GOVERNMENT OF DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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Date: May 20, 1998

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SUBJECT: CAB Nos. D-971 & D-972, Appeal of Ebone' Inc.

Attached is a copy of the Board's opinion in the above-referenced matter.

Mia J. House
MIA J. HOUSE
Clerical Assistant

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

EBONÉ, INC.	)	
	)	CAB Nos. D-971, D-972
Under Contract Nos. 91-0165-AA-2-0-KA	)	(Consolidated)
and 92-0052-AA-2-0-KA	)	

For the Appellant: Roderic L. Woodson, Esq., Claudette M. Winstead, II, Esq., Alexander, Bearden, Hairston & Marks, LLP. For the Government: Mark D. Back, Esq., and Marceline D. Alexander, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

In these consolidated appeals, Appellant, Eboné, Inc., seeks equitable adjustments under two contracts, claiming that it suffered compensable delay when the District issued notices to proceed with work in early 1993 rather than in late 1992 as anticipated by Eboné. The District argues that Eboné itself caused the delayed notices to proceed and that Eboné never complained about the delays until well after contract completion and final payment. After the Board conducted a hearing on the merits of entitlement and quantum, but before submission of posthearing briefs, Eboné moved to dismiss the appeals based on "final decisions" of the agency contracting officer issued three months before the Board hearing, purporting to grant Eboné the full amounts sought in its original claims filed with the Director of the Department of Administrative Services ("DAS"). The District argues that the final decisions executed by the agency contracting officer are invalid because the contracting officer did not receive prior approval from the Office of Corporation Counsel, the District's authorized legal representative in Board appeals. We conclude that the agency contracting officer's final decisions issued during the pendency of these appeals are invalid because under the then-applicable provisions of the Procurement Practices Act only the DAS Director had contracting authority to settle these disputes once Eboné initiated the statutory disputes process by filing its claims with the DAS Director. In addition, the Board, pursuant to its *de novo* jurisdiction, has authority to review whether an authorized contracting officer's action to settle a dispute pending before the Board is a valid exercise of discretion. Based on our review of the hearing testimony and the remainder of the record, we conclude that Eboné's claims are frivolous. Accordingly, the appeals are denied.

FACTS

In 1992, Eboné and the District entered into Contract No. 91-0165-AA-2-0-KA, entitled "FY-91 First Supplemental Joint Sealing Contract" (the "SJS Contract"), and Contract No. 92-0052-AA-2-0-KA, entitled "FY-92 First Slurry Seal Contract" (the "FSS Contract"). (Joint Stipulation of Facts ("JSF") ¶ 1).

Eboné's president and only witness, Ms. Belle Vee Gentry, described her expectations concerning when Eboné would receive written notice from the District to proceed with the contract work. She stated that based on her experience, she anticipated the District taking approximately three months, but no more than four months, from the time of bid opening to furnish the successful bidder the contract documents for execution. After receiving the contract documents, the contractor would require approximately 10 days to obtain signatures from the contractor's surety, execute the contract documents, and return them to the District. Then, the District would take approximately another 30 days to execute the contract, return an executed version to the contractor, and arrange a pre-construction meeting. At the pre-construction meeting, the parties would discuss the scheduling of the work, the identity of the government's inspector, and the date set for issuing the notice for the contractor to proceed with the contract work. The contractor would then prepare for mobilization and within a week or two, sometimes a month, the contractor would be ready to start work. Finally, the District would issue the written notice to proceed and the contractor would begin contract work. (*See, e.g.*, Tr. 13-14, 26, 142-143). Ms. Gentry testified that the construction season for the type of work involved in the two contracts generally begins on April 1 and ends on November 30. (Tr. 27-32). The FSS contract had a special provision which provided that after October 15, the slurry seal compound could not be applied when the surface temperature is below 50 degrees Fahrenheit. (D-972 AF Ex. 2, Special Provisions, at 10, ¶ B; Tr. 32-33, 39-40). For the SJS contract, the manufacturer's specifications required *inter alia* that joint sealing material could not be placed when the temperature was under 40 degrees Fahrenheit. (D-971 AF Exs. 8, 9; Tr. 185-186, 284-288).

The SJS Contract

Eboné has appealed the DAS Director's deemed denial of its claim for delay and impact damages arising from a delay in issuing the notice to proceed under the SJS contract. Eboné seeks $138,494.54, consisting of $17,983.52 for the "direct cost increase on equipment and materials," $74,186.78 for "extended overhead" for 206 days of delay, and the remainder apparently for interest on those amounts.[1] (JSF ¶ 13; Eboné's May 8, 1996 Supplemental Submission, Ex. 3; Tr. 172, 181).

On January 17, 1992, Eboné submitted a bid on DPW's Invitation for Bids ("IFB") No. 91-0165-AA-2-0-KA for the SJS contract. (JSF ¶ 2). The SJS contract called for Eboné to fill cracks in designated roads using a rubber-like sealing compound. (Tr. 139). Ms. Gentry testified that she received the draft contract documents on March 31, 1992, and returned the executed documents to DPW on April 8, 1992. (Tr. 143-144). The fully executed SJS contract is dated June 18, 1992, at its bid price of $500,000.00. (JSF ¶ 3). The total price is composed of an amount of $435,000 for applying the joint sealant (an estimated 250,000 pounds of sealant multiplied by a unit price per pound of $1.74) and $65,000 for maintenance of highway traffic. (Tr. 277-279). The contract specified a completion date "within one-hundred eighty (180)

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[1] In its posthearing brief, Eboné states its increased costs as $92,170.30. Unlike for the FSS claim, Ms. Gentry did not explain in her testimony why the amount of Eboné's claim under the SJS contract increased by $46,324. (Eboné's Initial Posthearing Brief, at 6; *cf.* Tr. 134-135).

consecutive calendar days after specified starting date." (JSF ¶ 4). The contract itself does not specify a starting date.

On August 20, 1992, DPW and Eboné conducted a pre-construction meeting (JSF ¶ 5), attended by, among others, Ms. Gentry, on behalf of Eboné, Mr. David Blankenship, the president of Quality Paving, a subcontractor Eboné was considering for executing the SJS contract, and Messrs. William Sebesky and James Williams, DPW inspectors. (Tr. 145-149, 231-233). Mr. William Clements, the DPW project engineer in charge of the SJS project, did not attend the meeting. (Tr. 280). Mr. Clements, who is now retired from the District government, was the only witness for the District. He testified that the preconstruction meeting normally would have been scheduled closer to the June 18, 1992 contract execution date but for a two-month delay caused by Eboné. He recalled that Eboné was not ready to start work because Eboné was undecided as to whether Eboné itself or a subcontractor was going to perform the sealing work. (Tr. 281-282). Mr. Clements testified that, in the first or second week of September 1992, Ms. Gentry informed him that Eboné was in the process of selecting a subcontractor to perform the work and that the subcontractor's superintendent would contact him to arrange for a review of the equipment and the joint sealing materials. Within about two weeks, the subcontractor's superintendent met with Mr. Clements, advising him that the subcontractor could not start work until early to mid-October 1992. The subcontractor representative stated that he did not want to start the project at that time of the year because of the temperature requirements for applying the joint sealing material. (Tr. 283-287). After the meeting, Mr. Clements contacted Ms. Gentry, telling her what the subcontractor's superintendent had stated to him. Mr. Clements offered Eboné the choice of starting work then (and meet the temperature requirements) or waiting until spring of the next year. Mr. Clements testified that Ms. Gentry agreed that the best time to start work would be in April 1993. (Tr. 288-289).

