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Robert Judson Howdyshell

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ARMED SERVICES BOARD OF CONTRACT APPEALS: ANALYSIS OF SUSTAINED DECISIONS ON NAVY SUPPLY CONTRACT DISPUTES

by

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I. INTRODUCTION

The Navy Acquisition process is guided by the Defense Acquisition Regulation (DAR). Similarly, the DAR or Armed Services Procurement Regulation (ASPR), as it was called prior to 8 March 1978 is the military's acquisition and contracting bible. It sets forth the underlying principles, policies and procedures on a vast array of subjects, required by acquisition and contracting personnel [4:85].

The military departments are authorized to implement the policies and guidelines of DAR internally but the intent of the Department of Defense (DOD) is that the implementing procedures be kept to a minimum and limited to those areas unique to the particular department. Thus, in the case of the Navy, the Navy Procurement Directives (NPD) provide more detailed procedures in their own spheres and include guidelines in areas not covered by the DAR. There is a continuing effort to eliminate departmental regulations by incorporating common areas into the DOD regulations [4:87]. Defense procurement has been criticized for the volume of regulations that surround it. Yet, recognizing the myriad of statutes that guide it, the many organizational entities concerned, and the variety of products and services purchased, regulatory controls will necessarily be extensive and varied. Duplications at lower levels of authority, however, are not condoned, and the DOD is responsible for their elimination [4:88].

The majority of Navy contracts flow through the contracting process without any significant problems. As in all systems or processes, there must be a method for taking care of the exceptions. One such exception, when a disagreement develops between contracting parties, is called a dispute. The DAR devotes an entire section to the disputes process, which is made applicable by the requirement to include the Disputes clause in all contracts. The resolution of disputes that may arise operates at three levels: the Procuring Contracting Officer (PCO) level, an administrative level above the PCO, and the judicial level [10:1].

Although disputes may be processed through all three levels, most disputes are settled through administrative procedures at the PCO level. In fact, only one appeal is made for every 10,000 PCO decisions [12:M-1-6]. The other two levels of dispute resolution contain issues where significant disagreement exists. The decision rendered by these two other levels can reiterate established policy, provide new policy or policy with expanded scope, or change policy where established policy has existed.

Many decisions from these two higher levels site previous decisions by either higher level as the basis for their decision in the dispute before them. Consequently, the body of knowledge required in the acquisition process is the summation of DAR and the interpretation or policy set forth in the decisions of these two levels of dispute resolution.

The Armed Services Board of Contract Appeals (ASBCA) is one of these higher levels of dispute resolution. The Board's charter states:

> 1. There is created the Armed Services Board of Contract Appeals which is hereby designated as the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy and the Secretary of the Air Force, in hearing, considering and determining as fully and finally as might each of the Secretaries appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions [16:A-1].

The importance and application of the decisions rendered by the ASBCA are well summarized in the following extract:

> Decisions of contract appeals boards resolving disputes that arise between federal government procuring agencies and private contractors form an integral part of government contract law. This body of law is unique, standing apart from many of the rules developed under commercial contract disputes--calling for the interpretation of government contract clauses--accordingly provide an essential guide to the day-to-day understanding of the special rules applying to government contract law...
>
> The boards decide a multitude of disputed points arising between contractors and government contracting agencies. Their decisions are an inseparable part of the law guiding government and contractor personnel in the day-to-day administration of government contracts. Also, how the boards interpret a particular contract clause is of vital importance in the initial phases of contracting--bidding or negotiating.
>
> Decisions of the boards, to say the least, are important precedents for the settlement or avoidance of contract disputes.[1]

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[1] Board of Contract Appeals Decisions, Loose-leaf binder, Introduction, page 5.

The resolution of disputes before the ASBCA is one of four types; denied, dismissed, settled or sustained. This study will focus on disputes arising out of Navy contracts, where a Contractor's appeal was sustained by the ASBCA. In Appendix A definition of selected terms used in the study are provided.

A. STATEMENT OF THE PROBLEM

Through the literature search and discussions with Navy Acquisition and Contracting Officers, it appears that an on-going systematic effort to incorporate policy shaped by ASBCA decisions into the PCO's bank of knowledge in some useable format does not exist. Certain publications highlight selected decisions, such as the Federal Contracts Report [9], but this periodical and others that do similar case reports do not give an extensive review of the 'big picture' of Federal contracting. This study addresses that void.

Case material for this study is available in the publication Board of Contract Appeals Decisions published by the Commerce Clearing House [6]. The contents of this publication are recognized as follows:

> ...endorsed in use by government and military personnel, Contract Appeals Decisions reports all new opinions handed down by the Armed Services Board of Contract Appeals. No other publication, government or private, reproduces these cases in full text.[1]

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[1]Ibid, page 5.

A problem still exists even if all PCOs were provided the ASBCA decisions, because of the magnitude of the analysis task. For example, in Fiscal Year 1978, the ASBCA docketed 875 appeals. The Commerce Clearing House (CCH) publication does not provide statistics nor managerial aids, but rather presents the material in a case-by-case format. Setting aside the problem of volume, in order for decisions to be useful as precedent, an analysis of each case would be necessary to determine where contracting management attention should be focused. Compounding this problem, are the issues of (1) variation in interpretation of decisions and (2) information retrieval.

Considering the economics of the situation, the individual PCO normally does not have the staff, nor would it be desirable for him to have the large staff, to perform such an analysis. The Navy has a centralized acquisition and contracting organization in Washington, D.C., under which approximately two-thirds of its contracting dollars are obligated. The decentralized acquisition operations of the Army and Air Force do not lend themselves to similar control procedures [4:88]. Therefore, an analysis as proposed herein could prove compatible, more economical and beneficial for the Navy's centralized acquisition system where the same quantum advantages may not exist for the Army and Air Force under the proposed system.

There is a report issued annually by the ASBCA, but it loses all Service orientation except at the highest summary

levels. This report, submitted to the Secretary of Defense and Secretaries of the Military Departments, is more a measure of workload for the ASBCA than anything else. The report discloses the number of appeals received, cases heard, opinions rendered, current reserve of pending matters, and such other information as may be required [16:A-3]. From the report itself, no useful measure of the Services' track record in the appeals area can be derived. The Comptroller General has declared that reporting services have:

> ...enabled the Contractor to keep currently informed as to rules and regulations promulgated by the various Government department and agencies ...and served as an essential, if not as an indispensable, aid in the...performance of the contract work.[1]

This infers that contractors rely heavily on the interpretation of ASBCA decisions in performing contracts. Therefore, it behooves the Government to rely heavily upon these decisions and to facilitate the gleaning, distribution and use of the knowledge contained in these decisions.

B. OBJECTIVES AND RESEARCH QUESTIONS

The overall objective of this study is to improve the Navy's Acquisition Process, particularly, as it pertains to conditions which traditionally have led to disputes. The

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[1]Ibid, page 8.

approach to accomplish this objective is to (1) analyze selected ASBCA decisions to determine if case analyses can be beneficial to PCOs, and (2) evaluate how best to draw conclusions from ASBCA decisions and to communicate these conclusions to PCOs in a useable format. This approach will be pursued by posing the following questions:

1. Can ASBCA decisions be analyzed in such a fashion as to provide meaningful conclusions for the acquisition process?

2. What conclusions or lessons can be drawn from such an analysis?

C. STUDY LIMITATIONS AND ASSUMPTIONS

The ASBCA is an administrative organization in the disputes process, but, the general nature of the ASBCA appeal process is judicial. Membership of the Board consists of qualified attorneys who have been admitted to practice before the highest court of any State or the District of Columbia [16:A;1]. The researcher's limited legal background might tend to bias the analysis, whereas, this shortcoming could possibly have been overcome by a legal practitioner.

The disputes process is a vast field and the study contained herein evaluates one facet of this process: appeals to the ASBCA. This study does not examine decisions of PCOs, Federal District Courts, the Court of Claims, the Comptroller General or legislative actions which could settle a dispute. Additionally, only decisions related to

Supply Contracts were researched in-depth, in order to reduce case analysis to a manageable level. Significantly, therefore, construction and service contract dispute decisons are two other areas which could conceivably produce different results. Further, only Navy Contracts brought before the ASBCA were researched. Army, Air Force and Defense Logistics Agency cases as well as decisions of other Federal agency Boards of Contract Appeals, e.g., Department of Agriculture Board of Contract Appeals (AGBCA), Department of Commerce Appeals Board (DCAB), and Department of Housing and Urban Development Board of Contract Appeals (HUD BCA) are outside the scope of this study [12:M-1-6].

In performing case analysis, the DAR and the Government Contract Law (GCL) [11] were the primary resources for policy and interpretations. Although several other publications provide ASBCA decisions and interpretations, the average PCO does not maintain an extensive library of such publications. He generally relies on DAR, his lawyer, and a major publication, such as GCL for guidance. The GCL was chosen, therefore, because it is readily available and is well suited as a supplemental aid.

This study assums contract law is an integral discipline in a PCO's initial and continuing education. Such knowledge forms a legal understanding that the PCO can draw upon in many facets of the acquisition process.

The study assumes that the reader has a basic understanding of the acquisition process. Consequently, lengthy

explanations of issues related to the disputes process are not provided where it is considered general knowledge.

The study further assumes that sustained decisions contain the material potentially most beneficial for improving the acquisition process within the Navy. In addition to sustained decisions, the ASBCA renders dismissed, denied and settled decisions, but normally in these cases either the Navy's actions or interpretations are upheld or the file is not detailed enough to provide sufficient data to conduct a thorough analysis.

D. LITERATURE SEARCH

The literature search encompassed the Naval Postgraduate SChool's Thesis Library and the Defense Documentation Center (DDC). Also, the computerized data of the Federal Legal Information Through Electronics (FLITE) and Defense Logistics Studies Information Exchange (DLSIE) were inquiried. The Air Force Business Research Management Center, Wright-Patterson Air Force Base, Dayton, Ohio, provided the most successful inquiry for this research.

There appears to be limited research completed in the area of appealed disputes, especially within the Navy. The Air Force has completed the only closely associated research concerning appealed contract disputes. Drawing on the results of these Air Force theses allowed this study to be more conclusive in certain areas. The two Air Force theses that were referenced are "An Analysis of Appealed Air Force

Contract Disputes" by Paul E. Newman [14], and "Inquiry Into the Contribution of Contracting Parameters to Contract Disputes" by Jon B. Baxa and Paul Hicks [2].

E. ORGANIZATION

The Introduction in Chapter I presents the general area the study will embrace. The impetus for the study is defined in the Statement of the Problem. The problems this study is attempting to resolve are put forth in the Objectives. To help direct the research and give a focus to the analysis, two Research Questions were formulated as part of the Objective. A further refinement of the scope of the research was accomplished in the Study Limitations and Assumptions. The Literature Search presents the avenues utilized to gather related research material. The last part of Chapter I is the Organization which explains the presentation of the study.

Chapter II proceeds into some depth concerning the background and resolution of disputes, putting selected cases into perspective. Chapter III identifies the research and describes the methodology used to collect the data and select the cases for further analysis while Chapter IV analyzes nine sustained appeals on a case-by-case basis.

