the work portrayed in the plans and specifications." ADT's letter of 16 January 2006 convinced her that ADT could "no longer perform or complete the construction work required." (R4, tab 2 at 3) In her July 2010 deposition, Frazier stated that, in addition to herself, the Corps technical team included Riddick, Musgrave and Tillman, the Corps Project Manager. She did not ask anyone from the Air Force, including Long, to review the termination decision. She did not get any direct information from Long on the termination. (Gov't opposition to appellant's spoliation motion (gov't opp'n), ex. 3 at 15) At the hearing in this appeal, Frazier testified that if the AF ACC had input on the termination recommendation she "would take it into account." However, it "would not be the driving factor to have [her] decide one way or another." (Gov't opp'n, ex. 6 at 124)

47. ADT appealed the termination by letter dated 8 February 2006 (R4, tab 1). The complaint was filed on 31 March 2006. In Count One of the complaint, appellant asserted that various government actions (set forth elsewhere in the complaint) including, but not limited to, failure to timely review and respond to appellant's design submissions, failure to make progress payments, and improperly withholding funds, delayed ADT and the delays were excusable. Count Two alleged that the government waived the contract completion date by failing to terminate within a reasonable time after expiration of the original completion date and failing to establish a new and reasonable time period for contract performance. In Count Three, appellant argued that even if the government was not responsible for delays, extraordinary and unforeseen events resulted in a contract that was commercially impracticable to perform. The complaint included the following allegations:

> 21. Upon information and belief, well before the February 2, 2006 Termination Letter, the Government determined to terminate ADT's Contract for default. Despite this determination, the Government urged ADT to maintain a full staff and to continue to work on the Project. Throughout this timeframe, the Government knew that ADT was suffering a severe cash flow crisis that hindered it from progressing the work.
>
> 22. Upon information and belief, at the time the Government sent the Termination Letter, the Government believed and understood that by terminating ADT's right to proceed for default: that the Government could force ADT's surety, Great American Insurance Company ("GAIC"), to complete the Project; that the Government would not have to engage in a reprogramming effort to obtain additional funds necessary to complete the Project in light of the cost escalation; that GAIC and ADT would be forced to pay for the additional costs of reprocurement and cost escalation, at least in the immediate time frame; that ADT would be forced to pursue its rights to challenge the default termination, and seek other relief, from a Court or Board; and that if ADT was successful in its efforts before a Court or Board, the additional costs would be taken out of the judgment fund, and a reprogramming effort would not be necessary.

The termination appeal was suspended pending the outcome of ASBCA No. 55307.

III. Performance Issues

At the hearing the parties provided evidence on a number of matters which were raised to show excusability for or the absence of delay so as to render the default termination improper. Findings related to each such issue are set forth below.

A. Cost Escalation

48. While appellant was awarded a firm fixed-price contract (finding 5), it did not intend to finalize pricing agreements with subcontractors at the time of its bid, but rather after approval of the design (*ADT V*, findings 135, 143). ADT's original schedule called for completion of the design by 12 December 2003 (*ADT V*, finding 51). The design was actually approved on 22 September 2004 (tr. 2/17-18; *ADT V*, finding 143), 285 days later.

49. Based upon our decision in *ADT V* issued on 9 July 2009, appellant was responsible for delay during the design phase up to 8 April 2004 and thereafter the government was responsible for delays of 168 days to 23 September 2004, except for a ten-day period while DDESB conducted its review. There were 60 days of concurrent delay to 22 November 2004. The adjusted contract completion date due to design phase delays was determined to be 7 May 2005. Thus, appellant was responsible for 118 days of delay to 8 April 2004. (*ADT V* at 46)

50. Appellant asserts that because of the delays found in our decision in *ADT V* it was not able to finalize subcontracts in April 2004 but had to wait until late 2004 when costs had risen considerably in southern Nevada.

51. ADT's argument is based on the proposition that it expected to be able to buy out its subcontracts by April 2004. However, it was not able to finalize its subcontracts until it received an approved design in the latter part of 2004 (app. reply brief dated 29 April 2011 (app. reply br.) at 14). It appears that the subcontracts at issue were actually finalized in mid to late November or early December 2004 (*see, e.g.*, ADT ex. 29, tab 2). Mr. Franco stated that because there had been "numerous changes by the government" during the design process, it was not until appellant had approval of the design package that it could buy out the subcontractors by "doing final negotiations" and "getting their prices locked in" (tr. 2/16-18). Appellant's delay analysis expert, Joseph Dean, testified as follows:

> Well, ADT is basically signed up for a hard money contract and the only way you get good pricing in a hard money environment is to have really two basic things at minimum. One is a known certain scope of work and two, a reasonably

> foreseeable and certain construction start date because...both of those things can influence price.

(Tr. 4/203-04)

52. The government's expert on financial analysis and damages, Robert Peterson (Peterson), responded to a question about whether a contractor that "follows the trade media or is involved in bidding new projects [would] be aware that escalation costs were occurring during the first quarter of 2004" as follows:

> I would expect so. Prior to actual escalation commencing, there would be some expectation of announcements with regard to some of the predecessor activities that would take place, someone building a new casino locally or whatever the case may be, there would be some signs generally of an uptick in impending activity.

(Tr. 7/257)

53. Appellant contends that the larger than expected subcontractor costs put ADT in a loss position on the contract which led to its financial inability to perform at the time of termination (app. post-trial brief dated 30 March 2011 (app. br.) at 19-21; app. reply br. at 18-19). Appellant's expert on financial analysis, Colin Johns, and the government's expert, Mr. Peterson, submitted expert reports and testified on this point, among other things. In addressing this matter, the parties and their experts looked to materials that had been prepared in connection with the entitlement pre-construction delay appeal, ASBCA No. 55307, and the corresponding quantum appeal, ASBCA No. 57322.

54. Following the Board's entitlement decision in *ADT V*, the parties attempted to negotiate quantum. Appellant provided the government with an EAJA fee application in November 2009 (Board files), a quantum submission for an improper termination claim in February 2010 (app. supp. R4, tab 659), and a cost proposal quantifying the pre-construction delay damages in May 2010 (app. supp. R4, tab 662). The parties were not able to reach agreement and in August 2010 the Board docketed a quantum appeal, ASBCA No. 57322, with respect to No. 55307. An Order on Proof of Costs was issued for ASBCA No. 57322.

55. On 10 September 2010, ADT submitted its May 2010 cost proposal as its statement of costs in ASBCA No. 57322 (R4, tab 352, ex. 18). The government submitted a response in the form of a declaration by Mr. Peterson (R4, tab 352, ex. 22). In his 3 November 2010 report in this appeal, Mr. Johns stated that he believed ADT's May 2010 "Pre-Construction Delay Quantum Claim" (app. supp. R4, tab 662), with minor adjustments, had been appropriately priced (app. ex. 28 at 14). The May 2010

version of the document, which totaled $1,639,782.45, was revised twice in November 2010. The first decreased the overall total to $1,570,173.13 (R4, tab 346). The summary page of the second revision provided as follows:

	Reference	Amount
Design Subcontracts	Schedule 1	$ 47,530.45
Trade Subcontracts	Schedule 2	705,960.30
General Conditions	Schedule 4	523.36
ADT Design & Admin. Labor	Schedule 4	15,151.16
Self-Performed Work (Union)	Schedule 6	6,279.44
Self-Performed Work (Gondek)	Schedule 8	3,125.30
Self-Performed Work (Pecoraro)	Schedule 9	1,430.00
Subtotal		780,000.01
Overhead @ 9%		70,200.00
Profit @ 9%		76,518.00
Interest	Schedule 10	188,077.23
EAJA (previously submitted)		253,161.64
Quantum Preparation Costs	Schedule 11	56,427.04
Total		$1,424,383.92

The schedules contained calculations for each item of cost. (App. ex. 29)

56. Mr. Peterson's October 2010 declaration responded to the May 2010 version of the statement of costs which claimed $831,384 for trade subcontracts. He noted that the figure for trade subcontracts consisted of $521,075 for "Additional Markup and Risk" and $310,309 for escalation. He found no support or rationale for the "Additional Markup and Risk." He said the escalation component was "an attempt to model the increase to subcontractor prices due to delays." With respect to escalation, he made several points as follows:

> ADT's calculation is based upon all delays in finalizing the subcontract prices, and as such includes the impact of delays for which the Board has found ADT to be responsible. The escalation calculation de-escalates actual subcontract prices, a methodology that does not consider any pre-delay pricing information that may be available. The escalation percentages are base[d] upon broad industry factors that may or may not be representative of any price escalation for the specific subcontractors in question. The pooling and averaging methods employed in the escalation calculation

> tend to calculate escalation over a period that is considerably longer than the actual delays in obtaining subcontract prices.

(R4, tab 352, ex. 22, ¶ 9)

57. Although the statements of cost and Mr. Peterson's declaration were initially submitted in the pre-construction delay quantum appeal, No. 57322, they were also admitted here, the statements were discussed in the reports of Mr. Johns and Mr. Peterson, and Mr. Johns and Mr. Peterson testified about them.[1] We look to the claimed increase in the cost of subcontracts because that is what appellant focuses on in its post-hearing briefs (app. br. at 19-21; app. reply br. at 18-19), and it is the largest part of the total claimed increase. The latest iteration of appellant's statement of costs shows a claimed increase in "Trade Subcontracts" of $705,960.30 based upon 218 days of delay and $672,085.60 based upon 158 days of delay (218 days less 60 days of concurrent delay as decided in *ADT V* (app. ex. 29, tabs 2, 2A).[2] As we understand it, Mr. Johns calculated those increases by taking the amounts of the "escalated" trade subcontracts that appellant entered into in late 2004 and attempting to "de-escalate" them, using the Rider Levett Bucknall (RLB) reports, to what they would have cost if appellant had been able to contract in April 2004.[3] Mr. Johns stated that he took the average of the Las Vegas RLB data for January and July 2004 in order to estimate what the amounts for material and labor within each craft would have been in April 2004 and compared those to the amounts at the end of December 2004. The differences were then pro-rated down to the actual number of delay days (apparently using both 218 and 158 days). (Tr. 4/67-81)

58. Mr. Peterson briefly addressed the escalation claim in his report. He correctly noted that appellant's escalation damages had not yet been adjudicated, but referred back to his declaration, submitted in the quantum phase of the design delay claim, in stating his view that the statement of costs overstated any damages that ADT might be entitled to. He concluded by indicating that until the Board had made a determination that appellant had experienced damages because of design period delays he would not be able to fully assess the level to which the government might have been responsible. (R4, tab

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[1] The government objected to this evidence saying that it was irrelevant to this appeal which only involved "entitlement." We admitted the documents and allowed the testimony recognizing that there appeared to be a relationship between the termination for default and the design period delays, but noting that the Board would have to decide what that relationship was. (Tr. 4/51-55, 76-80)

[2] The statement of costs also includes over $718,000 of other costs including increases in design subcontracts, self-performed work, overhead, profit, interest, and EAJA fees and costs.

[3] The RLB (sometimes RHLB) reports track construction costs in the United States and in particular areas of the country on a quarterly basis (tr. 4/65-67; R4, tab 667).

351 at 3-4)[4] At the hearing, Mr. Peterson testified that, looking just at the amounts of appellant's claimed escalation in the cost of trade subcontracts, the July 2005 claim sought $545,939 and the November 2010 statement of costs (at 158 days) sought $189,624.[5] He concluded that the original claim had been "dramatically inflated." (Tr. 7/283-88; R4, tab 359 at 18) He also expressed doubts about the additional markup and risk components of the escalation claim. He felt that the numbers had not been well documented, that it was odd that the numbers stayed the same as the number of claimed delay days decreased, that the method of calculating the numbers did not appear to take into account that both parties contributed to delay, and that ADT seemed to have assumed that increases in costs were the result of escalation rather than other possibilities. (Tr. 7/288-95)

B. ADT's Financial Condition

59. Appellant's position is that it was financially unable to perform because of wrongful government actions. The government contests the proposition that ADT did not have the financial resources to continue working.

