BILL J. COPELAND,	)	**AGBCA Nos. 1999-182-1,**
	)	**1999-183-1, 1999-184-1,**
Appellant	)	**1999-185-1, 1999-186-1,**
	)	**1999-187-1, 2000-147-1, and**
Representing the Appellant:	)	**2000-148-1**
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

October 24, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Dissenting Opinion by Administrative Judge POLLACK.

These appeals arise out of two contracts between Bill J. Copeland, a sole proprietor, of Banning, California (Appellant) and the U. S. Department of Agriculture, Forest Service, San Bernadino National Forest, California (Government or FS). Contract No. 50-9JA9-1-1L039, Santa Ana River Trail (the trail contract), was for the construction of 42,350 linear feet of trail and reconstruction of an additional 14,950 linear feet of trail. Contract No. 59-9JA9-1-1L026, Serrano Comfort Station (the comfort station contract), was for the new construction of one comfort station and the retrofitting of three existing comfort stations. During performance, employee complaints of Davis-Bacon Act violations arose and were referred to the Department of Labor (DOL). Prior to completion, the contractor=s rights to proceed under both contracts were terminated for default. The Contracting Officer (CO) issued decisions on both terminations and on various contractor claims under each contract. Appeals were made to the Board during fiscal year (FY) 1993. Those appeals (with 1993 docket numbers) were dismissed under Rule 30 pending resolution of the matters which were subject to DOL determination. They were later reinstated with 1998 docket numbers and again dismissed under Rule 30 during the pendency of the DOL proceedings. Finally, DOL issued a final decision

and the previous appeals were reinstated with the current (FY-1999) docket numbers. AGBCA Nos. 2000-147-1 and 2000-148-1 are appeals of later claims based on deemed denials by the CO.

A hearing on the appeals relating to both contracts was held October 23-26, 2000 in Palm Springs, California. Judge Edward Houry was the presiding judge. He has since retired.

The Board has jurisdiction to decide the appeals under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ' ' 601-613, as amended.

FINDINGS OF FACT

Contract No. 50-9JA9-1-1L039
Santa Ana River Trail

1. On August 19, 1991, the Government issued sealed bid solicitation no. R5-27-91-63 for the construction of 42,350 linear feet (LF) of new trail construction and 14,950 LF of reconstruction of existing trail. Appellant was the successful bidder and was awarded the contract September 27, 1991 in the original contract amount of $112,900. (Appeal File (AF) 104-07, 121.) Notice to Proceed was issued October 21, 1991 indicating that time on the contract would start October 22, 1991 (AF 170).[1] The contract performance period was 213 calendar days (AF 50).

[1] There are separate appeal files for the two contracts which were submitted during the pendency of the earliest appeals pertaining to each and each of these files are identified by those docket numbers. Subsequent submissions continued the sequential numbering. AF references in this section of these findings refer to the appeal files for the river trail contract. AF references in the section of the findings related to the comfort station contract will refer to the comfort station appeal files which also are numbered sequentially beginning with 1. Where context does not make clear which appeal file is being referenced, the AF page (p.) number and the name of the contract will both be used. The hearing took place over four days, two for each contract. Each set of two

transcript volumes begins with page 1. The citation abbreviation ATr. [p. #]@ is used to cite to hearing testimony. Where testimony pertains to the trail contract, the reference Tr. [p. #] refers to the trail contract transcripts. Similarly, where the testimony is about the comfort station contract, the transcript page references are to the two volumes of hearing transcript on that contract.

2. Section I of the solicitation included by reference Federal Acquisition Regulation (FAR) clause 52.249-10 (APR 1984) ALTERNATE II (APR 1984) DEFAULT (FIXED PRICE CONSTRUCTION). The list of clauses incorporated by reference also included the FAR clause, DAVIS-BACON ACT (FEB 1988); FAR clause 52.222-7 WITHHOLDING OF FUNDS (FEB 1988); FAR clause 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988); and FAR clause 52-222-8 and PAYROLLS AND BANK RECORDS CLAUSE (FEB 1988). (AF 115 and supplement to Tab 21 forwarded to the Board by Successor CO Douglas Hyde-Sato September 14, 2000).[2] Section J of the solicitation contained General Wage Decision No. CA91-2 for the California counties of Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, San Bernadino, San Luis Obispo, Santa Barbara, and Ventura.

3. FAR clause 52.222-7 WITHHOLDING OF FUNDS (FEB 1988) directs the CO to withhold on his or her own action payments as may be considered necessary to pay Davis-Bacon wages to employees or (emphasis added) subcontractors. Such withholdings are authorized from Athis contract or any other Federal contract with the same Prime Contractor.@

4. FAR clause 52.222-6, Davis-Bacon Act (FEB 1988) requires payment not less than weekly to employees of the full amount of wages and bona fide fringe benefits due at the time of payment computed at rates not less than contained in the wage determination contained in the contract. The contracts contain the Payrolls and B asic Records clause (FEB 1988) (48 CFR 52-222-8). The clause directs that the contractor maintain payroll and basic records relating thereto, which the contractor is to preserve and make available for review by the CO and the DOL.

5. Work to be performed consisted of Sections AA@ through AF.@ Sections AA@, AB@, AD@ and AF@ were new construction. Sections AC@ and AE@ were reconstruction. (AF 162-63.) Work on the project started between October 24 and October 28, 1991 (AF 68, 375). The CO was Peggy Silberberger (AF

[2] The original AF included the Table of Contents but did not include Sections D-I, J and K of the contract. Failure to include Section I particularly created the initial impression with the Board that certain relevant clauses had not been incorporated by reference. The current presiding judge and, it is now evident from the file, the previous presiding judge both spent inordinate time ascertaining that these clauses were in fact included in the contract. Contracting Officers and Government Counsel, initially, and Contractor however represented, subsequently, should ensure that the evidentiary record accurately reflects the underlying contract at a minimum.

107). The CO retired from the FS prior to the hearing and did not testify. The successor CO also did not testify. William Crane was the CO=s Representative (COR) and the inspector was David Relph (AF 168-69). Appellant=s initial crew consisted of three people, a salaried superintendent, Cheryl Mallie, and two laborers, John Patterson and David Mayberry. Appellant characterized his original arrangement as a subcontractor relationship with Ms. Mallie whereby he paid her and she was to pay the workers. Three or four weeks after the start of the contract, after he concluded that she was unable to handle the administrative aspects of a subcontractor arrangement, he ended that arrangement and Mallie, Patterson and Mayberry became Appellant=s employees (Tr. 340-41). The FS had not approved the Asubcontractor@ relationship (Tr. 351).

6. Appellant understood the Davis-Bacon Act wage determination to apply only to union contractors. When preparing his bid, he expected to be able to ignore the DOL wage determination and negotiate a lower hourly rate because he was non-union. He had intended only to pay workers $8 per hour (Tr. 299, 304-05, 352-53, 378-80.) He claimed to have had such an arrangement on one or more previous FS contracts which occurred about 15 or 20 years previously (Tr. 378-80). He testified that after the pre-work conference he instructed Ms. Mallie to pay the workers the prevailing wage rate of $25.10 per hour (Tr. 352). However, he had a hunch that she made a deal with the workers to build the trail for a flat figure (Tr. 352). The payrolls were prepared showing Ms. Mallie as salaried and Patterson and Mayberry as being paid $25 an hour initially and later $25.15 hourly (AF 68-100).

7. Contract Daily Diaries (daily diaries) were prepared by the inspector, Relph, on the days he visited the work site. The December 11, 1991, daily diary indicated that 24% of the contract time had been used and that 11% of the work had been completed. The crew was camping out at the work site from the time work commenced until December 19, 1991. At that time, a heavy snowstorm caused them to leave the work site and discontinue performance. The next daily diary in the AF is dated February 19, 1992 (AF 369), notwithstanding that work had resumed sometime in January. One of the original crew (Patterson) was fired January 5 or 6. Mayberry resumed work sometime in January. (Tr. 281-83). Relph=s testimony was that records show that as of January 28, 45% of the time had been used and the work was 45% complete. He did not identify those records and there is no daily diary in the AF for that date. (Tr. 284.) Appellant=s payroll form for the week ending February 21, 1992 shows Mayberry working through Wednesday the 19th. A notation on the form says that Mayberry was released for building a fire on the trail, destroying tools by abuse and leaving trash on the job site. (AF 98.) The payroll for week ending February 28, 1992 indicates that Ms. Mallie was no longer employed (AF 100). No later payroll forms were submitted. Appellant testified that a trail machine was brought on the job December 16, 1991, and all work using the machine was performed by himself, his grandson, Glen Copeland, whom he considered a superintendent or co-owner, and Jerry Larson who was the superintendent on the Serrano Comfort Station project (Tr. 376-77.) Glen Copeland and Jerry Larson do not appear on the trail contract payrolls.

8. Also in late February, Mayberry complained to the COR that he had not been paid in accordance with the Davis-Bacon Act. Mallie and Mayberry made a written complaint dated

March 9, 1992 on behalf of themselves and on behalf of John Ramirez.[3] The letter states that a list of hours worked, wages paid, and wages due was enclosed. However, the referenced attachment is not attached to the copy of the letter in the AF. (AF 49.) This was followed by a letter dated March 12, 1992 signed by Mallie, Mayberry and Ramirez, in which they state that instead of paying Davis-Bacon wage rates, Copeland offered to pay Mallie $50,000 to supervise 10 miles of trail construction starting October 23, 1991, to be finished by the end of May 1992. The letter states that actual payment was $1 per foot for finished new trail construction and $.50 per foot for finished existing trail construction. Out of these payments, according to the letter, Mallie was to pay Mayberry, Patterson and Ramirez. This letter also references an enclosed list which is not in the AF. (AF 46-47.) Dated March 16, 1992 is a letter from John M. Ramirez claiming wages due from January 25 through February 21, 1992 in the total amount of $2,914.24 (AF 48).

9. Appellant was promptly asked to provide evidence of payment of wages to employees. Prior to March 24, 1992, he provided some records for examination by the FS. Other documents were brought in to the FS April 9, 1992. (AF 42-43.) With one exception, a check for $500 made payable to Patterson, all evidence of payment provided by Appellant showed payments only to Mallie (Exhibit (Ex.) 58; Tr. 111-12, 115, 246-48). The COR examined the documents and was unable to conclude that the employees had been paid according to the contract. Total payments appeared to total less than the hours shown on the payrolls at the Davis-Bacon rate. The difference between hours shown on the payrolls and the checks provided by Appellant was approximately $8,700. Payrolls showed less than 40 hours a week of work from employees who were living on the site and therefore would appear to have been motivated to work a full work week. The difference between the hours claimed by the employees and the checks provided by Appellant was over $30,000. The COR could not conclude with certainty the exact amount of underpayment. He doubted the truth of the payrolls which indicated that the employees worked only three 8-hour days per week while camped at the site. Based on the information known to the FS at that time, the COR could not then conclude (nor can we now) that a withholding of $30,000 was excessive. (AF 42-43.) The CO and COR first discussed the pay estimate and the possibility of a Amajor Davis-Bacon violation@ on March 23, 1992 and they concluded that the payment should not be made until they could determine whether or not the employees had been paid correctly (AF 175).

10. By late February, Appellant had received payment for three pay estimates for a total of $46,040 (AF 59; Tr. 49). Pay estimate # 4 was ready for payment. This pay estimate is not in the record and it is unclear exactly what had been earned. The Government=s brief says that this original pay estimate # 4 was prepared in the amount of $34,371.41. No payment was made due to the Davis-Bacon violation allegations (Tr. 112, 135-36). When a later prepared payment estimate # 4 was paid on or about April 27, 1992, it showed that $30,371.41 had been withheld because of a Aclaim from

[3] Ramirez appears on no payrolls. It is unclear whether he worked on the project or not.

employees for unpaid wages due them.@ Appellant was paid $4,073.59. (AF 56). Pay estimate # 5 for work prior to June 1, 1992 in the amount of $5,910 was paid on or about June 29, 1992 (AF 53).

11. After examining the records provided by Appellant, FS personnel by letter of April 13, 1992 referred the matter to DOL as a possible Davis-Bacon violation. The letter and referenced a telephone conversation of the same date between the CO and DOL employee Sandra Guerrero. (AF 41.) By letter of July 10, 1992, DOL informed the CO that it had performed an investigation which disclosed Davis-Bacon violations. DOL requested that the CO withhold $37,635 for the violations on the river trail contract pending final resolution. DOL also stated that it had computed liquidated damages in the amount of $270 for Contract Work Hours Safety Standards Act overtime violations and suggested that the CO might wish to withhold that amount as well. (AF 29.) The parties met on July 13. The CO=s minutes of this meeting are labeled at the top as pertaining to AContract No. 50-9JA9-1-1L026" (the comfort station contract). According to these minutes, the purpose of the meeting was to discuss Appellant=s untimely performance (presumably on the comfort station contract) and to deliver to Appellant the FS letter of the same date. However, most of the detail in the minutes relates to discussion of DOL=s July 10 letter and request for withholding related to the trail contract. The minutes indicated that the trail contract had in it an unpaid total of $36,001.41 of which $30,371.41 was already being withheld. Pay estimate # 6 was for $5,630 which had been earned as of July 6, 1992. Thus, an additional $1,903.59 was needed if the entire $37,635 being requested by DOL were to be withheld. This amount was therefore to be withheld from the comfort station contract. (AF 28.)