Chapter V answers the study's research questions and presents conclusions in the form of lessons learned. Additionally, the study seeks to make a contribution to acquisition research by developing a model incorporating the

Lessons Learned from this study with established policies and interpretations. Finally, Chapter VI summarizes the study and presents recommendations based on the research and analysis performed herein.

II. FRAMEWORK

What is a dispute? Webster's New Collegiate Dictionary defines dispute in several different ways, such as: to engage in argument, to debate, to argue irritably or with irritating persistence, to struggle against, to struggle over.[1] Therefore, when a contractor and contracting officer argue, or debate, or discuss the pro and con of a contract provision, a dispute may arise.

The government brings into the contract a two-fold concern; first that the public receives reasonable value for the tax dollar spent [10:81], and second, that for the value received, the contractor should be rewarded with fair and reasonable payment. It is because of this second concern that the government, as a sovereign, allows itself to be sued in the courts by individuals or business entities [11:16;1-1].

The contractor's concern upon entering into a contract with the government is to obtain a reasonable profit. However, certain variables such as market conditions, associated contracts, research sharing (where a contractor could get side benefits in the commercial market), or buy-ins might alter corporate strategy to sacrifice profit on one contract for longer range benefits.

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[1] Webster's New Collegiate Dictionary, p. 330.

Intimately associated with the contractor's concern for profitability is the risk factor of being able to perform under the contract. If a contractor has knowledge and control of all the factors needed for contract performance, such as the technology, the costs, the skilled labor, and the facilities, then the risk associated with the contract might be minimal. However, in developing new weapon systems, contractors are often asked to push beyond the technological state-of-the-art or to commence production before specifications are finalized [13]. As contractor risk of successful performance increases, the likelihood of the contractor realizing a profit decreases unless he has negotiated this contingency into the contract price.

The government policy has been to "assume risk rather than permit contingency pricing" (and its potential abuse) and to "stimulate contractor cost efficiency [15:201]." One method for reducing the risk that contractor's bear in contracting with the government is to vary the pricing arrangement of the contract. For example, in a Firm Fixed-Price (FFP) contract, a fixed sum of money is paid to the contractor upon successful completion of the contract. Should the contractor lose money on the contract, he bears 100 percent of the loss; should he make larger than expected profits on the contract, he receives 100 percent of the excess profits. The government does not enter into any sharing of the loss or the profit. The FFP type of contract

is commonly used in those procurements where the purchase is for standard services or production of off-the-shelf supplies. As the risk factors increase, the government can agree to share some of the risk. The risk sharing can range from the government absorbing an increasing percent of excess costs incurred in Fixed Price Incentive (FPI) contracts and Cost Plus Incentive (CPI) contracts to those where the government alone absorbs the cost in Cost Reimbursement (CR) contracts [4:120-144].

The government complicates the acquisition environment, however, by using the contract as an instrument of national policy to enforce those social, economic, and regulatory situations that have been enacted into law. This is evidenced by mandatory clauses that are included in the government contract that are directed at such topics as preferential treatment of small business, the promotion of equal opportunity, the promotion of clean air/water standards, and reduction of unemployment [16].

Contract disputes arise generally when the contractor perceives that the contracting officer has not dealt equitably with his claim. There is also some evidence that contract type, complexity of the contract, and contractor size and location are indicators of contracts which have a higher potential for a dispute [2:74].

Contract disputes between defense contractors and the Department of Defense (DoD) over questions of fact concerning performance may be resolved by the administrative procedures

specified in the Disputes clause of the contract [16:14]. A copy of the standard Disputes clause is provided in Appendix B.

The standard Disputes clause has two major purposes. First, it identifies a procedure to prevent disputes from disrupting performance by giving the government the right to require the contractor to continue performance during the disputes process. The second major purpose is to provide a means of settling disputes as informally, expeditiously, and inexpensively as possible.

As indicated earlier, the system for resolving contract disputes operates at three primary levels: The contracting officer level, an administrative level above the PCO, and a judicial level [11:16-1]. The first attempt at resolving a dispute takes place in negotiations between the contractor and the contracting officer. The contracting officer's role is crucial in the disputes-resolving process. The contracting officer's duties are to administer the contract so as to avoid disputes whenever possible; to attempt to negotiate a settlement after a dispute has arisen; and if negotiations are unsuccessful, to make the initial decision for the government on the dispute [7:11]. In essence, the standard Disputes clause directs the DoD contracting officer to make a unilateral decision when a settlement cannot be negotiated. This administrative resolution takes the form of a written decision by the contracting officer

to the contractor in response to the claim made by the contractor and must state that it is his final decision [11:16;2-8].

Claims submitted by contractors normally involve reimbursement, price adjustment, or some other monetary issue. The contractor has the right to appeal the final decision of the contracting officer to the secretarial level of the service involved within 30 days from the contractor's receipt of the written decision. The appeal is filed with the contracting officer but it is addressed to the Secretary of the Service. The Secretaries of the Armed Services have delegated their authority to hear and rule appealed disputes to the ASBCA [11:16;3-2]. The parties to the contract, by inclusion of the Disputes clause, have agreed that the decisions of the ASBCA shall be final and conclusive. However, the Disputes clause recognizes the authority of the courts to render a final decision on the dispute should it be found "by a court of competent jurisdiction" that the decision rendered was "fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence [16:7-14]."

A contractor cannot seek settlement of a dispute in the courts until all avenues of administrative remedy have been exhausted. The exception to this is if the dispute is a pure question of law, then it can be taken directly to the courts. The ASBCA, however, has the authority to decide on questions

of law mixed with questions of fact. Specifically stated in DAR:

> 5. When an appeal is taken pursuant to a Disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue [16:A-2].

The appeals process is an expensive procedure for the contractor as well as for the government. Thus an appealed contracting officer's decision does not represent a casual or arbitrary undertaking on the part of the contractor; it is indicative of significant disagreements as to the rights, entitlements, and obligations of the parties under the contract.

This study addresses those disputes that are not settled by agreement at the contracting officer level, but are appealed to the next higher administrative level, the ASBCA.

III. METHODOLOGY

A. POPULATION DESCRIPTION

The population for this study consisted of the 21 appealed disputes of Navy Supply Contracts where the ASBCA had rendered sustained decisions during the period 1 October 1977 through 30 September 1978. The Chairman of the ASBCA, Mr. Solibakke, provided the ASBCA Docketing Register for Fiscal Year 1978 from which the 21 cases identified above were selected. Table 1 summarizes these cases, by Service, in the four categories established earlier, i.e., dismissed, denied, settled and sustained.

TABLE 1

TOTAL ASBCA APPEALS FOR ALL SERVICES FISCAL YEAR 1978

	NAVY	(%)	ARMY	(%)	AIR FORCE	(%)	ALL SERVICES	(%)
DISMISSED	54	24	73	23	39	22	166	23.3
DENIED	46	21	87	28	25	14	158	22.2
SETTLED	83	37	107	34	85	48	275	38.6
SUSTAINED	39	18	45	14	29	16	113	15.9
TOTAL	222	100	312	100	178	100	712*	100.0

Source: Researcher's summarization from ASBCA Docket data.

*This was the total for the three Services, however the ASBCA additionally decided 161 cases for such agences as Defense Supply Agency (DSA), Civil Service Commission (CSC), Health Education and Welfare (HEW), and Defense Mapping Agence (DMA).

The selection of sustained appeals was made on the premise that dismissed and denied appeals represent situations where Navy decisions and contracting actions were upheld and hence found to be valid. Similarly settled decisions, although not subjected to the rigors of the full appeal process, represent a compromise. Further, the report file is not generally complete when a settlement is made [1]. Sustained decisions were identified as the most fertile area for analyzing Government contracting actions which, for one reason or another, were not able to stand up under severe srutiny.

Table 2 illustrates a breakdown of sustained decisions by procurement type. Once again figures are provided for all three Services for comparison purposes. Table 2 shows the population under consideration in this study (Supply Contracts) and how it relates to the other procurement types of all Services. Note from Tables 1 and 2 that the population under examination represents approximately 10 percent of all Navy appeals and over 53 percent of Navy cases sustained.

TABLE 2

TYPE OF PROCUREMENT (SUSTAINED DECISIONS)

	NAVY	(%)	ARMY	(%)	AIR FORCE	(%)
SUPPLY	21	53.85	8	17.8	9	31.03
CONSTRUCTION	13	33.3	28	62.2	12	41.38
R & D	0	0.0	3	6.7	1	3.45
SERVICE	5	12.8	6	13.3	7	24.14
TOTAL	39	100.0	48	100.0	29	100.0

Source: Researcher's summarization from ASBCA Docket data.

B. SAMPLE DESCRIPTION

In order to concentrate the effort of this study, a sample from the population was necessary. Table 3 is a breakdown of the Supply type Contracts, appealed to the ASBCA and rendered a sustained decision, by the major issue under dispute. As in Tables 1 and 2, Table 3 provides the information for the other Services for comparison purposes. The Default clause as the major issue represents 43 percent of the appealed Navy Supply Contracts which were rendered a sustained decision by the ASBCA. This is significantly larger than any other issue, therefore it was concluded these nine cases might have the most potential for accomplishing the objective of the study.

TABLE 3

CLAUSE INVOLVED IN SUPPLY CONTRACTS SUSTAINED

	NAVY	(%)	ARMY	(%)	AIR FORCE	(%)
DEFAULT	9	43.0	1	12.5	6	66.7
CHANGES	5	23.8	4	50.0	1	11.0
COSTS	3	14.3	1	12.5	0	0.0
PAYMENT	0	0.0	1	12.5	0	0.0
T for C	2	9.5	0	0.0	0	0.0
TITLE	0	0.0	1	12.5	0	0.0
PROVISIONS	0	0.0	0	0.0	1	11.0
DISPUTES	0	0.0	0	0.0	1	11.0
LIQUIDATED DAMAGES	1	4.8	0	0.0	0	0.0
FIRST ARTICLE	1	4.8	0	0.0	0	0.0
TOTAL	21	100.0	8	100.0	9	100.0

Source: Researcher's summarization from ASBCA Docket data.

C. DATA COLLECTION PLAN

First the Federal Legal Information Through Electronics (FLITE) was contacted as a source of the desired data. FLITE is an activity of the Department of Defense, operated by the Judge Advocate General's Department, United States Air Force. FLITE is a computerized legal research service available at no cost to all DoD personnel and activities. For the objective of this study, FLITE proved not to be of any substantive value, mainly due to the time delay involved in loading ASBCA decisions to their data base.

A second approach was to request the Appeal Data Report from the ASBCA on the cases desired. A sample Appeal Data Report form is provided in Appendix C. The 21 cases were identified by ASBCA docketing number from the register, then upon request, the Appeal Data Report from the ASBCA Recorder was provided. This form contains the elements listed below (not inclusive):

1. Docketing number
2. Appellant's name
3. Amount claimed by or entitlement only
4. Type of contract
5. Command
6. Small business, 100 percent set aside
7. Type of procurement
8. Negotiated or advertised
9. Party of interest
10. Clause in dispute

11. Disposition
12. Amount sustained or remanded
13. Days from date of docketing to date of decision
14. Days from date of appeal ready for decision and date decision filed.