At the hearing, Ms. Gentry presented a quite different picture of the events. She testified that Mr. Clements inspected Eboné's equipment in July 1992 and found the equipment acceptable. (Tr. 145-146, 169-170, 355). She stated that Eboné was prepared to commence work in August 1992, or earlier, but was prevented from doing so because DPW did not have inspectors available to monitor the work. Ms. Gentry stated that she had frequent conversations with Mr. Clements and his supervisors before and after the August preconstruction meeting in which she asked when Eboné could begin work. She testified that at the end of October or early November, Mr. Clements informed her that Eboné would not be able to start the work until spring 1993.

We credit Mr. Clements' testimony and find that Ms. Gentry's testimony was not credible in certain critical areas. In her hearing testimony, Ms. Gentry testified that Eboné had always intended that it would supply the labor to place the joint sealant on the roads and intended to procure the material and equipment from a supplier. (Tr. 160, 176). She testified that when Eboné submitted its bid on January 17, 1992, it had lined up a supplier called Crafco to supply the material and equipment. (Tr. 167). She asserted that she had the equipment at her facility and that Mr. Clements and an assistant of his had come to the facility in July 1992 to inspect the equipment. (Tr. 170). She testified that Eboné "used a specific supplier/subcontractor's quotation

at the time of the bid to bid this particular contract and indicated to them [the supplier] an [intent][2] to utilize their product in the performance of this contract on award of the contract." (Tr. 175). During the line of questioning, counsel directed her attention to two quotations from a supplier called Chesapeake Supply & Equipment Company. (Eboné's Supplemental Submission, filed May 13, 1996, Ex. 6, at 1-2). The first quotation sheet, dated January 28, 1992, identifies "Crafco" as the brand name for the joint sealing material and equipment. (Ex. 6, at 1; Tr. 179). Ms. Gentry explained that Chesapeake was an authorized distributor for Crafco. (Tr. 359-360). The second quotation sheet, dated March 9, 1993, contains new (and higher) price quotations for the material and equipment. For its actual performance commencing in April 1993, Eboné apparently did in fact procure its material and equipment from Chesapeake according to the March 1993 quotation from Chesapeake. In presenting Eboné's damages claim, Ms. Gentry was using the two price quotations to establish material and equipment price escalation caused by DPW's alleged delay in issuing the notice to proceed. (Tr. 177-180, 193). She testified that she would execute the signature block on the quotation sheet to lock the supplier into the quoted price. (Tr. 176-177). Although the January 28, 1992 quotation sheet in the record does not contain her signature in the block calling for acceptance, she stated unequivocally during her direct and cross examination that she did accept Chesapeake's January 28, 1992 quotation and that the quotation was good until the end of 1992. During cross examination, she stated that a copy of Chesapeake's 1992 quotation bearing her acceptance signature would be found in a separate file for Chesapeake in her office but not in the contract file which she brought with her to the hearing. (Tr. 193-195). She never mentioned Quality Paving during any of her testimony in Eboné's case-in-chief.

The importance of Ms. Gentry's failure to mention Quality Paving during Eboné's case-in-chief became clear once Mr. Clements testified for the District. As discussed earlier, he testified that in the crucial time between contract execution on June 18, 1992, and October 1992, Eboné was considering using a subcontractor named Quality Paving (not Chesapeake as a supplier) to furnish not only the equipment and material for the joint sealing work but also the labor to place the sealing material on the roadways. Her omission of any mention of Quality Paving during her testimony in Eboné's case-in-chief, while emphasizing a role played by Chesapeake, is highlighted by her testimony regarding the preconstruction meeting. When first asked who attended the August 1992 preconstruction meeting, she could only recall that she and Robert Gentry attended for Eboné and Mr. Clements attended for the District. (Tr. 145-146). She omitted mentioning that Mr. David Blankenship, the president of Quality Paving, attended the meeting. When her counsel presented her with a copy of an attendance sign-in list for the meeting (apparently, discovered by the District shortly before the hearing), she testified: "In that meeting, it was myself, David Blankenship, Bill Sebesky and Jim Williams, the two inspectors from DPW, and some other people from Eboné . . . ." (Tr. 148-149). Without explaining, she said she would have to see the original of the document to confirm the attendees. (Tr. 149). Even after identifying Mr. Blankenship's name on the list, she still made no mention of Quality Paving or that Mr. Blankenship was Quality Paving's president. When asked whether the subject of the meeting related solely to the SJS contract (and did not include the FSS job), she replied: "That is what we would have — the individual that accompanied me, that is what we would have been

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[2] Ms. Gentry's use of the word "intent" was mistakenly transcribed as "attempt." (Tr. 175).

in to discuss, the joint seal." (Tr. 150). The "individual" she was referring to was Mr. Blankenship. Based on our review of the remainder of her hearing testimony and the written record, we find that she did not want to identify her dealings with Quality Paving in the period June 1992 through October 1992 or that the president of Quality Paving attended the August 1992 preconstruction meeting because that would lend credence to the District's defense that Eboné was considering whether to subcontract the SJS contract performance (labor, equipment, and materials) to Quality Paving since Eboné was working during the summer of 1992 on another DPW contract. (*See* District's Prehearing Brief, at 5 & n.2). Similarly, a discussion of her dealings with Quality Paving would clearly undermine Eboné's case built on the premises that: (1) Eboné intended to furnish its own labor to perform the contract work, and (2) Chesapeake was Eboné's chosen supplier of equipment and material. Moreover, Eboné's delay claim would certainly fail if Mr. Clements accurately testified that: (1) Ms. Gentry had called him in September 1992 to arrange a meeting between Mr. Clements and a Quality Paving's representative;[3] (2) the Quality Paving representative advised Mr. Clements that in October 1992 it would be too late in the season for Quality Paving to start the work; and (3) Ms. Gentry and Mr. Clements subsequently agreed to postpone starting work until spring 1993.

Ms. Gentry's earlier testimony unraveled when she testified during Eboné's rebuttal case. When asked whether she was familiar with a company called Quality Paving, she said she was. (Tr. 355). When asked whether Quality Paving was to be Eboné's "subcontractor" in the SJS contract, she stated:

> These words are used interchangeably -- to me they're not. Quality was my supplier for equipment on the joint seal contract, they're the ones that brought this equipment out for us and the department inspected it in July of '92. And Mr. Blankenship, who is the president and owner of Quality is the one that attended the preconstruction meeting — that [was shown on] the District [attendance] list [which] was [dated] August 20th, 1992.

(Tr. 355). This testimony contradicts her earlier testimony that Chesapeake was Eboné's supplier of equipment and material. She denied being aware of a meeting between representatives of Quality Paving and DPW in September 1992. (*Id.*). When Eboné's counsel asked whether a statement by a representative of Quality Paving to DPW would prevent Eboné from going forward with the contract, Ms. Gentry answered:

> It wouldn't have prevented us from going forward with the contract, but one of the reasons that I don't identify my subs immediately to the District, is because they take a position of management of my business affairs, which is inappropriate in my opinion. Conversation with my subs is not the responsibility of the District. That is business management. Let me finish, please. The point I'm trying to make is, they could have impacted on that particular supplier, equipment supplier at that

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[3] Mr. Clements believes that his meeting in September 1992 was with Quality Paving's superintendent. He could not recall the superintendent's name.

time, meaning that I would have to use an alternative. . . .