12. Appellant testified that he learned of the withholding on the morning of March 5, 1992 when he went to the FS office to check on the pending pay estimate (Tr. 370). As early as March 18, 1992, Appellant complained to the FS that the withholding of the progress payment affected his ability to carry on work under the contract (AF 44). In telephone conversations with the CO, correspondence and testimony, he asserted that the withholding was affecting work under the trail contract (AF 22, 39, 176, 191; Tr. 308). The initial withholding took place in March. DOL=s official request for withholding was not sent to the FS until July. Appellant has asserted that the withholding was improper because he was provided no written notice before the CO withheld the earnings in question. Appellant also asserts that the CO=s withholding of the funds otherwise payable was a breach of the contract. (Tr. 307-08.)

13. By letter dated April 29, 1992, Appellant submitted a claim in the amount of $25,000 for damages suffered because of the withholding. He provided several reasons for the claim. First, he asserted that no funds should have been withheld because the Acontract is fully covered for payment of labor & materials, as well as performance.@ Other reasons were that (1) he had not been provided a copy of the labor claims; (2) that Ms. Mallie was the provider of labor on the job and was responsible for paying the prevailing wage and Appellant had provided the COR evidence of his position; (3) that the CO had told Appellant that DOL required the withholding, but the DOL investigator had told Appellant that no recommendation had been made to withhold payment; and, (4) that the claim was attempted blackmail by employees who had been fired for cause. He stated that the withholding had caused Alosses in time@ and described financial detriment he had suffered. (AF 34-40.) The CO issued a final decision denying the claim. Therein, she responded one by one to the allegations in

Appellant=s letter referring to relevant contract or FAR clauses. (AF 30-33.) Appellant did not appeal the CO=s decision.

14. As of March 4, 1992, the work was ahead of schedule (70% complete with 62% of time used) (Tr. 285; AF 367). Some of the daily diaries indicate the percentage of time elapsed and percentage of work complete. Others do not. The original contract completion date was May 21, 1992, 213 calendar days after notice to proceed. (AF 50, 170.) The daily diary for April 22, 1992 shows work at 70% complete and time used at 86% (AF 365). The next daily diary dated June 11, 1992 lacks entries for work complete and time used (AF 364). On June 16, 1992, the FS inspected sections D, E, and F. FS officials on site were the inspector, Mr. Relph, the COR, Mr. Crane, Mike Florey, and Francis Enkoji. The daily diary for that day indicates that 239 days had elapsed (26 days in excess of the 213-day performance period). The inspector noted that section D needed tread widening on its lower half. Slough material had been placed on the outside edge to construct the trail but was not stable and did not meet the specifications. Section E had been reconstructed as specified to a width of thirty feet. The inspector noted such changes that the FS might want to make. He also noted that section F needed to be widened according to specifications. (AF 363.)

15. Shortly before June 30, 1992, the CO apparently sent Appellant a certified letter advising him that he was behind schedule. This letter is not in the record, but is referred to in Appellant=s June 30, 1992 response. Appellant=s June 30 letter listed Aa large number of additional grievances.@ Some of those amounted to claims. Appellant requested a time extension of 28 days for lengthy weather delays. He also claimed entitlement to an unspecified sum for construction of 880 feet of trail following erroneously placed flags. In addition, Appellant stated that his last pay request was filled out improperly and was not corrected until almost three weeks had passed. (AF 192.) Pay estimates were prepared by the FS (Tr. 48). Appellant complained that he could not hire men to work if he could not pay them and requested a time extension of three weeks. Appellant=s letter also contained claims on the comfort station contract which will be addressed later in this decision. (AF 192.) On July 1, 1992, a Wednesday, Appellant and the inspector had a telephone conversation in which they discussed the fact that Highway 38 was closed at the Forest Falls turnoff because of slides resulting from an earthquake the previous Sunday. A FS road was open for residents to use to bypass the slide area. The inspector told Appellant that the FS would not give him authority to Alet the Highway Patrol let him pass through the roadblock.@ The inspector told Appellant to use the FS road and commented that Appellant seemed unwilling to spend the Aextra time@ it would take to reach the project. (AF 362.)

16. The daily diary for July 6, 1992 indicates that 122% of the time had passed and the work was 88% complete. On that date, the inspector met Appellant at station 0+00 on Section B and measured 1,830 linear feet of trail 85% complete. He also measured 1180 linear feet of trail where section B crosses FS road IN12. A total of 10,418 linear feet had been constructed on section B. The inspector discussed areas needing work. He then returned to the office and prepared pay estimate # 6 which Appellant then came to the office and signed. (AF 361).

17. As mentioned in Finding of Fact (FF) 11 above, the minutes of the July 13, 1992 meeting indicate that its purpose was to deliver to Appellant a July 13 letter and discuss untimely performance on the comfort station contract. However, apparently more time was spent discussing the DOL letter and the withholding on the trail contract. DOL had requested that a total of $37,905 be withheld. Of that, the amount of $30,371.41 had already been withheld from monies earned as of pay estimate # 4. As of pay estimate # 6, the contract contained $5,630 earned but not yet paid to the contractor. This left a shortfall of $1,903.59 which was to be withheld from the comfort station contract. (AF 28.)[4]

18. After the July 6 entry, the estimates of percentage of work as reported in the daily diaries completed gradually decrease. Appellant continued to work slowly and made small amounts of progress. From July 6 to August 11, 1992, only 315 feet of trail was constructed and the inspector had lowered his estimate of work completed to 85%. (AF 360.) At the hearing, the inspector testified that the percentage indicated as complete on the daily diaries reflected only the links of work that had been done and provided no indication of work yet to be accomplished because it did not take into account the relative difficulty of work completed and work yet to be accomplished. (Tr. 387-91.)

19. The contract was never modified to extend the performance period. The COR=s letter to the CO providing comments on Appellant=s June 30 letter acknowledged that Appellant=s request for a 28 day time extension for weather delays was a valid request (AF 201). A series of e-mails from the COR to the CO on August 10, 1992 demonstrate the COR=s conclusion that Appellant was not making satisfactory progress on the trail project. The COR told the CO that the last time he spoke with Appellant, Appellant was working on the job only on weekends. (AF 208.)

20. The CO issued her decision on the claims contained in Appellant=s June 30, 1992 claim on August 13, 1992. She denied the claim for payment for 800 feet of trail on the ground that the first 100 feet of erroneous flag line had been removed, which should have alerted the contractor not to build in that direction because it was inconsistent with the trail as shown on the contract drawings. She also denied the request for the three-week time extension that Appellant claimed as a result of a mathematical error in the pay estimate # 5. She acknowledged a slight delay in the Finance and Accounting office but stated that information she had received was that Appellant should have received payment by July 11. Appellant had asserted that the FS was stalling on performing inspections but this assertion did not amount to a claim. In response, the CO explained that some work previously inspected had not met specifications and that if work had been completed Appellant should schedule an inspection with Mr. Relph. Regarding the closing of Highway 38, she stated that access to the project was available by the Thomas Hunting Ground Road. This route took 30-45 minutes longer than the Highway 38 route. Finally, in response to Appellant=s claim that he was

[4] The July 13 cure letter and Appellant=s response is outlined in the section of these findings pertaining to the comfort station contract.

entitled to a 28-day time extension for weather delays, the CO stated that the FS believed that the request Amay@ have been valid at one time. She went on to say that he had continually failed to perform in accordance with the contract and that granting additional time would not change the fact that Appellant was then running 70+ days over contract time. She did not directly state that the claim for the time extension was denied. (AF 19.) The COR had advised in his July 8 letter to her that the request was valid (AF 201). This decision was not appealed.

21. After addressing the claims and other topics presented in Appellant=s June 30, 1992 letter and informing him of his appeal rights, the CO advised that the Government was considering termination of the contract pursuant to the contract=s default clause. She asked that he provide, within 5 days, a course of action to improve performance as well as a new schedule of work showing the time frame in which project completion would occur. (AF 21.)

22. The inspector visited the project site and prepared two more daily diaries between August 11 and September 18 when the contract was terminated for default. On September 9, he reported that no workers were on site. Since August 11, there had been 460 linear feet constructed to 70% completion. Brush had not been disposed of 24 feet from the centerline of the trail. Cut slopes needed raking and trail treads needed to be outscored. The inspector showed the work at 81% complete. (AF 359.) On September 14, the inspector was accompanied by Mr. Crane, the COR, Mary Lou Matanis and Phil Sebek, both of the FS, and DOL investigator, Sandra Guerrero. One laborer was working. A visitor was present on site with him. Ms. Guerrero interviewed the worker and visitor privately. After that interview, the FS personnel discussed the project with the worker, stating that brush removal did not meet specifications and work was proceeding very slowly. (AF 358.)

23. The CO terminated Appellant=s right to proceed under the contract effective September 18, 1992, for unsatisfactory progress. She estimated the required production rate to be 269 feet per day and stated that FS records showed that Appellant had accomplished a daily average of about 10 feet of trail between July 6 and September 9. She also referred to Anumerous Davis-Bacon Act violations reported to [DOL].@ (AF 7.)

24. Appellant timely appealed the termination for default to the Board where it was docketed as AGBCA No. 93-124-1. Later it was dismissed pursuant to Board Rule 30 and then reinstated as AGBCA No. 98-118-1. After a second dismissal and reinstatement, the appeal was reinstated under the current docket number. These dismissals without prejudice were issued at the requests of Appellant during the pendency of the DOL investigation and adjudication.

25. In addition to contesting the termination, Appellant submitted an additional claim letter dated January 14, 1994. Therein, Appellant requested payment for 1,000 feet of finished trail on the North Face of Constance Peak at $2 per foot for a total of $2,000. He also requested $15,000 payment for 1,500 square feet of rock face retaining wall in the same 1,000 feet of finished trail. Both of these work items were claimed to have been completed but not paid. Appellant also made claims for damages allegedly resulting from the default termination: (1) lost profits which would have been

earned had the contract been completed ($10,000); (2) loss of trail building machine because he was unable to make the payments and the machine was repossessed ($26,000); (3) lost bonding capacity ($300,000); (4) foreclosure of home due to loss of income ($545,000); (5) lost income because of Aillegal@ withholding of progress payments which destroyed credit and left several suppliers with unpaid bills ($1,000,000); (6) Aforced@ sale of tools and equipment in attempt to save home ($50,000); (7) money withheld for DOL plus interest ($45,375); (8) $5,000 attorney=s fees and use of Appellant=s time to compile evidence ($60,000); and (9) loss of $200 per day personal earnings ($96,000). (Copeland Construction letter of January 14, 1994, not in AF. Copy in administrative file, AGBCA No. 94-178-1.)

26. The CO decided Appellant=s January 14, 1994 claims in a letter dated March 7, 1994. Regarding Appellant=s claim that he had constructed 1,000 feet of trail on the north face of Constance Peak that was never paid for, the CO found that after the cut-off date for pay estimate # 6 but prior to default, 2,145 feet of trail was constructed by Appellant but never processed for payment. She also found that approximately 1,600 linear feet of trail was paid for but never constructed by Appellant. This 1,600 foot segment of Section A was under snow at the time payment was made and could not be verified until after payment had been made. The CO subtracted 1,600 feed of construction from 2,145 feet and concluded that Appellant was due payment of $1,090 for 545 feet of trail at $2 per foot ($1 for clearing and grubbing and $1 for excavation). However, she determined to withhold that amount pending a DOL decision on the unresolved labor dispute. Also, she determined that if DOL did not request withholding for the labor violations, the rights of the surety which had paid excess reprocurement costs of $31,770 for completion of the contract were superior to those of Appellant. Addressing the $15,000 claim for having built a rock retaining wall, the CO determined that the wall in question was not required by the contract, nor was it built according to contract specifications for rock walls. She also asserted that Appellant, without the permission of the FS, built the wall as an alternative to performing some difficult excavation. Because an alternative was not covered by a Change Order, payment of this item Awould be processed@ under the pay item,Aexcavation.@ The claim was denied. The CO then discussed the claims for damages resulting from the termination for default: (1) Appellant=s average production rate was only 10 feet a day between July 6 and September 9; (2) on September 14, only one worker was on site; (3) at the time of default Appellant was nearly three months past the contract completion date. She also pointed out that the Government is not responsible for problems outside the terms and conditions of the contract; that a contractor is not entitled to profit on uncompleted work after a termination for default; and DOL, not the CO, would determine responsibility for labor violations. Based on the factors she outlined, the CO decided that the default termination was justified. She found the amounts claimed to pertain to losses after termination, outside the contract and not the fault of the FS. Those claim items were therefore denied. This decision of the CO was appealed to the Board. The appeal was received at the Board May 16, 1994. (Appellant=s May 3, 1994 notice of appeal in AGBCA No. 94-178-1 with attached copy of the CO=s March 7, 1994, decision.) The dismissals and reinstatements during the pendency of the DOL proceedings resulted in changes in the docket numbers for these matters. The final docket numbers for the claims originally docketed as AGBCA No. 94-178-1 are AGBCA Nos. 1999-185-1 and 1999-187-1.

27. One of Appellant=s claims was for building and then having to obliterate 800 feet of trail in section D. He testified that he constructed 800 feet of trail because he followed flags which the FS had mistakenly placed in the wrong place and when those flags ran out after the construction of the 800 feet in question, he (or his workers) investigated and discovered that flags had gone off at a right angle apparently because the route where the flags had originally been placed (and where the 800 feet was built) was unsuitable for the trail. These flags were not removed when the the path of the trail was turned around. Appellant therefore built that 800 feet of trail and then had to obliterate it when the mistake was discovered. He spent approximately one day building it with the trail machine. (Tr. 314-15, 317, 319.) The inspector testified that the first one hundred feet of the incorrectly placed flag was pulled out. He testified that reference to the map of the trail contained in the contract (AF 163) would have shown Appellant the correct trail path. He conceded that not all of the erroneous flags were removed. According to the inspector, Appellant could have looked down the slope past the area where the flags had been pulled out and have seen the remaining erroneously placed flags. If one were following the line indicated on the map in the contract, it would have been obvious that the line would go straight. (Tr. 384-86.)