These elements were ideal for group data analysis, similar to the related research efforts referenced previously, but not the data required for an in-depth case-by-case analysis.

The third approach to obtain the required data was to utilize the Board of Contract Appeals Decisions which contains all ASBCA decisions. Since this study was pursuing the most recent decisions one obstacle was encountered utilizing this publication, the time delay between the decision and the publication availability. Therefore the evolutionary path for this publication was back-tracked. The first step was to the publisher, Commerce Clearing House (CCH). Meeting some success at CCH, but not adequate to complete the data collection, the next step was to the ASBCA. The ASBCA was able to provide the remaining unreleased case reports thereby completing the data collection.

IV. ANALYSIS OF DATA COLLECTED

A. GENERAL

An in-depth analysis was performed on the nine selected cases. The major common issue of dispute for these nine cases was the Default clause. These nine cases represented 43 percent of all Navy Supply Contracts where the appeal was sustained by the ASBCA in Fiscal Year 1978. The remaining 57 percent (12 cases) are briefly summarized in Appendix D to indicate the various major issues of dispute.

Each of the nine cases are presented in a four step approach. The stage is first set with a summary presentation of the finding of fact. Next, the applicable policy or interpretation is outlined. Thirdly, an abstract of the actual ASBCA decision rendered is provided. Finally, a summary of the analysis, noting divergence between the policy/interpretation in DAR and GCL, and the policy/interpretation used in the case decision is presented.

B. CASE ANALYSIS

1. Case 1[1]

a. Finding of Fact

The contract specified partial deliveries on or before 9 May 1975. Modification (Mod) P00001, effective 14

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[1] 78-1 BCA/13,088. HAMILL MANUFACTURING COMPANY. ASBCA Number 20926. 7 March 1978. Contract Number N00221-75-C-0002.

January, 1975, accelerated the scheduled deliveries in exchange for an increased consideration. By mid-April all the appellant's deliveries had been late. The appellant blamed its subcontractors for these late deliveries.

The PCO, by letter of 18 April 1975, delegated authority to the ACO to negotiate a new delivery schedule and to recover the increased consideration authorized under Mod P00001. The PCO also informed the ACO that a critical need for the items existed and requested the ACO to render expediting assistance with respect to appellant's suppliers. As a result of this letter, Mod A00002 effective 14 August 1975, specifically deleted Mod P00001 in its entirety and failed to establish a new delivery schedule.

On 20 August 1975 the PCO issued a default termination based on the assumption Mod A00002 had established a new delivery schedule as directed. The PCO's copy of Mod A00002, at the time he took default action, had not been received.

b. Policy

Government actions which have been determined to constitute a waiver of the delivery schedule include (1) urging the contractor to continue performance after the delivery date has passed, and (2) accepting contractor deliveries after the delivery date [11:3-34].

c. Decision

The ASBCA decision was concisely summarized in the following excerpt:

> Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned a performance and a reasonable time has expired for a termination notice to be given.[1]

The Board contends the appellant's efforts at performance under the circumstances noted during the three to four month period preceding the default termination, in effect, constituted reliance upon the existence of a "constructive election not to terminate."[2]

d. Summary of Analysis

This case does not present any new policy or interpretation. It clearly reaffirms that the Government cannot accept late delivery or encourage a contractor who is repeatedly late to continue performance and then terminate for default. If a contractor is late and the Government desires continued performance, the Government must establish a new delivery schedule in order to be in a position to take default action for future late deliveries.

2. Case 2[1]

a. Finding of Fact

The Contractor had locked his plant, reduced his work force and connected his telephone to an answering device

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[1]76-1 BCA//11,883. WESTINGHOUSE ELECTRIC CORPORATION. ASBCA Number 20306. 26 April 1976. Contract Numbers N00104-71-C-1561 and N00104-72-C-4950.

[2]78-1 BCA//13,088. HAMILL MANUFACTURING COMPANY, page 63961.

[3]78-1 BCA//13,082. FAIRFIELD SCIENTIFIC CORPORATION. ASBCA Number 21151. 23 February 1978. Contract Number N00104-73-C-B291.

before completing contract performance. The Government deduced that the contract had been abandoned which was an effective repudiation. Based on this assumption, the Government sent a default termination 54 days before delivery was due. The requirement for a cure notice was a part of the contract's Default clause.

b. Policy

A termination for default by the Government is improper when the notice and opportunity to cure are required in the contract but not given [11:3-8].

The DAR requires a cure notice be given if the requirement is a part of the contract between the parties.[1]

The one exception where the Government is permitted the right to terminate for default without the 10 day cure notice is in the case of anticipatory breach. The elements of anticipatory breach are:

(1) a positive intention not to perform

(2) communication of the intent (by word or action) to the other contract party, and

(3) action by the aggrieved party in reliance upon the notice of intent to repudiate [11:4-4].

Contractor conduct which may constitute an anticipatory breach include such actions as (1) voluntary

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[1]DAR 7-103.11(a)(ii).

petition for bankruptcy, and (2) abandonment of the work [11:4-4].

c. Decision

Failure to send a cure notice is only excused by an anticipatory repudiation. Standing alone, the locked plant was not an unequivocal repudiation of the contract. The Contractor admitted that he had ceased performance prior to the time of the extension, and the Government contended that this abandonment was an effective repudiation. However, anticipatory repudiation requires an overt and unconditional manifestation, made to the Government through words or conduct, of intent not to perform a contract. Similarly, abandonment means to foresake an obligation; however, abandonment can be accomplished without any Government knowledge of the contractor's actions. Because the Government had not been made aware by the Contractor that he had discontinued performance, his actions did not constitute anticipatory repudiation relieving the Government of its duty to send a cure notice. Therefore the default termination was improper.

d. Summary of Analysis

This case emphasizes the need for the Government to meet the requirements of the contract. That is, when a cure notice is required in the contract, it must be given. Interpretation of the regulation indicates that abandonment of work by the contractor could constitute a breach [11:4-4]. This statement is very misleading, as this decision points out, without a thorough knowledge of the differentiation

between the terms anticipatory repudiation and anticipatory breach as implied by the contractor's act of abandonment.

To abandon means, to give up absolutely, to foresake entirely, to renounce utterly, to relinguish, or to desert.[1] The term includes the intention as well as the overt act by which the abandonment is carried into effect. To abandon conveys a sense or permanence, accompanied by intent, and bears much similarity to repudiation which means to put away, reject, disclaim or renounce a right, duty, obligation or privilege.[2]

Nevertheless, the terms abandon and abandonment are not employed by the learned commentators on anticipatory breach for good reason. Although imparting some similarity, abandonment is not synonymous with anticipatory repudiation. The difference is that abandonment can be accomplished without telling anyone, whereas the hallmark of anticipatory repudiation is the unequivocal manifestation of the repudiation to the promisee.

This case did not receive a unanimous decision and the contradicting view used another definition to support its' opinion. Contractural abandonment is defined to mean a matter of intent and implies not only non-performance, but

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[1] BLACK's LAW DICTIONARY, page 9.

[2] BLACK's LAW DICTIONARY, page 1467.

an intent not to perform which may be inferred from acts which necessarily point to actual abandonment.[1]

A very recent decision of the ASBCA upheld default termination of two supply contracts in advance of specified delivery dates on the grounds of non-verbal anticipatory breach.[2] Although no 10 day cure notice was issued in either case, the records in these appeals established that the Government was clearly aware prior to issuing the default termination decision that (1) the contractor had ceased operations entirely when his plant was closed, and (2) the contractor's assets had been seized by a county tax assessor.

There has been no decision by the ASBCA wherein a discontinuance of performance of a supply contract, not manifested to the Government prior to the termination, has been held sufficient to justify a default termination when not preceeded by a cure notice.[3]

Therefore, if the contractor does not manifest his unequivocal intent not to perform the contract, a cure notice must be given when required, unless extenuating circumstances exist which would inhibit performance. Abandonment, in itself, is not enough, but a clear understanding that the

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[1] BLACK's LAW DICTIONARY, page 10.

[2] 78-1 BCA//12,919. XL INDUSTRIES. ASBCA Numbers 20206 and 20221. 23 November 1977. Contract Numbers DAAH01-72-0-0177 et al.

[3] DAR 7-103.11 subparagraph (a)(ii).

contractor lacks the ability to perform is sufficient to provide effective anticipatory breach. By allowing contractor's actions or lack of ability to constitute an anticipatory breach permits the Government and contractor to dispense with the paperwork requirements of a cure notice and also allows the Government without delay to initiate alternative contract action.

In this case, communication between the contractor and the Government did not occur, therefore speculation was done solely on inferences drawn from the contractor's conduct. The contractor still had his assets available and time available to perform, consequently an unequivocal manifestation did not exist to substantiate anticipatory breach and permit dispensing with a cure notice.

3. Case 3[1]

a. Finding of Fact

The Contractor informed the Government in mid-April that the 1 May delivery date could not be met, but assured the Government that production could be completed by 17 May. The Government did not respond until after 17 May when delivery had not yet been made. The Government issued a show cause letter in reference to the failure to deliver by 1 May.

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[1] 77-2 BCA//12,827. MENCHES TOOL & DIE. ASBCA Number 21316. 17 October 1977. Contract Number N00174-76-C-0092.

b. Policy

One Government action, which has not constituted a waiver of the right to terminate for default, is failure to answer the contractor's request for more time. However, if the actions of the Government constitutes a waiver of its right to terminate for default, a new delivery schedule must be established [11:3-35].

c. Decision

The Government's inaction for over a month, while being aware that the delivery date could not be met and allowing the contractor to continue with production after failure to make delivery, constituted a waiver of the delivery schedule. The termination for default was improper since a new delivery schedule was not established.

d. Summary of Analysis

The important new interpretation brought forth in this decision is an expansion on the items or conduct that constitute a waiver of the delivery schedule. In addition to the previously held items that constitute a waiver[1] this decision presents a new interpretation: where the Government has knowledge that a contractor cannot meet the delivery schedule and exhibits faith in a new anticipated date by allowing the contractor to continue performance beyond

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[1]GCL paragraph 3-34.

the established delivery date constitutes a waiver of the delivery date.

4. Case 4 and Case 5[1]

a. Finding of Fact

The Contractor missed the first article due date of 5 August 1976. The Government PCO issued a cure notice for this failure dated 11 August 1976. Subsequently, the PCO terminated the contract for default on 3 September 1976, basing his decision on a Government inspector's report of a 31 August 1976 visit to appellant's plant. The Government inspector's report stated that the Contractor was not ready for the first article test. The PCO knew that the appellant had requested the chance to demonstrate the model on 31 August 1976, stating it was ready.

b. Policy

In accordance with the Default clause, the contractor, after receipt of the notice to cure a lack of progress, is allowed 10 days or longer if granted by the PCO.[2]

The general rule is that a contractor already in default is not entitled to any prior notice, unless there is a contract provision requiring such notice, and the contract may be terminated immediately [11:3-4].