60. The delay analysis expert for ADT, Joseph Dean, stated in his report that "beginning in June 2005, ADT faced an ever-widening revenue gap due to uncompensated escalated costs and due to liquidated damages withheld by the COE" (app. ex. 30 at 14). By 14 June 2005, the revenue gap was $171,910 (*id.* at 15), and by 2 January 2006, the revenue gap was $938,208 (*id.* at 15-16). Appellant's financial analysis expert, Mr. Johns, reported that as of 2 February 2006, ADT had spent $228,952, exclusive of payments to Las Vegas Paving for import fill, more than it had received from the government under the contract (app. ex. 28 at 13). On its 31 December 2005 financial statements, appellant showed a loss of $1,750,000 on the F-22 Project (app. supp. R4, tab 674 at S-2), and a negative net worth (or deficit equity) of $1,294,162 (*id.* at S-6). The government's financial analyst, Mr. Peterson, testified that as of 31 December 2005, appellant's cash on hand had increased to $563,800 and it had $740,260 in borrowing capacity under its lines of credit (tr. 7/195-98; R4, tab 351 at 11-12, tab 674 at 4, 11). Appellant challenged the government's use of its financial statements and contested whether the lines of credit were actually available for the F-22 Project since they depicted only a snapshot in time and as such were misleading. Further appellant adduced evidence to show that ADT could not have drawn down further on its lines of credit for the F-22 project given other corporate needs for those funds including other projects which ADT was self performing (PFF&R ¶¶ 97-101 and citations therein).

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[4] In this appeal from a termination for default, we are not faced with quantifying such increase in costs.

[5] These included relatively small amounts for ADT general conditions, administrative labor, and self-performed work.

C. The Contract Completion Date

61. ADT contends that, in June 2005, it was in a position to finish the project within a time frame that was properly extended to account for design delays and the fact that it had not been permitted to fast track. Based upon the report of Mr. Dean, using ADT's as-planned schedule revised to take into account the decision in ASBCA No. 55307, *ADT V*, appellant says that it would have started construction on 4 April 2004 and had 343 days to complete construction. It was not able to start construction until 22 November 2004 because it was not allowed to fast track. The decision in ASBCA No. 55307 extended the contract completion date 218 days to 7 May 2005 which left only 167 days in which to complete construction (from 22 November 2004 to 7 May 2005). Because the Board found ADT entitled to fast track, according to it, 343 days should be added to the actual construction start date of 22 November 2004 in order to restore the original days allotted for construction giving appellant until 30 October 2005 to complete work. (App. proposed findings of fact dated 30 March 2011 (App. PFF) ¶¶ 97-104; app. ex. 30 at 11-12). Mr. Dean also updated and analyzed ADT's construction schedule reaching the conclusion that as of mid-June 2005, appellant's projected completion date was 7 November 2005 or only eight days after the properly extended contract completion date of 30 October 2005 (app. ex. 30 at 12-13; app. PFF ¶ 103; tr. 4/197).

62. Mr. Andres, the government's scheduling and delay expert, analyzed appellant's schedule performance in six periods of time using an as-planned versus as-built methodology. He summarized his conclusions as follows: appellant did not meet its own construction schedules or milestones; although it originally planned on a construction duration of 184 days, it was only 47 percent complete after 437 days (22 November 2004 to 2 February 2006); it did not make any substantial progress between June 2005 and February 2006; the target completion date of 4 January 2006, set by the CO, set a reasonable and realistic goal; appellant had demonstrated that it was entitled to, at most, 35 days of excusable delay during construction. (R4, tab 350 at 2-3)

D. Payment Issues

63. The parties have raised issues involving payments under the contract. Appellant's program manager, Mr. Franco, testified that as work proceeded ADT and government personnel would meet and attempt to agree on the percentage of work that had been completed. Appellant would then submit a payment application. The government would sometimes request revisions to the applications. In that instance, the government would not accept the application or enter it into its computer system until all requested revisions had been made. Payment applications were numbered by appellant. If the government modified a pay estimate and appellant revised and resubmitted it, the payment number did not always match that on the appropriate pay estimate. For example, Payment No. 2 was made on revised Payment Estimate No. 3 and Payment No. 9 was made on revised Payment Estimate No. 10. (App. PFF ¶ 75; tr. 2/84-86)

64. ADT made ten original payment applications. A typical application would include a payment estimate on ENG Form 93, a subcontractor payments report, and a schedule of values showing each work item, the percentage of the project represented by that work item, the current percentage of the work item complete, the total amount paid and/or due for the work item, previous progress payments for the work item, and the amount due for the current period. The applications sometime included work/construction schedules. The cover sheet of the ENG Form 93 had two signature lines for approval by government officials. (R4, tabs 35-44, 678)

65. Appellant contends that a subcontractor, All Electric, stopped working on the contract because appellant was unable to pay it for work done because the government had not paid appellant for that work (app. PFF ¶¶ 90-94). The first application that included work for All Electric is Pay Request No. 5 covering the period 30 December 2004 through 30 January 2005. The request asserted that the project was 25.89 percent complete. ADT initially sought $302,158 in Pay Request No. 5 and this amount consisted of $242,848 for earnings during the period covered by the request plus $59,310 in previously withheld liquidated damages. The government eventually approved and paid $227,691 which was the requested amount of $242,848 minus $15,157 in additional liquidated damages for the new time period. (App. supp. R4, tab 678, subtab 5) In testifying about Pay Request No. 7, appellant's project manager (Franco) identified five All Electric work items in the schedule of values. These were electrical security systems, transformer, site electrical, site communications, and lightning protection. (Tr. 2/102) Peterson, the government's expert on financial analysis and damages, stated in his report that All Electric's work items included those five as well as fire alarm system, building communications, and exterior building lighting (R4, tab 351 at 9, attach. 11(a)). We will use the eight work items listed by Peterson as the work to be done by All Electric.[6] The Subcontractor Payment Report included in Pay Request No. 5 stated that $23,001 was paid to All Electric during the period covered by the request. Yet Pay Request No. 5 showed only two of the All Electric work items. For site electrical, the pay request said that 15 percent had been completed and $566 was due for the period. For site communications, 18 percent had been completed and $394 was due for the period. (App. supp. R4, tab 678, subtab 5) It is not clear from the documents associated with Request No. 5 what All Electric work totaled the $23,001 requested for that subcontractor.

66. Pay request No. 6, covering the period 30 January 2005 through 28 February 2005, was submitted on 29 March 2005. Asserting progress to date of 28.32 percent, ADT sought $140,372. The subcontractor payments report stated that $74,131 was for work done by All Electric. The schedule of values showed only $476 in charges for work

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[6] The numbering of work items in the schedules of values attached to pay requests varied. The descriptions of work was fairly consistent through the pay requests, although a specific work item might not be listed in a schedule of values until some work within that work item was actually done.

on what we view as an All Electric work item, in this case "3i Site Electrical." It is not clear from these papers what All Electric work totaled the $74,131 requested for that subcontractor. ACO Riddick responded to the request on 8 April 2005. He stated that the government could not process the request because appellant had not yet provided, as previously requested by the government, a construction schedule which was needed to evaluate the payment request. As to certain items including "3i Site Electrical," Mr. Riddick also noted that construction activities and a schedule of values for those activities were needed. The government did not approve or pay this pay request even though Riddick's 8 April 2005 letter indicated that $32,715 would be paid for site utilities and $239 would be paid for site electrical. (App. supp. R4, tab 678, subtab 6; tr. 2/95-96).

67. On 3 June 2005, appellant submitted Pay Request No. 7 for the period 28 February 2005 through 15 May 2005 with updated schedules. The request stated that 44.27 percent of the project was complete and requested $574,506. That amount included a request for a refund of the $140,372 sought but not paid in Pay Request No. 6. The subcontractor payments report stated that $68,301 was for work done by All Electric. It is not clear whether that was in addition to the amount sought for All Electric in Pay Request No. 6 or a revision of that amount. The schedule of values for what we view as All Electric work items provided in part as follows:

	Current % Complete	Total $ Complete	Prev. Progress Payments	Amt. Due this Period
Fire Alarm Sys.	0%	$0	$0	$0
Elec./Security	8%	9,690	0	9,690
Transformer	100%	16,239	0	16,239
Bldg. Comms.	0%	$0	$0	$0
Site Elec.	40%	21,933	713	21,220
Site Comms.	18%	6,871	1,182	5,689
Lighting Prot.	50%	20,806	0	20,806
Ext. Bldg. Lt.	10%	4,453	0	4,453
Totals		$79,992	$1,895	$78,097

(App. supp. R4, tab 678, subtab 7)[7]

[7] We assume that the difference between the amount due ADT for All Electric work items in the schedule of values, $78,097, and the amount to be paid for All Electric work as set out in the subcontractor payments report, $68,301, was, at least in part, appellant's markup.

68. Franco testified that the government had appellant revise the completion percentages for the project as a whole and for All Electric's work items for Pay Request No. 7 (tr. 2/102-05). The revisions are included in appellant's submission of 16 June 2005. The overall completion percentage was decreased from 44.27 percent to 35.83 percent and the total amount sought from $574,506 to $344,687.[8] The pertinent part of the modified schedule of values stated the following as to the All Electric work items:

	Current % Complete	Total $ Complete	Prev. Progress Payments	Amt. Due this Period
Fire Alarm Sys.	0%	$0	$0	$0
Elec./Security	0%	0	0	0
Transformer	0%	0	0	0
Bldg. Comms.	0%	0	0	0
Site Elec.	1%	713	713	0
Site Comms.	3%	1,182	1,182	0
Lighting Prot.	0%	0	0	0
Ext. Bldg. Lt.	0%	0	0	0
Totals		$1,895	$1,895	$0

(App. supp. R4, tab 678, subtab 7) Mr. Franco testified that the government required ADT to make those changes to its 16 June 2005 payment request despite what he viewed as clear evidence of work that All Electric had completed, stating "if you remember the pictures we had looked at before, there was a significant amount of work that All Electric had done" (tr. 2/104-05). The pictures he is referring to are photographs of the work site showing, among many other things, an electrical trench, an underground electrical pull box, electrical equipment and conduit, unpacked fixtures and wiring and conduit and wiring that were to be under the slab. The photographs of the first two items mentioned are dated January 2005 and the rest are dated November and December 2005. (Tr. 2/45-75; app. supp. R4, tab 668 at 16-17, 20-21, 64-67, 72-77, 99-90, 107)

69. When referred to the Subcontractor Payments Report and asked what it reflected with respect to money requested for All Electric, Franco testified:

> Well, it's not being requested. It's no longer our request. What's happened is, it's what the Government has now allocated to this progress payment. So, again, if we go...to

[8] The revised ENG Form 93 states that it covers the period 28 February 2005 through 15 May 2005, but the 16 June 2005 cover letter says that the payment request is based on revised activity percentages through 15 June 2005.

> All Electric, what...they've done is zeroed them out completely of any progress payment, any recognition of work that they had accomplished. And...there was a significant amount of work that All Electric had done, and, in fact, at this juncture, the Government is penalizing us and totally penalizing our subcontractor by zeroing them out.

(Tr. 2/105)

70. Appellant also takes issue with government revisions to pay application No. 8 (app. PFF ¶ 95). The application was submitted on 28 July 2005 covering the period 15 May 2005 through 15 July 2005. The application stated that the project was 47.91 percent complete and sought $403,222.35. The ENG Form 93 was signed by Mr. Franco and had government approval signature lines for COR Musgrave and CO Frazier. The application included copies of paid invoices for materials sold to ADT and its subcontractors. It also included an extensive "Baseline Schedule." The first page of the schedule contains the handwritten initials "CMK," which apparently refer to ADT's contractor quality control person, Charles Kelly, followed by the signature "Ron Colwell," and the date, 21 July 2005. (App. supp. R4, tab 678, subtab 8)[9] By letter dated 9 August 2005, ACO Riddick informed ADT that the government would not process the payment request "as received" because it did not agree with the "status of the scheduled activities" and he did not have any record of an agreement with Mr. Colwell on that status. He advised ADT to set up a meeting with Andy Fikus "to review and agree on the status of the scheduled activities." (R4, tab 563) Franco complained about the ACO's decision to Riddick himself, to John Keever, the Area Engineer and to Colonel Alex Dornstauder, Commander of the Los Angeles District (R4, tabs 208, 564, 568). Eventually, pay application No. 8 was processed using a 46 percent completion rate for the project. The government paid appellant $246,246.83. The adjusted ENG Form 93 was signed for the government by Ron Musgrave. (App. supp. R4, tab 678, subtab 8; tr. 2/145-52)

71. ADT asserts that the government failed to pay all that was due for stored material (app. PFF ¶ 96). Referring to correspondence from late January 2006, appellant noted: (1) that it had requested payment for stored materials in Pay Request No. 10 dated 9 January 2006; (2) that ACO Riddick had internally stated appellant was entitled to a payment for stored materials; and, (3) that CO Riddick had told ADT it would pay

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[9] During the hearing, the government's chief quality assurance representative (QAR) for the F-22 Project, Andrew Fikus, described Mr. Colwell as "like an assistant" QAR (tr. 5/30). Mr. Musgrave, the COR, characterized Mr. Colwell as a construction representative (tr. 5/64).