(Tr. 356). When counsel followed up with the question, "[W]ould you have performed the contract notwithstanding the statement from Quality Paving?" she replied: "Yes. I was ready to go to work at that time. . . ." (Tr. 357). When asked whether she was stating that Quality Paving was also to provide the materials, with Eboné providing the labor, Ms. Gentry replied:

> No, sir. They [Quality Paving] were going to supply the equipment, they, to my knowledge, from my remembrance, they are not a distributor like Chesapeake was, Chesapeake was an authorized distributor of the company that we decided to use the material. They could have been, but I don't recall that they were. They were just the equipment people and we needed an approval on the equipment before we could order the materials . . . .

(Tr. 359). Beyond the inconsistencies in Ms. Gentry's hearing testimony,[4] we find that the key testimony presented by Ms. Gentry at the hearing is directly contradicted by sworn statements she made in an affidavit signed by her on February 22, 1995, and filed with the Board on May 8, 1996.[5] (Supplemental Submission by Eboné Incorporated in Support of Claims for Breach of Contract and Equitable Adjustments, Ex. 1). In paragraphs 8-12 of her affidavit, Ms. Gentry states:

> 8. At the time of bid (January 17, 1992), Ebone had arranged for execution on this contract by a sub-contractor, Quality Pavemarking of Alexandria, Virginia.
>
> 9. At the preconstruction meeting held between Ebone and DPW on August 20, 1992, Ebone was ready to start work and requested DPW inspection of equipment and materials.
>
> 10. On September 20, 1992, I contacted DPW regarding the inspection and start date as no further action was taken by DPW since the August 20th meeting.
>
> 11. At no time did Ebone agree to a postponement of the start of the SJS Contract.
>
> 12. Because of the delay in issuance of the Notice to Proceed until April, 1993, the sub-contractor selected by Ebone became unavailable due to other work commitments. When Ebone was orally informed during March, 1993 that the Notice to Proceed was to be issued in April, 1993, Ebone determined to execute the contract itself; entered purchase orders for supplies; and, submitted its information to DPW for approval on or about March 30, 1993.

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[4] There were other contradictions in her hearing testimony which detracted from her credibility.

[5] She was not confronted with the affidavit during the hearing.

Thus, in paragraphs 8 and 12 of her affidavit, she confirms that Quality Paving was Eboné's selected "subcontractor"[6] who was to "execute", *i.e.*, perform, the contract work and that Eboné determined to execute the contract work itself because Quality Paving "became unavailable due to other work commitments." That much was accurate. Throughout 1992, Eboné always intended that Quality Paving was going to provide labor, equipment, and materials. Ms. Gentry's case-in chief testimony, that in 1992 Eboné intended to furnish its own labor with Chesapeake supplying the equipment and material, was not accurate. Her testimony on rebuttal, that she had intended Quality Paving to be her "equipment supplier", was not fully accurate. Paragraph 9 of her affidavit, where she states that Eboné requested at the August 20, 1992 preconstruction meeting that DPW inspect the equipment and materials, also contradicts her hearing testimony that Mr. Clements had already inspected her equipment in July 1992.

We find Mr. Clements' testimony to be credible based on his demeanor on the witness stand and the consistency between his testimony and the entire written record. For example, his testimony concerning Quality Paving is consistent with those portions of Ms. Gentry's affidavit which state that Quality Paving was Eboné's intended subcontractor throughout 1992 and with a written report he made to his superiors on April 5, 1993, which states in pertinent part:

> At the pre-construction meeting on 8/20/92, the contractor was in the process of selecting a sub-contractor. In September the contractor had selected a sub-contractor and was ready to start work. However, after meeting with the contractor and the Engineer, it was felt to[o] late in the year to begin joint sealing. The contractor and Engineer agreed to start this contract in the spring of the year 1993.

In a report prepared for his superiors after Eboné filed its claim in September 1994, Mr. Clements wrote in pertinent part:

> Contractor delayed having pre-construction meeting until 08/20/92. At the pre-construction meeting, the contractor said they were still in the process of selecting a subcontractor, not ready to start work.
>
> In September [1992], the contractor had selected a subcontractor and was ready to start work. However, after discussions with the contractor, subcontractor and the Engineer, it was felt to[o] late in the year to begin joint sealing (specifications call for 40 degrees and rising before lay down operations can begin). The contractor and Engineer agreed to start this contract in the spring of 1993.
>
> [L]ater, in December, the contractor notified the Engineer they would perform the lay down operations for the joint sealing contract. They were renting all necessary equipment to perform the work in accordance with DPW specifications.

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[6] Ms. Gentry was careful in distinguishing between her use of the term "supplier" and "subcontractor." (*E.g.*, Tr. 355).

> In March [1993], the contractor requested an inspection and approval of rented equipment. Equipment was inspected and approved March, 1993.

(D-971 AF 8). In contrast (and despite Ms. Gentry's years of District contracting experience) there is not a single letter from Eboné to Mr. Clements, his supervisors, or the contracting officer notifying DPW that Eboné was ready to start work in 1992, that DPW was unreasonably delaying notice to proceed, or that Eboné was incurring costs as a result of DPW delay. (Tr. 163-164).

DPW transmitted notice to proceed with the SJS contract on April 12, 1993, and thereafter Eboné commenced work. (JSF ¶ 6; D-971 AF Ex. 8). Eboné performed the SJS contract work itself. (D-971 AF Exs. 11-A to 11-F). DPW issued six partial payments between May 5, 1993, and October 6, 1993, to Eboné for its work. (JSF ¶ 7; D-971 Exs. AF 10-A to 10-F). In a letter to Eboné dated November 27, 1993, DPW notified Eboné that all work under the SJS contract was completed and in substantial conformance with the contract specifications. (JSF ¶ 8; D-971 AF Ex. 6; Tr. 292-293, 299). DPW issued the final payment for the SJS contract on December 3, 1993. (JSF ¶ 7.g; D-971 AF Ex. 10-G; Tr. 298-299).[7]

By letter of September 23, 1994, to DPW's contracting officer, Eboné requested compensation of $92,169.78 for extended overhead and increases in cost of materials, due to late issuance of the notice to proceed under the SJS contract. (JSF ¶ 9; D-971 AF Ex. 5). The September 23, 1994 letter was the first written notification by Eboné of any claim relating to the contract. Although Ms. Gentry testified that she gave oral notice to Mr. Clements' supervisors as early as the fall of 1992, neither her testimony nor the written record credibly establishes that Eboné provided actual notice to the contracting officer of its intent to file a delay claim prior to the September 23, 1994 letter. In another claim letter dated September 28, 1994, Eboné identified that its claim for extended overhead was based on an alleged 206-day delay to starting work on the SJS contract. (JSF ¶ 9; D-971 AF 4). DPW acknowledged receipt of Eboné's claim seeking additional compensation by letter dated October 17, 1994. (JSF ¶ 10; D-971 AF Ex. 3). On November 30, 1994, Eboné submitted its claim under the SJS contract to the DAS Director. (JSF ¶ 11; D-971 AF Ex. 2). On May 30, 1995, Eboné filed a notice of appeal with the Board, docketed as CAB No. D-971, based on the DAS Director's deemed denial of its claim.

The FSS Contract

Eboné has appealed the DAS Director's deemed denial of its claim for delay and impact damages arising from a delay in issuing the notice to proceed under the FSS contract. Eboné seeks $132,199.57, consisting of $49,124.09 for the "direct cost increase on materials and equipment," $54,294.81 for "extended overhead", and the remainder for interest on those amounts. (JSF ¶ 30; Eboné's May 8, 1996 Supplemental Submission, Ex. 2; Tr. 69-72, 134-135).