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[1]78-1 BCA//12,911. LORCH ELECTRONICS CORPORATION. ASBCA Numbers 21496 and 21749. 29 November 1977. Contract Number M00027-75-C-0043.

[2]DAR 7-103.11 subparagraph (a)(ii).

c. Decision

Default action was improper because the salient test characteristics were met and a Government inspector's statement of readiness should have been investigated before default termination was issued. The Government had an obligation to resolve an obvious contradiction rather than taking action in favor of its own interest without inquiring as to the cause of the contradiction. This case was therefore sustained.

d. Summary of Analysis

This case illustrates the application of the duties of a PCO as defined:

> It is the PCO's duty to administer the contract so as to avoid disputes whenever possible; to attempt to negotiate a settlement after a dispute has arisen; and if negotiations are unsuccessful, to make the initial decision for the Government on the dispute [7:11].

A significant contradiction existed between the Contractor's request and the Government inspector's report. The PCO was responsible for resolving the conflict so as to avoid a dispute. If the PCO was interested in terminating the contract for default his proper action would have been to send the termination for default letter upon expiration of the 10 days required by the Default clause without waiting for the inspection report submitted on 31 August. By delaying his action, the PCO constructively extended the cure period and the Contractor was not in default at the time the conflict arose.

5. Case 6[1]

a. Finding of Fact

The contract delivery date of 13 December 1976 was waived when the Government on 23 December 1976 reinstated the contract (after terminating it for default on 14 December 1976), without setting a new delivery date. On 16 February 1977 at 2:00 p.m., the Government set another completion date against which it might take default action. By telephone the Government notified appellant that the contract would be terminated for default unless the system was made fully operational on that day.

b. Policy

If Government action constitutes waiver of the delivery schedule, thereby relinguishing its right to terminate for default, a new delivery schedule must be established. Such a new schedule must be reasonable in light of all the facts [11:3-35].

c. Decision

The contract delivery date of 13 December 1976 was waived when the Government on 23 December reinstated the contract without setting a new delivery date. The burden was on the Government to establish a new delivery date which would be reasonable under the circumstances then existing.[2]

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[1]78-1 BCA//12,994. ELECTRAK CORPORATION. ASBCA Number 21879. 10 January 1978. Contract Number N60921-76-C-0259.

[2]61-2 BCA//3210. LUMEN, Inc. ASBCA Number 6431. 2 November 1961. Contract Number AF 33(600)-39963.

The Government did not set another contract completion date against which it might take default action until 16 February 1977. Under these circumstances, establishing 16 February 1977 as the new completion date was an unreasonable requirement. Therefore, because the Government waived the delivery date and failed to reestablish a reasonable new delivery date, the appeal was sustained.

d. Summary of Analysis

This decision is a reiteration of established policy. A point worth emphasizing: if a delivery schedule is waived either through written or other actions on the part of the PCO, then a new schedule must be established before any proper default action can be initiated. Contractor progress cannot be judged unless a delivery schedule exists to compare progress against.

6. Case 7[1]

a. Finding of Fact

The Government issued a show cause letter on 3 February 1976 to the Contractor allowing 10 days to reply. When no response to the show cause letter was forthcoming, the Contractor was contacted on 19 February whereupon he indicated that he was considering bankruptcy.

On 1 March 1976 the Government agreed to go to the Contractor's plant the following day. The trip to the

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[1]78-1 BCA//13,152. COMP-CON TECHNOLOGY AND MANUFACTURING, INC. ASBCA Number 21150. 21 March 1978. Contract Number N60530-75C-0188.

Contractor's plant was to inspect the material and to agree upon a reduced price. The Contractor was willing to settle the matter, so as to avoid default termination. The PCO sent a truck for pick-up concurrently with the inspector on 2 March. Due to a conflict with the bank, the parts could not be picked up on that date but an agreement to accept the parts was still in affect as long as it could be accomplished before 5 March 1976. On 4 March the Government issued a termination for default against the written contract.

The challenge is premised upon appellant's assertion that the parties had entered into an agreement prior to the termination for default. This agreement called for the Government to accept the units at a reduced price of $45,000 if delivered by the 5 March deadline. Appellant contends the Government violated that agreement by issuing a termination notice on 4 March 1976.

b. Policy

Establishing a supplemental agreement constitutes a waiver of the right to terminate for default [11:3-34].

c. Decision

The Board concluded that the appellant agreed to deliver and the Government agreed to accept delivery of the uncompleted parts by 5 March 1976, subject only to an agreement on a price. There is no question that the appellant and the Government agreed upon a price of $45,000 on 3 March 1976.

The Board contends that it was rather apparent that the issuance on 4 March of a termination for default was a product of faulty communication. Although the appellant may not have been prepared to turn over the parts on the 2nd or 3rd of March, he was ready to do so before the deadline. Therefore default termination was premature.

d. Summary of Analysis

Most of the facts and memorandums in this case were generated from memory by both parties after the appeal was filed. The PCO was preparing to depart on leave and his representative who actually sent the termination for default knew little about the case having just returned from temporary duty. Two important points can be made: (1) when key members are absent much of the time, good management practice requires clear and detailed memorandums for the record, and (2) the duties of the PCO are to administer the contract so as to avoid disputes whenever possible; to attempt to negotiate a settlement after a dispute has arisen; and if negotiations are unsuccessful, to make the initial decision for the Government on the dispute [7:11]. None of the elements of these two points were met. These elements deal with the PCO's basic management common sense, rather than the area of contracting policy interpretation.

7. Case 8[1]

a. Finding of Fact

On 13 June 1975, 11 days after the first article approval, appellant began working two 10-hour shifts toward producing the units. Notwithstanding this effort, appellant was unable to meet the revised schedule. The Government issued contract Mod P00007 effective 23 October 1975 which provided for a time extension. On 12 January 1976 appellant sought permission to subcontract certain work in order to meet the new Mod P00007 schedule. Appellant continued to fall behind and on 26 January 1976 delivery was 12 units behind. The Government granted permission to subcontract with no objection to appellant's delinquencies. By letter on 10 February 1976, the ACO directed appellant to show cause why the contract should not be terminated for default. During the show cause period the Government attempted to advise and assist appellant in straightening out his accounting system. The Government auditors advised the Contractor to hire a CPA familiar with Government contracts. The PCO in early March 1976 suggested the possibility of the SBA assisting appellant in modifying its bookkeeping system. Although the contractor acted upon this advice, he met with little success.

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[1]78-2 BCA//13,348. SPECIALTY CONSTRUCTION COMPANY. ASBCA Number 21132. 17 July 1978. Contract Number N62578-75-C-0116.

The PCO, by final decision on 11 March 1976, terminated appellant's contract for default. At this time the appellant was 21 units behind schedule.

b. Policy

Actions on the part of the Government which have been determined to constitute a waiver of the delivery schedule include: (1) urging the contractor to continue performance past the due date, (2) performing an acceptance inspection after the due date, and (3) accepting deliveries after the due date. It is clear that when the Government encourages and induces a contractor to continue performance and, in reliance upon this Government inducement, the contractor does continue performance, a waiver of the right to terminate for default will be found [11:3-34].

If Government action constitutes a waiver of the delivery schedule thereby relinguishing its right to terminate for default, a new delivery schedule must be established. Such a new schedule must be reasonable in light of all the facts [11:3-35].

c. Decision

The Default clause provides that the Government had the right to terminate all or any part of the contract if the appellant failed to make delivery of the supplies within the time specified.[1] When appellant failed to deliver

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[1]DAR 7-103.11.

the building units in accordance with the second increment of the Mod P00007 schedule, the delivery schedule in effect at the time of the termination, the Government had the vested right to terminate the contract for default, unless appellant was able to demonstrate that its untimely deliveries were excused. When a contractor fails to delivery by the due date and his delay is not excusable, the Government has the right to terminate or permit the contactor to continue; but the election must be made with reasonable promptness. If after the contractor defaults, the Government delays too long or by its conduct thereafter encourages continuance of performance, the inference is that time is no longer of the essence so long as the Government continues to encourage the contractor's performance, and the contractor, in reliance, continues to incur performance costs.[1] The contract here required the building units to be delivered incrementally. Under such a contract, failure to deliver any increment would be a new default, subjecting the entire contract to a default termination by the Government. Thus, waiver of the delivery date for the first increment would not, in and of itself, operate as a waiver of the delivery dates for the subsequent increments unless the delay is shown to be due to excusable causes or the Government, by its subsequent conduct, has

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[1]188 Ct. Cl. 979 (1969). D. Joseph DeVito v. United States.

waived the date in the same general sense already noted.[1]

The Board considered that the approximately two months between the first indication of a default with respect to the Mod P00007 delivery schedule and the Government's 10 February 1976 show cause letter to have had an unreasonably long time. In early January 1976, when appellant had fallen 12 units behind the new schedule, the Government still gave no indication of its intentions to terminate but, rather, continued to encourage appellant to perform its contractual obligations.

Thus, aside from the unreasonably long period between appellant's default of the 12 December 1975 incremental delivery requirement and the Government's 10 February 1976 show cause letter, the Government's affirmative actions thereafter, in the form of suggesting continued performance, constituted a waiver of the entire delivery schedule. The only proper way for the Government to again make time the essence of contract performance was for the PCO to establish a reasonable, specific time for performance.

Accordingly, the Board concluded that failure to establish a new and reasonable delivery schedule undermined the validity of the Government's default termination. The Board sustained the appeal.

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[1] 78-1 BCA//12,989. NOVELTY PRODUCTS CO. ASBCA Number 21077. 30 January 1978. Contract Number DSA100-75-C-0988.

d. Summary of Analysis

This case points out the need for the PCO to be consistent. If the PCO decides to terminate for default, a prompt decision must be made and his team's actions must be consistent with that decision. If the PCO decides not to terminate for default, but time is of the essence, then he must promptly establish a new delivery schedule which is reasonable, taking into account all the facts. This not only establishes that time is of the essence, but establishes a new delivery schedule to judge progress and permit default termination at a later time if deemed necessary.

8. Case 9[1]

a. Finding of Fact

Appellant's contract was for 500 lead wool blankets to be delivered to the Mare Island Naval Shipyard at Vallejo, California. Mod A00001 granted a price reduction of $300 as consideration for an extension of the delivery date to 10 December 1976, reducing the contract price to $14,650. The blankets were not delivered on time but rather on 18 February 1977. The blankets passed source inspection by the Government's quality assurance representative but final inspection and acceptance was at destination.

When the blankets were delivered an inspection resulted in a deficiency report stating the following:

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[1]78-2 BCA//13,351. RIDGE INSTRUMENT COMPANY, INC. ASBCA Number 22277. 30 June 1978. Contract Number N00221-76-C-0190.

(1) the grommets are not well seated into the blanket

(2) the grommets are not to sketch, they are outside of the blanket edge

(3) there are loose threads

(4) evidence of poor workmanship, and

(5) the blankets were received with cartons torn open or crushed.

The Government official who reviewed that report considered the blankets unacceptable if they had grommets that were not well seated, or showed no herculite material gripped by the grommet around the outside of the grommet hole. However, the Government official stated that the thread ends and workmanship were acceptable.

The Government sent a Report of Item Discrepancy (ROID) to the appellant, stating that the blankets were received late and reported the above-listed alleged deficiencies, including loose threads and poor workmanship. The ROID asked for disposition instructions and for the earliest replacement of the blankets.

The appellant then offered to negotiate with the shipyard to repair the blankets. The Government again inspected the blankets more thoroughly with additional inspectors. When this inspection uncovered more discrepancies, the Government's supervisory nuclear engineer and the official who reviewed the above referenced reports, then inspected all 500 blankets (before this inspection they had used a

random sample). This inspection allegedly disclosed additional deficient conditions, many noted as evidence of 'poor workmanship.'

The appellant then inspected the blankets and blamed ambiguous specifications for the deficiencies noted by all the inspections.

The Government again rejected the blankets and requested the appellant to specify when replacement blankets would be delivered. Appellant did not furnish replacement blankets and after unsuccessful efforts to compromise the dispute, the Government terminated the contract for default. The termination was not based on untimely delivery, but, because the blankets allegedly did not meet contract requirements. The termination letter stated: "...the blankets were rejected for poor workmanship..."[1]

b. Policy

The default termination provision in fixed priced supply contracts permits the Government to terminate all or any part of the contract if (1) the contractor fails to make delivery within the time specified in the contract, or (2) the contractor fails to make progress so as to endanger performance, or fails to perform any other provision of the contract.[2]

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[1]Ibid.

[2]DAR 7-103.11.

The Inspection clause gives the Government the right to reject any defective material or workmanship, or to require its correction [11:1-41].

The Government may, at any time prior to acceptance, reject any item for defects, even though prior Government inspections and tests had not rejected the items. The inspection and test by the Government of any supplies or lots thereof does not relieve the contractor of any responsibility regarding defects or other failures to meet contract requirements which may be discovered prior to acceptance [11:1-43].

If the contractor fails promptly to remove such supplies, which are required to be removed, or promptly to replace or correct such supplies or lack of supplies, the Government may replace or correct them at the contractor's expense, terminate the contract for default, or require delivery at equitably reduced prices [11:1-45].

Taking default action is the last resort [11:1-48].

c. Decision

The Government said little about the fact that the blankets were delivered late, and with good reason. The Government's inducement to continued performance and its request for replacement blankets were inconsistent with an assertion of a right to terminate for untimely delivery. Therefore, the contract was terminated for the alleged failure of the supplied to conform to contract requirements.

When the Board looked at the rejection for poor workmanship alone, they said it might not be upheld. Not only had the supplies passed inspection by the Government's quality assurance representative, but the shipyard's reviewing official initially agreed the workmanship was acceptable. Although the shipyard had the right to final inspection, the Board was not persuaded that the Government's conclusions on workmanship were correct.

The main point of contention between the parties was whether the applellant had logically followed sketches 1 and 5 attached to the contract to produce the blankets which were rejected by the shipyard.

The Board concluded that the appellant's interpretation of the specifications and sketches was reasonable. With the possible exception of readily correctable minor defects, appellant showed, prima facie, that the blankets complied with the specifications. Since the Government failed to persuade the Board that the workmanship was defective or, with the exception of shipping damage, that the blankets were otherwise unacceptable, the default termination was improper and was converted to a termination for convenience.

d. Summary of Analysis

This case identified the Default clause as the major issue under dispute but the case did contain many aspects of the Inspection clause. It cast light on the

importance of inspection and acceptance at different levels. The Government's quality assurance representative at origin passed the items. The Government's reviewing official at destination accepted the items for workmanship but rejected them for three other reasons. The ROID sent to the Contractor then included workmanship as a discrepancy. Also a subsequent inspection by the Government's supervisory nuclear engineer cited several poor workmanship deficiencies. When negotiations failed to resolve the differences the default termination was sent predicated on poor workmanship.

This illustrates a lack of consistency. At the origin and the first inspection review at destination the workmanship was acceptable, but then subsequent Government inspections determined workmanship was deficient. The inconsistency cast doubt on whether the blankets were really deficient. The Government had a case for default on late delivery but it waived its right to terminate for default by not taking prompt action and by continuing to encourage further performance.

More stringent requirements on the Government's inspections at origin should be stressed to help protect the Government's interest. If the item is being built for the first time, or if doubt exists whether the specifications are clear, it would be appropriate to require a first article approval or a similar technique to iron out any deficiencies in specifications and to provide a means of judging a minimum

acceptable standard prior to full production. There is a need for better communications between the Government's routine inspectors and the Government inspectors that subsequently inspected the items, establishing for the Government that the workmanship was deficient.

C. DEFAULT TERMINATION MODEL

A Default termination model has been developed based on the regulations and interpretations used for this study. In addition, the model incorporates the two areas that appeared inadequately addressed in the regulations and interpretations prior to this analysis.

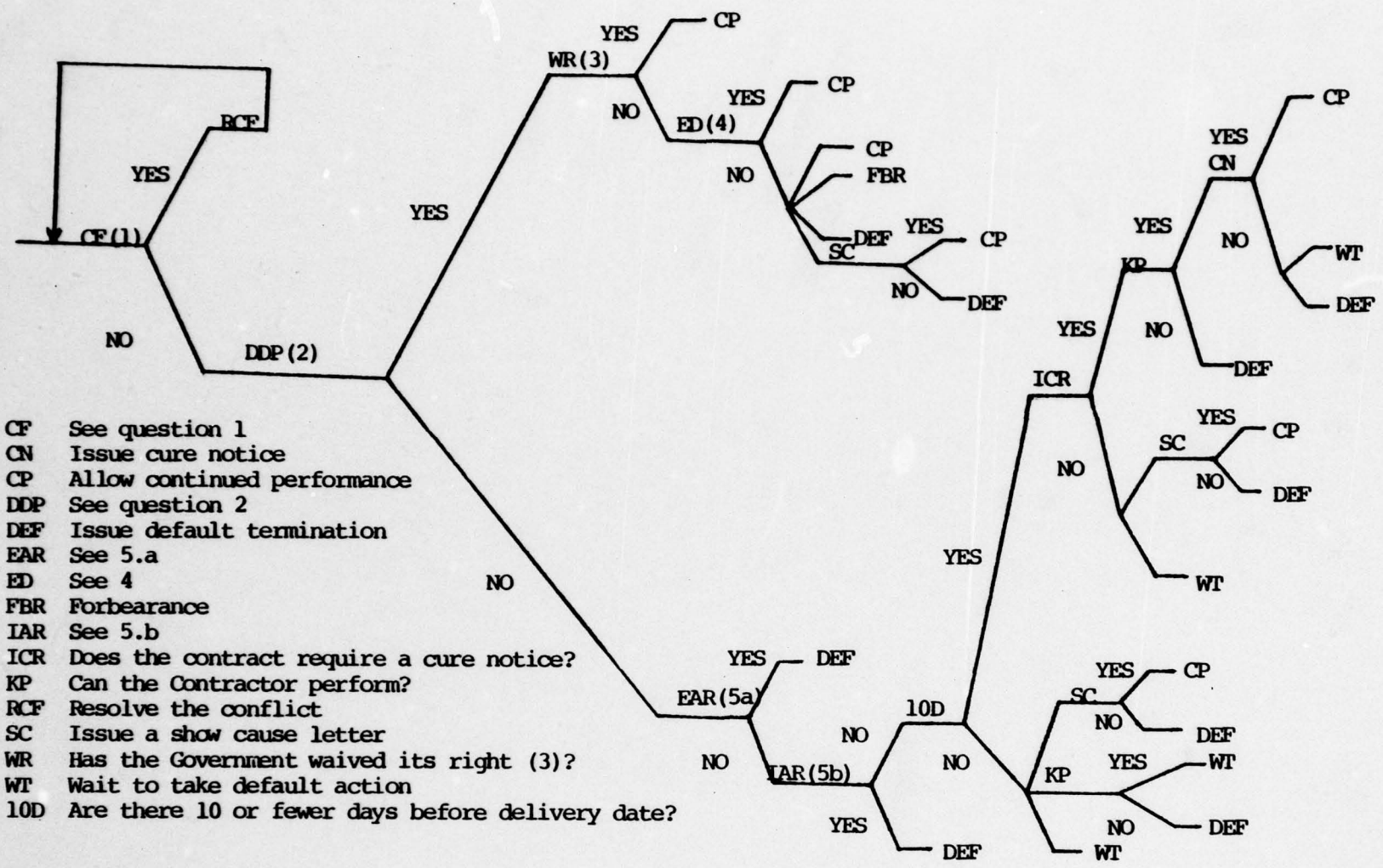
The goal of the model is to help disentangle the complex throught process when potential default action exists. Used properly, the model could prevent perpetuating a time consuming and costly dispute or could serve as a tactical organizer to take default action. The sample model constructed in Table 4, is in the form of a decision tree provided with some checklist-type questions as tools in making the applicable decisions. The model is designed as a point-in-time decision aid and therefore when the end of a branch is reached, action concerning that particular default effort has been concluded. Future default action necessitates entry into the model again at step 1.

The model, if utilized during contract performance of the selected cases when potential default action was imminent, could have eliminated virtually all of the disputes

presented in this study before they had evolved into appeals. In a broader sense, the Default Termination Model could serve as a management guide in the acquisition process, depicting areas of concern where preventive action could be taken to avert disputes concerning the Default clause. It could also be a guide for acquisition team member's conduct as a precaution in case the need arises to initiate default action, so the Government team is untainted and the contracting officer's decision will be upheld.

TABLE 4

DEFAULT TERMINATION MODEL



CF	See question 1
CN	Issue cure notice
CP	Allow continued performance
DDP	See question 2
DEF	Issue default termination
EAR	See 5.a
ED	See 4
FBR	Forbearance
IAR	See 5.b
ICR	Does the contract require a cure notice?
KP	Can the Contractor perform?
RCF	Resolve the conflict
SC	Issue a show cause letter
WR	Has the Government waived its right (3)?
WT	Wait to take default action
10D	Are there 10 or fewer days before delivery date?

[1] All questions referred to herein are found immediately following the model.

Checklist type questions to use with the model (question number corresponds to numbers in the model).

1. Does a conflict exist? Conflict is defined as a disagreement concerning a contract performance/progress milestone where the Government disagrees with the contractor's contention that he has met the milestone. In such a case, any further action toward a default termination might be useless until the conflict is resolve. In the model, therefore, failure to resolve a conflict leads to a continuous loop until that conflict is resolved.

2. Has the delivery due date expired? Difference courses of action are required, depending on the point in time such action is considered in relation to the delivery due date.

3. Has the Government waived its right to default? Examples of Government's conduct which might waive its right, are:

a) urging the contractor to continue, accepting samples and pre-production models
b) performing an acceptable inspection
c) accepting deliveries
d) issuing change orders and supplemental agreements
e) knowing the contractor cannot meet the delivery due date and allowing him to continue performance past the due date, and
f) not taking action within a reasonable time.

4. Does excusable delay exist? The cause must be beyond the control and without the fault or negligence of the contractor. Examples include:

a) acts of God

b) acts of the public enemy

c) acts of Government (either soveriegn or contractual)

d) fires

e) floods

f) epidemics

g) quarantines restrictions

h) strikes

i) freight embargoes, and

j) unusually severe weather.

5. Does anticipatory repudiation exist? Anticipatory repudiation is a definite and unequivocal manifestation of intention on the part of the contractor not to render the promised performance at the time specified in the contract. Step 5 has been subdivided into parts a and b. Step 5a. would be the contractor's written or oral repudiation of the contract rendering a cure notice superfluous and immediate default action appropriate. Step 5b. represents implied anticipatory repudiation and requires application of judgment and inference. The Board has previously defined anticipatory repudiation as the positive, definite, unconditional, and unequivoal manifestation of intent, by words or conduct.[1]

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[1]69-2 BCA//8010, page 37,243.

Examples of conduct that have been upheld to imply anticipatory repudiation without the required cure notice being sent, are abandonment of the contract and voluntarily filing for bankruptcy. Either contractor action must render the performance impossible within the specified contract delivery schedule. If any means exist by which the contractor could perform, such as (1) his assets are still available and sufficient time remains, or (2) a pending court decision that could provide adequate capital to make the contractor solvent and sufficient time still remains; then a cure notice must be given to substantiate the intent of the contractor. One exception: a cure notice is not proper if less than ten days remains for performance, in which case the Government can either issue a show cause letter or wait until the delivery date has expired.

The model brings out the important areas when a potential default action is considered. In ASBCA decisions there has not been much credence placed on the Government's judgment or interpretation of the contractor's willingness or intent to perform the contract. Therefore several additional steps in the area concerning judgment of contractor intent were omitted intentionally in the model due to non essentiality and the possibility of introducing unneeded risk assumption.

V. ANALYSIS OF THE RESEARCH QUESTIONS

A. PREFACE

Nine selected cases with the Default clause as the common issue under dispute were presented and analyzed.[1] Also, from the regulations and interpretations used in the research effort, along with the new policy and interpretation gained by the analysis, a Default Termination Model was constructed.[2] Drawing from the research accomplished for these efforts the next two subsections will consolidate the accomplishments of this study in response to the Research Questions which served to direct the analysis.[3] In Subchapter V.B the emphasis was to determine if there was value in the analysis accomplished. The natural follow-on question, presented as the second Research Question, was to determine the conclusions or lessons that could be derived from an analysis structured similar to this study.

B. CAN ASBCA DECISIONS BE ANALYZED IN SUCH A FASHION AS TO PROVIDE MEANINGFUL CONCLUSIONS FOR THE ACQUISITION PROCESS?

It is believed that meaningful conclusions can be drawn for the acquisition process using the methodology of this

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[1]Subchapter IV.B Case Analysis.

[2]Subchapter IV.C Default Termination Model

[3]Subchapter I.B Objectives and Research Questions.

study. The analysis, in particular, uncovered two areas in which DAR and the GCL guide used in this study, do not treat adequately: (1) What constitutes a waiver of the delivery schedule and (2) What constitutes anticipatory breach thereby permitting default action to be taken without sending a cure notice, prior to the delivery date.

In addition to regulations where the analysis can be used to improve the writing of, or interpretation used by the acquisition personnel, the analysis can also be used to direct management's attention in areas where adherence to regulations is less than adequate.

C. WHAT CONCLUSIONS OR LESSONS CAN BE DRAWN FROM SUCH AN ANALYSIS?

The following Lessons are offered in response to this research question:

1. Lesson 1

Default action is often taken based on a delivery schedule which was waived by the conduct of the acquisition team members. Case 3 illustrated this situation. There was a delivery schedule, but due to the PCO's inaction, upon being advised of the Contractor's inability to meet the delivery schedule, and waiting to take default action until the Contractor's proposed delivery date; the established delivery date had been constructively waived. Therefore, default action was deemed improper.

Case 6 represents a situation where a contract terminated for default was reinstated, but a new delivery

schedule was not established at that time. The PCO unilaterally established at 2:00 p.m. the new delivery date for that same day. This new delivery date was not reasonable considering all the facts and therefore, was determined an improper contractural delivery date. In case 8, the Contractor was making deliveries against a schedule and was consistently late. But while technically in default, the Government continued to perform acceptable inspections, accepted deliveries, and urged the Contractor to continue performance. Anyone of these three Government actions has been held to constitute a waiver of the delivery schedule when the Contractor does continue performance in reliance upon this Government inducement.

These cases substantiate that the Navy has taken default action based on a delivery schedule which was waived by the conduct of acquisition team members.

2. Lesson 2

The acquisition team members have a common objective when interfacing with a contractor, but often the conduct of different members, and even the conduct of an individual member appears inconsistent to the contractor.

The acquisition team is often composed of members from different activities, different Services or Agencies spread throughout the country, frequently in remote areas. Aggravating the situation further, team members could be in foreign countries with non-U.S. personnel composing a portion of the team. The acquisition team, including the contracting

officer, inspectors, engineers, specification drafters, and contract negotiators, all play an active role in the acquisition process. Because the ASBCA views these individuals collectively as the "Government," it is most important that the acquisition team present a concerted, consistent front to the contractor.

For example in Case 1, the acquisition team had assisted the Contractor in his supply problems, encouraged performance past the delivery dates, permitted the Contractor to continue performance past each due date, accepted the late deliveries and then the PCO terminated the contract for default. The default action was incongruent with the other member's actions.

In Case 3, the PCO allowed the Contractor to continue performance past the delivery date knowing for approximately two weeks that the delivery date could not be met. The Contractor assured the PCO that delivery could be met by 17 May vice the 1 May contract delivery date. The PCO took no action until the Contractor did not deliver on 17 May, and then took default action based on the 1 May delivery date. It was inconsistent for the PCO to allow the Contractor to place reliance on 17 May as a new delivery date without establishing the new date contracturally, and then taking default action based on the original date.

In Case 6, a contract delivery date was waived when the PCO reinstated the contract without establishing a new

delivery schedule. When a delivery schedule does not exist, time is not considered of the essence. The PCO called the Contractor at 2:00 p.m. on 16 February and unilaterally established 16 February as the new delivery date. This indicated time was of the essence, contrary to his previous action wherein he failed to specify a delivery date when reestablishing the contract.

In Case 7, the PCO made a verbal supplemental agreement and then took default action prior to the delivery date.

In Case 9, the inspectors were not in agreement as to the acceptability of the material. The ROID sent to the Contractor stated the workmanship as the reason for rejection, yet the Government Plant Quality Assurance Representative and the Reviewing Official at destination had accepted the workmanship of the material. The appeal was upheld since the inconsistencies substantiated that the Navy was not sure what constituted acceptable workmanship.

3. Lesson 3

Many misconceptions are prevalent concerning when default action can be taken prior to the delivery date or more specifically, what constitutes anticipatory breach?

For example in Case 2, the Contractor locked his plant and reduced his work force until the owner was the only employee. The record shows that the owner was not personally capable of performing the contract and had connected his telephone to an answering service. This

appeal was upheld because such circumstances do not necessarily constitute anticipatory breach.

Some of the ideas presented in this decision were:

a. When a cure notice is required, it must be given (this is not a new idea).

b. The only circumstances which deem a cure notice unnecessary prior to default is if the cure notice is superfluous. That has meant in practice that a cure notice serves no purpose when it is only additional paperwork and the contractor cannot perform the contract in the time designated. The only cases upheld by the ASBCA where repudiation did not exist was where performance had ceased and the assets of the contractor were seized by the tax assessor, or the contractor had filed for bankruptcy, and performance was consequently deemed impossible. The judgment on the part of the PCO or any team member is not sufficient to conclude an anticipatory breach has occurred as long as performance is possible in the time remaining.

The ASBCA even admits they use the terms abandonment and anticipatory breach interchangeably sometimes, but not in a context where it is of significance. Of note, GCL states anticipatory breach can be inferred by abandonment.[1] Yet, the analysis in Chapter IV has shown anticipatory breach

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[1]GCL 4-4.

cannot be inferred by abandonment except under certain circumstances. To clarify this statement and summarize the lesson, if the contractor has repudiated the contract, there is no need for a cure notice. If the contractor has abandoned the contract, but still has his assets available for performance and there is still time for performance, a cure notice must be sent to substantiate the contractor's intent. As long as the contractor has his assets available and performance is possible, anticipatory breach cannot be inferred by abandonment without a repudiation.

Lesson 4

The PCO sometimes falls prey to the urge to join sides with the acquisition team on controversies between the contractor and the Government.

In Cases 4 and 5, the Acquisition Team Member, an Inspector, said the Contractor was not prepared for the first article test. The Contractor disagreed and asserted he was prepared. The PCO terminated the contract based on a government inspection report without settling the conflict.

Also in Case 9 a conflict existed between the Contractor asserting the material delivered was in accordance with the specifications and drawings, and the Government's inspectors, some approving and others rejecting the material. The material's acceptability was not determined before default action was taken.

The following excerpt summarizes the role of the PCO in a conflict and delineates the major extremes that may arise:

> However, the Contracting Officer is supposed to act when rendering decisions within the contract as a fair and impartial judge. There are, however, wide variations in the ability, personality and philosophies of the Contracting Officer. Some Contracting Officers, particularly resident Contracting Officers, after a long period of relationship with a particular contractor, may, in effect, "go native" and develop such an understanding of the contractor's problems that they may forget their responsibility to the Government. On the other hand, there are Contracting Officers who operate on the assumption that the contractor, unless prevented by them by every means at their disposal, will engage in outrigth fraud, at least take advantage of the Government [12:M-1-2].

5. Lesson 5

Often times the communications network breaks down within the Navy acquisition team or between the team and the contractor. Establishing and maintaining an adequate communications network in an organization as diverse as that described in Lesson 2 is a tremendous task. It is extremely important to have a viable communication system.