28. The record contains no evidence in support of Appellant=s request for a three week time extension other than the allegations in his June 30 claim letter. Similarly, Appellant=s claim that the FS was stalling on inspections has not been supported.

29. State Route 38 which was the most convenient route in and out of the project site was closed for a period after an earthquake in the area on or about Sunday, June 28, 1992 (AF 24). Appellant=s claim letter of June 30 requested a time extension until it was reopened. In his letter of August 23, he stated that it had remained closed for three weeks. (AF 17.) An alternate route, IN 12, was available. It resulted in additional travel time of 45 minutes each way to reach the job site. By this time there was no longer a crew camped at the job site. Workers were traveling in and out each day of work. Appellant testified at the hearing in 2000 that the Amain road@ was closed five weeks which contradicted his 1992 letter. (Tr. 328-30.) The COR informed the CO in 1992 that she could justify a time extension of 1-2 days for the road closure (AF 10).

30. Regarding Appellant=s claim for 1,000 linear feet of trail constructed but not paid for, the inspector testified that the statement in the CO=s March 7, 1994 letter that 2,145 linear feet had been built and not paid for was in error. He testified that in the two-month period between the July 6th pay estimate (not processed) and the September 9th measurements, 775 feet of trail were built but not to 100% completion. Adjusting for the lack of completion, he estimated, based on his contemporaneous daily diaries, that 590 feet of trail had been built in that span of time. He suggested that the $1,180 which would have been payment for those feet at $2 per linear foot was probably held for reprocurement costs. He did not know how that erroneous figure of 2,145 had been calculated. (Tr. 62-63, 100.) Appellant testified that the record showed as plainly as he could read it that 2,145 feet was completed and not paid for. He stated that was the record he had and it corresponded to his figures. He neither identified the record he was referring to nor did he provide his calculations. (Tr. 331-32.)

31. Appellant also claimed a payment of $15,000 for construction of a rock face retaining wall in the 1,000 feet of finished trail that was the subject of the claim discussed in FF 28 above. Standard specification section C.6. 935 Rock Retaining Walls, as modified by special project specification section C.7, Rock Retaining Walls, requires that all rock shall be of a general rectangular shape, and at least 50% of all rocks in a completed wall shall be one-half cubic foot or greater in size.[5] Appellant testified that he built a rock wall to hold a portion of the mountain which was sliding after an earthquake. He sought permission from the FS to build the wall and when permission was denied, he built it anyway. (Tr. 287-89.) The inspector testified that the wall was not built to specification and the contract did not require a wall in that location (Tr. 64).

32. Appellant claims entitlement to payment for constructing 2,145 feet of trail for which he was not paid. He had, in a January 14, 1994, earlier claim, asked for payment for having constructed an additional 1,000 feet. The figure of 2,145 feet did not appear in the record until the CO=s March 7, 1994, decision on that claim where she stated that 2,145 linear feet of trail had been constructed and not paid for but that 1,600 linear feet had been paid for and not constructed. (AF 262.) Appellant provided no other evidence in support of the claim for construction of 2,145 feet of trail. His January 21, 2000 submission refers to the length of completed trail as having been Astipulated by letter from [the] C.O.@ On the other hand, the inspector testified that the CO erred when she stated in her decision that 2,145 feet had been constructed and not paid for. The correct distance was 315 feet. The contract daily diary for August 11, 1992 contains the COR=s report that in section B, he measured to the end of the end of the constructed trail, from station 0+00 to station 21+45 and that only 315 feet had been constructed since July 6, 1992. (Tr. 62-63, 100, 235; AF 360.)

33. Regarding a $15,000 claim for building a 1,500 square foot rock retaining wall, Appellant testified that he built a rock wall despite the fact that the FS denied his request to build one. The inspector testified that the rock wall was not required by the contract and was not built to specifications. (Tr. 64, 286-89.)

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[5] The Appeal File did not include section C, Description/Specification/Work Statement, nor did either party place these relevant technical specifications in the record at the hearing. The Government quoted from section 935 at page 25 of its brief. Copies of C.6 and C.7, Rock Retaining Walls, were later furnished Appellant and the Board at the request of the Board. Standard specification section C.6.935 required a minimum rock size of one cubic foot. Special Specification section C.7.935 reduced that minimum size requirement to one-half cubic foot.

Contract No. 50-9JA9-11L026
Serrano Comfort Station

34. The FS issued solicitation no. R5-27-91-64, Serrano Comfort Station, for the construction of a new comfort station and the retrofitting of three existing comfort stations August 13, 1991 (AF 37).[6] Appellant was the successful bidder and was awarded the contract September 19, 1991 for $147,777 (AF 38). The contract through FAR clause 52.212-3 (APR 1984) provided that the work should begin within 10 days of receipt of notice to proceed (NTP) and be completed ready for use not later than 120 days after receipt of NTP. (AF 28 and supplement to Tab 14 forwarded by the successor CO September 14, 2000 (Tab 14 supplement)).[7] Section 01010, paragraph 1.03, SITE CONDITIONS, provided that the site would be closed from December 1 through April 1 of each year as it is an eagle winter nesting location (AF 51). The original COR on the contract, Mr. Crane, selected the specified performance period of 120 days (Tr. 15). He based that period on the contractor using a crew of six or eight workers (Tr. 46).

35. Section I.2 of the solicitation included FAR clause 52.249-10 (APR 1984) ALTERNATE II (APR 1984) DEFAULT (FIXED PRICE CONSTRUCTION), providing in part that if it is later determined that the contractor was not in default, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government. Also included in Section I was FAR clause 52.249-2 (APR 1984) Alternate I (APR 1984) TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE). This clause provides for profit only on work performed before the effective date of termination of the contract, not on work not performed.

36. Section I.1 provides a list of clauses incorporated by reference, including FAR clause 52.222-6, DAVIS-BACON ACT (FEB 1988); FAR clause 52.222-7 WITHHOLDING OF FUNDS (FEB 88); and FAR clause 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 88) (AF 42 and supplement to Tab 14 forwarded to the Board by the successor CO September 14, 2000).

37. Section J of the solicitation contained General Wage Decision No. CA91-2 for the counties of Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, San Bernadino, San Luis Obispo, Santa Barbara, and Ventura (AF 122). The contract contained FAR clause SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (FAR 52.236-3) (APR 1984) (Tab 14 supplement). Sheet 2 of the contract drawings required the contractor to connect to existing water, gas and electrical (Tab 25, Supplement to Appeal File (SAF)). The contract contained no liquidated damages clause.

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[6] In this section, references to AF and Tr. pages refer to the comfort station contract appeal files.

[7] The original AF did not contain sections D-I, K and L of the contract. Sections D, H and I particularly contained provisions relevant to the appeals.

38. The CO was Peggy Silberberger. She retired prior to the hearing and did not testify. The successor CO also did not testify. The original COR was William Crane; he was succeeded by Mary Lou Matanis. The inspector was Phil Sebek. By the time of the hearing, the CO had retired and the inspector was deceased. Ms. Matanis= name had changed to Mary DeBelina. She and Mr. Crane testified. (AF 40; Tr. 11, 16, 63.)

39. Work required by the contract involved construction of a reinforced concrete block comfort station including all utility services associated with the comfort station. The comfort station was to contain five showers, one storage room and men=s and women=s restrooms. The contract also required retrofitting of seismic bracing to three existing comfort stations. (AF 47.)

40. In a letter dated September 18, 1991, Appellant confirmed his bid, indicated that he had inspected the site, and acknowledged both the contract performance period and the December 1 to April 1 site closure. He also confirmed that he understood the Davis-Bacon wage rates. Apparently, however, unbeknowst to the FS at that time on this contract he had prepared his bid planning to pay laborers $9 per hour instead of the higher hourly wage rate required by the wage determination contained in the solicitation (Tr. 194-96).

41. Appellant acknowledged a NTP of October 23, 1991 by his signature on the minutes of the pre-work meeting held October 21, 1991 (AF 26-27). Appellant therefore had 39 days to work before the December 1- April 1 eagle nesting shutdown. Had Appellant begun work again exactly on April 1, the contract completion date would have been June 20. Appellant did not begin work again until April 20 and the FS apparently restarted the count of days in the performance period on that date (April 20) and calculated the contract completion date to be July 11(Tr. 65-66; Government=s Brief, p. 4).

42. The earliest daily diary in the record is for Thursday, November 7, 1991. The COR, Mr. Crane and the project inspector Phil Sebek visited the work site. According to the daily diary prepared by the COR, compaction for footings was 75-85% complete. (Daily diary for November 7, 1991.) At that time, the FS considered work to be unacceptable. However, soon thereafter, on November 13, 1991, the inspector indicated that compaction for footings was at 96% and work was indicated to be acceptable (Daily diary for November 13, 1991). Footings were poured November 19, 1991, and the inspector indicated work to be both on schedule and acceptable (Daily dairy for November 19, 1992).[8] Work was still underway December 13. Compaction was at 96% per the COR; the daily diary prepared by the COR states: APlans to pour footing tomorrow.@ This seems to be in error as the five-page dairy for November 19 provides a detailed account of the pours and subsequent dairies refer to compaction around footings. As of November 29, work was indicated to be acceptable and on schedule. On December 13, the COR marks the work as acceptable but there is

[8] The daily diaries and record provide no explanation for work being allowed to continue after the December 1 start of the eagle nesting period.

no indication whether the work is on schedule. (Daily diaries for November 19, November 20, and December 13.) Diaries for these 1991 dates indicate only Appellant and his grandson, Glen Copeland or the two of them and one laborer on site. On one occasion only Glen Copeland was present. (Daily diaries for November 7, 19 and 20 and December 13.) The sole 1991 payroll in the record shows Appellant and his grandson as salaried and a single laborer as having worked during that period (Payroll for week ending November 29, 1991).

43. Work resumed in April 1992 (Tr. 65-66; Government Brief, p. 4). About two-thirds of the contract time remained; the only work accomplished before the shutdown was the pouring of footings (Tr. 66). All 1992 payrolls show four employees, Appellant, himself, and Jerry Larson (the superintendent) both as salaried, and two laborers, Pavel Oajdea and Richard M. Aspril. The contract daily diary for May 6 indicates that Appellant and a 7-person concrete crew were on site. On May 15, workers on-site were two block masons. Three workers, including Appellant and the superintendent were shown as working on May 20. By June 17, the inspector reported that 81% of the performance period had elapsed and approximately 50% of the work had been completed (Daily diary for June 17). By letter dated June 26, 1992, the CO asked Appellant to provide, by July 7, 1992, a new schedule of work showing how he would complete the work and within what time frame (AF 25). Appellant=s response of June 30, 1992 did not provide the requested revised schedule. Instead, Appellant complained of the withholding for alleged Davis-Bacon Act violations on the trail contract (FF 9-11). Appellant also listed what he termed Aa large number of additional grievances.@ Those pertaining to the comfort station contract which remained unresolved were (1) a dispute over an additional walkway request by the COR; (2) a dispute over wording about floor covering in the shower room and dressing room; (3) a FS request to move plumbing one foot; (4) a dispute and delay involving specified paint no longer being available in California; (5) conflicting wood treatment processes shown on the plans and in specifications resulting in a three-week delay; (6) a two-week delay resulting from a disconnect between the brand name and product number for a specified hot water mixing valve; (7) a two-day delay for the resolution of a drawing error regarding spacing of bolt patterns; (8) a one-day delay involving a FS request for a quote on additional hardware for retrofit; (9) need for clarification on wording in amendment no. 1 which referred back to original specifications; and, (10) a two-week delay for approval of Fiat bathroom stall partitions when the specified Sanimetal partition proved to be no longer available. (AF 19-24.)

44. The COR had provided the CO written comments on the matters pertaining to the comfort station raised in Appellant=s letter. She stated that the walkway work in question was extra work for which the Government had asked Appellant to submit a cost proposal. Appellant had submitted a cost estimate which the FS rejected as too high. The FS had proposed a price believed to be fair and equitable and had invited a counter-offer. Appellant made no response. (AF 17-18.)

45. Regarding the question of wording in the specification for floor covering in the shower room and dressing room, the COR stated that she had provided Appellant work order # 7 in which item # 1 addressed the FS=s Aintent for the wording in the contract for the area to be covered.@ Appellant had been told that any further concerns on this issue needed to be raised with the CO in writing. Regarding the request to move the plumbing one foot, the COR explained that this work was needed

to meet accessibility requirements. Appellant had been notified of the change on May 22, 1992 and it was noted in work order # 6, item # 10 dated May 27. As of June 6, work was still being done on the walls; thus, no costs should have been incurred from moving the plumbing one foot. The COR stated that the parties had discussed the fact that the Glidden paint was no longer being sold in California. A Pratt & Lambert epoxy coating was suggested but no submittal had been made. The product is a primer for masonry and could not be applied until the block had cured 28 days and, therefore, it was not then holding up the project. The COR responded to the allegation about the wood treatment process by saying that Appellant had informed the FS that plans and specifications had provided different methods, one of which was illegal, and that this situation was causing a three week delay. According to the COR, the FS had told Appellant to use the legal process. Regarding the claimed two-week delay in approving the submittal for the hot water mixing valve, the COR responded that Appellant failed to inform the FS that he submitted the Powers model because the manufacturer of the Bradley model did not sell the valve separately from the shower assembly. The FS had originally desired the Bradley fixture as it had been used in the existing comfort stations and using the same equipment in all stations would facilitate maintenance. However, when Appellant later explained that the Bradley valve could not be purchased separate from the entire shower assembly and resubmitted the Powers model on June 17, it was approved in a work order issued the same day. The COR stated that the bolt spacing error was resolved in the field the day it was discovered and thus no delay had occurred. The COR=s response to the claim of one-day delay for providing a quote on additional locks and handles for the retrofit portion of the contract was that Appellant was asked to provide a bid, it was deemed too high and thus the FS decided not to add the work to Appellant=s contract. The COR responded to the request for a one-day delay in providing clarification about wording in the change order regarding floor closing by simply referring back to her initial response on that item in which she had related that Appellant had been told to submit further concerns to the CO in writing. Regarding the claim of a two-week delay in approving the Fiat partitions, the COR responded that the original rejection was to maintain uniformity across the campground. (AF 17-18.) When Appellant resubmitted on June 17, he explained that the Sanimetal partitions were no longer available. The FS verified that information and issued a work order approving the Fiat partitions the same day. The COR summarized his comments to the CO by stating that most of the claims for delay were related to FS responses to submittals. Specification section 01300, Submittals, allows the Government 15 days for review of original submittals and 7 days to review resubmittals. The contractor=s original submittals were received May 26, 1992. The FS responded with approvals and denials the following day. Resubmittals were received June 17, 1992, and approved the same day.[9] (AF 17-18.)