$114,257 for stored materials (app. supp. R4, tabs 607, 608, 609; tr. 5/199-05, 6/170-72). Ultimately, however, appellant received, in mid-February 2006, only $22,028.60 for stored materials (app. br. ¶ 96; app. supp. R4, tab 652). The record indicates that appellant requested payment for the following in stored materials: $22,028.60 CMU Block; $33,176.37 Material Hoists (overhead cranes); $72,235.08 Mechanical Equipment; and $31,037.16 Metal Roofing (R4, tab 240). The invoices for those materials are in the record with Pay Request No. 10 (app. supp. R4, tab 678, subtab 10).

72. ADT representatives and its surety Great American met with CO Frazier and other Corps representatives including Riddick on 19 January 2006 (app. supp. R4, tabs 608, 609). In summarizing what went on in that meeting in an email dated 23 January 2006, Franco stated, among other things, that:

> [W]e have contributed very significant resources of our own to the Project without compensation from the Government. We are willing to make every effort to do what is necessary to finish the job, but there are limits to what we can do, given the size and resources of our 8(a) Company. We need the Corps to do everything possible to support our efforts so that together, ADT, Great American and the Corps can complete the job, while reserving the respective rights of each.
>
> Taking into account all of the pertinent events and circumstances, we repeat our request that the Corps withdraw its Show Cause Letter of December 22, 2005, and make full payment against Payment Application #10. The Project will benefit immediately. All of the other options available to the Government will inevitably lead to further delays in the completion of the job and to litigation over responsibility for delays and the propriety of termination.

(App. supp. R4, tab 607)

73. Thereafter, Riddick submitted his notes and comments on the meeting via email internally to Frazier and others within the Corps on 23 January 2006. His fifth bullet point with respect to releasing of funds and the ADT representation that this would lead to immediate improvements on the job site stated:

> It was made clear that the Government would continue withholding earnings for purposes of LD's. Contractor was advised that their current payment request #10 would be processed timely and they would be advised by Tuesday, 24 January 2006 if there [are] any problems. There is a

problem. We can not [sic] agree to the amount of earnings requested. We can agree to payment for stored materials. (Note: ADT's payment request #9 was not processed because we could not agree that there were any earnings for that period to include payment for stored materials.) However, the amount of withholdings will exceed the amount for stored materials. The contractor has recently delivered additional stored materials that will be consider[ed] for payment upon inspection and acceptance.

(App. supp. R4, tab 608)

74. Riddick officially responded to Pay Request No. 10 on 24 January 2006, stating:

> Per QA inspection, we cannot agree to the percentage complete noted in your progress payment request #010. We have reviewed your payment request for stored materials and will agree to payment in the amount of $114,257.00 for the materials stored onsite. Working with your field office staff, there were items of stored material that could not be found. Also, there are amounts requested that exceed the amounts from your schedule of values. Your schedule of values includes all cost for materials, labor, etc. for that activity. The amount for stored materials cannot exceed the amount from your schedule of values for that activity.
>
> Your progress payment request #010 notes the return of the $145,783.70 of withholdings. We are currently withholding a total of $106,758.00. As you have been notified in [writing] by Tina Frazier, Contracting Officer, all funds currently being withheld will not be returned.
>
> Per the above, your progress payment request #010 cannot be processed as received. We have requested that ADT field office staff schedule a review with the Government field office staff...to update the percentage complete for the scheduled work activities prior to receipt of your progress payment request.

(App. supp. R4, tab 609)

75. Franco replied that same date, saying he was confused by Riddick's letter and making the following points:

> 1. Is your Office processing a progress payment against our request #010 for the $114,257.00 amount you[] have agreed to, or is that a current amount that you are agreeing to, as of the date of your letter, but not processing?
>
> 2. The amounts requested by ADT's subcontractors for the cost of materials they have purchased and place[d] on site do not exceed any of the respective Schedule of Values items. Do you have different information?
>
> 3. I believe there were two (2) items of mechanical stored materials that initially your representative could not find? It is my understanding that these items are now on site.
>
> 4. The $145,783.70 is the amount of ADT's Progress Payment Request #009, which was never processed and therefore withheld by the Government.
>
> ....
>
> 7. Earlier today, the documentation for $31,037.16 of "on-site" stored roofing material was provided to you along with ADT's request that this amount be added to your payment for our Request #010-if you had in fact not completed processing...yet. As we are not sure if you have or have not processed our Progress payment Request #010, if you have not then please add the $31,037.16 to the monies which will be paid against [that request].

(R4, tab 236)

76. Riddick indicated he would pay for the stored roofing material upon verification of the materials. He also noted that "after subtracting the stored material amount, the remaining schedule of value amount must be reasonable enough to cover all remaining work." Franco answered that $31,037.16 was much less than the roofing subcontract of $127,382 and Riddick countered that the roofing activity on the schedule of values was only $44,069 and asked where Franco got $127,382 for roofing. Mr. Franco replied that the F-22 Project had experienced a significant cost escalation. "Once the appropriate escalation values are applied on this Project, the scheduled values

will match the subcontract values–ergo, the subcontracted amount reflects the cost for roofing the F22 MMF." (App. supp. R4, tab 678, subtab 10)

77. On 6 February 2006, Mr. Franco requested the processing status of Pay Request No. 10 (R4, tab 237). Four days later, Mr. Riddick responded that the government would pay the $22,028.60 for masonry materials and take possession of them. It would not process a payment for the other materials. He went on to state the following:

> All materials on the project site that you have received payment for are the properties of the Government and shall remain on the project site. All materials on the project site that you have not received payment for are the properties of the contractor. You and your subcontractors are allowed to remove materials from the project site that are the property of the contractor.

(R4, tab 239)

78. Thus, while Riddick indicated the Corps would pay $114,257.00 for stored materials, ultimately appellant received, in mid-February 2006, only $22,028.60 (app. br. ¶ 96; R4, tab 652). The record indicates that appellant requested payment for the following in stored materials: $22,028.60 for CMU Block; $33,176.37 for Material Hoists (overhead cranes); $77,235.08 for Mechanical Equipment; and $31,037.16 for Metal Roofing (R4, tab 240). The invoices for those materials are in the record with Pay Request No. 10 (app. supp. R4, tab 678, subtab 10) and total over $158,000.

E. Liquidated Damages

79. Appellant argues that the withholding of liquidated damages by the government was a material breach of contract because ADT was entitled to time extensions for government delays. Appellant also asserts that the CO's failure to release the withheld money as requested by ADT resulted from her reliance on incomplete and inaccurate information. (App. PFF ¶¶ 74-89)

80. The government began assessing liquidated damages following expiration of the original contract completion date of 1 October 2004. With regard to Pay Estimate No. 4, for the period 1 October 2004 through 30 December 2004, the government withheld $59,310.00 in liquidated damages (R4, tab 38; app. supp. R4, tab 652). With regard to Pay Estimate No. 5, for the period 31 December 2004 through 30 January 2005, the government withheld an additional $15,157.00 in liquidated damages for a total of $74,467.00 (R4, tab 39; app. supp. R4, tab 652). With regard to Pay Estimate No. 7, for the period 16 May 2005 through 16 July 2005, the government withheld an additional

$32,291.00 in liquidated damages (R4, tab 42; app. supp. R4, tabs 652, 678, subtab 8). The total withheld from payments made to appellant through its termination on 2 February 2006 was $106,758.00 (app. supp. R4, tab 652).[10]

81. The government took the position that it would not process a payment estimate unless the earnings exceeded the accumulated liquidated damages for that period. In November 2005, Mr. Musgrave told appellant that "a retained amount for liquidated damages" would continue to be withheld "each day from February 05, 2005." (R4, tab 224)

82. Substantially every time appellant requested a progress payment it requested release of the withheld liquidated damages (R4, tab 39 at 2232, tab 40 at 2274; app. ex. 38; tr. 2/92). In doing so, it indicated that its cash flow problems were affecting performance of the contract (tr. 2/88, 5/94; app. ex. 38). In response to a December 2005, request by ADT that the government release about $200,000.00 in withheld funds, the CO declined to do so for the following stated reasons:

> 1. A Show Cause has been issued to your company as a result of your lack of performance and progress on the project site. It would not be prudent under these circumstances to release funds that are designed to protect the Government's best interest.
>
> 2. The funds withheld are significantly less than your anticipated amount of $200,000.00 and the Government's belief is that those funds will only partially satisfy past debt owned [sic] to your subcontractors.
>
> 3. In reviewing your current completion schedule, the funds requested to be released will not establish and/or create the cash flow required to move the construction project forward.
>
> 4. As a result of your being approximately 15 months behind schedule, the Government has incurred additional supervision and administration (S&A) cost on this contract.

(App. ex. 8)

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[10] On the ENG Form 93, the withholdings are listed as deductions and the spaces specifically for entry of liquidated damages were left blank. The COR testified that the government did this because if liquidated damages were actually entered as such, "it could never be pulled out until the contract was final" (tr. 5/55).

83. At that time, the CO believed that the contract allowed the government to retain those funds and she was not aware of the Peter Gauer memorandum opining that appellant was entitled to a time extension of 167 days (tr. 6/166-69).

IV. Spoliation Motion

84. Dennis Long was the F-22 project manager for the ACC (finding 16). He held that position until well after appellant was terminated for default (app. motion for sanctions for spoliation of evidence (Spoliation Mot.), attached declaration of John W. Ralls dated 2 December 2010 (Ralls decl.), ¶ 8, ex. 10 at 22). Mr. Long was involved in the development and drafting of the RFP for the F-22 project (spoliation mot., ex. 4 at 5/82-83, 107-08). Appellant says that its "attempts to obtain Air Force documents date back to 2006." In ASBCA No. 55307, ADT's attorney noticed that the Rule 4 file did not appear to contain AF documents, and made "repeated inquiries" to Gilbert Chong who was the government's attorney at that time. In December 2006, Mr. Chong provided appellant with "Dennis Long's file" for the project. Mr. Long had provided this file to Mr. Chong. Mr. Long was deposed in ASBCA No. 55307 in December 2006. He indicated that he had put aside his paper records so that they could be picked up, but he did not print out email that was on his computer and on a government network and make it available. Following the deposition, Mr. Chong produced additional material from an ACC division that Mr. Long did not work for. The materials provided extend from 1997 to 2007. There were only two documents dated after 2004. Mr. Long testified at the March 2007 hearing in ASBCA No. 55307. (Spoliation mot. at 6; Ralls decl. ¶¶ 2-8, tabs 2, 6)

85. Appellant's efforts to obtain AF documents in this appeal began in 2009 (Ralls decl. ¶ 7). ADT issued requests for production of documents to the government on 25 May 2010. Paragraphs 7, 16, and 36 of the requests sought the following:

> 7. Dennis Long's entire project files and Documents for the F-22 MMF Project and Contract No. DACA09-03-C-0009 for the period 22 November 2004 to the present.
>
> ....
>
> 16. The United States Air Force Air Combat Command's entire project files for the F-22 MMF Project and Contract No. DACA09-03-C-0009 for the period 22 November 2004 to the present.
>
> ....

> 36. For the period 22 November 2004 to the present, any and all Documents, including email, reflecting communications between representatives of the United States Air Force (including, without limitation, the Air Combat Command) and the United States Army Corps of Engineers, or anyone acting on its behalf, having to do with the F-22 MMF Project. To the extent that email has not already been printed, it is requested that email be provided on CD-ROM or DVD, and in native format or .pst files, with attachments.