In addressing the communication aspects of the nine cases analyzed in this study, three phases are identified: pre-award, contract performance, and potential default termination situations.

a. The pre-award phase has one communication link which is extremely important. This is the ability of the PCO to put into contract language his perception of the Government user's need, and have that user's need satisfied by contract performance. In Case 9 it was evident that this link had failed. It was determined that the Contractor

had adhered to the drawings and specifications of the contract but the workmanship was determined inadequate by the Government user. A dispute evolved over the acceptability of the material provided because the contract's language had not presented a true portrayal of the user's need to the Contractor.

b. In the nine cases reviewed, communications broke down in several significant instances during contract performance. In Case 1, the PCO delegated authority to the ACO to negotiate a new delivery schedule. The result was a complete deletion of the delivery schedule with no new schedule being negotiated. In Case 2, the Government and the Contractor had little communications during much of contract performance, therefore inferences were drawn from actions. Case 3 showed a one-way communication initiated by the Contractor, notifying the PCO he could not make the delivery date and proposing a new delivery date. The PCO did not respond, but took action as if he had altered the delivery schedule until the Contractor did not meet his proposed date. The PCO then took action as though no communication had taken place. In Case 7, the PCO and the Contractor worked out a supplemental agreement verbally where the terms were perceived quite differently by the two parties. In Case 9 there appeared to be poor communications between the following: specification drafters, users, the contractor, the Navy Plant Representative, the Quality Assurance Inspector, inspectors at the destination, inspectors for the users, and the PCO.

c. When grave action such as a default termination is contemplated, much care must be exercised to insure that all concerned are aware of the action under consideration. In Case 1, the PCO terminated the contract without even a copy of the latest Modification. In Case 2, the PCO and the Contractor were not communicating at all. In Case 3, the PCO's inaction waived the delivery schedule, but the PCO then took default action as if he was unaware of the Contractor's plight. In Case 6, the contract was reinstated without a delivery schedule and then the PCO, via a telephone conversation, initiated an immediate cure notice with that day as the deadline. Case 7 was laced with examples of poor communications, well evidenced by almost all records being constructed by both the PCO and the Contractor after the default action had been initiated. In Case 8, numerous Government inspectors/auditors and the PCO were lending assistance to the Contractor while in fact he was in default. The Government was trying to help the Contractor until the very day the default action was taken. The Contractor, without knowing that default was imminent, went further into debt in attempting to meet performance requirements. Case 9 had many areas where poor communications played a significant role once default termination was a possibility. The government officials inspecting the material evidently could not communicate to one another what constituted poor workmanship or what was an acceptable product.

6. Lesson 6

There was evidence that the Navy's acquisition team members were not knowledgeable in critical areas of the acquisition process. Therefore, training is a possible remedy to improve the level of competence. (This need will always be present in a dynamic field such as acquisition and contracting.) Briefly, to show the almost limitless scope of the possible requirements for acquisition training, Case 8 is a good example. Government auditors were performing an inspection of the Contractor to see if adequate records were being maintained. At that time, during performance, the Contractor was in default due to late deliveries. The auditors made several recommendations to the Contractor concerning his operation. These recommendations were made in good faith and in a true spirit of cooperation. These auditors, however, were part of the Government Team and suggestions and recommendations made by them and acted upon by the Contractor in good faith, waived the Government's right to default action. This points out the fact that the contracting officer must play a significant role in controlling suggestions and recommendations made to contractors. This could be done as in Case 8 by requiring a pre-brief with the audit/inspection team to familiarize them with the situation or in a review and approval of the auditor's report or debrief to the contractor.

Consistency, communication and training are very much intertwined. Improvement in either communication or

training would improve the ability of the diverse acquisition team to perform consistently in its dynamic environment.

VI. RECOMMENDATIONS AND SUMMARY

A. PREFACE

The research accomplished for this study brought out many imperfections in the present acquisition system as evidenced by the Lessons Learned. To ameliorate those conditions that existed in the cases analyzed several recommendations are presented. The recommendations are of a general nature to provide broad application. The need to avoid specifics is supported in a statement of a publication doing related work:

> The reader is cautioned the decisions made by administrative, judicial, and quasi-judicial agencies are based on fine points of law and contract interpretation and will very rarely be applicable in their entirety to another situation [12].

Often the specific cure cannot be deduced until further research is accomplished. In these areas the additional research that is necessary is identified. Many of the recommendations interrelate and overlap therefore only the major areas will be classified separately.

B. RECOMMENDATIONS

1. Recommendation 1

PCOs should be careful to apply basic contracting knowledge consistently when making decisions. The conclusion that PCOs are not always applying basic contracting knowledge is evidenced by the cases analyzed. For example: A PCO should know when reestablishing a contract that a delivery

schedule is required. A PCO should know it is impossible to terminate for default, prior to the delivery date, in a verbal supplemental agreement when the contractor has the material ready for delivery. A PCO should know that a ROID and a termination for default initiated on the basis of poor workmanship, when in fact the Government quality assurance representative at the plant and the Government reviewing official at the destination both accepted the material for workmanship, presents an extremely untenable circumstance. The cause of such circumstances might be:

a. Lack of training
b. Poor advice
c. Acting upon conflicting reports
d. Not have adequate time to decide personally on each decision
e. Use of the Government's monopsonistic power.

These are some of the possibilities that could have caused decisions that ultimately resulted in a sustained appeal. Bearden conducted a study into the personal characteristics of negotiators and his approach could serve as a guide for a similar research effort into the root causes behind PCO's decisions that result in sustained appeals [3]. Until such time that the cause is determined for these decisions, specific corrective action cannot be recommended unequivocally.

2. Recommendation 2

The acquisition team needs viable communications. The PCO must know what the other members of the acquisition team are doing and planning, and likewise they must know what the PCO is doing and planning. For example, in Case 1 the PCO should not have assumed his directions to the ACO to establish a new delivery schedule were carried out until he had received the Modification.

3. Recommendation 3

The acquisition team needs more training. This idea will be addressed in combination with Recommendation 5.

4. Recommendation 4

The acquisition team needs improved regulations and procedures. This will be discussed with Recommendation 5.

5. Recommendation 5

The acquisition team needs to present a more consistent front to industry. Recommendations 2, 3, 4 and 5 are all intertwined where interdependencies and tradeoffs exist. For example, improved consistency might be accomplished through improved training, improved communications or improved regulations and procedures. Similarly improved communications might be accomplished via training, regulation, or consistency. Another item not specifically addressed is organizational structure which interacts with many of the above recommendations. This study limited its scope to improvements within the existing system and consequently this item will not be pursued in this study. Therefore keeping in mind the

interdependencies of these actions the necessary effort will most likely be a combination of actions.

6. Recommendation 6

There is a need for a 'standard alert' on contracts that are potential candidates for default. In the nine cases analyzed, there appeared to be little change in the acquisition team's treatment or interface with the contractor after default action was initiated. This is not surprising since default action is not a common procedure for acquisition team members to handle. Only one in 10,000 PCO decisions are even appealed.

7. Recommendation 7

The PCO needs more control of the team member's interface with the contractor. This appeared true in one case analyzed in particular. In Case 8 the auditor recommended that the Contractor hire a certified public accountant (CPA) with government experience to assist with the required accounting records. The Contractor acted on the recommendation and hired the CPA specifically suggested. The important point is, that when the recommendation was made, the Contractor was already in default. Possible improvements to such situations are addressed in Recommendations 2 through 6. The improved control could be direct, where the PCO must review all communications between an auditing team and the contractor, or might be indirect in the form of organizational changes or training requirements. The central emphasis or

goal is that all team members are working in a concerted mode set by the PCO.

8. Recommendation 8

The conduct of the PCO should be decisive. The contractor/government relationship should be characterized by an atmosphere of interdependence with no surprises.

In Case 3 the Contractor advised the PCO in mid-April that delivery could not be made on the 1 May delivery date, but insured delivery by 17 May. The PCO did not reply to the correspondence and did nothing until 17 May when the material delivery did not transpire. The PCO then sent a show cause letter and subsequently a default termination for not meeting the 1 May date. During the period up to 17 May it is likely that default could have been taken and upheld by the ASBCA.

9. Recommendation 9

Analysis of appealed contract disputes is needed. The Lessons Learned brought to light many imperfections in the present Navy Acquisition System. Commitment to the type of analysis used herein, due to the limited scope and methodology of this study cannot be made without additional research. Some recommendations concerning areas to consider when developing a research plan brought out in the study are presented below.

a. Only two related studies conducted to date were found in the area of appealed disputes. Both studies utilized data from the Appealed Data Report. Newman was

looking for relationships between the factors on the Appealed Data Report to determine the cause of disputes but was unable to conclusively find such relationships. Newman recommended in his conclusion that "...case studies might prove more enlightening than group data analysis toward determining the cause of disputes ... [14:22]."

b. The second study, by Baxa and Hick's, used the Appeal Data Report with the addition of some external factors such as labor surplus area, tangible assets of contractor, and sale volume of contractor concluded:

> ...there exists a higher propensity to submit a claim if the contractor is located in a labor surplus area. Also the complexity and uncertainty of the technology was directly related to appealed disputes. Additional research is needed in the area of appealed disputes. But if the relationships between the factors and situations that motivate contractors to appeal the final decision of a PCO were better understood this would give the PCO valuable insight prior to award [2].

c. The analysis accomplished herein appears to support the idea that relationships between the factors on the Appeal Data Report exist. Certain contract factors have a higher tendency to be a part of a sustained appeal. For example, small business contractors were represented in 66 percent of the appeals brought before the ASBCA in Fiscal Year 1978. All nine of the cases in this study involved small business contractors.

To conclude from the sample and methodology used herein, small business in relation to large business has a

much greater potential for a sustained appeal concerning the Default clause in Navy Supply Contracts.

In general, as more research is accomplished, if certain contract factors conclusively pose a higher risk to the Government because they have a greater tendency to perpetuate appealed disputes, the requirements could be made more stringent for contracts or potential contracts containing these factors.

Areas where changes could be accomplished to reduce the Government's risk are (1) more stringent pre-award surveys, (2) weighting factors in the source selection, and (3) reduce the use of contracts for governmental social economic goals. These areas deal in the pre-award phase but also some post-award areas can be identified, such as (1) inspections, (2) audits, (3) reports, (4) extensions or modifications, (5) bonds, and (6) a general alertness for circumstances and conditions which might otherwise be overlooked, that potentially could lead to a dispute.

d. It appears that Secretarial delegation of authority to resolve appealed contract disputes to the ASBCA has at the same time relinguished some control of the acquisition process.

Davies has said "management control is the activity which measures deviations from planned performance and initiates corrective action...[8:341]." The ASBCA initiates an annual report which is basically an ASBCA workload

recapitulation. This report for a Service manager at any level is meaningless by itself. To use the figures given, some analysis must be performed so the manager can gain a notion of his organization's performance. From this analysis the manager could make corrective action to the system. The research required to establish a control report could entail a case-by-case analysis to get at the root cause of the adverse situation or could be a statistical analysis, reporting adverse trends or relationships. Then, through the distribution of this report, positive changes in the acquisition system could be initiated. To qualify as a control report, Davis said, "...only if the report of past performance is the basis for control of future action may it be considered to be a control report [8:358]."

Therefore, some analysis of the data provided on the Appeal Data Report used with data from contracts being awarded during comparable periods, could enhance management control of the acquisition system.

e. The present acquisition system, where the PCO is dependent on legal council for feedback from the appeal's process, needs to be improved. Because the basis for a PCO's decision cannot be determined from ASBCA decisions, no specific recommendation can be made. However, the following are the steps leading to an ASBCA decision with a demonstration of possible legal involvement:

(1) The contract is written with the legal staff's advice

(2) Contract performance occurs

(3) A contract dispute arises

(4) The PCO makes a decision with the legal staff's advice

(5) The contractor appeals the PCO's decision

(6) The ASBCA makes a decision. The Board is composed of lawyers using the legal data base.

(7) Subsequently, the decision rendered becomes part of the legal data base. Only if a case sets precedent does it receive wide distribution reaching the PCOs not directly involved in the dispute.

A feedback loop does exist, but in a restrained fashion, using the legal staff as an integral liasion to the information contained in the legal data base.