46. Thereafter, on July 13, the meeting described in FF 10 and 16 took place. It is unclear in the minutes of the meeting exactly what was said relative to the fact that both contracts were behind schedule but the CO hand-delivered a letter pertaining to the comfort station contract which was both

[9] Neither the submittals nor the cited work orders are in the record; however, Appellant does not dispute the assertion and has not attempted to demonstrate that the facts are other than indicated.

a CO=s decision on the matters raised in Appellant=s June 30, 1992 claim letter and a cure letter. She again asked for a completion schedule. She again informed Appellant that the FS was considering termination pursuant to the Default clause in the contract. She directed Appellant to inform her within 5 calendar days what action he would take to improve performance. He was also to provide a new schedule of work showing the time frame in which project completion would occur. This letter acknowledged a three-week delay on the matter of the conflicting requirements for wood treatment and Agranted three weeks additional time.@[10] (AF 13-14.)

47. Appellant provided the requested completion schedule in a letter dated the next day. He indicated that roof framing would be complete by July 24; roofing and metal skylights by July 31; doors and hardware by August 7; plumbing, wiring, and venting by August 21; painting, clean up and retrofit by August 28; and grading and sidewalks by September 4. Thus, the contractor=s estimated completion date was 7 weeks and 4 days away from the date of the July 13 meeting and 7 weeks and 6 days from the contract completion date of July 11, 1992. The letter stated that the schedule was based on the receipt of prompt payments and Afurther consideration of disputed items which have still to be resolved.@ It also related that Appellant was preparing claims for disputed time delays. Additional representations were that the contractor would have men on the job on a regular five-day-a-week basis and all materials had been purchased and were on hand. (AF 10.)

[10] The CO did not modify the contract to extend the performance period by these three weeks.

48. The COR testified that the CO agreed to a seven-week time extension at the July 13 meeting (Tr. 70). On August 19, 1992, the CO signed Modification No. 2 with an effective date of August 7, 1992. The description of the modification reads as follows: AReference the Contractor=s latest Progress Schedule, dated July 14, 1992; should the Contractor fail to make timely progress and complete the work as indicated, the Contractor agrees to an automatic decrease in the price of $3,000 (approximately a 2% reduction - $2965.02). Penalty shall be assessed on September 4, 1992.@ Appellant signed the modification Asubject to time extension request.@ His signature was undated. The CO=s agreement, in effect, to adopt Appellant=s revised schedule and extend the contract completion date to September 4, 1992 in effect granted all time extension requests prior to the August 7, 1992 effective date of the modification. (AF 29.) The COR signed a Justification Statement@ dated August 7, 1992. The statement read as follows: AThis change order is to inform the contractor of the Government=s intent to assess a penalty against him for failure to complete the contract within the time schedule which was submitted by him on 7/14/92. After discussions with the contracting officer, it has been decided that a $3000.00 (2-3 % of the contract price) penalty will be assessed on 9/04/92 if the contract is not complete as promised. Also, further penalties may be assessed for further delays.@ (AF 30.) While it does not directly state that the contract performance period has been extended by a specified number of days, we find that this inartfully worded modification extended the performance period by the 55 days which extended the completion date from July 11 to September 4, 1992.[11] Pay estimate no. 7 addresses the time extension a little more directly. Line 12 there indicates that 79% of the performance period had elapsed and a corresponding remark is that this reflects approval of a 7-week time extension Aper C.O. # 2.@ (AF 148.) Presumably C.O. # 2 is Change Order or Modification No. 2. The COR testified at the hearing that the three week extension promised by the CO for the wood treatment chemical delay (which was never separately granted in a modification) was a part of the seven week extension being described here (Tr. 85). Apparently the requested time extension request upon which Appellant conditioned his signature and assent to modification # 2 was his claim for an extension of three weeks because his Yale door locks had not been delivered.

49. Appellant=s claim for a time extension because his ordered Yale door locks had not been delivered was dated August 15, 1992, between the effective date of modification # 2 and the date the

[11] Nowhere in the record does the FS speak of a 55-day time extension. All references, both in the contemporaneous documents and in testimony are to time extensions measured in weeks. Nonetheless, both Modification No. 2 and the daily diaries beginning with August 18 show a completion date of September 4, which is 55 days (7 weeks and 6 days) after the date of July 11 which the FS had previously used as the completion date.

CO signed it. He stated that several weeks of delay had already occurred and asked for a time extension of three weeks plus an ongoing period from that date until the locks arrived. He raised an issue of the design of the air exhaust fan over the shower end of the station. Appellant believed that a larger fan was needed to prevent moisture accumulation. He mentioned that four days had passed. He was not installing the delivered specified fan for that reason. However, at the hearing he stated that this was not a change order for which a claim existed. (Tr. 55.) In the letter Appellant also mentioned small hairline cracks in plaster walls resulting from earthquake aftershocks. He also mentioned a five-week elapse of time from submission of pay estimate no. 5 until payment. Finally he complained that the COR had Areprimanded@ him when workers were not on the job at 9:00 a.m. He closed the letter asking the CO to Agrant . . . these requests.@ Other than the request for three weeks for the delay in delivery of door locks, it is not entirely clear what the claimed requests were. (AF 6-9.)

50. In a letter to the CO, dated September 16, 1992, the COR advised against an additional time extension and recommended termination for default. The extended completion date of September 4, 1992, had passed without the project being completed. Even though the schedule was one proposed by the contractor himself, he was unable to meet the deadlines. The COR had reviewed a list of work remaining to be performed on the project which had been compiled by the inspector. After that review, she estimated six weeks more of work with a full crew. The latest delay was being caused by failure of Appellant=s supplier to deliver door locks. (AF 4.) At the hearing, the COR=s testimony was consistent with this report. She testified that Appellant had repeatedly failed to get enough workers on the job. (Tr. 75.) At the time the contract was terminated, he had not installed the penetrations for plumbing; he had not hung the bathroom partitions; locks and plumbing fixtures had not been installed and were later installed by the completion contractor (Tr. 83, 91). The contract daily diary for September 9, 1992 contains what amounts to a punch list of work remaining to be accomplished on the project. It contains multiple items of work to be performed in each of five areas identified as (A) exterior work; (B) building interior work; (C) storage room; (D) building exterior; and, (E) pipe chase area (SAF tab 24, daily diary 9/9/92).

51. By letter dated September 18, 1992, the CO terminated Appellant=s right to proceed on the contract for default. She outlined the chronology of Appellant=s progress in the following way. As of June 4, 1992, 71% of the contract time had elapsed and 50% of the work had been completed. The contract completion date was July 13, 1992. On July 13, 1992, the CO informed Appellant in writing that he had failed to cure conditions endangering performance. The FS was considering termination pursuant to the Default clause in the contract. In addition, she stated that Athis letter granted@ Appellant an additional three weeks for a wood treatment problem extending the contract completion date to August 1, 1992. Appellant provided the new progress schedule on July 14, 1992 showing all work would be complete within 7 weeks by September 4, 1992. This new schedule exceeded the allowed contract time, counting from August 1, by 34 days and the FS therefore executed Modification No. 2 to deduct $3,000 from the contract should Appellant fail to pursue the work in a diligent manner and complete by September. Appellant signed the modification Asubject to change order request.@ The CO addressed the August 15, 1992 request for an ongoing delay until the Yale locks were delivered. She stated that she had called the supplier as he had suggested in his August 15

letter. The supplier advised that a 10-12 week lead time was normal for delivery of the lock-type in question. Although Appellant discussed the locks with the supplier as early as approximately May 30 and told him to order them in mid-June, the order was not placed until July 5. The delay was in obtaining a signed credit application from Appellant which was received June 23. For those reasons, the request for a time extension was denied, and the contract price reduction pursuant to Modification No. 2 was accomplished. Referencing the completion date of September 4 established by Appellant=s most recent progress schedule, the CO stated that a significant amount of work remained to be completed. She cited poor contract management, too few workers on the job, and a new Davis-Bacon Act complaint. In view of those conditions, she terminated for default Appellant=s right to proceed for default effective that date (September 18). (AF 1-3.)

52. Appellant=s Exhibit A-1 provides what Appellant terms a Alist of excuses for termination to be considered unwarranted.@ The list appears to be intended to be in reference to the comfort station contract. Item 3 speaks of Athis (emphasis added) job as well as the trail job (emphasis in original). In reality, it commingles excuses relating to both jobs. Many of the excuses (even as applied to the comfort station termination) relate to the Davis-Bacon dispute and withholding on the trail project. Other excuses included his grandson=s disillusionment with working as a contractor as a result of Government actions on the two contract; Appellant=s credit problems resulting from the withholding; Appellant=s estimation that he was within 10% of completion at the time of termination; Appellant=s view that the FS was incorrect in its assertions that he was not providing adequate numbers of workers (e.g. during the curing period for concrete blocks and while he was working on the retrofits of the existing comfort stations); Appellant=s view that his disagreement concerning whether the air handling units were designed to code allowed him to stop work; and, Appellant=s allegation that the contract specifications for door hardware were for unavailable products. Appellant excused his failure to install plumbing fixtures by asserting that the fixtures would be vulnerable to vandals if he installed them prior to delivery and installation of the door hardware. He also asserted as an excuse the theft of many of his tools by one of his workmen. (Exhibit (Ex.) A-1.) Appellant=s opening brief focuses almost entirely on the labor issue. Appellant=s Rebuttal Brief argues that the CO granted him a 10-week time extension rather than the seven-week (or seven-week six-day) time extension discussed in FF 48 above. Appellant based this contention on the CO=s July 13, 1992 letter (presented at a meeting on July 13) which informed him that he would receive a three-week time extension due to a conflict in wood treatment specifications (AF 11-14) and the subsequent payment # 7 which indicated a seven-week time extension (AF 148). (In the interim between the July 13 letter and meeting and the pay estimate, Appellant had provided the CO a schedule indicating he needed seven weeks to complete the job. The CO had in effect granted the entire period.) In addition to arguing that he had been granted a 10-week time extension which had not elapsed at the time of termination and several of the items discussed above, Appellant also argued that the CO=s withholding for labor violations was improper because he had not received written notice prior to the withholding. He also argued entitlement to a time extension based on the FS not providing him Aa reliable point of connection for the gas line.@ (Appellant=s Rebuttal Brief.)

53. By letter dated January 14, 1994, Appellant made a claim for work performed before the default termination and claims for damages as a result of the default termination. He claimed $5,000

for electrical, plumbing and painting and loss of profit on the balance of construction in the amount of $10,000. Appellant provided no detail to describe the electrical, plumbing and painting work for which he claimed compensation. He emphasized his contention that, because the trail contract and the comfort station contracts were concurrent and were terminated at the same time, the termination of this contract was a contributing factor to the damages allegedly suffered on the trail contract. (Appellant=s January 14, 1994, letter not in the AF; filed in administrative file AGBCA No. 94-177-1.)

54. The CO decided these claims in a decision dated March 7, 1994. She denied the $5,000 claim for electrical, plumbing and painting work performed before the default termination. In so doing, she noted that all such work was included in pay item 13121, Building. She stated that Appellant had submitted a recommended breakdown by dollar amounts for calculating progress payments for this bid item and that Appellant had invoiced for his progress payments according to the breakdown proposed by him. Her decision also found that there was work remaining in each of the trades which would cost the amounts remaining or more. The CO, therefore, found that the amounts submitted and paid for these trades were more than sufficient to compensate him for the work completed in these areas.[12] (CO=s decision dated March 7, 1994 filed in administrative file for AGBCA No. 94-177-1). Appellant=s testimony at the hearing provided no detail in support of his claim that electrical, plumbing or painting had been accomplished without having been compensated.

55. Regarding Appellant=s claim for $10,000 for loss of profit on the terminated contract, the CO again stated her reasons for terminating the contractor=s right to proceed under the contract, including his failure to meet the extended progress schedule suggested by him and granted by the CO; failure to timely order locks for the building; and, failure to man the job with a full crew. She also stated that the Government was not responsible for problems outside the terms and conditions of the contract

[12] The CO=s decision did not identify Appellant=s recommended breakdown by date or in any other manner. We have been unable to find such a document in the record. Most payments for work performed under pay item 13121 merely indicate a percentage of completion without indicating what building construction work was included in the payment. Pay estimate no. 5 does indicate a payment of $4,003 *additional* for the unpaid portion of plumbing supplies based on current invoices and previous payments (AF 152). Pay estimate no. 6 indicates that $2,500 was paid for painting that was approximately 50% complete (AF 150).

and that a contractor is not entitled to profit on incomplete work after a default termination. (CO=s March 7, 1994 decision.)