(App. motion to compel production of documents dated 30 September 2010 (Mot. to Compel, ex. A)

86. As to request for production No. 7, the government objected that it was vague and that Mr. Long's files were not in the custody of the Corps. As to request No. 16, the government objected that AF files were not in the custody of the Corps. As to request No. 36, the government objected that it would be an undue burden to provide documents not in the custody of the Corps that may be in the custody of the AF. The government also stated that, without waiving its objection, all relevant, non-privileged documents not already produced and in the custody of the Corps would be produced. The government's responses were provided on 15 July 2010. (Mot. to compel at 3-4)

87. Appellant filed a motion to compel production of, among other things, the documents covered by request Nos. 7, 16, and 36. The parties briefed the motion. By telephone conference of 26 October 2010, memorialized on 28 October 2010, the Board ruled that the government had to produce AF documents and granted requests Nos. 7, 16, and 36. The Board concluded as to those requests, "[t]to the extent obvious documents are missing, counsel may explain that omission through a declaration from Mr. Long or from counsel."

88. On 9 November 2010, the government's present counsel sent appellant's counsel an email stating that the AF did not have any additional responsive documents and that Mr. Long did not "save his e-mails or keep any documents that fall within the time period you requested" (app. mot. to take deposition of Dennis W. Long (Deposition mot.), ex. A). A few days later, the government provided declarations from Mr. Chong and Mr. Long. Mr. Chong stated that he had spoken to Mr. Long who told him that he had previously provided Mr. Chong with all responsive documents and that Mr. Chong had previously produced all AF documents he had in his possession (dep. mot., ex. B). Mr. Long stated that during the design phase appeal he provided Mr. Chong with all of his files and "ACC command files" for the project. He noted that, in response to inquiries from Mr. Chong in October 2010, he had replied that he had changed jobs since previously providing AF documents and did not retain documents from 2003 to the present. He did have documents from 2000 to 2002 and again gave them to the

government. He went on to say that he had asked the AF Command "now in charge of maintaining such documents for the F22 project documents." He was told that "as part of a document retention policy, [the] documents were not maintained by that Command." (Spoliation mot., ex. 9)

89. ADT then moved for authorization to take Mr. Long's deposition. The Board ruled that the deposition could be taken (memorandum of conference call dated 19 November 2010). Summarizing Mr. Long's deposition in the ASBCA No. 55307 appeal, his declaration, and his December 2010 deposition, appellant states that Mr. Long's production in 2006 was limited to pre-2003 documents, that no additional documents were ever produced, and that any post-2003 documents have been destroyed (gov't opp'n to app. spoliation mot. at 7-9). At his deposition, Mr. Long provided a document from the AF Records Information Management System that apparently indicated an AF military construction retention policy allowing documents to be destroyed "five years after program year involved or when no longer needed." He stated that, to his knowledge, no documents had been discarded as of his earlier deposition, on 14 December 2006, or even as of the time of the hearing on the pre-construction delay claim, March 2007. (Gov't opp'n, ex. 2)

90. Appellant filed the Spoliation Motion on 3 December 2010, the Friday before the Monday, 6 December 2010 start of the hearing in the instant appeal, ASBCA No. 55358. It asserted that the government intentionally destroyed relevant documents at a time when it was aware of pending ASBCA appeals. ADT requested that the Board draw certain adverse evidential inferences in appellant's favor and that the Board award attorney fees and costs incurred in seeking to obtain AF documents and in investigating the government's document destruction. The Board stated that ADT's Spoliation Motion would be addressed in the decision on the appeal (tr. 1/48-63).

DECISION

This is an appeal from the termination of ADT's contract for the F-22 Munitions Maintenance Facility project under the Default clause, FAR 52.249-10. Under that clause the government has the discretion to terminate a contract for default when a contractor refuses or fails to prosecute the work with such diligence as will assure its completion within the time allowed in the contract or fails to complete the work within the time allowed. The clause also provides that a contractor's right to proceed cannot be terminated if the delay in completing the work arose from unforeseeable causes beyond the control and without the fault or negligence of the contractor.

Initially, the government has the burden of showing that the termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987); *Empire Energy Management Systems, Inc.*, ASBCA No. 46741, 03-1 BCA ¶ 32,079 at 158,553, *aff'd*, 362 F.3d 1343 (Fed. Cir. 2004). If the government does so, the burden shifts to the

contractor to prove that the default was excusable. *Empire Energy*, 03-1 BCA ¶ 32,079 at 158,553. The parties contest both whether the decision to terminate was warranted and whether the problems that led to the termination were beyond appellant's control and not its fault.

While appellant's complaint included waiver of contract completion date and commercial impracticability theories (finding 47), its post-hearing submissions are more focused.[11] Its present position, summarized from the narrative in its opening brief, is as follows. The government approved appellant's design in late September 2004. It was only then that ADT could buy out its subcontractors, and the cost of the subcontracts was approximately $1 million more than it was to receive for subcontracts under the contract. Appellant's small size and limited resources meant that it needed contractual relief from the government. It requested such relief many times, but the requests were denied. The situation, as ADT continued to perform, worsened because the government withheld liquidated damages and reduced contract payments. Appellant sought contractual relief for an import fill claim and for pre-construction delays which were denied. The government's evaluation of the latter claim was dysfunctional. By June 2005, appellant did not have the resources to keep all of its subcontractors on the job. It continued to do what work it could. The government gave ADT five months to finish work in August 2005. In December 2005, the government issued a show cause letter and denied the pre-construction delay claim. The government refused payment for stored materials in January 2006. In early February 2006, the government terminated the contract for default. (App. br. at 5-12)

The particular arguments now made by appellant, based on the above facts, are first that the termination was an abuse of discretion because the CO was not aware: (1) that fast track provisions had been included in the contract by mistake and ADT would not be allowed to use fast track; and, (2) that Mr. Gauer had concluded, with a concurrence by the ACO, that appellant was entitled to 167 days of delay time. ADT also says that its inability to perform should be excused because the government materially breached the contract by not making progress payments as due and in requested amounts, by withholding liquidated damages when appellant was not late, by concealing the truth about fast track, and by denying the pre-construction delay claim after inadequate consideration. Finally, appellant asserts that its slow performance and ultimate inability to complete work were the result of financial problems caused by the government and, again, should be excused.

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[11] ADT does not, that we can see, continue to argue waiver of the contract completion date or commercial impracticability. To the extent it did, we do not see those theories as viable defenses.

The Government's Decision to Terminate was Reasonable

With respect to the decision to terminate, tribunals recognize that a CO has "broad discretion" and a termination decision will be overturned only if it is determined to be "arbitrary, capricious or constitutes an abuse of discretion." *See, e.g., Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343-44 (Fed. Cir. 1999). In making that determination, the Board considers four factors:

> 1) [W]hether the Government official acted with subjective bad faith; 2) whether the official had a reasonable, contract-related basis supporting the decision under review; 3) the amount of discretion vested in the official whose action is being reviewed; and 4) whether a proven violation of relevant statutes or regulations can render a decision arbitrary and capricious.

Empire Energy, 03-1 BCA ¶ 32,079 at 158,553.

In August 2005, the CO set a new contract completion date for the purpose of measuring progress and performance. She also requested a revised schedule from ADT that would show how appellant would meet the new dates. ADT responded by saying that it would do so based on the assumptions that the government would release progress payments that had been withheld and not assess liquidated damages if appellant met the new dates. Moving forward with the project was explicitly conditioned on the government making a progress payment and releasing withheld payments. Appellant provided the government with a schedule on 31 October 2005, but ADT continued to condition completion of the project on favorable financial considerations from the government. (Findings 39-40, 42)

The government's 21 December 2005 show cause notice observed that ADT had not done any significant work on the project and it did not appear that it could complete the project by the 4 January 2006 deadline. In response, appellant mentioned government delays, failure to make payments, the refusal to release withheld funds, and a new REA. If the government took the right steps, ADT said that it could complete construction of the facility within 100 days of the release of funds. In later terminating the contract for default, the CO stated that not only had appellant failed to restart construction or perform any significant work, it had failed to "offer any realistic plan or schedule" to accomplish the contract. (Findings 43, 45, 46)

The CO's February 2006 decision to terminate the contract for default was not an abuse of discretion. An examination of the factors set out in *Empire Energy*, 03-1 BCA ¶ 32,079 at 158,553, shows that the decision was justified. The discretion vested in the CO by the default clause was not explicitly limited. Further, ADT does not argue, and

we see nothing to indicate, that the decision to terminate violated a statute or regulation. Likewise, appellant makes no assertion, and there is no evidence, that the contracting officer acted out of a personal sense of bad faith toward ADT. Finally, the CO had a reasonable contract-based rationale for terminating the contract. We read the CO's termination decision to be based both on the fact that ADT had not met the 4 January 2006 interim completion date and the fact that appellant had not offered "any realistic plan or schedule which [would] accomplish the work portrayed" in the contract (finding 46). In other words, the termination was based, in our view, on the CO's determinations that ADT had missed both the original and interim completion dates, that appellant's lack of progress indicated that it was unlikely to meet any new completion date, and that appellant had failed to provide adequate assurances that it would or could complete the contract. Those reasons are clearly related to the contract and ADT's performance under the contract. *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1329 (Fed. Cir. 1999) (no abuse of discretion where there was a nexus between the decision to terminate and the contractor's performance), *cert. denied*, 529 U.S. 1097 (2000), *and on remand to*, 50 Fed. Cl. 311 (2001), *aff'd in part, vacated in part*, 323 F.3d 1006 (Fed. Cir. 2003), *on remand to*, 76 Fed. Cl. 385 (2007), *aff'd*, 567 F.3d 1340 (Fed. Cir. 2009), *vacated and remanded sub nom., General Dynamics Corp. v. United States*, 481 U.S. 239 (2011) (Supreme Court review was limited to the effect of the government's assertion of state secrets privilege on the contractor's superior knowledge theory); *see also Lisbon Contractors,* 828 F.2d at 765-66; *Discount Co. v. United States*, 554 F.2d 435, 441-42 (Fed. Cir. 1977); *Armour of America v. United States*, 96 Fed. Cl. 726, 745-47 (2011).[12]

Appellant briefly suggests that cases such as *McDonnell Douglas, Lisbon, Armour* and *Discount* are not on point because they involved terminations before the completion date while this appeal involves a termination well after the completion date (app. reply at 5). The original contract completion date here was 1 October 2004, but the CO later established a new completion date of 4 January 2006 "for the purpose of measuring progress and performance" (findings 12, 39). As discussed later in this opinion, the government did not waive the original completion date. In these circumstances, it serves no purpose to attempt to draw distinctions between terminations before the completion date and terminations after the date. As we have found above, appellant missed the completion dates, showed little progress, and failed to provide adequate assurances. The differences in the termination for default precedents perceived by appellant do not change those facts.

ADT also argues that there was no anticipatory repudiation in this case (app. reply br. at 22-25). While it is true that failing to offer reasonable assurances has been

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[12] The *McDonnell Douglas* case involved the clause at FAR 52.249-9, DEFAULT (FIXED-PRICE RESEARCH AND DEVELOPMENT) (APR 1984). We do not see a substantive difference for present purposes between that clause and the default clause involved in this appeal.

described as a "branch of the law of anticipatory repudiation," *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001), that ground for termination appears to have its own distinct rules. *See Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719. Refusing to perform without a change to the contract meets this variety of anticipatory repudiation, *id.* at 170,954, as does a failure to commit to completion by a certain date. *A.R. Sales Co. v. United States*, 51 Fed. Cl. 370, 373 (2002), *see also L&M Thomas Concrete Co.*, ASBCA No. 49198, 03-1 BCA ¶ 32,194 at 159,122 (failure to provide assurance of "timely specification-compliant performance").