The standardization of the acquisition and contracting regulations that is taking place within the Federal Government may make the legal aspects easier to solidify and also make an automated interrogation of needed information more feasible. It is possible to require the PCO to get a legal staff approval on more decisions but this could encumber the system unnecessarily and would weaken the position of the PCO, which is also undesirable.

The PCO's ability to use the legal data base needs improving whether it be organizational, communication, training, hardware, software or a combination of several factors. Therefore a fruitful area for research could be an analysis of the legal data base required by a PCO and the best viable system to insure he has the data required.

f. Changes to the acquisition system to make it more dynamic and sensitive to appealed dispute decisions. This could be accomplished as illustrated in the model developed in this study, where significant decisions would be incorporated into a standard model and the revised model distributed in a timely fashion. Also it could be done in a publication with a numbering system parallel to DAR, and as significant decisions are made setting precedent or new interpretations, updates could be mailed to the cognizant acquisition teams. The fact that most PCOs are not appraised of the information contained in the decisions as they are made, but only find out about the decisions once they are involved in a similar circumstance, is unsatisfactory.

The idea that promulgation of the decisions in some meaningful fashion could be of some benefit can be inferred even by the small sample of cases used for this study. For example, portions of the ASBCA decision for Case 8 utilized the decision for Case 2. It is valid to assert if such decisions were promulgated in a meaningful fashion a reduction in disputes concerning that area could be realized.

Even though this study limited its scope to ASBCA decisions, the input for the analysis could be expanded to other levels such as judicial and Comptroller General decisions to make the aid more comprehensive. Also other Services' and Agencies' appeals could input valuable data to this

analysis. Promulgation of new laws and regulations that are not a part of DAR, but affect the acquisition process might prove useful. For example, references to the General Accounting Office (GAO) reports or the Brooking Commission Report in Office of Management and Budget (OMB) Circular A-76. These aids may be extremely helpful to the individual PCO in forming his acquisition strategy until such time they are incorporated into the DAR, NPD, or some other acquisition directive.

g. The Services appear to conduct business differently, therefore it is important that whatever analysis is done, should maintain the Services' identity. For example: The Army had 62.2 percent of its sustained ASBCA decisions in construction contracts whereas the Navy had only 33.3 percent in this category. Likewise the Navy had 53.8 percent of its sustained appeals in supply procurements while the Army had only 17.8 percent. Some of the benefits which could possibly be derived at the Service Secretary or Secretary of Defense level from the information gained through analysis of appealed contract disputes are: (1) a report card on how the Services are performing in the acquisition process under the present regulations/interpretations, (2) a source of identifying areas where new regulations are required, and (3) a source of new regulations required by decisions establishing precedent. The analysis is more appropriate at the Service Secretary or Secretary of Defense level because:

(1) such an analysis is too much to assume or expect the individual procuring agencies to undertake, (2) it coincides with trends toward standardization of acquisition regulations in DoD, and (3) the economic benefits inherent in a centralized analysis.

10. Recommendations For Further Research

a. Procurement types other than supply.

b. Other avenues of appeal such as Court of Claims, Federal District Courts and General Accounting Office.

c. Causes of decisions that have led to sustained appeals.

d. Impetus for appeals. It has been postulated that appeals are purely an avenue for regaining lost profit sometimes even on other contracts.

e. Problem for a contractor that initiates an appeal against the Government in terms of future business, image and poor relations. This would infer that many disputes would never surface on the records.

f. Viable means of incorporating the Lessons Learned into the acquisition system.

g. Means of establishing a PCO tailored automated data base with tailored models for interrogation on a real time basis.

This list is not inclusive but presents areas of research that appear untapped, and hold promise of positive results.

C. SUMMARY

The decisions of the ASBCA are a source of vital information that could be beneficial to the Navy's Acquisition System. ASBCA decisions are currently added to the legal data base used by the lawyers in providing advice or preparing cases. This same legal data base is used by the Boards and Courts in deciding cases. At present, it seems the best potential use for ASBCA decisions is to decide a similar appeal downstream. The purpose of this study was to analyze selected ASBCA decisions and determine if meaningful conclusions could be gained in the form of lessons learned. The study also presented a Default Termination Model for use by PCOs in the decision-making process. Much additional research is required. The analysis of appealed disputes is a promising areas as a source of information for refinement of our dynamic acquisition system.

APPENDIX A

TERMS

ASBCA: Armed Services Board of Contract Appeals; a quasi-judicial, administrative board with delegated authority from the Secretaries of the Armed Services to hear and rule on questions of fact in contract disputes.

Construction Contract: A kind of procurement dealing with construction, alteration or repair of buildings, structures or other real property.

Contract Provision: A clause or phrase within the contract that defines a variable or directs the actions required of the contracting parties.

Contract Type: All the types of pricing arrangements listed in item 20 of the Individual Procurement Action Report, DD Form 350.

Contracting Officer: The person executing a contract on behalf of the Government.

CPFF: Cost Plus Fixed Fee; a contract type in which profit is fixed in the form of a specified fee and the contractor is reimbursed for his allowable costs.

Default Clause: A standard contract clause. When a contractor fails to perform the contract according to its terms, the Government has the right to terminate all or part of the contract.

Dispute: A failure of the Government and contractor representative to reach agreement concerning a question of fact. A dispute occurs when the contractor requests a final decision and/or files an appeal with the ASBCA.

FFP: Firm-Fixed-Price; a contract type in which the contractor agrees to deliver supplies or services for a specified price which includes profit. The Government does not share in the risk for gains or losses.

Formal Advertising: A method of contract award in which the Government advertises requirements and contractors respond to Invitation for Bids. After bids are reviewed, determination of responsiveness and capability to perform is made. The contract is usually awarded to the low bidder.

Labor Surplus Area: Department of Labor designation of an area with very high unemployment. For the purpose of this study, any code other than a 5 in item 9 of the DD Form 350 designates the area as labor surplus.

Negotiated Procurement: A method of contract award in which contractors respond to a request for proposal. The Government evaluates prospective suppliers and a contract is negotiated and awarded to the bidder proposing the most advantageous offer to the Government.

R & D: Research and Development; as used here refers to contracts that are for experimental, developmental or research work.

ROID: Report of Item Discrepancy; a procedure used to inform a contractor that their material was received discrepant.

Sales Volume: Sales Volume as used in this report is the quotation of total annual sales for a contractor as listed in the Standard and Poor's publication.

Service Contract: A kind of procurement which calls directly for a contractor's time and effort rather than for a concrete product.

Small Business Set Aside: A program, established in 1961 by Public Law 87-305, and designed to strengthen the industrial base by providing competitive opportunities for small business. A set-aside restricts a procurement partially or totally to competition among small business firms.

Statements of Work/Specifications and Drawings: The detailed description of the work effort contracted for and how it is to be accomplished as well as how the output of the effort is to function.

Supply Contracts: As used here, referes to any contract other than purchase orders and short form negotiated contracts involving the procurement of supplies.

Tangible Assets: Tangible assets as used in this report is the rating given a contractor by the Thomas Register publication.

Termination for Default: The government terminates all or a part of a contract when a contractor is not performing in accordance with the provisions of the contract. The contractor may then be liable for excess costs the government experiences by having another contractor perform the contractor requirements.

Time Extension: A lengthening of the contract performance time. It is a negotiated condition with consideration given for the time extension.

T for C: Termination for Convenience; A contract clause which gives the Government the right to refuse to continue with contract performance. When the contracting officer serves a termination notice the contractor has the right to claim costs incurred in the performance of work terminated.

APPENDIX B

STANDARD DISPUTES CLAUSE

7-103.12 Disputes.
(a) Except as provided in (b) below, insert the following clause:

DISPUTES (1958JAN)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decision provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

SOURCE: Armed Services Procurement Regulation. Department of Defense. 1 July 1976.

APPENDIX C

APPEAL DATA REPORT

Contract No. _____

Contractor: (Name and Address):

_____

_____

_____

Department: _____

Command: _____

Contract Office Which Made Award:

_____

Contract Office Which Made Decision:

_____

Amount Contract Award: _____

Amount Contract at Time of Appeal: _____

Amount Claimed: _____

Appellant: _____

Sub-Contractor: _____

Government: _____

Description of Commodity or Service Procured:

_____

_____

_____

_____

_____

_____

ASBCA No. _____

Business Size: (Circle)

Large Small

Principal Place of Performance:

_____

Labor Surplus Area: _____

Real Party in Interest: (Circle)

Prime Sub

If Sub-Contractor: Large Small

Contract (Use ASPR Citations):

(a) Method of Award:

Advertised, _____

Negotiated, _____
(Authority)

Set Aside, _____

(b) Type of Contract (ASPR 3-4 _____)

_____

_____

_____

(c) Kind of Procurement:
(Supply, Const. R.D. etc.)

_____

_____

Contract Articles Basis for Claim:

_____

_____

Please complete and return this form within seven days of receipt. It is designed to facilitate answering statistical inquiries about appeals filed with the Board.

SOURCE: Armed Services Board of Contract Appeals.

APPENDIX D

Appealed Navy Supply Contract Disputes Rendered a Sustained Decision by the ASBCA in Fiscal Year 1978 Where the Major Issue of Concern was Other Than the Default Clause

Case 10: 78-2 BCA//13,038 & 13,216. Dealt with the Contractor being reimbursed for standby cost when a suspension was in effect.

Case 11: 78-2 BCA//13,238. This case dealt with the requirement for first article approval on a second contract with the same Contractor for the same item.

Case 12&13: 78-1 BCA//12,875. This case dealt with a situation where some items passed inspection but yet identical items later in the contract did not pass the inspection. The specifications were behind the main thrust of the dispute.

Case 14: 78-1 BCA//12,885. This case dealt with the imposition on the Contractor of performance and testing requirements not in the contract.

Case 15: 78-1 BCA//12,985. This case dealt with defective cost data and determine if the Government can recover overstated cost if the negotiated price is not overstated. Also this case looked at the effects of concessions made during negotiations but not necessarily made a part of the contract.

Case 16: 78-1 BCA//12,987. This case dealt with the liability of the Government to pay interest on the amount claimed in a dispute when decided in favor of the Contractor. Also determine the inclusive dates the Government was liable for interest on the unpaid claim.

Case 17: 78-2 BCA//13,110. This case dealt with defective pricing. The Contractor's failure to disclose current cost data allowed the Government to speculate a price overstatement existed, but was not able to show that the failure to disclose current cost data caused an overstated price in any reasonable ascertainable amount.

Case 18: 78-1 BCA//13,163. This case dealt with the Government's liability in a situation where a bid mistake was made but the Government had sufficient facts to be fully aware of the error.

Case 19: 78-2 BCA//13,444. This case dealt with defective drawings and a model, furnished by the Government with the resulting appellant's difficulties in designing and fabricating a major component.

Case 20: 78-2 BCA//13,469. This case dealt with entitlements to the Contractor for the Government imposing extra work via improper inspections and rejections (Changes clause).

Case 21: 78-2 BCA//13,427. This case dealt with asserted liquidated damages withheld and the effects of first and second level subcontractors on excusable delays.

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