56. During performance Appellant asked the inspector to provide a point of location for the existing gas line. Testimony of the parties was contradictory as to whether the gas line was located where the inspector suggested Appellant excavate. Appellant testified that he himself finally located it under the sidewalk. Appellant said that the difficulties in locating the gas line delayed his performance and were very costly. (Tr. 89, 172.) Appellant presented no evidence that the contract required the FS to locate the gas line for him.

57. Appellant made a claim for $650 for the cost of widening the sidewalk adjacent to the comfort station. At the hearing the FS conceded Appellant=s entitlement on this claim. (Tr. 30, 80.) The record does not demonstrate that Appellant has received payment for this work.

58. Appellant has a claim of $450 for Amoving water closets.@ The parties presented conflicting testimony on this issue which involved the need to alter the configuration of toilet stalls by one foot to meet accessibility standards for the handicapped. There was testimony that only partitions were required to be moved (Tr. 216). There was testimony that some rerouting of rough plumbing was required (Tr. 164). There was also testimony that Appellant did not perform this work because it was yet to be accomplished at the time of termination (Tr. 83-84).

59. Appellant claims $500 for delay due his refusal to build an air exchange system that he considered potentially dangerous. Appellant opted not to install the system as designed because he considered it defective and that installing it would cause him to be in violation of state and county codes. (Tr. 58, 199.) He provided no analysis of concurrent activities or evidence that the work was on the critical path. Nor did he provide an analysis of whether the period during which he refused to work on the air exchange system was concurrent with any other delay.

60. Appellant=s describes his $1,500 claim for a three-week delay as follows: AThe specification for the comfort stations call for the sill plates to be treated under pressure with one type of chemical which had become illegal to use in California. - Cost for time lost (three weeks). $1,500.@ This was the same Awood treatment process@ matter discussed in FF 45 above. The parties agree that the plans called for one type chemical treatment and the specifications another. Appellant claims entitlement to a three-week time extension because it took the supplier three weeks to supply the lumber after being told which treatment to use. The COR testified that the three weeks claimed was included in the seven-week time extension granted by the CO. Appellant did not explain how he calculated the $1,500 claimed. (Tr. 85, 167.)

61. Appellant generally alleges that a great deal of time was lost over smaller problems (e.g., bolt spacing in the foundation; location of sewer stub out; definitions of shower room and dressing room) but provides no convincing evidence to support either the nature of the problems or whether they delayed project completion.

62. Appellant alleges that the pressure valve numbers on the hot water heater were ambiguous and that he is entitled to $550 for time lost. Here, too, he provided no testimony to explain what happened or why this matter delayed performance. The COR explained that the contract specified a particular valve which was identical to those installed in the existing comfort stations. When Appellant submitted another valve for approval, his submittal was not approved. It was only when resubmitted that Appellant explained that the originally specified valve was no longer available. Once Appellant offered this explanation, the FS approved his resubmittal. (Tr. 86.)

Post-performance Matters - Both Contracts

63. As indicated in the introduction above, Appellant timely filed his original appeals at the Board and they were dismissed without prejudice during the pendency of the DOL proceedings. After the passage of almost five years from the initiation of the DOL investigation, the assigned DOL Administrative Law Judge (ALJ) on January 28, 1997, issued a decision and order granting Appellant=s motion to dismiss on the ground that he had been prejudiced by extreme and inexcusable delay in bringing the matter to a hearing. DOL filed a timely petition for review with the DOL Administrative Review Board (ARB) which affirmed in part and reversed in part, remanding the case to the ALJ for proceedings consistent with its decision. The ARB expressed concern about striking an appropriate balance between protecting the rights of Appellant and of the claiming employees who were available to testify.[13] Other claiming employees had not been certified to testify. The ARB, therefore, in a decision and order for remand dated October 31, 1997, remanded the case to the ALJ to first determine after a fact finding hearing if a case against Appellant could be made. The ALJ was to determine after hearing if Appellant had been actually prejudiced in his defense on the merits with regard to Mayberry and Patterson (the employees certified to testify) and whether such prejudice were directly attributable to the procedural delay. Subsequently the ALJ conducted an evidentiary hearing. Having taken that evidence, the ALJ, thereafter, in accord with the ARB order, made findings on the merits. While he found Appellant to be a credible witness and Mayberry and Patterson not to be, he also found that Appellant=s claimed method of payment which included advance wages in the form of payment for tools, clothing and insurance was not a bona fide prepayment of wages. He found certain amounts of money due to the two employees. He found that Patterson was owed wages of $963.90 less $500 in severance pay for a net of $463.90. He found that Mayberry was owed $2,987.10. On the issue of debarment, he found Appellant had disregarded his obligations to employees justifying debarment for a period of three years. He then addressed the question of prejudice. The ALJ concluded that the lengthy processing delays which were both unwarranted and the responsibility of DOL caused the unavailability of Ms. Mallie, Ms. Silberger and Mr. Oajdea whose testimony would have been relevant on various issues. Thus, he ordered that

[13] These included Mallie, Glen Copeland and others, some of whose names do not appear on payrolls or other contract records and who Appellant denied ever worked on the job.

Appellant had carried his burden of showing prejudice in defense on the merits and because he was prejudiced the matter should be dismissed with prejudice and all monies withheld should be returned to him. This Order is silent on debarment. He also made no finding that the amounts withheld were excessive. (Decision of Administrative Judge Stephen Smith in the Matter of Bill J. Copeland, Case No. 1996-DBA-18, March 8, 1999 Administrative File, AGBCA No. 1999-182-1.)

64. After this order, Appellant petitioned for reinstatement of his appeals. Judge Houry, who was then presiding convened a telephonic conference with the parties on August 9, 1999. He memorialized the agreements and understandings reached during that conference in a letter of August 13, 1999. Among other things, he confirmed the docket numbers for the appeals under both contracts. AGBCA No. 1999-182-1 (formerly 93-123-1 and 98-117-1) was assigned to the appeal from the termination for default on the Serrano Comfort Station contract. AGBCA No. 1999-183-1 (formerly 93-124-1 and 98-118-1) became the docket number for the appeal from the termination for default of the Santa Ana River Trail contract. AGBCA No. 1999-184-1 (formerly 94-177-1 and 98-119-1) and AGBCA No. 1999-186-1 were assigned to the appeals from the CO=s March 7, 1994 denials of claims for electrical, plumbing and painting ($5,000) and for lost profit ($10,000) on the comfort station contract. The second docket number was due to the submission of a certified claim and the issuance and appeal of a CO decision dated October 6, 1994, on claim matters which had been the subject of an earlier docket number. AGBCA Nos. 1999-185-1 and 1999-187-1 (formerly 94-178-1 and 98-120-1) were assigned to various claims on the trail contract denied by the CO March 7, 1994. These were $2,000 for work finished; $15,000 for rock face retaining wall work; $10,000 for lost profit; $26,000 for loss of trail building machine; $300,000 for loss of bonding capacity; $545,000 for home foreclosure; $1,000,000 for destroyed credit; $50,000 for loss of tools; $45,375 withholding for DOL; $60,000 for attorney=s fees and time spent; and $200 per day for lost earning. These were denied by a CO decision dated March 7, 1994. The second docket number was due to a subsequent certified claim and CO decision from which an appeal was taken. (Judge Houry=s letter of August 13, 1999.)

65. Thereafter, by transmittal dated August 31, 1999, Appellant Arefiled@ (with the CO) his original claims and added what he termed amended claims. This was in a 37-page document with 55 numbered Aclaims.@ (Letter from Appellant to Mr. Doug Hyde-Sato and Mr. James E. Andrews in administrative file for AGBCA No. 1999-183-1). The CO did not issue a decision on these Arefiled@ and Aamended@ claims. Subsequently, Appellant sent the Board a letter dated January 21, 2000 in which he stated that he was enclosing complaints for both contracts. He went on to say that Athese appeals@ were the results of a serious effort to condense and combine prior appeals. He enclosed a document listing 12 claims pertaining to the trail contract. Claim no. 1 consolidated all claims dated March 4, 1992; May 3, 1998; and August 31, 1999. Claim no. 2 in the amount of $5,645.20 was Ato repay the contractor for an improper wage determination.@ Claim no. 3 in the amount of $3,700 related to the withholding for labor violations. Exactly what Appellant is alleging is unclear. He alleges a seizure of $41,000. He also refers to an amount of $3,583.59 over the amount claimed being seized March 3, 1992, and held until April 22, 1992. Finally, in reference to the DOL decision, he states that he was granted a full return of the improperly seized funds. Claim no. 4 for $28,870 was for work completed before termination (2,145 feet of trail on the north slope of Constance Peak;

1,500 square foot retaining wall; trail build following erroneous flags; lost profit; 590 feet of trail finished after the last progress payment). Claim no. 5 in the total amount of $921,000 included loss of the trail building machine; loss of bonding ability; loss of two homes, barn and 11 acres; and forced sale of equipment. Claim no. 6. for $33,000 made allegations related to the propriety of the termination for default. Claim no. 7 was the claim for $200 per lost day of work for the contractor. Claim no. 8 was for interest and legal fees. Claim no. 9 in the amount of $3,700 (the same $3,700 as claim no. 3) was for the CO=s failure to make progress payments. Claim no. 10 also pertained to the default termination and sought the same $33,000 as claim no. 6. Claim no. 11 was for tortious breach of contract based on several allegations (denial to contractor of his right to choose his own prevailing wage; withheld discovery; improper wage determination; failure to include non-union wage scale and classifications; and withholding of progress payment no. 4). Appellant acknowledged that claim no. 11 was based on the same facts as other of these claims in which the costs were sought and he listed no quantum for that claim. In claim no. 12, Appellant asserted that as a matter of law, the Government has no right to any type of termination when the contractor would lose protection for his losses and costs for his continued work. As bases for this claim, Appellant made a number of general allegations of impropriety, and some references to previous claims. The only monetary amount mentioned in claim no. 12 was $200 per day from September 18, 1992, until settlement. (Appellant=s letter of January 21, 2000 and 12 page enclosure filed in administrative file AGBCA No. 1999-183-1.)

66. A similar complaint or appeal, this one with 13 claims, was submitted for the comfort station contract by the same January 21, 2000 transmittal. Claim no.1 pertained to the $1,903.59 withholding on that contract but Appellant made no monetary claim. Claim no. 2 was for $3,483.60 was for the difference between $8.00 per hour and the $25.15 required by the wage determination for 384 hours worked on the comfort station contract. Claim no. 3 also pertained to the $1,903.59 withholding and for it Appellant claimed the same $3,700 as claimed under claim no. 3 of the river trail contract. Claim no. 4 was a request for $20,550 for 10 items relating to work finished before termination ($5,000 painting, plumbing and electrical; $10,000 profit; $1,500 time and cost locating gas; $650 additional sidewalk; $450 move water closets; $500 air exchangers; $1,500 sill plates; $550 pressure valve; $550 small problems). Claim no. 5 was a no cost claim relating to a discovery request for documents which could not be located. Appellant acknowledged that Government counsel had made a good faith effort to locate the materials. Claim no. 6 related to the fact that the withholding by the CO predated the DOL request for withholding. Again, Appellant claimed the same $3,700 asserted to be due therefrom. Claim no. 7 was for $79,277 paid by Appellant=s surety to complete the comfort station contract under its take-over agreement. In his claim no. 8 Appellant requested Apayment of all appeals@ based on his allegation that the contract forbids termination if the contractor is not responsible or has not Acommitted default for which he has been accused.@ Claim no. 9 for $33,000 was for tortious breach of contract for refusing to use payment bond to protect complaining employees and taking contractor payroll and working capital. In claim no. 10, Appellant asserted that actions of the CO (failure to grant time extensions, improper wage determination, defective specifications, withholding) caused harm in the amount of $250,000. Claim no. 11 repeats the prior claim for $200 per day from September 18, 1992, until the case is settled for Appellant=s own time. Claim no. 12 is another for tortious breach of contract based on allegations seen before, i.e., that

Appellant had the right to chose his own wage determination, discovery problems, and withholding for labor violations. Finally claim no. 13 was for interest and legal fees.