Appellant points to *David/Randall Associates, Inc. v. Department of the Interior*, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598, in arguing that its response to the show cause letter was not an anticipatory breach. While Civilian Board decisions are not binding on the ASBCA, we think that case is distinguishable. There, the CO wrote to the contractor requesting that it "advise this Office as to its intentions on fulfilling its outstanding obligations under the subject Contract." After a series of emails, the contractor's attorney responded as follows: "It is David/Randall's intention, upon satisfactory resolution of a number of outstanding issues, to complete performance of this suspended project." The issues mentioned included negotiations as to time extensions and reimbursement of "costs incurred by David/Randall as a result of the suspension." *Id.* at 166,415. The Civilian Board ruled that the response was not an anticipatory repudiation. *Id.* at 166,416. It said that the email was not an absolute refusal to perform unless certain conditions were met, it was a statement of intent to perform on the resolution of certain issues. The contractor was not issuing an ultimatum, it was attempting to work with the government to resolve problems. *Id.*

ADT equates the contractor's response in *David/Randall* to its 16 January 2006 response to the show cause letter. In that letter, appellant asserted that an assortment of government-caused delays, failure to make payments, and failure to release withheld funds had led to the project delays. It mentioned a new REA which would show entitlement to 342 days and $1,020,000, and proposed a meeting at which it would describe how, with the right steps by the government, appellant could finish construction. ADT ended by saying "We will continue to pursue completion of the Project, as diligently as we possibly can, given our current financial resources." (Finding 45) Even if *David/Randall* correctly interprets and applies the law regarding failure to give reasonable assurances and we do not concede it does, we see fundamental differences between the response in that case and that provided by appellant here. David/Randall stated that it intended to complete performance. ADT said that it would pursue completion "as diligently as we possibly can" given our resources. There is no dispute that appellant did not have the resources to finish the project and ultimately did not do so. Its promise to pursue completion was clearly based on its requested increases in the contract price and time extensions and must be considered completely conditional. It was an unambiguous failure to provide adequate assurances of performance. *DK's Precision Machining & Manufacturing*, ASBCA No. 39616, 90-2 BCA ¶ 22,830; *see also Free &*

Ben, 11-1 BCA ¶ 34,719; *A.R. Sales Co.,* 51 Fed. Cl. 370; *L&M Thomas Concrete,* 03-1 BCA ¶ 32,194.

Citing *The Ryan Company Inc.*, ASBCA No. 48151, 00-2 BCA ¶ 31,094, and *Ryste & Ricas, Inc.*, ASBCA No. 51841, 02-2 BCA ¶ 31,883, appellant says the termination was an abuse of discretion because the CO did not have all of the relevant information and some of the information she did have was erroneous. There is no doubt and no dispute that ADT did not complete the F-22 Project by the 4 January 2006 deadline. While appellant may dispute that it failed to offer a plan or schedule as to how it would finish the work, the CO certainly viewed ADT's submissions as deficient. Further, in those submissions appellant explicitly conditioned completion of the project on, among other things, the release of withheld payments. (Findings 40, 45) That information was known to the CO and it was not erroneous.

There are three items of information that appellant says were not available to the CO or were available but flawed: (1) the CO did not know that the fast track provisions had been included in the contract by mistake; (2) the CO erroneously believed that ADT had been allowed to fast track; and (3) the CO did not know that a government official, in assessing the pre-construction delay claim, had concluded appellant was entitled to 167 days of delay. ADT states that the CO's memorandum justifying the termination decision referred to her mistaken "understanding that ADT had been permitted to fast track the job and her understanding that the government was not responsible for pre-construction delays." (App. br. at 13-15)

With respect to fast track, appellant's arguments appear to be based on the findings we made in our decision on ADT's pre-construction delay claim, *ADT*, 09-2 BCA ¶ 34,200 (*see* app. br. at 15). That is, appellant relies on that decision to confirm its interpretation of the fast track provisions, how the parties dealt with the issues raised by them, and whose interpretation of the provisions was correct. That decision, however, was issued more than three years after the termination for default. In essence, appellant asks us to judge the CO's decision based on a resolution of issues that occurred much later in time. We decline to do so.

The default clause is construed as requiring a "reasonable belief" on the part of the contracting officer that the basis or bases given for termination were valid. *Cf. Lisbon Contractors,* 828 F.2d at 765.[13] We look to the evidence as it existed at the time the decision was made. *RFI Shield-Rooms*, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 at 61,734. We do not examine post-termination factors or events. *McDonnell Douglas,*

[13] *Lisbon* involved a termination for failure to make progress. In that situation, the CO would have to have a reasonable belief that "there was no reasonable likelihood that the contractor could perform the entire contract within the time remaining for contract performance." *Lisbon*, 828 F.2d at 765.

323 F.3d at 1017. It is not required that the CO's assessment have been correct or that the CO have had "perfect foresight." *Id.* The fact that the CO's understanding of fast track differed from what we, three years later, determined it might have been, does not make it unreasonable at the time of termination.[14] That is particularly true in this appeal because, in our view, the CO terminated not only for failure to meet the contract completion date but also for failure to provide adequate assurances (findings 39-46).[15] Whether the CO knew about the fast track problems has no bearing on whether ADT provided such assurances.[16]

The third item of information cited by appellant is Peter Gauer's analysis of appellant's pre-construction delay claim. The Gauer analysis was sent to CO Frazier by Roger Riddick on 27 September 2005. Mr. Gauer stated that he believed that ADT might be entitled to 167 "non-compensatory calendar days" and that would "change the contract completion date to March 16, 2005." The CO testified that she does not remember receiving the memorandum, analyzing it, or incorporating it into her findings on the pre-construction delay claim. She also said that if she had been made aware of the memorandum she would have taken it into account. She would not, however, have gone to Mr. Gauer for input because he was not part of the project. (Finding 41)

The question is whether the termination for default was an abuse of discretion because it does not appear that the CO was aware of Mr. Gauer's conclusion that the government may have caused 167 days of delay in the design phase of the contract. If appellant is arguing that had the CO seen the Gauer memorandum it would have changed the outcomes on the pre-construction delay claim and on termination, we see no evidence supporting such a conclusion. A perhaps tougher question is whether there is a problem

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[14] Although we previously ruled that ADT had a contract right to fast track in the decision on the pre-construction delay claim, we also "observed" that appellant's proposal was itself ambiguous with respect to fast track. *ADT*, 09-2 BCA ¶ 34,200 at 169,084. Confusion about fast track at the pertinent time period seems to have been widespread.

[15] Even if the CO had not relied in part on a failure to provide adequate assurances, we would find that she clearly sought assurances and just as clearly ADT failed to provide them (findings 39-46). We may sustain a default termination on any valid grounds regardless of the justification originally given by the government. *Kirk Bros. Mech. Contractors, Inc. v. Kelso*, 16 F.3d 1173, 1175 (Fed. Cir. 1994); *McDonnell Douglas,* 567 F.3d at 1355.

[16] *Ryan,* 00-2 BCA ¶ 31,094, *Ryste*, 02-2 BCA ¶ 31,883, and the other decisions cited by appellant are inapposite. There was no indication in those appeals, as far as we can see, that despite the erroneous or withheld information, the CO could yet have reasonably believed, as we have found here, that the contractor could not have timely completed the contract. Nor was there an independent basis on which to terminate the contract as there is here.

here simply because Mr. Gauer's work apparently was not available to the CO. We actually do not know whether it was or was not available because Ms. Frazier's testimony is simply that she does not remember seeing it (finding 41). Assuming, however, that it was not available to her, that alone would not invalidate the decision to terminate.

Ryan, 00-2 BCA ¶ 31,094, *Ryste*, 02-2 BCA ¶ 31,883, and the other decisions cited by appellant, involved situations where information was withheld from the CO, where the CO clearly received erroneous information, or where the CO insufficiently assessed the information he or she had. In this case, there is no evidence the Gauer memorandum was intentionally withheld. The fact that the CO does not remember the Gauer memorandum, does not make the information she did have erroneous. Nor does it prove a faulty assessment. There is no indication that the memorandum contained material not already available to the CO. And, although she said she would have taken the memorandum into account if she had been aware of it, she would not have sought input from Mr. Gauer because he was not on the project (finding 41). It is also worth noting that, as to the 2 February 2006 termination, it is somewhat difficult to see how Mr. Gauer's memorandum, which concluded that the contract completion date should be extended to 16 March 2005, would have made much difference. In addition, only 31 of the 167 delay days put forward by Mr. Gauer coincide with the delay days found by the Board in the decision on pre-construction delays in ASBCA No. 55307. Of the 167 delay days proposed in the Gauer memorandum, 136 were before April 2004. In contrast, the delays found by the Board started on 8 April 2004. (*Cf.* finding 41 with finding 49) Most importantly, the Gauer memorandum does nothing to undermine the conclusion that ADT failed to provide adequate assurances when requested by the government.

The CO's decision to terminate appellant's contract for default was not an abuse of discretion. It was a justifiable exercise of the authority she had under the default clause.

Appellant's Default Was Not Excusable

Having found that the termination was justifiable, we turn to the excuses offered by ADT. Appellant makes two related arguments. The first is that its obligation of continued performance was excused because the government materially breached the contract. The second is that appellant's financial inability to perform should be excused because it was caused by wrongful government actions. The burden of proving excusability is on ADT. *Empire Energy*, 03-1 BCA ¶ 32,079 at 158,553. That includes establishing not only the specific excuse asserted but also, where applicable, that any resulting delay arose from "unforeseeable causes beyond the control and without the fault or negligence" of appellant. FAR 52.249-10(b)(1); *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 132 (2001), *aff'd*, 36 F. App'x 452 (Fed. Cir. 2002).

Asserted Material Breaches of Contract

ADT argues that the government materially breached the contract in three respects. The initial asserted breach was the government's failure to make progress payments as due and in proper amounts. Appellant cites payments that excluded work done by subcontractor All Electric, reductions to the payment for Payment Estimate No. 8 based on work progress, and a failure to fully pay for stored materials. (App. br. at 2, 16-18) An examination of the circumstances of those payments does not show that the government breached the contract.

Payment for All Electric

With respect to All Electric, appellant says that in Pay Estimate No. 6 it requested $74,134 for work done by that subcontractor. Following no payment on the pay estimate, a revised submittal in Pay Estimate No. 7, and further revisions to that Pay Estimate, the government's Payment No. 6 did not include reimbursement for electrical work. (App PFF ¶¶ 90-94)

Our review of the record indicates some methodological issues with Pay Estimate No. 6 which covered 30 January 2005 through 28 February 2005. The pay estimate appears to have initially listed only one All Electric work item in the schedule of values in the amount of $476. The ACO's response was to remind ADT that a construction schedule had previously been requested and to also request a listing of certain construction activities and a schedule of values for those activities. The government did not pay Pay Estimate No. 6. The amount sought in that request appears to have been included in Pay Estimate No. 7 which covered the period 28 February 2005 through 15 May 2005. The schedule of values showed new electrical work totaling $78,097 and the subcontractor payments report showed $68,301 for All Electric. (Findings 65-67)

Appellant's program manager testified that in preparing payment estimates and revisions to estimates, ADT people would meet with government people to try to come to an agreement on the percentage of work that had been completed. Ultimately, the government would not enter payment requests into its computer system until requested revisions had been made. (Finding 63) This process resulted in revisions to Pay Estimate No. 7, which apparently now extended through 15 June 2005. The percentage of total work completed was decreased from 44 percent to 35.83 percent and the total amount sought was decreased from $574,506 to $344,687. With the changes, the schedule of values showed no new amounts sought for electrical work. The program manager stated that the government required those changes despite clear indications that electrical work had been done referring to photographs of the work site. The photographs showed, *inter alia*, an electrical trench, an underground electrical pull box, electrical equipment and conduit, unpacked fixtures and wiring, and conduit and wiring that were to be under slab.

The photographs of the first two items mentioned are dated January 2005 and the rest are dated November and December 2005. (Finding 68)

Based on the facts found, we cannot say that the government's decision not to pay for electrical work initially included in Pay Estimates Nos. 6 and 7 was a breach, much less a material breach, of the contract. The contract included the payments clause at FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997). Under subsection (b) of that clause, the government was to make progress payments "on estimates of work accomplished which meets the standards of quality established under the contract." Subsection (d) obligated the contractor to refund progress payments plus interest where it is found that payment was made for work that failed to conform to contract requirements. Subsection (e) allowed the government to retain up to ten percent of a progress payment if satisfactory progress had not been made. Those provisions gave the government "considerable discretion" in deciding whether payment was warranted given the amount of work completed and the quality of that work. *Cf. Technocratica*, ASBCA No. 46007 *et al.*, 94-1 BCA ¶ 26,584 at 132,288 (interpreting FAR 52.232-5(e)); *Morganti National,* 49 Fed. Cl. at 142 (interpreting FAR 52.232-5(b) and (e)).

In asserting a culpable failure to pay, appellant must show that the government abused its discretion. *Technocratica*, 94-1 BCA ¶ 26,584 at 132,288. ADT appears to suggest that payment for electrical work in Pay Estimates Nos. 6 and 7 was required because there is photographic evidence that electrical work had been done. In the first place, appellant has not shown that the photos that were entered into the record depict the work that it sought reimbursement for in the Pay Estimates. Most of the photos are dated well after the time periods covered by the Pay Estimates (finding 68). Even if the photos showed work pertinent to this argument, appellant has not established that it was work accepted by the government. We have seen nothing that indicates that the government's actions as to the Pay Estimates were inconsistent with the contract. We have held, in fact, that the government does not abuse its discretion in payment matters even if it gives itself the benefit of the doubt on matters in dispute. *See, e.g., Fortec Constructors*, ASBCA No. 27480, 83-2 BCA ¶ 16,727 at 83,187; *The Davis Group*, ASBCA No. 48431, 95-2 BCA ¶ 27,702 at 138,093.