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[7] Until shortly before the hearing, Eboné never contended that it had not received final payment under the SJS contract. Although the joint stipulation is conclusive for establishing final payment, the remainder of the written record independently supports the fact of final payment.

On May 1, 1992, Eboné submitted a bid on IFB No. 92-0052-AA-2-0-KA for the FY-92 First Slurry Seal Contract ("FSS Contract"). (JSF ¶ 14). The FSS contract called for Eboné to apply the slurry seal coating to designated asphalt roads to prolong the life of the roads in between major renovations and replacement. (Tr. 11). Ms. Gentry testified that she received on August 26, 1992, a notice of award from DPW, dated August 21, 1992, then received the draft contract documents on September 8, 1992, and, on September 24, 1992, returned the executed documents to DPW. (Tr. 16-18). The fully executed FSS contract is dated October 14, 1992, at its bid price of $435,000.00. (JSF ¶ 15). The price is based on a unit price of $0.87 per square yard of slurry seal in place multiplied by an estimate quantity of 500,000 square yards of slurry seal. (D-972 AF 1, Pay Item Schedule). Like the SJS contract, the FSS contract specified a completion date "within one-hundred eighty (180) consecutive calendar days after specified starting date." (JSF ¶ 16). The contract itself does not specify a starting date. The contract contains a special weather requirement that the slurry seal not be applied after October 15 of the year where the surface temperature is below 50 degrees Fahrenheit. The parties have stipulated that the District did not issue the notice to proceed with work until the following spring, April 12, 1993. Thus, the question is: was Eboné ready and willing to commence work after contract execution on October 14, 1992, but the District prohibited Eboné from getting started in October 1992, or, did the parties mutually agree in October 1992 to delay notice to proceed until spring 1993. The answer to the question, and thus Eboné's claim for late notice to proceed, rises or falls on the credibility of Ms. Gentry (for Eboné) and Mr. Clements (for the District) because their testimony is irreconcilable.

The essence of Eboné's case is that Ms. Gentry anticipated Eboné going to work soon after contract execution and that Eboné would be doing the contract work using its own forces, *i.e.*, not using a subcontractor:

> Q So then it's fair to say that Eboné was prepared to go forward to work and anticipated going to work [after the October 14, 1992 date of contract execution]?
>
> A Yes, I anticipated going to work and possibly having no less than 30 to 45 days of performance on this contract [during the winter season], maybe more.
>
> Q Was Eboné going to perform the Slurry Seal contract itself?
>
> A Yes.
>
> Q Did it perform the Slurry Seal contract itself, in the end?
>
> A Yes.

(Tr. 28).[8]

Mr. Clements, on the other hand, testified that: (1) Ms. Gentry had advised him before October 1992 that Eboné was going to be using a subcontractor (Tr. 230-232); (2) Ms. Gentry had advised him after contract execution that Eboné was negotiating with a firm called E.E. Lyons Construction to be its subcontractor to perform the contract work (Tr. 236); (3) Ms. Gentry and he agreed in October 1992 that based on the time of year it would be best to delay notice to proceed until the spring of 1993 (Tr. 239-241); and (4) he spoke with Lyons' superintendent in the last week of March or first week of April 1993 concerning Lyons' execution of the contract work (Tr. 241).

Based on numerous internal inconsistencies in Ms. Gentry's testimony, inconsistencies between her testimony and the record documentation, Mr. Clements' demeanor, and the overall consistency between Mr. Clements' testimony and the written record, we credit Mr. Clements' testimony and find Ms. Gentry's testimony to be inaccurate in several critical areas.

With regard to the events in 1992, Ms. Gentry testified that after she had returned the draft contract documents to DPW in September 1992, and received the fully executed contract dated October 14, 1992, she was expecting to receive a call from Mr. Clements arranging a preconstruction meeting in October and then a notice to proceed from DPW that same month. (Tr. 19-20). When she did not receive any call, she says she contacted Mr. Clements the week she received the executed contract documents to find out when Eboné could start work. She states that Mr. Clements responded that the lists identifying the road locations were still being prepared by DPW, that he had to get inspectors assigned, and that he would get back to her at a later time. (Tr. 20-24). She said that normally she would receive the location lists, the designation of the inspectors, and the start date at a preconstruction meeting. (Tr. 25-26). She stated that there was no preconstruction meeting for the FSS contract in 1992 and that the preconstruction meeting held on August 20, 1992, related only to the SJS contract. (Tr. 19, 46, 147, 150). Ms. Gentry testified that Eboné was prepared to start work at the time the contract was executed on October 14, 1992, and that Eboné never indicated to anyone that it was unprepared to go forward with the contract work. (Tr. 26-28). She stated that she anticipated getting 30 to 45 days of contract work done during the winter season. (Tr. 28). She stated that she continued to call Mr. Clements and his superiors advising them that Eboné was anxious to get started prior to "going into winter suspension." (Tr. 28-29). She said that sometime around Thanksgiving, in 1992, DPW advised her that "we weren't going to be performing the work this year." (Tr. 29-30).

That Eboné always intended to execute the contract work itself, but was prevented from doing so by DPW, was the foundation for her assertion that Eboné was prepared to start work in October 1992. After testifying that Eboné intended to do the work itself, she explained the nature of her conversations with DPW representatives during the period January 1, 1993, to April 12, 1993, this way:

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[8] In its posthearing brief, Eboné states that it "performed the contract alone. Tr. 17, 28." (Initial Post-Hearing Brief, at 8).

> [T]o solicit our list[9] so that we could start — actually, to solidify the renegotiations on our material with our suppliers, and to see what materials, if any, we could stock pile or take early delivery on, based on the quantity or volume we were going to achieve on a daily or weekly basis. . . .

(Tr. 43). Ms. Gentry's testimony concerning the role of Eboné and its "suppliers", however, shifted throughout the hearing. Her initial testimony was at best vague as to what Eboné's "suppliers" would be supplying. But she was unambiguous on the point that Eboné was going to furnish its own labor to perform the work. It was not until her testimony on material and equipment escalation damages that the inconsistencies in Ms. Gentry's testimony on the full scope of the role of Eboné's "suppliers" became apparent. First, she stated that she obtained only materials and equipment from a "supplier." Later, she was compelled to admit that her payments to her "supplier" were essentially all of the direct costs for the contract, *i.e.*, material, equipment, *and* labor costs. However, she did not want to admit that the supplier was really her subcontractor who furnished materials, equipment, *and* labor, because such an admission would undermine her claim that Eboné (using its own forces) was ready to begin performance in October 1992. We summarize the relevant portions of the written record and hearing testimony below.

In her initial written claim of 1994 submitted to the contracting officer, she identifies a "direct cost increase on equipment and materials" equal to $49,124.09. (D-972 AF 6 (September 28, 1994 letter), at 3). During the hearing, she testified that this amount represented "the difference in actual cost of material and equipment to perform this contract once it was completed based on the actual estimated bid of the materials and equipment on that particular contract when it was bid." (Tr. 53-54). In a one-page note to her counsel, which Eboné had sought leave shortly before the hearing to include in the record, Ms. Gentry identifies three components to the $49,124.09 amount: an increase of "material costs" of $34,212.64; increased sales tax, insurance, and bonding of $3,352 (Tr. 65); and certain other increased costs equal to $11,559.45, variously described as either "equipment rental increase" or "subcontractor, labor & labor expenses." (See Eboné's Motion for Leave to File Out of Time Supplemental Materials in Support of its Claim, filed August 14, 1996, at 4).[10] Although the Board did not admit the document into the record, Ms. Gentry's testimony repeatedly referenced the figures identified in that document. (Tr. 49-66, 72-85). Most of her testimony was directed to the $34,212 component for alleged material escalation.