67. By letter of April 6, 2000, Appellant appealed an April 3, 2000 CO decision denying a March 2, 2000 claim for $31,770 for reprocurement costs paid by his surety to the FS for completion costs on the trail contract. Appellant had also made a claim for $10,613 for costs of pursuing claims. In the same decision, the CO stated that Athe costs in pursuing the claim . . . are not part of the contract requirement and are recoverable@ [sic]. (Appellant=s April 6, 2000 letter with attached April 3, 2000 CO=s Decision, filed in Administrative File AGBCA No. 1999-183-1.) In another letter, dated April 18, 2000, Appellant filed appeals of the CO=s decision on the comfort station claims (the decisions having been made in an undated decision also received by Appellant on April 6, 2000). The first claim denied by the CO was for $79,277 assessed against Appellant by his bonding company under bond no. 003000247 due the surety=s having sustained a loss under the bond. Appellant had agreed to personally indemnify the surety. The second was for $10,613 costs associated with pursuing the claim and appeal. Regarding the claim under the comfort station contract for the same $10,613 for claim preparation costs, the CO stated Athe costs in pursuing the claim . . . are not part of the contract requirement and are not recoverable (emphasis added).@ Appellant=s April 18, 2000 letter with attached undated CO=s Determinations and Findings, filed in Administrative File AGBCA No. 2000-147-1.) The use of the term Anot recoverable@ in this letter seems to indicate that the statement that the identical costs were recoverable in the previous letter was a typographical error created by the omission of the intended word Anot.@

68. Judge Houry convened a telephonic conference on April 18, 2000. He concluded that the submissions dated January 21, 2000, could be considered appeals of the deemed denials of the August 1999 claims (1) to the extent that they did not duplicate appeals already decided by the CO, (2) to the extent that the August 1999 claims actually included what were appeals in the January 21, 2000, submissions, and (3) with the understanding that he, as the presiding judge, cannot commit the panel of judges deciding the appeal to reach the same conclusions. The Government had treated the January 21, 2000, submissions as complaints and had filed answers. While Judge Houry found this constructive in terms of sharpening the issues, he opined that it did not solve the problem that the Board lacked jurisdiction over several of the numbered items as they had not been properly appealed. Thus, in the course of the conference the judge and the parties reviewed the claims on the two contracts to determine what was duplicative of issues already before the Board in the existing appeals, what qualified as new claims and what should be given new docket numbers as not then before the Board. On the trail contract, they determined that claim no. 1 consolidating all previous claims could be ignored. Claim no. 2 for $5,645.20 for the failure to attach the correct wage determination was assigned docket number AGBCA No. 2000-148-1. Claim no. 3 was a claim for $3,700 related to the labor violations withholding (duplicating claim no. 6 on the comfort station contract). This claim was also assigned AGBCA No. 2000-148-1. Claim no. 4 for $28,870 for work completed before termination and loss of profit was made a part of AGBCA No. 2000-148-1 as well. The work in question was (1) construction of 2,145 feet of trail finished on the north side of Constance Peak; (2) construction of a 1,5000 square foot rock-faced retaining wall; (3) construction of 800 feet of trail following erroneously placed flags; (4) lost profit of $10,000; and (5) construction

of 590 feet of trail after the last progress payment. Claim no. 5 relating to the loss of the trail machine, loss of bonding capacity, loss of two homes and forced sale of equipment was already before the Board in AGBCA Nos. 1999-185-1 and 1999-187-1. The presiding judge referred to claim no. 6 for $33,000 as undefined and was assigned AGBCA No. 2000-148-1.[14] Claim no. 7 for $200 per day was already before the Board in AGBCA Nos. 1999-185-1 and 1999-187-1. Claim no. 8 for attorneys fees and interest was agreed to be premature at best. Appellant withdrew claim no. 9 which was duplicative of claim no. 3. Appellant also withdrew claim no. 10 which duplicated the claimed costs of claim no. 6. The parties agreed that claim no. 11 was not, in fact, a claim but was an allegation in support of Appellant=s appeal of the termination for default.

69. The January 21 claims on the comfort station contract were also discussed. Claim no. 1 was for $1,903.59 which had been withheld for labor violations on the other contract. That money had been repaid to Appellant after the DOL decision. The parties agreed that this amounted to an argument bearing on the propriety of the termination for default. Claim no. 2 for $3,483.60 involving the wage determination was not previously before the Board. It was assigned AGBCA No. 2000-147-1. Appellant withdrew claim no. 3. Claim no. 4 for $21,550 included some items already before the Board in AGBCA Nos. 1999-184-1 and 1999-185-1. Other items therein were not previously before the Board. They were docketed as AGBCA No. 2000-147-1. The claim items not previously before the Board were the $1,500 claim for time and cost locating the gas line; $550 for additional sidewalk; $450 to move the water closet; $500 air exchangers; $1,500 sill plates; $500 pressure valve; and $550 small problems. These were docketed as AGBCA No. 2000-147-1. Claim no. 5 was not a claim but, at best, a discovery dispute. Claim no. 6 for $3,700 for moneys withheld and allegedly not returned was also assigned docket no. 2000-147-1. Claim no. 7 in the amount of $79,277 for moneys the surety was allegedly required to pay to complete the work would also be adjudicated under AGBCA No. 2000-147-1. The parties agreed that no. 8 was not a claim but an argument bearing on the propriety of the termination for default. Claim no. 9 for $33,000 on the ground that the employees= claim should have been referred to the surety for to be compensated under the payment bond was withdrawn. Claim no. 10 was determined not to be a claim but an allegation bearing on the propriety of the termination for default. Claim no. 11 for $200 per day admittedly a duplication of a claim under the other contract (only one recovery sought) was made a part of AGBCA No. 2000-147-1. Claim no. 12 for tortious breach of contract based on an allegedly erroneous wage determination was agreed not to be claim but an allegation bearing on the propriety of the termination for default. The record of the telephonic conference does not address claim no. 13 for interest and attorneys fees, but as in the other contract, that claim was premature pending decision on the propriety of the termination and subject to a subsequent claim under the Equal Access to Judgement Act.

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[14] We find that the allegations made by Appellant in claim no. 6 are alleged defenses to the termination for default and thus are to be considered in AGBCA No. 1999-183-1 and not in AGBCA No. 2000-148-1 as informally decided in the conference on August 18, 2000. As noted in the record of that conference Judge Houry advised the parties that his agreements there were subject to the decision of the panel which would decide the case.

DISCUSSION

AGBCA No. 1999-183-1 - Santa Ana River Trail Contract -Termination for Default

The burden of proving the basis for the default is on the Government. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). Appellant has the burden of proving excusability. Switlik Parachute Co. v. United States, 216 Ct. Cl. 362 (1978); Davis v. United States, 180 Ct. Cl. 20 (1967); H & H Mfg. Co. v. United States, 168 Ct. Cl. 873 (1964); J. F. Whalen & Co., AGBCA Nos. 83-160-1, 83-281-1, 88-3 BCA & 21,066, affirmed (Fed. Cir. Jan. 31, 1990).

Appellant failed to perform the contract work within the contractual performance period. Such a failure is grounds for default termination absent excusable delay. John F. Richmond, AGBCA No. 84-179-1, 85- 3 BCA & 18,450; Stutesman & Sons Construction Co., AGBCA No. 83-203-1, 84-2 BCA & 17,499; Craig Honkala, AGBCA No. 83-206-1, 84-2 BCA & 17,486. The Government has met its burden of proving that the work required under the contract was incomplete and that the contract performance period had been exceeded. Moreover, Appellant was working at an exceedingly slow rate. By the time of the termination for default, the job was being worked only on weekends. At no time during performance had Appellant provided what the FS considered to be a full crew of workers. Much of the work which had been performed did not meet the requirements of the specifications. (FF 16, 19, 22, 23).

Appellant has defended on various grounds. His principal defense has been that the FS erred in withholding progress payments for completed work because of alleged Davis-Bacon wage violations. He argues that the withholding of progress payments decreased his cash flow to the extent that he was unable to hire workers. The contract, however, incorporated by reference both the DAVIS-BACON and the WITHHOLDING OF FUNDS clauses (FF 2). The suspension of payment for potential labor violations was authorized by the "WITHHOLDING OF FUNDS" clause. Appellant has argued that the CO had no right to withhold progress payments prior to a written request from the DOL. This is incorrect. The CO has an affirmative right and duty to do so under the clause. Many of Appellant=s problems here are the result of his misunderstanding of the Davis-Bacon clause and its requirements. He has insisted throughout that the wage determinations in the contract were not applicable to him because he was a non-union contractor. He has stated in correspondence and testimony that, notwithstanding the presence of the clause and the wage determinations in his contract, he expected to be allowed to negotiate a lower rate of about $8 per hour to pay laborers. He testified that he negotiated a lower rate than required by the Davis-Bacon wage determinations on contracts 15 or 20 years earlier. He also testified that he instructed Ms. Mallie to pay Davis-Bacon wage rates on this project. (FF 6). We find that the CO acted reasonably and within her authority when she withheld progress payments after learning of potential Davis-Bacon violations. She was not required to wait until she received a formal request from DOL. The eventual DOL decision on the labor violations was to some extent favorable to Appellant. However, DOL found on the merits that Appellant had violated the terms of the Davis-Bacon Act. Rather, DOL found that Appellant had been prejudiced in his opportunity to defend against the charges because of the dilatory manner

in which DOL processed his case. Even if DOL had found for Appellant on the merits, he still would have had to have shown that the CO acted unreasonably based on the information she had at the time for the withholding to have constituted excusable delay. The Government may properly withhold amounts potentially due employees pending final determination by DOL. Sealtite Corp., ASBCA No. 30353, 87-1 BCA & 19,469.

The record does not contain the exact calculations in support of the withholding of $30,371.41 from payment estimate # 4. However, it does demonstrate that the COR, aware of the work accomplished, examined the contract payrolls and documents submitted by Appellant and concluded that the difference between the wages for hours claimed by the employees and the checks submitted by Appellant was over $30,000 (FF 9). DOL made a later independent request for withholding of $37,635, which tends to confirm the reasonableness of the FS conclusions based on the evidence at hand. (FF 11). Appellant=s arguments turn on his misunderstanding of the Davis-Bacon Act requirements in the contract. Unlike the approach of the dissent, Appellant neither challenged nor addressed the reasonableness or accuracy of the amounts withheld. His challenge is to the fact that any sum at all was withheld. It is proper for the CO to withhold funds from a Government contract (even another contract) in order to pay underpaid employees. A withholding of monies while awaiting a DOL decision concerning allegations of non-compliance with contractual and statutory pay requirements is proper. Servicemaster of West Central Georgia, DOTCAB No. 1096, 80-2 BCA & 14,676.

The instant case can be distinguished from Monarch Enterprises, Inc., VABCA No. 2239 & 2296, 86-3 BCA & 19,281, in which the Veterans Administration Board held that a CO=s withholding of $6,000 of a $17,400 contract for labor violations was improper and justified the contractor=s abandonment of the project. In Monarch, which does not establish binding precedent for this Board, the withholding was in excess of what was needed to protect the interests of the affected workers. The issue there was whether the employees should be paid as subcontractors or employees. The CO, however, withheld all but $350 of earnings for the first four months of the job. He did not release enough of the earned funds to account for the undisputed portion of the earnings. In this case, the first three payment estimates totaling $46,040 (or almost 41% of the contract amount) were paid prior to any withholding (FF 1, 11). The initial $30,371.41 withheld by the FS in this case includes amounts to cover payment for alleged hours worked up to the time of withholding for which Appellant had already been paid in the first three payment estimates totaling $46,040 (i.e., earnings during the periods of claimed Davis-Bacon under-payments to the employees). While $30,371.41 is a substantial amount, that figure represents what the FS concluded, based on the evidence provided, was the amount that should have been, but was not, paid to employees. The FS gave Appellant ample opportunity to provide data to demonstrate that the claims were not true or to establish that the figure owed was a lesser amount. The responses provided by Appellant were not adequate. Had Appellant provided reliable payroll checks or records, the FS might have modified its withholding. However, Appellant provided only the sketchiest of data which did not overcome what appeared to be significant under-payments to the workers. (FF 9, 10.) Appellant was responsible for ensuring that workers as employees obtained at least Davis-Bacon salaries. The amount in dispute was one for which Appellant should have had records and which amount he should have been able to verify had they been paid. Appellant did not

or could not verify such payments when asked to do so by the FS. Appellant has not demonstrated in the existing record that the FS inappropriately withheld monies. Thus, we conclude that the Appellant has not established an excusable reason to alter the default determination.

The contracts contain the Payrolls and Basic Records clause (FEB 1988) (FAR 52.222-8). The clause directs that the contractor maintain payroll and basic records relating thereto, which the contractor is to preserve and make available for review by the CO and the DOL. Had Mr. Copeland complied with these provisions, and made available the requisite information, the amount of withholdings may have been lessened. Faced with the allegations, the DOL process did not fault the amount of withholding; this Board does not fault the amount of the withholding. The record does not demonstrate that the amount withheld was excessive given the allegations and materials presented to the contracting agency. In our view, to find the amount of withholding excessive is to ignore the provisions regarding terminations for default, which do not find excusability grounded in matters within the control of the contractor. Here Mr. Copeland had the ability and an obligation to present credible records.

There were various problems associated with the project during the initial weeks when the crew of Mayberry, Mallie and Patterson were working on the project. Nonetheless, even after they were all fired, the work was on schedule. As late as March 4, 1992, the work was slightly ahead of schedule (FF 14). Appellant suffered some adverse weather during performance of the project. The COR informed the CO that Appellant was entitled to 28 weather days and an additional two days for delays due to the closing of state highway 38. (FF 20). The FS contends that the claim for a 28 day time extension was denied in the CO=s August 13, 1992 decision which was not appealed. The wording in the decision, however, is not so clear. Had the claim for a time extension been clearly denied in that decision, we would lack jurisdiction to decide it. However, the wording lacks the requisite clarity and we do not treat the claim as having been denied. Thus we find we have jurisdiction on this issue. Had the CO modified the contract to so extend the performance period, the adjusted contract completion date would have been June 21, 1992. Thus, on July 6 when the inspector estimated the work to be 88% complete, Appellant would have used 107% of the time to reach 88% completion, not 122% of the time. Had the CO provided the requested 28 day time extension for weather, the project would still have been behind schedule. Appellant worked on sporadically during the summer months, but made slight progress. The reason for this is that he did not dedicate sufficient resources to the job. (FF 18, 20, 22, 23). In his mind, the withholding for labor violations may have justified this lack of diligence, but contractually it did not constitute an excusable delay. The FS through the daily diaries and the testimony of the inspector and COR has meet its burden of proving failure to complete the project within the specified time (even adjusting for the time extension that the COR found justified) (FF 14, 16, 18, 19). Appellant has provided no evidence which we find legally excuses his failure to complete.

We find the termination for default of the Santa Ana River Trail contract justified and deny the appeal in AGBCA No. 98-182-1.

AGBCA No. 1999-182-1, Seranno Comfort Station - Termination for Default

Here, too, Lisbon places on the Government the burden to prove Appellant=s failure to complete the required work within the contract completion period as extended. Once the Government has met that burden, the burden shifts to Appellant to prove excusable delay. The performance period for this contract began with a Notice to Proceed effective October 23, 1991. Following a scheduled shut down for an eagle nesting period from December 1, 1991 - April 1, 1992, Appellant resumed work in mid-April. The FS calculated the contract completion date as July 11, 1992 (FF 41). By June 17, the inspector reported that 81% of the performance period had elapsed and approximately 50% of the work had been completed (FF 38). On June 26, the CO wrote Appellant asking him to provide a new schedule of work indicating how he planned to finish the work and in what time frame. Appellant responded to her letter on June 30 but failed to provide a revised schedule. (FF 43.) In a meeting on July 13, the CO hand-delivered to Appellant a cure letter and again asked for a completion schedule. She informed Appellant that she was considering termination for default. The following day Appellant provided a schedule indicating he would finish work by September 4, 1992. He stated that all materials were on hand and that he would have workers on the job five days a week. (FF 46, 47.) Thereafter, the CO issued modification no. 2 which effectively extended the contract performance period to September 4, 1992 (FF 48). By September 18, work was still incomplete and the CO terminated Appellant=s right to proceed citing the fact that there was still a significant amount of work to be accomplished; Appellant had exercised poor contract management; the job was insufficiently staffed; and she had received a new Davis-Bacon Act complaint (FF 52).

Appellant has offered various excuses for his untimely performance. Primarily, Appellant relies on presenting his view of how the matter of the alleged labor violations should have been handled by the CO. On pages 8 through 32 of his opening brief, Appellant makes various references to FAR 22.406-1 through 22.406-9 in support of his argument that the CO erred in withholding funds based on allegations of labor violations before conducting a labor investigation and compliance check. He apparently based his argument that Athen and only then should the [CO] turn to the drastic measure of withholding the [contractor=s] progress payments@ on the fact that compliance checks and labor investigations are covered in earlier paragraphs than withholding. FAR 22.406-9, AWithholding from or suspension of contract payments,@ makes clear that withholding may precede investigation. Sub-sub-paragraph (a) (2) thereof refers to investigations occurring after withholding when it states: AIf subsequent investigation confirms violations, the contracting officer shall adjust the withholding as necessary.@ Both sub-paragraphs (a) and (b) make clear that withholding may occur at the request of DOL or at the CO=s own option. The notion underlying the statute and implementing regulations is to assure taht employees and workers are paid properly.

Although he does not directly so state, Appellant=s second argument seems to be that the project was not behind schedule at the time of termination. In his brief, Appellant makes a non-chronological analysis of the correspondence, pay estimates and modifications to reach this apparent conclusion. He correctly states that pay estimate # 7 (cut-off date - 8/20/92) indicated that the CO had granted a seven week time extension. However, he then refers to an earlier letter which he says granted Aanother time extension for three weeks@ and says that in this same letter an additional four weeks and three days was denied Awithout good cause@ (Appellant=s Brief, p. 33.) To analyze Appellant=s

argument, one must acknowledge the Agivens.@ It is a given that Appellant has the burden to prove entitlement to a time extension. It is also a given that only the Contracting Officer can grant a time extension and that it must be done in the form of a contract modification. Appellant does not satisfy his burden by totaling any time granted by the CO, any time that the CO may have indicated a willingness to grant and any time Appellant requested but which the CO failed to grant without what Appellant determined to be good cause. Looking at the events chronologically, it is apparent that Appellant sought a time extension of (or slightly in excess of) seven weeks. Upon initial examination, the CO indicated an intent to grant three weeks. Later, she apparently reconsidered and granted Appellant until September 4 (a period of time which we calculate to be seven weeks and six days). (FF 46, 48.) In essence, the CO granted Appellant the entire period requested. This was a generous response to a time extension request which was described not in terms of excusable delays experienced, but in terms of time needed to complete.[15] Appellant=s argument seems to be that he is entitled to the requested seven-plus weeks twice (the three weeks that the CO indicated that she would grant plus the four plus weeks that she indicated an intention not to grant plus the entire period when she relented and granted it all). Appellant has not carried his burden to prove that he is entitled to a greater time extension than the CO granted.

We find the termination for default of the contract to construct the Serrano Comfort Station justified and deny Appellant=s appeal of AGBCA No. 1999-182-1.

AGBCA No. 1999-184-1 and 1999-186-1 - Claims for Plumbing, Electrical, Painting and Lost Profits on the Comfort Station Contract

The burden of proof to support a contractor claim under the contract rests on the contractor, The Work Force Reforestation, Inc., AGBCA No. 90-132-3, 90-3 BCA & 23,233; Susan Erickson, AGBCA No. 76-162, 80-2 BCA & 14,477; Reif Construction, AGBCA No. 79-133, 79-2 BCA & 14,170; Pankratz Earthmoving Co., AGBCA No. 78-123, 79-1 BCA & 13,751. That burden is not reduced because appellant does not have the benefit of legal counsel. See Butler Enterprises, AGBCA No. 74-106, 76-2 BCA & 12.094. Broad general allegations without specifics and without other support cannot be accepted as proof. TOR Industries, Inc., ASBCA No. 21333, 78-1 BCA & 12,933; Bayou Culvert Mfg. Inc., AGBCA No. 400, 76-1 BCA & 11,796.

Appellant has provided no more than allegations and generalization to support his claim for plumbing, electrical and painting work performed and not compensated prior to termination (FF 51). His generalized claims fall short of meeting his burden of proof.

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[15] We note that neither party seems to have taken into account whether delays were concurrent in requesting or granting time extensions.

Regarding Appellant=s appeal of the CO=s denial of his claim for lost profit, we refer to our determination earlier in this decision that the termination for default was proper and is to be upheld. Appellant thus is entitled to no payment for unperformed work. Even if we had overturned the termination for default, it would have been converted to a termination for convenience, and a settlement made under that clause which specifically provides only for profit on work performed prior to termination. The principle that anticipated profits are not recoverable under a convenience termination is firmly settled, Kevin Wells, AGBCA Nos. 82-284-3, 83-150-3, 83-1 BCA & 16,507, citing C. G. Casebolt v. U.S., 190 Ct. Cl. 783, 421 F. 2d 710 (1970).

AGBCA Nos. 1999-184-1 and 1999-186-1 are denied.

AGBCA Nos. 1999-185-1 and 1999-187-1- Claims on the Santa Ana River Trail Contract - Lost Profit and Losses Stemming from the Termination for Default

As stated above in the discussions of the claims under the comfort station contract, Appellant has the burden to prove his claims. His claim for lost profits on the trail contract suffers the same defect as the claim for lost profit on the comfort station contract decided above. The contract does not allow for profit on unperformed work whether or not we sustained the termination for default. Because Appellant did not demonstrate a breach by the Government, this claim for lost profits must fail. Similarly the other claims here docketed are for damages allegedly resulting from the termination for default and/or the withholding for labor violations. We have found the withholding reasonable based on the CO=s information at the time. We have upheld the termination for default. Appellant is therefore not entitled to the claimed damages for loss of a repossessed trail building machine; lost bonding capacity; foreclosure of his home; lost income resulting from destroyed credit and unpaid suppliers; forced sale of equipment; loss of personal earnings at a rate of $200 per day, and the money withheld for DOL plus interest. Had the default termination not been sustained, it would have been converted to a termination for convenience and Appellant=s recovery calculated under the terms of that clause. Many, if not all, of these claimed damages are not payable in a termination for convenience and thus would not have been recoverable even if the Government had not been able to prove the propriety of the default termination.

Appellant also has a claim for attorneys fees and for his own time in preparing his claim against the Government. Attorneys fees are payable only to a prevailing contractor under the Equal Access to Justice Act. Under the FAR, claim preparation costs are not recoverable. 48 CFR 31.205-47(f)(1); see also Silvics, Inc., AGBCA No. 88-243-1, 93-2 BCA & 25,783, and cases cited therein.

AGBCA Nos. 1999-185-1 and 1999-187-1 are denied.

AGBCA No. 2000-148-1 - Santa Ana River Trail Contract- Claims for Erroneous Wage Determination, Money Withheld and Not Repaid and Work Completed Before Termination

Appellant has argued that the CO failed to insure that the wage determination Afit the job.@ His contention is that wage determination was based on union wages in the area and not the prevailing

wage rates in the local area which he argues are non-union. Appellant=s argument and claim assumes that there actually existed another wage DOL wage determination for the area which was based on non-union wages. Matters arising out of the labor standards provisions of contracts are generally within the exclusive jurisdiction of DOL. Emerald Maintenance, Inc. v. U. S., 925 F. 2d 1425 (Fed. Cir. 1991). Appellant and DOL engaged in a lengthy appeal process. The decision in that matter is contained in the record before us. The DOL Administrative Judge did not affirm Appellant=s argument that an incorrect wage determination was placed in the solicitation which formed a basis for this contract. To the contrary, he held that the challenge to the appropriateness of the wage determination was untimely as such challenges must be made prior to contract award. Matter of Bill J. Copeland, Case No. 1996-DBA-18 (Mar. 8, 1999), p. 33, fn. 12. (Decision filed in administrative file AGBCA No. 1999-182-1.) In any event, the contract was competed and awarded with the given wage rates. Appellant entered the contract with the Davis-Bacon Act clause requiring him to pay the stated rates at a minimum.

During performance, a total of $37,905 in earnings under the two contracts was withheld for alleged labor violations. The first withholding was from pay estimate # 4 in the amount of $30,371.41. Later $5,360 was withheld from pay estimate # 6 which was apparently prepared but not processed because after the withholding there remained no funds to be paid to the contractor. In fact, the amount earned ($5,360) when added to the $30,371.41 previously withheld from pay estimate # 4 did not amount to the total requested to be withheld by DOL. Thus, the remaining $1,903.59 was withheld from the comfort station contract. (FF 10, 17.) Appellant here claims $3,700 because the CO withheld funds. He characterizes the withholding as a tortious breach of contract. He provides no explanation for how he calculated his quantum. In reading Appellant=s submissions, one gains the impression that he may be saying that when the withheld monies were refunded after the DOL decision, the refund was short by $3,700. Nowhere, however, is that clearly stated. We have already held that the withholding action by the CO was reasonable based on the circumstances and available information at that time. The withholding was permitted by the Withholding of Funds clause in the contract and was not a breach of contract. Appellant has not made clear exactly what he is claiming, much less carried his burden to prove the allegation that he is owed $3,700 related to the withholding and return of funds after the DOL decision.

Also docketed as AGBCA No. 2000-148-1 are Appellant=s claims for work allegedly finished before termination. The first of those claims was for 2,145 feet of trail on the north slope of Constance Peak allegedly constructed but not compensated.[16] This claim includes an earlier claim for 1000 feet. Appellant=s claim for the increased 1,145 feet appears to be a result of the CO=s decision on the earlier

[16] Appellant made a claim for 1,000 feet of trail constructed but not paid for in his claim of January 14, 1994. The CO decided that claim in her decision of March 7, 1994, which was appealed and docketed in the appeal that eventually became AGBCA Nos. 199-185-1 and 1999-187-1. That earlier claim appears to be included in the current claim for 2,145 feet. The previous presiding judge assigned docket number AGBCA No. 2000-147-1 to the entire claim and it is therefore being decided here.

claim. There she stated that 2,145 feet of trail had been constructed and not paid for and another approximately 1,600 feet paid for but not constructed. Thus she found Appellant due payment in the amount of $1,090 for the net amount of feet constructed and not paid for. Appellant has provided no explanation for his claim that he constructed 2,145 feet before termination. He contends that the CO stipulated the amount in her decision of March 7, 1994 (FF 32). A contractor=s appeal of a CO=s decision results in a de novo review of the facts. The CO=s decision retains no presumptive evidentiary weight nor does it bind the Board in any way. Wilner Construction Co. v. U.S., 24 F.3d 1397 (Fed. Cir. 1994). Thus, Appellant has the burden to prove his entire claim in both entitlement and quantum by a preponderance of the evidence. This he has failed to do.

Appellant=s claim for having constructed 800 feet of trail following erroneously placed flags was denied in the CO=s August 13, 1992 decision which Appellant failed to appeal to the Board. Therefore, we lack jurisdiction to decide that claim item.

The list of items comprising Appellant=s A$28,870 claim for work completed before termination@ also contains a lost profit claim which duplicates other lost profit claims but which the Board apparently included with those items assigned to AGBCA No. 2000-147-1. It is subject to the same valid legal defenses discussed in our analysis of AGBCA Nos. 1999-185-1 and 1999-187-1.

Finally, AGBCA No. 2000-147-1 includes Appellant=s claim for 590 feet of trail finished after progress payment # 6. The CO has the right to retain funds otherwise due a defaulted contractor at the time of termination to be applied against cost of completing. Trinity Universal Insurance Co. v. U.S., 382 F.2d 317 (1967), cert. denied, 390 U.S. 906, 88 S.Ct. 820, 19 L.Ed. 2d 873, Mega Const. Co. v. U.S., 29 Fed. Cl. 396.

AGBCA No. 2000-147-1 is denied.

AGBCA No. 2000-147-1 -Serrano Comfort Station Contract - Claims for Incorrect Wage Determination; Miscellaneous Small Claims; $3700 Withheld and Not Returned; $79,277 Paid by Surety to Complete; and $200 Daily Compensation for Contractor

Appellant=s claim for $3,700 for the Awrong@ wage determination having been included in his contract is identical to the claim asserted under the trail contract. It suffers from the same disabilities and is also denied for the reason stated above.

Appellant asserts several miscellaneous small claims. He claims $1,500 for time and effort in locating the gas lines fails. He has not demonstrated a contract provision placing that responsibility on the FS, nor has he proved that the delay in locating it resulted from action or inactions of the FS as opposed to his own.

The FS did not contest Appellant=s claim for $650 for the construction of additional sidewalk (FF 57).

Appellant claims $450 for Amoving water closets.@ This involved a change order presented by the FS to move partitions to meet handicapped accessibility standards. Appellant has failed to prove that he performed this work, incurred expense or suffered a delay. The testimony was contradictory as to whether the situation required Appellant only to move partitions or to also reconfigure rough plumbing. The COR testified that Appellant did not perform the work at all because it had not been accomplished prior to termination. (FF 58.) Appellant has the burden to prove this claim. We have been unable to determine from the record whether or not he performed the work in question. If his claim is for delay as opposed to direct costs (which has not been made clear), we find that he has not proved this work, even if performed, constituted a delay to the critical path. The claim is denied.

Appellant provided no evidence in support of his claim for delay related to the air exchangers. He neither proved that the design was defective nor that the work which he unilaterally refused to perform was on the critical path. (FF 59.)

Appellant did not prove that the conflict between the plans and specifications regarding type of chemical treatment for sill plates delayed completion of the project. The FS provided convincing evidence that three weeks of the seven week time extension granted by the CO was for any delay associated with this conflict. Appellant did not explain how he derived the monetary claim of $1,500, (FF 45, 60.) Similarly Appellant failed to carry his burden of proof on the miscellaneous smaller problems delay claim and the valve delay claim (FF 61, 62).

Appellant=s claim for $3,700 in monies withheld and not returned duplicates a claim docketed and decided under AGBCA No. 2000-148-1. The identical claim docketed as a part of AGBCA No. 2000-147-1 is subject to the same defenses and is also denied.

The terms of the contract required Appellant to furnish a performance bond which he did. His surety took over and completed the comfort station contract pursuant to the requirement for such a bond. We have found the termination for default justified. Appellant has presented no evidence or argument in support of his claim that he is entitled to be paid for the amount his surety expended to complete the contract. His claim for $79,277 is therefore denied.

DECISION

Appellant=s appeal of the CO=s denial of his claim for $650 for construction of additional sidewalk claim docketed under AGBCA No. 2000-147-1 is sustained. All other claims under that docket number and all other appeals are denied.

Appellant is entitled to interest on the $650 pursuant to 41 U.S.C. ' 611.

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ANNE W. WESTBROOK

Administrative Judge

Concurring:

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JOSEPH A. VERGILIO
Administrative Judge

Dissenting Opinion by Administrative Judge POLLACK.

These appeals put into issue, two well developed doctrines of Government contract law. First, matters involving violations and adjudication of labor standard matters, such as those in issue in these appeals, are exclusively adjudicated under the jurisdiction of the Department of Labor (DOL). Second, among excuses for failure to make progress, is the wrongful or excessive withholding of progress payments by the Government.

In these appeals, during performance, Copeland was charged with labor violations. The initial decision to withhold money was made by the FS personnel, based on allegations being presented to them by various employees of Copeland. The FS initially withheld $30,371.41 from progress payments during the spring of 1992. The termination in issue, however, was not exercised until September 1992. The termination was based on Appellant=s failure to make satisfactory progress. Although the FS= withholding adversely affected Copeland, the withholding did not appear to become critical, at least in relation to the termination, until well into the summer of 1992. On July 10, 1992, DOL wrote to the FS and directed the FS to withhold $37,635, which included the $30,371.41 already withheld. In the DOL letter, DOL indicated that they had conducted their investigation and determined that Davis-Bacon Act violations had occurred. (AF 29.) The FS officials complied. They did so under the understanding that they were obligated under regulations and the contract to follow the DOL direction. In recommending termination to the CO, the COR took into account the excuses Mr. Copeland was putting forward for lack of progress, including the argument that the Government was wrongfully withholding $37,000 of Copeland=s operating capital. The COR did not consider the excuses to be valid. (Tr. 119.) I do not question the judgment of the FS officials in July 1992, and believe that they had no legal authority to go behind the directions and findings of DOL. The cut-off of the money, however, seriously impacted the Appellant and prevented the Appellant from proceeding with the progress on the project that it needed to satisfy the FS. While the withholding of money was not the only matter affecting Appellant=s ability to make progress, I find that it was the principal matter. I also find that the withholding impacted Copeland=s ability to complete both the trail and comfort station contracts.

As the withholding continued, the Appellant=s progress continued to deteriorate throughout the remainder of the summer and into the start of fall of 1992. The FS defaulted both of Copeland=s contracts on September 18, 1992, when it became apparent to the FS that the Appellant could not move forward in a timely manner. The FS then reprocured. At the time of the default, there had been

no resolution nor hearing as to the labor matters. Thereafter, resolution of the labor claims further languished (through no fault of Appellant), and while DOL dealt with the matter procedurally in 1997, the issues as to withholding did not get decided on the merits by a DOL judge until March 8, 1999, approximately seven years after the FS had initially withheld money for labor violations.

If the decision of the DOL judge in the hearing on the merits had substantially supported the DOL inspector=s direction for withholding of $37,635 or supported a number within hailing distance, I would reach the same result as the majority and find that the withholding did not qualify as an excuse for lack of progress. In judging what would meet hailing distance, I am not looking to set out a particular percentage, but instead, in order to find the amount of withholding justified, need to conclude that the number used appears reasonable in relation to what should have been known by DOL at the time and in relation to the final result.

In his decision on the merits (which addressed only Mr. Patterson and Mr. Mayberry), the DOL Judge was able to validate only $3,951 in violations. That compares to the total of $37,635, which was withheld for seven individuals. Even then he did not require Copeland to pay that money, finding that Copeland had been prejudiced in his ability to defend. In arriving at his total, the DOL Judge stated that he found the Appellant to be highly credible and found the accuser employees were evasive, combative and inconsistent in their testimony. (p. 31, DOL decision). The record before both DOL and the FS shows that the accuser employees were alleged to have drug and alcohol problems. The judge also indicated, as to one of the two employees that alcohol use on the site was probable. (Tr. 276-77.) At the time they put in the labor charges, the employees had been fired by Copeland. Copeland charged that the employees had filed the labor charges out of retaliation.

In his decision, the DOL Judge found that Copeland=s certified payrolls accurately reflected the amount of work performed by the employees, and that Copeland established that the employees were paid the prevailing wage of $25.15 per hour. The amount not paid, and for which the Judge found not properly paid (although dismissed because of prejudice), was for deductions made by the Appellant from the pay of the employees for tools, clothing, accident and health insurance. The DOL Judge ruled that these deductions should have been shown on the certified payrolls and were not. In commenting upon this matter, the Judge stated, AThe undersigned does not doubt the sincerity of Respondent=s explanation that he failed to list the deductions because he considered such matters confidential, as the employees were members of his church.@

Further, and in fairness to the FS officials and the DOL investigator, the record before this Board and as reflected in the DOL Judge=s decision, showed that there was considerably less than ideal record keeping by Copeland. Much of the DOL Judge=s conclusions were not based on specific documents he had before him, but instead were based upon his belief as to Copeland=s verbal testimony and the Judge=s disbelief and lack of confidence in the testimony and findings put forth by others. Notwithstanding that Copeland=s written documentation was poor, DOL, not the Board, decides the propriety of withholding, and in that regard and on the evidence surrounding those matters, we are to defer to the conclusions and findings of the DOL Judge.

My reading of the Judge=s decision leads to the conclusion that in many instances he thought the DOL investigator relied on substantially unfounded assumptions and rejected information that she should have accepted. There is simply no other way to reconcile the dramatic difference in dollars between what the Judge was able to validate and the sum withheld during the project. As noted by the majority, the FS in a memo of April 10, 1992, indicated that the FS found a difference of $8,700 between hours reflected on the payrolls and checks presented to it by Copeland. Nevertheless, the FS withheld over $30,000, and identified the additional $21,000 plus, as the withholding for additional work hours, hours that Copeland stated were not incurred. Logically, if the employees did not actually incur the hours, then those hours would not be reflected on any payrolls. Further, the record made by the DOL Judge in his decision of March 1999, indicates that there was significant data contradicting the claim allegations, and that data was simply not given weight by DOL at the time it directed the FS to withhold the $37,635.

Copeland=s record keeping was flawed. However, Copeland=s failure in that regard, while it may very well justify more withholding than $8,700, does not justify withholding $37,635, when the primary catalyst for that sum came from employees, who were suspect and who the DOL Judge concluded, from his observations at the DOL hearing, were lacking in credibility. In contrast, the FS, and more importantly, DOL, by assessing $37,635, appeared to give no challenge to the employees= charges, but rather gave them full credence.

We thus have before us the following situation. The FS terminated the contracts for default based on a failure of Copeland to make progress. The Appellant has shown enough for me to conclude that he could not proceed at the pace demanded because of a lack of money. In Copeland=s letter of June 30, 1992, he cited what he described as a Acritical financial position@ that he had been forced into. He said the longer these problems remain unsolved, the more delays will accrue. (AF 27.) The lack of money was caused by the DOL directed withholding of contract monies. On the other hand, I again point out that the CO, who withheld the money, acted properly within her role, as she was required to follow the dictates of the DOL. The problem is that we now know that the DOL investigator=s decision, which served as the basis for the CO withholding the money, was grossly excessive, in light of the decision of the DOL Judge.

The following question is then posed. Where the contracting agency (here the FS) has acted reasonably and as prescribed in regulations and under the contract, but it has done so on faulty data from a sister agency upon which it must rely (and who is acting for it on a matter related to the contract), should the contractor that has been defaulted as a result of the faulty data, be entitled to have its termination for default converted to one for convenience? Coming from the FS perspective, one could ask why should the FS now have to pay convenience costs, when it acted reasonably at the time, particularly given a lack of choice on its part, once the DOL made the withholding direction. In researching this matter, I find no clear guidance on point.

With no specific guidance on point, I look to how defaults in general are handled. The case law is replete with defaults that have been converted to convenience, because the CO failed to recognize time due the contractor, or failed to acknowledge that a contractor was properly performing

specifications, even though at the time the Government reasonably believed that the work was not in compliance. In addition, there are numerous cases where money was withheld on the belief it was proper and where it was later found that the withholding was either excessive or unwarranted. Monarch Enterprises, VABCA Nos. 2239, 2296, 86-3 BCA & 19,281; H.E. Blinne Contracting Co., ENG BCA No. 4174, 83-1 BCA & 16,388; Northern Helix v. United States, 197 Ct. Cl. 118, 455 F.2d 546 (1972); General Dynamics Corp., DOT BCA No. 1232, 83-1 BCA & 16,386. These cases follow the principle that where the underpinnings for the CO=s conclusion on default was wrong, the default should not stand. The question before the Board in our appeals is, does the lack of underpinning become a non-factor, because in this case, the withholding leading to the non- performance, was withholding directed by the DOL.

Default is a drastic sanction. It is not to be taken lightly. I do not suggest that the FS officials in this case made the decision lightly. They believed that they were properly withholding the money and that Copeland=s failure to make progress, even if due to a claim of lack of funding, was not excusable. However, if this was a default caused by withholding because of alleged defective work, even if the CO acted with the best of intentions and caution, that default would be overturned, if it was shown that the data relied on by the CO as to the withholding was wrong and unsupportable. The fact that the CO in this appeal, acted on the incorrect information provided by an investigator from DOL, and not from a FS official, should not change that result.

I see nothing in the case law, see Emerald Maintenance, 203 F.3d 808 (Fed.Cir. 2000), Herman B. Taylor Construction Co. v. Barram, 203 F.3d 808 (Fed. Cir. 2000); Burnside Aviation Training Center v. United States, 985 F.2d 1574 (Fed. Cir. 1993), that creates a special shield from wrongful termination for cases based on bad information from the DOL. In this opinion, I am not questioning the findings of the DOL Judge. Rather, I am examining the legal standards for a termination based on a failure to make progress, in light of that DOL Judge=s factual findings.

When the contractor entered this agreement, it agreed that the DOL would have the right and obligation to make decisions on labor matters, and not the FS. Similarly, the FS entered the contract knowing that on labor matters, the DOL would be acting on behalf of the Government and in the FS= stead. Given that the DOL was acting in the FS= stead, should not the FS bear the financial responsible, where its surrogate provided a faulty analysis?

It is not permitted for this Board to adjudicate whether there were labor violations. The DOL has done that through its hearing process. However, here we are faced with deciding a contract issue dealing with whether in the context of a default decision for failure to make progress, the Appellant=s lack of progress was excusable. Here the excuse puts into question whether the FS withholding of $37,635, on a matter validated, to the extent reached, by the DOL to have been worth $3,963.90 (and then not enforced), constitutes a sufficient excuse to justify the Appellant=s failure to make progress.

As best I can determine this presents a case of first impression. I recognize that the DOL investigator did not have the benefit that we do of hindsight. However, the finding of the DOL Judge as to various items of evidence and his ultimate conclusion as to what was owed, compels a finding that a

considerably lesser sum should have been withheld, rather than the sum directed. Absent finding or being cited to case law which holds that an agency is immune from challenge to a default as long as it follows the DOL investigator=s lead, I cannot find that this case should be treated any different than any other case where the basis of the withholding proves excessive. I do, however, join my colleagues in finding that to the extent there is a wrongful default, it is not a breach but rather the appropriate remedy for wrongful termination would be to convert the termination to one for convenience.

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HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
October 24, 2002