Revisions to Pay Estimate No. 8

ADT contends that the government breached the contract by making significant reductions to Pay Estimate No. 8 despite the fact that a government employee had approved the progress stated in the Pay Estimate (app. PFF ¶ 95).

Pay Estimate No. 8 was submitted on 28 July 2005. It covered the period 15 May through 15 July 2005, stated that the project was 47.91 percent complete, and requested $403,222.35. A "Baseline Schedule," included with the payment estimate, was initialed

apparently by ADT's quality control person and signed by a government employee, Ron Colwell. Mr. Colwell was described by government witnesses as a construction representative and "like an assistant" QAR. The materials submitted by appellant in the Pay Estimate included an ENG Form 93 that was signed by appellant's representative and had blank signature lines for government officials. In August 2005, the ACO notified appellant that the government would not process Pay Estimate No. 8 as it was because it did not agree with the "status of scheduled activities." He also said that he had no record of an agreement with Mr. Colwell on the status and counseled appellant to meet with Mr. Fikus to review and agree on the status of scheduled activities. Pay Estimate No. 8 was ultimately signed for the government by Ron Musgrave and processed using a 46 percent completion rate. Appellant was paid $246,246.83. (Finding 70)

The government's processing of Pay Estimate No. 8 was not a breach of the contract. ADT provides no support whatsoever for the implied proposition that Mr. Colwell could have obligated the government to a certain percentage of completion. Even if he had had the authority to do so, we see nothing on the Baseline Schedule to indicate what Mr. Colwell's signature was supposed to mean. There were no government signatures on the Payment Estimate's ENG Form 93 as submitted by appellant. It was only after the completion percentage was lowered that a government representative signed the ENG Form 93 and appellant was paid. The government was not bound by Mr. Colwell's signature and it made a separate assessment of how much of the project had been completed. In our view, that process was fully compliant with the Payments clause.

Payment for Stored Materials

ADT alleges that, as to Pay Estimate No. 10, the government made only a partial payment for stored materials even though it had previously agreed to pay for all claimed stored materials (app. PFF ¶ 96; app. br. at 18).

Pay Estimate No. 10 included invoices for materials stored on site: $22,028.60 CMU Block; $33,176.37 Material Hoists (overhead cranes); $77,235.08 Mechanical Equipment; and $31,037.16 Metal Roofing (finding 71). Mr. Riddick stated, by letter dated 24 January 2006, that the government would pay $114,257 for stored materials. Mr. Franco asked, by letter and email dated the same day, that $31,037.16 for stored roofing material be added to pay application No. 10. Mr. Riddick, in both his original letter and by email, responded that that could be done upon field verification of the materials and went on to note in the email that after subtracting the amount for stored material, the remaining schedule of value amount had to be reasonable enough to cover all the remaining work. Mr. Franco answered that $31,037.16 was much less than the roofing subcontract of $127,382. Mr. Riddick then stated that the roofing activity on the schedule of values was only $44,069 and asked where Mr. Franco got $127,382 for roofing. Mr. Franco replied that the F-22 Project had experienced a significant cost

escalation, and that once the appropriate escalation values are applied on the project, the scheduled values would match the subcontract values and thus reflect the actual cost for roofing the facility. (Findings 74-76)

On 6 February 2006, Mr. Franco requested the processing status of pay application No. 10. Mr. Riddick responded that the government would pay the $22,028.60 for masonry materials and take possession of them. He stated that the government would not process a payment for the other materials and noted that all "materials on the project site that you have received payment for are the properties of the Government and shall remain on the project site. All materials on the project site that you have not received payment for are the properties of the contractor. You and your subcontractors are allowed to remove materials from the project site that are the property of the contractor." (Finding 77)

There was no breach of contract in the government's handling of the request for payment for stored materials. Subsection (b)(2) of the Payments clause clearly gave the government discretion to take stored material into consideration in payments. The government did consider the stored materials invoices tendered by appellant, declined to reimburse for some of them, and told ADT that it and its subcontractors could remove any stored materials not paid for. (Findings 74, 77) As to the invoices rejected, we understand that the government was concerned that the amounts sought were inconsistent with the corresponding work items in the schedule of values. In other words, the amounts sought for some of the stored materials would have left little or nothing in the schedule of values for certain work items. We find that this was a valid concern on the government's part. ADT's program manager essentially argued that the schedule of values did not take into account the escalation in costs that had occurred, particularly in its subcontracts. Once that was taken into account, presumably through the government granting the then-pending pre-construction delay claim, there would be sufficient money in the schedule of values for the stored materials and the work to be done with them. (Finding 76) Appellant's response to the government's concern was unsatisfactory. The government's actions were consistent with the contract and not an abuse of discretion or breach. *The Davis Group*, 95-2 BCA ¶ 27,702 at 138,092-93.

With regard to all of its payment arguments, ADT cites *H.E. & C.F. Blinne Contracting Co.*, ENG BCA No. 4174, 83-1 BCA ¶ 16,388; *Building Maintenance Specialist, Inc.*, ENG BCA No. 4115, 83-2 BCA ¶ 16,629; *Whited Co.*, VABCA No. 1604, 84-3 BCA ¶ 17,654; *Penker Construction Co. v. United States*, 96 Ct. Cl. 1 (1942), for the general proposition that a material breach by the government, not paying when or as required, excuses a contractor's obligation to perform. We agree with the general proposition, but the decisions are not particularly helpful in the instant situation. The rulings in *H.E. & C.F. Blinne, Building Maintenance*, and *Whited* appear to be based on payment clauses that required payment on the submission of vouchers or on a strict monthly basis. We have found above, based on decisions interpreting the clause in

appellant's contract, that the government had discretion and properly exercised it in deciding how much work had been done and what work and materials would be paid for. The decisions cited by appellant do not require a different result.

Liquidated Damages Withheld

ADT argues that the government's withholding of liquidated damages from payments breached the contract (app. reply br. at 16-18; app. PFF ¶¶ 74-88).

The government began assessing liquidated damages following expiration of the original contract completion date of 1 October 2004. As to Pay Estimate No. 4, for the period 1 October 2004 through 30 December 2004, the government withheld $59,310 in liquidated damages. As to Pay Estimate No. 5, for the period 31 December 2004 through 30 January 2005, the government withheld an additional $15,157 in liquidated damages. As to Pay Estimate No. 7, for the period 16 May 2005 through 16 July 2005, the government withheld an additional $32,291 in liquidated damages. The total withheld through ADT's termination was $106,758. It appears that the government did not assess liquidated damages unless there was a sufficient amount in a payment estimate to cover the assessment. (Finding 80)

Appellant requested release of the withheld liquidated damages. In doing so, it sometimes indicated that its cash flow problems were affecting performance of the contract. In response to a December 2005 request by ADT that the government release withheld funds, the CO declined to do so. At that time, the CO believed that the contract allowed the government to retain those funds and she was not aware of the Peter Gauer memorandum in which he said he believed that appellant was entitled to a time extension of 167 days. (Findings 82-83)

The Liquidated Damages clause provided that if appellant did not timely complete the project, appellant would pay $659.00 a day until the work was completed or accepted (finding 7). ADT does not challenge the validity of the clause or the daily damages amount. We understand it to argue that the government breached the contract by assessing liquidated damages from the original completion date of 1 October 2004 when: (1) the government extended the completion date to 4 January 2006; (2) this Board later determined that appellant was entitled to 218 days of time extensions in *ADT*, 09-2 BCA ¶ 34,200; and (3) the CO was not informed of the Peter Gauer memorandum. (App. reply br. at 16-18)

The Liquidated Damages clause clearly gave the government the right to assess liquidated damages if appellant did not meet the contract completion date. The original contract completion date was 1 October 2004 (finding 12). There is no dispute that ADT did not meet that deadline and the government began assessing liquidated damages as of that date. Appellant had submitted a request for a 125-day time extension on 29 September 2004.

It provided additional information about this REA in November 2004 and April 2005. (Finding 32) ADT submitted, on 12 July 2005, a claim seeking a time extension of 278 days and $826,725.16 (finding 37). The claim was denied in December 2005, and in July 2009 Board awarded appellant a time extension of 218 days (findings 44, 60). Essentially, appellant argues that the government breached the contract by assessing liquidated damages while its REA and claim were pending because we eventually awarded a time extension. We see nothing in the contract that requires that sort of forbearance on the part of the government. The liquidated damages clause does not and neither does the Disputes clause. The latter clause, in fact, specifically obliges the contractor to continue working during resolution of a dispute suggesting that the parties need not presuppose the outcome of a dispute.[17]

Appellant's attempted reliance on the CO's establishment of a new completion date in August 2005 is also misplaced. In the first place the new date was "for the purpose of measuring the progress and performance of ADT" and the CO explicitly reserved the government's "right to assess liquidated damages from the original completion date of October 1, 2004." (Finding 39) We see no waiver of the original completion date. *Arens Corp.*, ASBCA No. 50289, 02-1 BCA ¶ 31,671 at 156,507-08 (waiver of a completion date is rarely found in construction contracts especially where the contractor was informed that the original completion date was not waived and the government assessed liquidated damages); *Protech-Atlanta*, ASBCA No. 51252, 01-2 BCA ¶ 31,624 at 156,237-38. Indeed, not assessing liquidated damages may have resulted in a determination that the completion date had been waived. *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,473, *aff'd,* 795 F.2d 1019 (Fed. Cir. 1986) (Table).[18]

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[17] The fact that the CO was not aware that Peter Gauer had opined that ADT was entitled to 167 days does not change this result. She would not have been required to accept his opinion. More importantly, as we have already discussed, his conclusions, as judged by this Board's decision, were largely erroneous.

[18] ADT also contests the government's depiction of the total amount withheld as *de minimis* (app. reply br. at 16-17). Appellant's arguments are based in large part on the impact of the government's actions on its ability to continue performing. The government assessed liquidated damages of $106,758 for a time period that covered almost a year (finding 80). To our knowledge, the government did not seek payment from appellant for liquidated damages that were not withheld from payments to appellant. To the extent that the government meant that such withholdings would not seem to have been enough to prevent performance by a viable business, we agree.

Government Review of the Pre-Construction Delay Claim

Appellant's final point in this section is that the manner in which the government reviewed and handled the pre-construction delay claim was a breach of the contract. ADT complains: (1) that the government took too much time to review its REA and claim; (2) that the CO was not made aware that fast track provisions had been included in the contract by mistake and that appellant would not be allowed to fast track; and (3) that the Peter Gauer memorandum was not provided to the CO. Appellant also argues that because the government failed to disclose the fast track information and Gauer memorandum to it, the government should be estopped from relying on the duty to proceed in the Disputes clause. (App. br. at 18-19; app. reply br. at 11-15).

Just before expiration of the original contract completion date, appellant submitted an REA for a 125-day time extension for design delays. Appellant provided additional information about the REA in November 2004 and in April 2005. (Finding 32) ADT converted the REA to a claim on 12 July 2005. In this pre-construction delay claim, appellant sought a 278 day time extension and $826,725.16 (finding 37). The CO largely denied the pre-construction delay claim on 29 December 2005. She did not recall receiving input from Mr. Tillman about the ADT claim including ADT's position that it was not allowed to fast track. No one told her that the fast track provision had been included in the contract by mistake. (Finding 44) The CO does not remember receiving the Peter Gauer memorandum, analyzing it, or incorporating it into her findings on the pre-construction delay claim. She stated that if she had been made aware of the memorandum she would have taken it into account. She would not, however, have gone to Mr. Gauer for input because he was not part of the project. (Finding 41)

Appellant cites no legal support for the proposition that the problems it sees with the government's review of the pre-construction claim constituted a material breach of the contract. We do not believe the proposition is supportable. We know of no deadline for government review of an REA. Appellant could have converted the REA into a claim at any time, but chose to wait almost ten months to do so. ADT may have had valid tactical or business decisions for waiting to convert the REA, but the decision to wait was appellant's. We cannot say that the timing of the government's review of ADT's REA and claim was beyond appellant's control and so it cannot provide an excuse for appellant's failure to perform.