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[9] She is referring to the list of road locations from DPW which would tell her which roads were to receive the slurry seal application.

[10] The document is undated, but undoubtedly was prepared by Ms. Gentry shortly before the August 12, 1996 filing date of the motion. We refer to the document because it places Ms. Gentry's hearing testimony in context and is relevant to the question of credibility. In its posthearing brief, Eboné states that the $11,559.45 amount represents increased costs for "rental equipment." (Eboné's Initial Posthearing Brief, at 14).

Ms. Gentry began by defining the increased material costs as the additional costs for lime, aggregate, emulsion, and the "main equipment relative [to] trucking, anything relative to getting that material to the company in order to perform the job." (Tr. 54, 57-58). When asked what the total invoice amounts were for lime, she replied:

> I cannot tell you the actual invoice amounts for lime. I can tell you the actual total payments to our supplier for that material and equipment . . . .

(Tr. 55). When asked about the total invoice amounts paid to the supplier of the aggregate, she stated:

> That encompasses the aggregate, the lime and emulsion — the actual Slurry Seal machine itself, the trucks and any other tools or incidentals that *we utilized to actually make the slurry Seal and to apply the application.*

(Tr. 56 (emphasis added)). This testimony indicates that Eboné had been supplied with not only the material (and transportation of that material to Eboné's facility), but also the equipment — the slurry seal machine, the trucks, and any other tools or incidentals — used to combine the materials into the slurry seal compound and to apply the slurry seal to the road surfaces. She confirmed that a single firm, E.E. Lyons Construction, had supplied all of the materials and equipment. (Tr. 57-58). At this point she still made no suggestion that Lyons (rather than Eboné) furnished the labor for combining the materials and applying it to the road surfaces. As Ms. Gentry acknowledged elsewhere, performing the actual project work by furnishing materials, equipment, and labor would make Lyons a "subcontractor" not a "supplier." (Tr. 96, 355).

As her testimony developed, Ms. Gentry was unable to identify the actual breakdown of material costs, stating that she would have to look at the individual material ticket orders (which she did not have at the hearing). (Tr. 57-58). But she also testified that the supplier's material costs were separately collected under Eboné's computerized job cost accounting system. However, she did not bring those figures or the job cost records to the hearing. (Tr. 58, 73-77, 80-82).

The repeated thrust of Ms. Gentry's testimony was that each component of the $49,124.09 claim amount for material and equipment escalation was derived from the "actual hard costs" obtained from Eboné's job cost system. (*E.g.*, Tr. 52-60). For example, she stated that the $34,212 figure represented increased cost of materials from its supplier which, she said, was derived from material order tickets "for every ton, square yard, cubic yard" of material. (Tr. 55, 57-58). It became clear during the hearing, however, that Ms. Gentry had calculated the total material and equipment escalation amount of $49,124.09 by taking the difference between the original unit cost estimate of $0.68 "per square yard for material and equipment" and the $0.75 "actual cost" per square yard (a difference of $0.07) and multiplying that by the actual amount of material put in place, 701,772.77 square yards. (Tr. 58-66, 77-78, 80; *cf.* Tr. 80-81, 93-94, 104-106). She repeatedly contradicted herself on Lyons' involvement and what she meant by "materials and equipment." During her direct examination, she testified that the original unit cost estimate of $0.68 per square yard comprised the cost of material and equipment from her

"supplier." (Tr. 58-59, 61). Then, she testified that the $0.68 per square yard estimate and $0.75 actual "included everything" to perform and complete the contract:

> [W]e knew our estimated cost to do this contract would be 68 cents per square yard. That included everything. When we completed this contract, the cost had gone up and, in fact had cost us just to perform 75 cents per square yard.

(Tr. 65, 66). Later, she stated: "When we originally bid this contract, the cost that was identified, which consisted of all of our equipment and all of our materials to perform this contract was -- it included everything except for -- it was 68 cents a square yard." (Tr. 77). Still later, she said the unit price of doing the work was "a composite of the work force, the equipment and the material on the Slurry [Seal contract]. (Tr. 84). During cross examination she stated that the total payment to her "supplier" (Lyons) was for "equipment and supplies to do this contract." (Tr. 94-95). When asked if that constituted all of Eboné's costs, she replied: "No, it wouldn't have been all my costs, but it would have been the cost -- the hard cost, yes." (Tr. 95). When asked to itemize the total payment to Lyons, she replied that the payment "consists of equipment, all of the material and the related incidentals to that equipment to perform [the] contract." (*Id.*). She defined "incidentals" this way: "Well if there was fuel to go into the machine, if there was burlap to go on the back, if there was hand rakes or anything relative to that, those are incidentals relative to the equipment and materials to do this work." (*Id.*). When asked whether Lyons was "your subcontractor for this contract", she responded: "They were my supplier." (Tr. 96). She repeated that Lyons provided equipment, materials, and "incidentals." (*Id.*). Near the end of the cross examination, she said the unit estimate of $0.68 was for "my materials" and "my materials and equipment." (*Cf.* Tr. 98, 107 *with* Tr. 65).[11]

The District presented its case through the testimony of Mr. Clements. Mr. Clements testified, and the parties stipulated prior to the hearing, that a preconstruction meeting covering the FSS contract was held on August 20, 1992. (JSF ¶ 17; Tr. 226-232, D-972 AF 18). Contrary to Ms. Gentry's testimony, Mr. Clements stated that the meeting covered both the SJS and FSS jobs, even though the FSS contract had not been formally executed by the parties. (Tr. 226-228).[12] He testified that he learned from Ms. Gentry before the preconstruction meeting that she intended to use a subcontractor for the FSS contract. (Tr. 230-232, 310-311). The parties did

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[11] Although Ms. Gentry initially testified that she had paid her "supplier" $0.75 per square yard (her "actual costs"), she later admitted that Eboné had withheld about $20,000 from Lyons. (Tr. 101-102, 104). In other words, Eboné had not paid Lyons as represented in its claim and in Eboné's contract certifications attesting to the payment of subcontractors and suppliers. (Tr. 102-104; D-972 AF Ex. 21-F, at 3).

[12] We credit Mr. Clements' testimony on this point. Ms. Gentry never identified any other date that a preconstruction meeting was held for the FSS job. The record, including Mr. Clements' file memorandum and the April 21, 1993 subcontractor approval request, supports his testimony. So too does Ms. Gentry's testimony that DPW issued a notice of award for the FSS contract precisely one day after the August 20, 1992 preconstruction meeting. (Tr. 17).

not discuss a starting date for performance because the contract had not been executed. (Tr. 233-234). In addition, Eboné was still in the process of selecting a subcontractor. (D-972 AF 18, at 1, 3; Tr. 265-268). After contract execution on October 14, 1992, Mr. Clements had a conversation with Ms. Gentry in which she indicated that Eboné was negotiating with Lyons to be the subcontractor. (Tr. 236, 230-231, 309-311). They also discussed the lay down temperature for the slurry seal because Ms. Gentry, initially, at least, was thinking of having Lyons start work at that time. (Tr. 236, 240). After discussing the matter further, Mr. Clements and Ms. Gentry agreed, based on the time of year, that it would be better to start the following spring. (Tr. 239-243).

Mr. Clements testified that the next contact with Eboné occurred in March 1993, when he asked Ms. Gentry if she had a subcontractor in place. (Tr. 243). Mr. Clements met with Lyons' superintendent in late March or early April 1993 to discuss the execution of the contract work. (Tr. 241-242). Eboné submitted a "Subcontractor Approval Request" dated April 21, 1993, identifying Lyons as Eboné's subcontractor. That document bears Ms. Gentry's signature. (D-972 AF Ex. 18, at 3; Tr. 241). The record also contains the project's daily inspection reports and they all identify Lyons as Eboné's subcontractor during the contract performance period. (D-972 AF Exs. 22-A to 22-E; *cf.* D-971 Exs. 11-A to 11-F).

In Eboné's rebuttal case relating to the FSS contract, Ms. Gentry testified that Eboné, at the time of bid, did not anticipate using "the subcontractor" to do the work, did not anticipate "the use of E.E. Lyons in any capacity," did not anticipate using Lyons as a subcontractor at the time of contract execution (October 14, 1992), and was not aware of conversations between DPW and Lyons regarding the FSS contract in 1992. (Tr. 348-349). When asked whether a representation by Lyons, to the effect that Lyons could not go forward with the contract, would have prevented Eboné itself from going forward with the contract, she answered:

> No, it would not have prevented Eboné from going forward with the Slurry Seal contract. It could have and there have been instances where it was impacted on the quotation, if you had solicited quotations from them, since they did end up on the contract, which explained why the quotation went up for the year of '93 because they had prior knowledge that we were not going to be able to buy the material from them in the '92 season.

(Tr. 350). When asked about a price quotation from Lyons in 1992, she responded: "Actually, we didn't use their price quotation in 1992." (*Id.*). Then she admitted that "We had received a price quote." (*Id.*). When counsel asked again whether "any representation by E.E. Lyons to DPW [would] have prevented Eboné from going forward with work on the executed contract," she replied: "We were prepared to go forward with the work on the contract, though any conversations that the District had with E.E. Lyons may have impacted any supplie[s] that they quoted, but it wouldn't have stopped us from going forward." (Tr. 352). She then denied having any conversations with Lyons prior to October 14, 1992, adding: "[T]hey were not going to be the supplier at that time." (*Id.*). When asked when was the first time that she had a conversation with Lyons concerning the FSS contract, she replied:

> The answer is I'm sorry, yes, we had talked to E.E. Lyons about supplying us on the contract. . . . [W]e had talked to E.E. Lyons about being a supplier on the contract. There had been conversations with them. We needed a supplier on the contract prior to August of 1992.

(Tr. 353). Then she said that her first conversation with Lyons was in October 1992. (*Id.*). Next she stated that E.E. Lyons was not her intended supplier but rather a supplier named General Paving, and added:

> But obviously it was somebody — obviously, it was before the executed contract.
>
> . . . .
>
> Yes, we had not decided on who the supplier was. We had not submitted our supplier specifications, yet. We couldn't identify it to the District whom our supplier was. I'm sorry. I'm thinking ahead here. I hadn't decided. How could I tell anybody?

(Tr. 354). This final answer also corroborates Mr. Clements' testimony that Eboné was not prepared to go forward in 1992 because it had not finalized its arrangements with Lyons as its subcontractor.

The written record also supports Mr. Clements' testimony and contradicts Ms. Gentry's testimony, beginning with the following stipulated fact:

> After discussions between Appellant [Eboné] and the DPW Engineer [Mr. Clements], the FSS Contract start date was postponed until the Spring of 1993. (D-972 AF 18, 19.)

(JSF ¶ 18). The Appeal File exhibits cited in the stipulation are reports made by Mr. Clements to his superiors. One report, dated April 5, 1993, provides in pertinent part: "The contractor and Engineer agreed to start this contract in the spring of 1993. Specifications require 50 degrees and rising to properly construct Slurry Seal." (D-972 AF Ex. 19; Tr. 268-269). The other, prepared by Mr. Clements after Eboné filed its claim in September 1994, states that: (1) at the preconstruction meeting, Eboné advised that it was "still in the process of selecting a subcontractor," (2) by October 1992, Eboné still had not selected a subcontractor, and (3) the parties agreed that it was too late in the year (1992) to begin and that performance should therefore start in the spring of 1993. The report also states that in April 1993, Eboné "notified the Engineer they had selected a subcontractor." (D-972 AF Ex. 18; Tr. 264-268). As with the SJS contract, Eboné was unable to produce a single written document corroborating Ms. Gentry's recitation of the events giving rise to the delayed issuance of the notice to proceed.

In sum, the record clearly and convincingly demonstrates that in 1992 Eboné intended to have a subcontractor, E.E. Lyons, perform the contract work, and that Eboné agreed to delay notice to proceed until the spring of 1993.

The record also clearly and convincingly shows that Lyons in fact performed the contract work as Eboné's subcontractor in 1993. Mr. Clements met with Lyons' superintendent in late March or early April 1993 to discuss the execution of the contract work. (Tr. 241-242). Eboné received an oral notice to proceed with the FSS contract on April 12, 1993. (JSF ¶ 19; D-972 AF Exs. 18, 19). Eboné submitted a "Subcontractor Approval Request" dated April 21, 1993, identifying E.E. Lyons as Eboné's subcontractor. (D-972 AF Ex. 18, at 3; Tr. 241). Eboné began work on the FSS contract on May 5, 1993. (JSF ¶ 21; D-972 AF Ex. 18). The project's daily inspection reports uniformly identify Lyons as Eboné's subcontractor during the contract performance period. (D-972 AF Exs. 22-A to 22-E; *cf.* D-971 Exs. 11-A to 11-F). And, Ms. Gentry admitted that the subcontractor payments Eboné made to Lyons covered all of the job's direct costs. (Tr. 65, 78, 82, 94-95).

We also find that Eboné failed to give notice of its claim in a timely manner. Eboné never mentioned any impact costs (*e.g.*, increased material and equipment costs) from the alleged delay even when it executed two bilateral change orders during the course of contract performance.[13] In a letter to Eboné dated August 20, 1993, DPW directed Eboné to complete additional slurry seal work under the FSS Contract. The increase in the contract price was $139,200.00. (JSF ¶ 23; D-972 AF Exs. 13, 14, 16; Tr. 259-263). In a letter to Eboné dated November 15, 1993, DPW further directed Eboné to complete additional work under the FSS contract. The increase in the contract price was $23,925.00. (JSF ¶ 24; D-972 AF Exs. 9, 10, 12; Tr. 253-259). These change orders were priced using the contract's unit price. Eboné never asserted in connection with these changes that its unit price should be upwardly adjusted to reflect cost increases as a result of DPW's alleged delay in issuing the notice to proceed. (Tr.108-113).

Eboné's claim was filed with the contracting officer long after final payment had been made. The District argues that the contract's Suspension of Work Clause expressly precludes an equitable adjustment claim after final payment has been made. The relevant facts are as follows. DPW issued six partial payments between June 7, 1993, and November 16, 1993, to Eboné for its work under the FSS contract. (JSF ¶ 22; D-972 AF Exs. 21-A to 21-F). In a letter to Eboné dated November 27, 1993, DPW notified Eboné that all work under the FSS contract was completed and in substantial conformance with the contract specifications. (JSF ¶ 25; D-972 AF Ex. 8; Tr. 252-253). DPW issued the final payment for the FSS contract, in the amount of $100.20, on December 3, 1993. (JSF ¶ 22.g; D-972 AF Ex. 21-G; Tr. 273-276). Eboné's first notice of its delay claim is found in a letter to DPW dated September 23, 1994, that is, nine months after final payment. (JSF ¶ 26; D-972 AF Exs. 7, 6). During the hearing, Ms. Gentry claimed that the final payment of $100.20 had never been paid to Eboné. (Tr. 91-92). We did not find this testimony credible. In its submissions to the contracting officer, the DAS Director, and the Board, Eboné admittedly never claimed that it had not received final payment (Tr. 92-93). Also, in its Eichleay calculations, Eboné computed its allocable overhead using a contract billings figure which included the final payment amount. (Eboné's May 8, 1996 Supplemental Submission, Ex. 2, at 2). Finally, Eboné and the District jointly stipulated two months before the

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[13] Although Ms. Gentry said that one of the bilateral change orders was really a unilateral change order, her testimony was plainly not credible. (Tr. 109-113; D-972 AF Ex. 13).

hearing that final payment had been made. (JSF¶ 22.g).

After filing its delay claim with DPW under the FSS contract, Eboné submitted its claim to the DAS Director on November 30, 1994. (JSF ¶ 28; D-972 AF Ex. 4). On May 30, 1995, Eboné filed a notice of appeal with the Board, docketed as CAB No. D-972, based on the DAS Director's deemed denial of its claim. (JSF ¶ 30).

Eboné presented no job cost records or other financial documentation to support its alleged material and equipment escalation or unabsorbed home office overhead. (Tr. 73-77, 81-82, 84-85, 121, 123-124; *see* Board order dated March 26, 1996).

DISCUSSION

We exercise jurisdiction over the consolidated appeals pursuant to section 903 of the Procurement Practices Act, D.C. Law 6-85 (formerly codified at D.C. Code § 1-1189.3 (1992)).

A. The Delay in Issuing the Notices to Proceed

Both the SJS and FSS contracts required contract completion within 180 consecutive calendar days after an unspecified starting date. The SJS and FSS contracts were executed on June 18, 1992, and October 14, 1992, respectively. The District issued the notices to proceed for both contracts on April 12, 1993. Eboné claims additional material and equipment costs and unabsorbed home office overhead as a result of the delays in issuing the notices to proceed.

The Suspension of Work Clause for the SJS and FSS contracts provides in pertinent part:

> If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted by an act of the Contracting Officer in the administration of the Contract, or by his failure to act within the time specified in the Contract (or if not time specified, within a reasonable time), an adjustment will be made for an increase in the cost of performance of the Contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the Contract modified in writing accordingly. However, no adjustment will be made under this Article for any suspension, delay, or interruption to the extent:
>
> 1. That performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or
>
> 2. For which an equitable adjustment is provided or excluded under any other provision of the Contract.

Standard Contract Provisions (1973), Article 26 (Standard Specifications for Highways and Structures (1974)).

Generally, in order for a contractor to recover for the government's delay in issuing a notice to proceed, any additional costs must be recovered under the contract's Suspension of Work clause. *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992); *Excavation-Construction, Inc.*, ENG BCA No. 3858, 82-1 BCA ¶ 15,770 at 78,066. Where the contract is silent as to when the notice to proceed must be issued, the government has an implied obligation to issue the notice to proceed within a reasonable period of time. *Manis Drilling*, IBCA No. 2658, 93-3 BCA ¶ 25,931 at 128,983. The contractor is only entitled to recover under the Suspension clause when the government's actions are the sole proximate cause of the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period. *Triax-Pacific v. Stone*, 958 F.2d at 354; *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976).

The record convincingly shows that Eboné was unable to get commitments from its intended subcontractors to begin performing the contract work in 1992 and that Eboné agreed with DPW to delay issuing the notices to proceed until the spring of 1993. The cause for the notice to proceed delay under the SJS contract was Eboné's inability to secure the commitment of its intended subcontractor, Quality Paving, to start performance in 1992 after contract execution on June 18, 1992. The cause for the notice to proceed delay under the FSS contract was Eboné's inability to secure the commitment of its intended subcontractor, E.E. Lyons, to start performance in 1992 after contract execution on October 14, 1992. The notice to proceed delay was not the fault of the District but, rather, was an accommodation to Eboné itself. *See C. Walker Constr. Co.*, VABCA No. 1527, 82-2 BCA ¶ 15,799 at 78,249 (denying recovery where the parties mutually agreed to delay issuance of the notice to proceed); *Amcat Corp.*, ENG BCA No. PC-99, 95-2 BCA ¶ 27,742 at 138,323 (delayed notice to proceed caused by contractor's failure to have materials on site in a timely fashion); *Manis Drilling*, 93-3 BCA ¶ 25,931 at 128,983 (delayed notice to proceed caused by contractor's failure to timely submit performance bonds).

Our conclusions follow from our findings that the testimony provided by Eboné's president lacked credibility. A substantial amount of testimony, material to resolving the disputed issues on appeal, was offered by Eboné concerning its intent in 1992 to furnish its own labor to perform the FSS and SJS contract work, its intention only to use "suppliers" for material and equipment, and its calculation of alleged delay and impact damages. Although we have attempted to harmonize the hearing testimony of Eboné's president — internally, with regard to the affidavit of Eboné's president, with regard to testimony of the District's witness, and with regard to the written record — we could not do so.

The PPA provides a remedy against a contractor who is unable to support a claim and the inability is attributable to a material misrepresentation of fact or fraud by the contractor:

> If a contractor is unable to support any part of his or her claim and it is determined that the inability is attributable to a material misrepresentation of fact or fraud on the part of the contractor, the contractor shall be liable to the District government for an amount equal to the unsupported part of the claim in addition to all costs to the District government attributable to the cost of reviewing that part of the contractor's claim.

D.C. Code § 1-1188.5(e)(1). We remand to the District's Chief Procurement Officer to determine whether an application for costs is warranted here.

We also conclude that Eboné's delay claims are barred under the Suspension of Work clauses of the SJS and FSS contracts. Eboné's claims arise under the Suspension of Work clause, which provides that no claim under the clause shall be allowed:

> 1. For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and
>
> 2. Unless the claim, in an amount stated, is asserted in writing as soon as practicable after termination of such suspension, delay, or interruption, but not later than the date of final payment under the Contract.

Standard Contract Provisions (1973), Article 26 (Standard Specifications for Highways and Structures (1974)). Under this Suspension clause we look to see whether the contractor first asserted its delay claim no later than the date of final payment under the contract.

The District issued notice to proceed for both of the contracts on April 12, 1993. Eboné received notification of acceptance of its work under the contracts from the District by letters dated November 27, 1993. The District made final payment for both contracts on December 3, 1993, a fact to which Eboné stipulated. Ms. Gentry's subsequent testimony at the hearing that Eboné did not receive final payments under the contracts was not credible. Because Eboné first asserted its delay claims in September 1994, the claims are untimely.

B. The Post-Appeal "Final Decisions"

On September 20, 1996, approximately one month after the Board's evidentiary hearing, Eboné filed two motions asking the Board to stay posthearing briefing and to dismiss the consolidated appeals on the ground that Eboné and DPW's contracting officer had previously executed settlements fully resolving the claims in dispute. The District opposed the motion on a number of grounds, primarily arguing that the agency contracting officer improperly attempted to settle the appeals without the knowledge, authority, and approval of Corporation Counsel who is representing the District in these appeals.

The relevant background is this. Eboné filed the captioned appeals on May 30, 1995. Counsel for the parties prepared their cases for a hearing scheduled for August 14-15, 1996. On August 1, 1996, at what was to be the prehearing conference, District counsel reported that it had just discovered that Eboné's principal and the DPW contracting officer were apparently in the final stages of consummating a settlement of the appeals, without the knowledge of either counsel, and that a "check was about to be cut." In a follow-up conference, District counsel reported that there was not going to be a settlement. Eboné's counsel did not dispute that assessment. Final preparations were made for the hearing, including a motion by Eboné for leave to supplement the

Eboné contends that the May 16, 1996 "final decisions" constitute valid settlements of the appeals. Eboné argues that the District's Office of Corporation Counsel had no authority to reject the settlements entered into by the agency contracting officer. The District argues that the purported settlements are invalid because the contracting officer lacked legal authority to settle the pending litigation against the District without approval from District counsel. The District also argues that Eboné waived its right to have the settlements enforced by failing to raise the issue until four months later, and after the Board had conducted the hearing. We agree with the District that the May 1996 final decisions of the former DPW contracting officer have no legal effect, but our conclusion is based on a different rationale.

Eboné's appeals were filed with the Board in 1995 under the original PPA provisions of D.C. Law 6-85 granting the Board jurisdiction to "review and determine de novo" an appeal by an aggrieved party "from a final decision by the [DAS] Director which is authorized by this chapter." D.C. Law 6-85, § 903 (formerly codified at D.C. Code § 1-1189.3 (1992)).[14] To review and determine an appeal *de novo* means that the Board makes findings of fact, based on a factual record created through Board proceedings, and makes legal conclusions, based on its findings of fact and the applicable law. The Board considers the final decision of the DAS Director but any findings of fact or conclusions of law made in the Director's final decision are given no presumptive validity. *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 42 D.C. Reg. 4902, 4908; *cf. Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (holding that under the CDA the contractor is entitled to a *de novo* proceeding and a contracting officer's decision is not entitled to a presumption of correctness);[15] *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed.Cir.1987) (boards have authority to modify or nullify claim amounts awarded by the contracting officer); *Southwest Welding & Mfg. Co. v. United States*, 413 F.2d 1167, 1184-85 (Ct. Cl. 1969) (the contracting officer's decision is deemed "vacated" when an appeal is filed with the agency board).

In these consolidated appeals, we are reviewing the DAS Director's "deemed denial" of Eboné's claims which were submitted to the DAS Director under the authority of section 805(a) of D.C. Law 6-85 (formerly codified at D.C. Code § 1-1188.5(a) (1992)). The Director made no findings of fact and no conclusions of law.

Under the PPA disputes resolution scheme applicable to these appeals (and unlike the federal CDA scheme), the DAS Director, not the agency contracting officer, is ultimately responsible for exercising contract disputes authority for the District government once a claim was filed with the Director pursuant to the then-applicable provisions of the PPA. Under those provisions, the contractor presents its claim to the DAS Director who conducts an informal

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[14] By virtue of the Procurement Reform Amendment Act of 1996, the Board now reviews final decisions from contracting officers. D.C. Code § 1-1189.3 (Supp. 1997)

[15] Regarding federal contracting officer final decisions, the CDA provides that "[s]pecific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding." 41 U.S.C. § 605(a).

hearing to review and make a decision on the contractor's claim, even if the contractor had previously filed a claim with the agency contracting officer. Thus, under the special review and approval authority exercised by the DAS Director under the former PPA disputes resolution scheme, an agency contracting officer was not authorized to take unilateral contract actions to resolve and settle contract disputes filed with the Director pursuant to former PPA section 805(a) without the approval of the DAS Director. *See Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 74 (D.C. 1997); *Singleton Electric Co.*, CAB No. P-411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4894. This unique authority of the DAS Director is highlighted in *Recycling Solutions*, where the Court of Appeals held that the DAS Director alone was authorized under the PPA to seek judicial review of Board decisions. *Id.* at 74-75. The PPA's legislative history also supports our conclusion that this disputes resolution authority resided in the DAS Director, not the agency contracting officer, once a claim had been filed with the DAS Director.[16]

Because there is no indication in the record that the DAS Director approved of the May 1996 final decisions of the agency contracting officer purporting to modify Eboné's contracts by granting Eboné's claims, the final decisions are a nullity.

There is a second fundamental problem with Eboné's argument that we must give effect to these final decisions of the agency contracting officer. The PPA requires that we conduct a *de novo* review of the appealed decision. We carefully consider the rationale offered by a contracting officer to support the actions taken in a final decision — along with the remainder of the record prepared in the appeal proceedings — but we are not bound by such actions. *See Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997). It is true that under the federal disputes mechanism, boards of contract appeals have recognized the authority of a contracting officer to settle a dispute while it is pending before the board. *See, e.g., E-Systems, Inc.*, ASBCA No. 21091, 79-1 BCA ¶ 13,806 at 67,700-02 (and cases cited therein). Nevertheless, like other actions requiring the exercise of discretion by the contracting officer, the determination to settle a claim calls for the exercise of discretion by that official, and such a determination during the pendency of an appeal is reviewable by the Board. The federal boards and the courts will review determinations particularly committed to the discretion of the contracting officer to see whether discretion was abused. *See, e.g., Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d at 859-60; *L&H Constr. Co.*, ASBCA No. 43833, 97-1 BCA

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[16] In the Council Report for Bill 6-191, which resulted in D.C. Law 6-85, the Council stated:

> In addition, Title VIII of the bill provides for the Director to settle disputes arising from the performance of contracts. The Director is authorized to debar or suspend persons from receiving contracts for specific reasons as set forth. The Director has the authority to render decisions on claims arising from an aggrieved contractor, thus providing an administrative mechanism for resolving disputes. Appeals of these decisions are made to the Contract Appeals Board.

See COMMITTEE ON GOVERNMENT OPERATIONS, REPORT ON BILL 6-191, "DISTRICT OF COLUMBIA PROCUREMENT PRACTICES ACT OF 1985" at 4-5 (Oct. 10, 1985).

¶ 28,766 at 143,555-56; *Thomas W. Yoder Co.*, VACAB No. 997, 74-1 BCA ¶ 10,424 at 49,250-51. Thus, even if DPW's contracting officer had received the DAS Director's approval to resolve Eboné's claims through the May 1996 final decisions, we would still have the authority to review those actions. Because of the important policy of encouraging parties to settle disputes pending before the Board, it will be rare when we have to conduct a detailed review as we have done for the purported settlements here.

Based on the record developed before the Board, we conclude that the May 1996 final decisions do not constitute a proper exercise of discretion. First, the final decisions do not identify any facts supporting the contracting officer's conclusions. Second, the contracting officer does not identify the documentation that he reviewed in reaching his conclusions. Third, it is most likely that the contracting officer was not even aware that the claims were pending before the Board and thus the contracting officer did not have the benefit of the documentation, testimony, and defenses identified by District counsel. Fourth, as a result of the case presentation by the parties, and the testimony given by the witnesses at the Board's evidentiary hearing, it is now quite clear that Eboné's claims are frivolous. Finally, it would work a serious injustice to the integrity of the disputes process and to the District government were we to permit Eboné to receive unmerited compensation for frivolous claims improperly prosecuted before the Board.

CONCLUSION

The appeals are denied. The District shall determine whether an application for costs pursuant to D.C. Code § 1-1188.5(e)(1) is warranted.

DATED: May 20, 1998

JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

PHYLLIS W. JACKSON
Administrative Judge