Appellant also complains that the CO was not told that fast track provisions were in the contract by mistake and that fast track would not be available. As noted above, we see the termination as justifiable both for failure to complete on time and, separately, for failure to provide adequate assurances in response to the government's show cause letter. Whatever the CO did or did not do in reviewing the pre-construction delay claim, does not change the fact that appellant's response was completely inadequate. The fact that the CO does not remember seeing the Peter Gauer memorandum suffers from the same

deficiency. In addition, we have previously shown that the Gauer memorandum would not have been particularly helpful to the CO.

Government-Caused Inability to Perform

The second excuse offered by ADT is that it was unable to perform because of its poor financial condition which was in turn caused by the government. Appellant says that as a result of the delays already found in the decision on the pre-construction delay claim, it suffered dramatic cost increases. Its financial condition was exacerbated by the government's failure to make proper payments, its delay in deciding the pre-construction delay claim, and its failure to evaluate that claim fairly. (App. br. at 19-21; app. reply at 11-15, 18-20; app. PFF ¶¶ 105, 113)

Cost Escalation

Appellant says that it was financially unable to perform mainly because the delays that were found to have occurred in *ADT V*, forced it to subcontract and perform at times when the cost to do so had greatly increased (app. br. at 19-21; app. PFF ¶¶ 97-104).

The government says that this argument lacks merit because there was no economic price escalation clause in the contract (gov't reply at 18-19; gov't ltr. br. dated 14 November 2011). Appellant does not simply rely on an increase in costs. Its position is that government-caused delays forced it to subcontract at a time when the costs of doing so were higher than when it otherwise would have subcontracted. We do not believe that the absence of a price adjustment clause here precludes the assertion of such an argument. *Ricmar Engineering, Inc.*, ASBCA No. 44260, 98-1 BCA ¶ 29,463 at 146,245 (where financial inability to perform was caused by the government, a default will be set aside). Of course, appellant would still have to meet the requirements of the default clause and show that the default was beyond its control and without its fault or negligence. FAR 52.249-10(b)(1); *Empire Energy*, 03-1 BCA ¶ 32,079. We have gone so far as to say that the government's actions had to be the "sole or even controlling cause" of a contractor's financial inability to perform. *Tri-Delta Corp.*, ASBCA No. 17456, 75-1 BCA ¶ 11,160 at 53,167.

ADT provided the government with a price and technical proposal in May 2003. In the proposal, appellant set out its construction team which included "'Named' Subcontractors" such as Southland Industries, Las Vegas Paving, AAA Hoist & Crane, among others. ADT described its approach, in part, as follows. "The expertise of the *design team* is extensive and will be combined with the construction experts of ADT and its subcontractors (many of whom are 'named subcontractors'[)], who have executed agreements for this Project with ADT." (Finding 3)

ADT's argument is based on the notion that it expected to be able to buy out its subcontracts by April 2004. However, it was not able to finalize its subcontracts until it

received an approved design in the latter part of 2004. It appears that the subcontracts at issue were finalized in mid to late November and December 2004. Mr. Franco testified that because there had been "numerous changes" during the design process, it was not until appellant had approval of the design package that it could buy out the subcontractors by "doing final negotiations" and "getting their prices locked in." Appellant's delay analysis expert, Joseph Dean, testified as follows. "ADT is basically signed up for a hard money contract and the only way you get good pricing in a hard money environment is to have really two basic things at minimum. One is a known certain scope of work and two, a reasonably foreseeable and certain construction start date." The government's expert on financial analysis and damages, Robert Peterson, responded to a question about whether a contractor that "follows the trade media or is involved in bidding new projects [would] be aware that escalation costs were occurring during the first quarter of 2004" as follows. "I would expect so. Prior to actual escalation commencing, there would be some expectation of announcements with regard to some of the predecessor activities that would take place, someone building a new casino locally or whatever the case may be, there would be some signs generally of an uptick in impending activity." (Findings 51-52)

This aspect of the appeal raises two fundamental questions. The first is whether ADT really had to wait until November and December 2004 to buy out its subcontractors. If it did, the second question is whether that delay increased the cost of the subcontracts, and, if so, to what extent. Appellant has not convinced us that the timing of its subcontracting was solely the result of government actions or that its quantification of the claimed increase in costs is defensible.

Based on the record before us, we believe that costs were increasing in southern Nevada in 2004. We also accept the argument that subcontracting before design approval would have left appellant with some uncertainties, but it also included inherent risks it should have contemplated at time of bid. What we are doubtful about is the extent to which it can be said either that appellant was unaware of the apparently rapidly rising costs, *Bayou Culvert Mfg., Inc.*, AGBCA No. 400, 76-1 BCA ¶ 11,796 at 56,306 ("A 'contractor is charged with knowledge of the state of his industry at any given time.'"), or that there was no alternative to entering into subcontracts when it did. ADT's May 2003 price and technical proposal listed "named" construction subcontractors and noted that appellant had entered into agreements with them (finding 3). While we understand that the price of those subcontracts may not have been finalized, appellant knew, to some extent, early on who it was going to contract with and what those subcontractors were going to do. We see nothing in the record that demonstrates ADT could not have subcontracted earlier than it did or even moved toward more fixed arrangements with its proposed subcontractors. *Cf. Yankee Telecommunication Laboratories, Inc.*, ASBCA No. 25240 *et al.*, 85-1 BCA ¶ 17,786 at 88,873 ("The 'notion that a bidder has no responsibility to obtain firm commitments before bidding is not tenable.'").

It is also troubling that in attempting to quantify the claimed cost increases, appellant seems to have used the same method for all of the subcontracts (findings 57-58). The types of work to be done, not to mention the materials to be used, varied under the contract, and we would be more comfortable with a calculation that took that into account. Finally, the amount originally sought in the pre-construction delay claim for the increase in the cost of subcontracts over 278 days was $545,939 while the comparable figure in the November 2010 statement of costs, which used 158 days of delay, was $189,624 (finding 58). At some point, the decreasing magnitude of the asserted escalation in costs brings into question whether that increase was the cause of appellant's claimed financial problems. ADT has not shown that the increase was beyond its control, FAR 52.249-10(b)(1), or that it was the increase that led to appellant's default. *Tri-Delta Corp.*, 75-1 BCA ¶ 11,160 at 53,167.[19]

Appellant's Financial Condition

ADT asserts that it was a small, disadvantaged business entity that could not absorb the cost escalation that it encountered on the project and would have suffered immediate and devastating impacts if it had been required to finish the job (app. reply at 18-19; app. PFF ¶¶ 105-113; app. br. at 19-21).

The delay analysis expert for ADT, Joseph Dean, stated that "beginning in June 2005, ADT faced an ever-widening revenue gap due to uncompensated escalated costs and due to liquidated damages withheld by the COE." By 14 June 2005, the revenue gap was $171,910 and by 2 January 2006, the revenue gap was $938,208. Appellant's financial analysis expert, Mr. Johns, reported that as of 2 February 2006, ADT had spent $228,952, exclusive of payments to Las Vegas Paving for import fill, more than it had received from the government under the contract. On its 31 December 2005 financial statements, appellant showed a loss of $1,750,00 on the F-22 Project and a negative net worth of $1,294,162. The government's financial analyst, Mr. Peterson, testified that as of 31 December 2005, appellant's cash on hand had increased to $563,800 and it had $740,260 in borrowing capacity under its lines of credit. Appellant

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[19] Appellant has not continued to pursue a commercial impracticability theory. Even assuming the validity of a claimed increase in total costs of "about $1 million" (finding 32), we would likely not find that ADT's continued performance would have been "commercially senseless." *Raytheon Co. v. White*, 305 F.3d 1354, 1367-68 (Fed. Cir. 2002) (57 percent cost overrun does not establish commercial impracticability); *Gulf and Western Industries, Inc.*, ASBCA No. 21090, 87-2 BCA ¶ 19,881 at 100,574-75 (claimed 70 percent overrun did not show commercial impracticability); *C&M Machine Products, Inc.*, ASBCA No. 43348, 93-2 BCA ¶ 25,748 (apparent 105 percent overrun did not result in commercial impracticability).

challenged the government's use of its financial statements and contested whether the lines of credit were actually available for the F-22 Project. (Finding 60)

The parties spend a fair amount of time and effort contesting ADT's financial condition in the months leading to the termination. A poor financial condition resulting in inability to perform would make a difference only if it had been caused by the government. *See, e.g., Ricmar Engineering,* 98-1 BCA ¶ 29,463 at 146,245. Because we have already found that the reductions in payments made by the government, its withholding of liquidated damages, and its review of the pre-construction delay claim did not violate the contract, and that the apparent increase in subcontract costs was not caused by the government, there is no reason to address what the state of appellant's finances were in 2005 and 2006.

Construction Schedule

Appellant contends that the fact that it was not allowed to fast track impacted its construction schedule and the contract completion date should be extended to 30 October 2005 (app. PFF ¶¶ 97-104).

Based upon the report of its delay expert, Joseph Dean, appellant says that it would have started construction on 4 April 2004 and had 343 days to complete construction. It was not able to start construction until 22 November 2004 because it was not allowed to fast track. The decision in ASBCA No. 55307 extended the contract completion date 218 days to 7 May 2005 which left only 167 days in which to complete construction (from 22 November 2004 to 7 May 2005). Because the Board found ADT entitled to fast track, 343 days should be added to the actual construction start date of 22 November 2004 giving appellant until 30 October 2005 to complete work. Mr. Dean also updated and analyzed ADT's construction schedule reaching the conclusion that as of mid-June 2005, appellant's projected completion date was 7 November 2005 or only eight days after the properly extended contract completion date of 30 October 2005. (Finding 61)

Mr. Andres, the government's scheduling and delay expert, analyzed appellant's schedule performance in six periods of time using an as-planned versus as-built methodology. He summarized his conclusions as follows: appellant did not meet its own construction schedules or milestones; although it originally planned on a construction duration of 184 days, it was only 47 percent complete after 437 days (22 November 2004 to 2 February 2006); it did not make any substantial progress between June 2005 and February 2006; the target completion date of 4 January 2006, set by the CO, set a reasonable and realistic goal; appellant had demonstrated that it was entitled to, at most, 35 days of excusable delay during construction. (Finding 62) We find Mr. Andres more credible on this issue.

Appellant's Motion for Sanctions

Appellant has requested the imposition of sanctions against the government. The request is based on appellant's contention that the government destroyed documents relevant to the appeal. ADT asks the Board to apply inferences in its favor and to award it attorney fees and costs. As discussed below, we lack the authority to award monetary sanctions and we decline to draw adverse inferences against the government.

CO Frazier terminated the contract for default on 2 February 2006. In her July 2010 deposition, CO Frazier stated that, in addition to herself, the Corps technical team included, Mr. Riddick and Mr. Musgrave, and the Corps project manager, Mr. Tillman. She did not ask anyone from the AF, including Mr. Long, to review the termination memorandum. She did not get any direct information from Mr. Long on the termination. At the hearing, she testified that if the AF ACC had input on the termination recommendation she "would take it into account." However, it "would not [have been] the driving factor to have [her] decide one way or another." (Finding 46)

ADT appealed the termination later in February 2006. The complaint was filed on 31 March 2006. The complaint included the following allegations:

> 21. Upon information and belief, well before the February 2, 2006 Termination Letter, the Government determined to terminate ADT's Contract for default. Despite this determination, the Government urged ADT to maintain a full staff and to continue to work on the Project. Throughout this timeframe, the Government knew that ADT was suffering a severe cash flow crisis that hindered it from progressing the work.
>
> 22. Upon information and belief, at the time the Government sent the Termination Letter, the Government believed and understood that by terminating ADT's right to proceed for default: that the Government could force ADT's surety, Great American Insurance Company ("GAIC"), to complete the Project; that the Government would not have to engage in a reprogramming effort to obtain additional funds necessary to complete the Project in light of the cost escalation; that GAIC and ADT would be forced to pay for the additional costs of reprocurement and cost escalation, at least in the immediate time frame; that ADT would be forced to pursue its rights to challenge the default termination, and seek other relief, from a Court or Board; and that if ADT was successful in its efforts before a Court or Board, the

additional costs would be taken out of the judgment fund, and a reprogramming effort would not be necessary.

(Finding 47)

Dennis Long was the F-22 project manager for the ACC. He held that position until well after appellant was terminated for default. Mr. Long was involved in the development and drafting of the RFP for the F-22 project including use of "fast track." Appellant says that its "attempts to obtain Air Force documents date back to 2006." In ASBCA No. 55307, ADT's attorney, Mr. Ralls, noticed that the Rule 4 file did not appear to contain AF documents, and made "repeated inquiries" to Gilbert Chong who was the government's attorney at that time. In December 2006, Mr. Chong provided appellant with "Dennis Long's file" for the project. Mr. Long had provided this file to Mr. Chong. Mr. Long was deposed in ASBCA No. 55307 in December 2006. He indicated that he had put aside his paper records so that they could be picked up, but he did not print out email that was on his computer and on a government network and make it available. Following the deposition, Mr. Chong produced additional material from an ACC division that Mr. Long did not work for. The materials provided extended from 1997 to 2007. There were only two documents dated after 2004. Mr. Long testified at the March 2007 hearing in ASBCA No. 55307. (Finding 84)

In this appeal, ADT issued requests for production of documents to the government on 25 May 2010. Paragraphs 7, 16, and 36 of the requests sought the following:

> 7. Dennis Long's entire project files and Documents for the F-22 MMF Project and Contract No. DACA09-03-C-0009 for the period 22 November 2004 to the present.
>
> ....
>
> 16. The United States Air Force Air Combat Command's entire project files for the F-22 MMF Project and Contract No. DACA09-03-C-0009 for the period 22 November 2004 to the present.
>
> ....
>
> 36. For the period 22 November 2004 to the present, any and all Documents, including email, reflecting communications between representatives of the United States Air Force (including, without limitation, the Air Combat Command) and the United States Army Corps of Engineers,

> or anyone acting on its behalf, having to do with the F-22 MMF Project....

(Finding 85)

As to request for production No. 7, the government objected that it was vague and that Mr. Long's files were not in the custody of the Corps. As to request No. 16, the government objected that AF files were not in the custody of the Corps. As to request No. 36, the government objected that it would be an undue burden to provide documents not in the custody of the Corps that may be in the custody of the AF. (Finding 86) Appellant filed a motion to compel production of, among other things, the documents covered by request Nos. 7, 16, and 36. The parties briefed the motion. By telephone conference of 26 October 2010, memorialized on 28 October 2010, the Board ruled that the government had to produce AF documents and granted requests Nos. 7, 16, and 36. The Board concluded as to those requests, "[t]to the extent obvious documents are missing, counsel may explain that omission through a declaration from Mr. Long or from counsel." (Finding 87)

On 9 November 2010, the government's present counsel sent appellant's counsel an email stating that the AF did not have any additional responsive documents and that Mr. Long did not "save his e-mails or keep any documents that fall within the time period you requested." A few days later, the government provided declarations from Mr. Chong and Mr. Long. Mr. Chong stated that he had spoken to Mr. Long who told him that he had previously provided Mr. Chong with all responsive documents and that Mr. Chong had previously produced all AF documents he had in his possession. Mr. Long stated that during the design phase appeal he provided Mr. Chong will all of his files and "ACC command files" for the project. He noted that, in response to inquiries from Mr. Chong in October 2010, he had replied that he had changed jobs since previously providing AF documents and did not retain documents from 2003 to the present. He did have documents from 2000 to 2002 and again gave them to the government. He went on to say that he had asked the AF Command "now in charge of maintaining such documents for the F22 project documents." He was told that "as part of a document retention policy, [the] documents were not maintained by that Command." (Finding 88)

ADT then moved for authorization to take Mr. Long's deposition. The Board ruled that the deposition could be taken. Summarizing Mr. Long's deposition in the ASBCA No. 55307 appeal, his declaration, and his December 2010 deposition in this appeal, appellant states that Mr. Long's production in 2006 was limited to pre-2003 documents, that no additional documents were ever produced, and that any post 2003 documents have been destroyed. At his deposition, Mr. Long provided a document from the AF Records Information Management System that apparently indicated an AF military construction retention policy allowing documents to be destroyed "five years after program year involved or when no longer needed." He stated that, to his

knowledge, no documents had been discarded as of his earlier deposition, on 14 December 2006, or even as of the time of the hearing on the pre-construction delay claim, March 2007. (Finding 89)

Appellant filed the Spoliation Motion on 3 December 2010, the Friday before the Monday 6 December 2010 start of the hearing in the instant appeal, ASBCA No. 55358. It asserted that the government intentionally destroyed relevant documents at a time when it was aware of pending ASBCA appeals. The Board stated that ADT's Spoliation Motion would be addressed in the decision on the appeal. (Finding 90)

Appellant's motion seeks an award of attorney fees and costs. It also requests that the Board draw the following adverse evidential inferences in deciding the appeal:

> (1) The Air Force documents destroyed would have been favorable to ADT's position;
>
> (2) That Air Force personnel had information in their possession that was favorable to ADT's position concerning entitlement to additional time and compensation;
>
> (3) That Air Force personnel were aware that they had made mistakes in connection with the preparation of the RFP and in the administration of the contract that contributed to the difficulties ADT was experiencing on the project;
>
> (4) That Air Force personnel chose not to communicate this information to the Contracting Officer in order to make it more likely that ADT would be terminated for default;
>
> (5) That Air Force personnel knew that if ADT was terminated for default there would be no need to request additional funds from Congress or otherwise;
>
> (6) That the allegations in ADT's complaint herein, paragraph 22, are deemed established as follows:
>
> > [A]t the time the Government sent the Termination Letter, the Government believed and understood that by terminating ADT's right to proceed for default: that the Government could force ADT's surety, Great American Insurance Company ("GAIC") to complete the Project; that the Government would not have to engage in a reprogramming effort to obtain additional funds

necessary to complete the Project in light of the cost escalation; that GAIC and ADT would be forced to pay for the additional costs of reprocurement and cost escalation.

(7) That the ACC had additional evidence relevant to the termination of ADT, and favorable to ADT's position, that the Contracting Officer did not have and therefore did not consider when she decided to terminate ADT.

(Spoliation Mot. at 2-3, 22)

ADT's request for an award of attorney fees and costs is denied. The Board does not have authority to assess monetary sanctions against a party. *Security Insurance Co. of Hartford and National American Insurance Co.*, ASBCA No. 51813, 01-2 BCA ¶ 31,588; *E-Systems, Inc.*, ASBCA No. 46111, 97-1 BCA ¶ 28,975; *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756.

We also deny the request that we draw adverse inferences against the government. To begin with and simply as a practical matter, the requested adverse inferences do not address the primary basis for the termination and would not change the outcome of this appeal. We have found that the CO justifiably terminated the contract based upon, among other things, appellant's failure to provide adequate assurances that it could or would complete the contract in response to a show cause letter. That response was solely within appellant's control. The AF had nothing to do with it. Drawing the inferences requested would not change ADT's response to the show cause letter or the legal effect of that response. The termination for failure to supply adequate assurances would still stand.

Having said that, it is also our view that appellant's request is problematical under the law of spoliation. Spoliation refers to the "destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1344 (Fed. Cir. 2011); *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011); *see also Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007) (appeal from the Board of Veterans' Appeals).[20]

[20] *Hynix* and *Micron* were patent cases decided by the Federal Circuit under the law of the regional federal courts of appeal where they originated. For *Hynix*, originating in California, that was the United States Court of Appeals for the Ninth Circuit, and for *Micron*, originating in Delaware, that was the United States Court of Appeals for the Third Circuit.

The party seeking sanctions for spoliation must prove:

> (1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 520-21 (D. Md. 2010); *Jandreau*, 492 F.3d at 1375.[21]

As to the first element, there appears to be no dispute that the AF destroyed documents that appellant now seeks. The government asserts, through Mr. Long, that the documents were discarded pursuant to a routine AF record retention policy. (Findings 88, 89) Although we previously ruled that the Corps had to produce AF documents (finding 87), the question now before us is whether the AF had an obligation to preserve such documents at an earlier point in time. This is an important question that we would have difficulty resolving on the sparse present record.

There has been a great deal of litigation about the second element, in particular whether a showing of bad faith, or something less than that, is required before a tribunal imposes sanctions. *See Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp. 2d 598, 614-615 (S.D. Texas 2010). This appears to be an open question in the Federal Circuit. *Jandreau*, 492 F.3d at 1375-76; *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 264-69 (2007) (bad faith need not be shown to impose spoliation sanctions); *Consolidated Edison Co. of New York v. United States*, 90 Fed. Cl. 228, 254-64 (2009) (not finding the intentional destruction of emails, the court declined to follow *United Medical Supply* and refused to impose a negative inference). Again, the lack of an adequate record regarding exactly what happened to the documents at issue makes it difficult to assess whether the second element was met.

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[21] Courts have identified both their inherent power to control the judicial process and litigation and statutes or rules as the sources of their authority to impose sanctions for spoliation. *Victor Stanley*, 269 F.R.D. at 517-18. We have said much the same thing. "[T]his Board has the inherent power to control the discovery process in appeals before it. We have implemented this authority, in part, with Rules 31 and 35." *Turbomach*, 87-2 BCA ¶ 19,756 at 99,953.

The third element, which speaks of relevance, is often cast in terms of prejudice. That is, it must be shown that the requesting party was prejudiced by the loss of evidence. *See, e.g., In re Delta/AirTran Baggage Fee Anti-Trust Litigation*, 770 F.Supp. 2d 1299, 1310 (N.D. Ga. 2011) (movant must show "critical" or "crucial" evidence destroyed); *Pandora Jewelry, LLC v. Chamilia, LLC, et al.*, 2008 WL 4533902, at *9 (D. Md. 2008 (plaintiff failed to provide "concrete proof" that lost materials would have produced "favorable" evidence). This is especially so where serious sanctions, such as adverse inferences, are requested. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D. N.Y. 2003) (in order to receive an adverse inference the movant had to demonstrate not only that relevant evidence was destroyed but also that the destroyed evidence would have been favorable to the movant). In this case, we have no idea what was in the materials that were destroyed. We see no reasoned or common sense basis, given the record before us, on which to assume they would have been relevant to or supported appellant's defenses to the termination.

As suggested by our review above, the lack of a factual record on the spoliation issue is a problem. That problem highlights our main concern with appellant's motion--timeliness. ADT took Mr. Long's deposition in the pre-construction delay appeal, ASBCA No. 55307, in December 2006. He testified that he had produced his paper files and that he had not produced emails from his computer and the government network. (Finding 84) Appellant knew at that point of the existence of the emails now at issue and of the likely existence of ACC files other than Mr. Long's. Mr. Long has testified that to his knowledge those documents had not been discarded as of December 2006 or even March 2007 (finding 89). Although appellant had, in March 2006, filed its complaint in this appeal in which it set out allegations that mirror or are very similar to the adverse inferences it now requests be drawn against the government (finding 47), it did not, that we can see, request the documents at issue until over three years later (finding 85). And, it was that request that led to the instant motion for sanctions.

Although we are not aware of a specific deadline for appellant's motion in this appeal, its timing requires that it be denied. "There is a particular need for these motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are [sic] fact intensive." *Goodman v. Praxair Services, Inc.*, 632 F.Supp. 2d 494, 506-09 (D. Md. 2009); *Permasteelisa CS Corp. v. Airolite Co., LLC*, 2008 WL 2491747, at *2-3 (S.D. Ohio 2008) (request for adverse inference based on destruction of evidence denied when made one year after movant became aware of destruction, and a week before trial); *accord Aero Products International, Inc. v. Intex Recreation Corp.*, 2004 WL 417193, at *4 (N.D. Ill. 2004). In *Goodman*, the court denied a motion for sanctions citing as "particularly egregious" the fact that the movant was aware of the grounds for the motion months before it was filed. In this appeal, if appellant had followed up on what it learned in the December 2006 deposition, it may have stopped destruction of the documents at issue. We cannot sanction the government under those circumstances.

Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 23-24 (1st Cir. 1981) (no adverse inference where documents had been destroyed but movant had waited three and a half years after becoming aware of documents to request their production).

CONCLUSION

For the reasons stated above, the appeal is denied. In addition, the motion for sanctions is denied.

Dated: 30 April 2013

RICHARD SHACKLEFORD
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. 55358, Appeal of ADT Construction Group, Inc. by Timothy S. Cory, Chapter 7 Trustee, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals