BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE DRIGGS CORPORATION	)	
	)	
Under Maryland Aviation	)	Docket No. MSBCA 1775
Administration (MAA) Contract	)	
No. MAA-CO-93-011 for BWI	)	
Runway 10-28 Extension	)	

June 25, 1996

Termination for Default - Burden of Proof - The State bears the burden of proof in an appeal involving a termination for default even though the contractor has the statutory duty of seeking final administrative resolution of the dispute and filing the appeal with the Board of Contract Appeals.

Termination for Default - Timely Completion - A contract may be terminated for default if a contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in the contract.

In determining whether a contractor is performing its work with the diligence necessary to insure timely completion any one of the following factors is appropriate for consideration: The Contractor's failure to submit a work schedule showing that it is ready, willing and able to make progress; the percentage of progress achieved by the contractor as compared to that work schedule as of the date of termination; and the extent of the work force on the job.

Termination for Default - Role of Attorney

The language of COMAR 21.10.04.04C which states that the "recommended decision of the Procurement Officer shall be submitted for review to the reviewing authority and the Office of the Attorney General" does not preclude the Procurement Officer from adopting as his recommended decision a document prepared by the Office of the Attorney General in the first instance, as long as the language of the recommended decision represents or reflects the Procurement Officer's informed, independent and personal assessment of the situation.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final agency decision terminating the above captioned contract for default. Upon completion of the Respondent's case-in-chief, Appellant moved for summary disposition on grounds that there was no dispute as to any material fact necessary to determine as a matter of law that the termination of Appellant's contract for default in October of 1993 lacked a reasonable basis or was otherwise inappropriate and thus should be converted by operation of law to one for convenience. Appellant also contended that the Respondent had failed to meet its initial burden to show prima facie that the termination for default was appropriate and that by operation of law the termination is converted to one for convenience.

The Board considered the Appellant's motion and argument of counsel thereon and upon its consideration of the entire record as then compiled denied the motion by an interlocutory order and supporting memorandum decision dated January 2, 1996. The memorandum decision sets forth the standard of review the Board applied to the Appellant's motion. Thereafter, the Appellant rested without presenting any further evidence beyond what had been already incorporated in the record upon the conclusion of the Respondent's case in chief. Upon advice that Appellant rested the Board set a briefing schedule for the parties. The Board having received and considered the briefs and reply briefs of the parties and the entire administrative record compiled in the appeal to date hereby issues its decision on the merits of the appeal with the burden of proof resting with the State[1].

Findings of Fact

1. This appeal involves the MAA's (sometimes referred to herein as State) termination for default of the captioned contract to extend Runway 10-28 at Baltimore Washington International

[1] The State bears the burden of proof in an appeal involving a termination for default even though the contractor has the statutory duty of seeking final administrative resolution of the dispute and filing the appeal with the Board of Contract Appeals.

Airport (BWI). The project engineer and State's agent was the Ralph M. Parsons Company (Parsons). Greiner, Inc. (Greiner) was the project designer. The Runway 10-28 project was approved and partially funded by the Federal Aviation Administration. The west end of this runway is referred to as Runway 10 and the east end as Runway 28. Runway 10-28 is one of BWI's two main runways for jet operations.

2. The Contract called for the addition of approximately equal extensions to each end of the runway, for a total of 1,050 feet, including the addition of paved shoulders and safety grading throughout the length of the runway; extensions to the existing taxiway system, including a new 2,400-foot parallel taxiway at the Runway 28 end; runway and taxiway center line and edge lights; extensive modifications and additions to existing navigation aids equipment (NAVAIDS); and realignments to the Stoney Run Road Interchange with Aviation Boulevard (Maryland Route 170) located approximately northwest of the extension of Runway 10. Runway 10 is the only BWI runway that can be used during the most severe low visibility conditions (referred to as Category II conditions). Its level of instrumentation (i.e., navigation aids or NAVAIDS) is more sophisticated and meets Federal Aviation Administration (FAA) requirements for take-offs and landings in bad weather. It is important that this runway be fully operational in the winter and early spring months. If Runway 10 is not operational or only partially operational during this period, aircraft cannot land in low visibility conditions and must be diverted to other airports.

3. An invitation for bids (IFB) was issued on February 9, 1993 with a pre-bid meeting scheduled for February 16, 1993 and bid opening scheduled for March 3, 1993. In Special Provision SP-5.24 of the IFB, the project was broken into three phases with associated completion dates measured in calendar days from the stipulated Notice to Proceed (NTP) date:

Phase 1 - Stoney Run Road Interchange - No completion date specified

Phase 2 - Runway 10 Extension (including Exit and Parallel Taxiway, and Paved Shoulders, denominated Phase 2A, and Runway 10 Extension, Phase 2B) - 140 days for re-establishment of Runway 10 threshold

Phase 3 - Runway 28 Extension - 240 days for re-establishment of Runway 28 threshold

Completion of all remaining work - 250 days.

4. In Addendum No 1, issued after the pre-bid meeting, the bid opening date was revised to March 24, 1993. MAA stated in the addendum that an April 15, 1993 issuance of Notice to Proceed was anticipated.

5. The schedule for project completion was changed in Addendum No. 2, issued March 12, 1993. Rather than a single Notice to Proceed, the addendum contemplated issuance of an initial Notice to Proceed for Phase 1 and Phase 2 and a subsequent Notice to Proceed for Phase 3.

6. The schedule for project completion as set forth in Addendum No. 2 may be summarized as follows:

Phases 1 and 2 - 200 calendar days from the initial NTP date to re-establish the Runway 10 thres-hold

Phase 3 - 90 calendar days from the Phase 3 NTP date to re-establish the runway 28 threshold

Completion of all remaining work - 100 calendar days from the Phase 3 NTP date

7. Bids were opened on March 24, 1993. Appellant's bid of $11,570,098.50 was the apparent low responsive bid and Appellant was given conditional notice of award by MAA in a letter dated March 25, 1993. Appellant was given until close of business on April 6, 1993 to submit the required DBE commitment package.[2] On the same day that it was notified of the intended award, Appellant orally indicated to MAA that it was having trouble getting MBE subcontractors and that it was planning to do most of the work itself.

8. On March 31, 1993, MAA advised Appellant of the importance of timely submission of an approvable DBE package since MAA intended that the contact would be submitted for approval to the Board of Public Works on April 7, 1993. In follow-up conversations, Appellant was advised that, after Board of Public Works and FAA approval, a pre-construction meeting would take place and the initial NTP would be issued at that time, with construction to begin within ten days thereafter.

9. Appellant's DBE package was submitted on April 6, 1993; however it was not approvable. Appellant was granted until April 9, 1993 to submit approvable revisions. Appellant made a

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[2] The IFB contained Disadvantaged Business Enterprise (DBE) provisions with a percentage participation goal.

revised DBE submission on April 9, 1993 and MAA approved the DBE package on April 13, 1993. The contract was re-scheduled to be considered by the Board of Public Works on April 14, 1993.

10. In the meantime, the second low bidder protested the award to Appellant complaining first that Appellant had failed to submit the requisite DBE package within the required time and in a second protest claimed that Appellant should not have been given additional time to revise its DBE package. Both protests were denied.

11. When the proposed contract was presented to the Board of Public Works on April 14, 1993, the Board was asked to approve the contract in the face of the protests pursuant to COMAR 21.10.02.11 because of the urgent need to begin and complete the project. The Board was informed that:

> Once work on the BWI runway commences, the Airport will operate at a reduced navigational capacity. Therefore, it is imperative that work on [Phases 1 and 2][3] commence now so that construction can be completed by the end of the construction season when traditionally poor weather sets in. Failure to complete [Phases 1 and 2] on schedule will result in delays to air carriers and the public, and potential diversion of flights to Washington National or Dulles Airport during bad weather.

12. Appellant was represented at the Board of Public Works meeting and received a copy of MAA's justification for award in the face of the bid protests.

13. On several occasions, including before the Board of Public Works approval of the award of the contract, MAA told Appellant that NTP would be issued in early May. On May 6, 1993 MAA convened a pre-construction meeting. When Appellant was told to expect issuance of NTP on May 10 or 11, it asserted that MAA was not authorized to do that and that such an NTP would be "premature". After FAA approval on May 10, 1993, MAA issued NTP on May 11, 1993:

> Receipt of this letter shall serve as the Notice to Proceed for the subject contract. As specified in G.P.-8.03, NOTICE TO PROCEED, The specified contract completion time will begin on the day work actually starts or ten (10) days following the date hereon [May 11, 1993], whichever is earlier.

14. The NTP thus contemplated a start date between May 11 and May 21, 1993. However, Appellant did not actually begin work until June 10, 1993.

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[3] In the letter, the initial work, i.e., Phases 1 and 2, was referred to as Phase I, and the Phase 3 work was referred to as the second major phase of the project.

15. Appellant maintained that Special Provision SP-5.16, Construction Contractor's Quality Control Program (QCP), which requires that a QCP plan be submitted to the Engineer "(w)ithin three (3) weeks of the award of the contract" and also states that "(t)he Notice to Proceed will not be given until the plan is submitted and approved by the Engineer," precluded MAA from requiring Appellant to proceed until Appellant had submitted and MAA had approved a QCP plan. The State maintained it could and did waive the requirement that an approved QCP plan be submitted prior to issuance of NTP. The record reflects that Appellant was told at progress meetings on May 19, 1993 and June 3, 1993 and by letter from Mr. Paton of Parsons dated June 8, 1993, that Appellant would be permitted to submit a partial QCP plan covering only those activities which would be performed first upon commencement of work.[4]

Appellant also asserted that at the time of Notice to Proceed it could not start work because the State had failed to obtain required licenses and permits. The State asserts that notwithstanding that certain required licenses and permits were then lacking, there was work unaffected by the absence of such permits and licenses that Appellant could perform, and that speedier approvals could be secured if necessary.

16. There were a number of revisions to the work before and after Appellant actually began work on June 10, 1993. Red Line Revisions to the contract drawings were issued on May 25 and June 29, 1993, primarily to implement changes to sediment and erosion control. Certain runway and taxiway lights were also added and there were a number of miscellaneous changes. The changes of May 25 (referred to as "Red Line Revision No. 1") affected 60 of the 314 contract drawings and those of June 29 (referred to as "Red Line Revision No. 2") affected 30 drawings.

The record reflects that many of the changes were minor and inconsequential and that none of the sediment and erosion control revisions would have affected critical activities and thus would not have adversely affected project time one way or the other. Therefore Appellant should have accommodated them in its work plans without any delay to the project. Indeed, as discussed in more detail below, the record reflects that a number of the sediment and erosion control changes

[4] Appellant submitted a QCP plan for approval on May 27, 1993. Rejected for not being complete, a QCP plan for the entire project was submitted on July 14, 1993 and approved on July 27, 1993.

had a favorable impact on the work. As an example, 30 sediment traps along the length of Runway 10-28 were replaced with 3 sediment basins.

17. To the extent not resolved by the State's agreement, flowing from a meeting of July 30, 1993, to measure Appellant's performance time from June 14, 1993 rather than May 21, 1993, neither the Red Line Revisions issued on May 25 and June 29, 1993 nor the availability of licenses or permits should have delayed the completion of Phases 1 and 2.

On May 21, 1993, the last date for commencement of work per the Notice to Proceed, the Maryland Department of Environment (MDE) issued a conditional permit approving the sediment and erosion control plan for the project. The permit allowed the contractor to commence work in portions of the project identified as "Area A," which primarily encompassed all of the work to be performed south of the centerline of Runway 10/28. This represents the bulk of the work to be performed during Phases 1 and 2, as well as those areas of the project where work first had to be performed. Sediment and erosion control for the area west of Runway 10 and north of the centerline of Runway 10/28, identified as "Area B," was approved by MDE on June 22, 1993.

Appellant was advised by Mr. Paton[5] of Parsons of the availability of "Area A," by letter dated May 25, 1993 transmitting the revised contract drawings referred to as Red Line Revision No. 1.

18. Red Line Revision No. 1 consisted primarily of changes to the sediment and erosion control requirements, the most signi-ficant of which occurred in three areas.

South of Runway 28 at the eastern end of the project, the stockpile area was more clearly defined, the drawings were changed to add two temporary sediment traps to control the stockpile, and Sediment Basin No. 4 was added, along with associated temporary risers and pipe outfalls. All temporary sediment traps, temporary stone outlet structures, earth dikes and silt fences originally required between Runway 4/22 and the stockpile area were deleted. These changes had the net effect of simplifying and reducing the sediment and erosion control measures required of the contractor south of Runway 10/28.

South of Runway 10 at the western end of the project, two sediment traps near Station 90+00 were combined into one trap and, east of Station 90+00, five sediment traps were eliminated

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[5] Mr. Paton was Parsons' resident engineer for the Runway 10-28 project.

and replaced by new Sediment Basin No. 3. The work required by these changes was roughly equivalent to the work which had to be performed under the original drawings.

At the Parallel Taxiway, the sequence of construction was changed to first require installation of a 60" reinforced concrete pipe under Taxiway C, followed by the installation of new Sediment Basin No. 5A, and thereafter the installation of new Sediment Basin No. 5B, all prior to commencing the earthwork operations associated with the construction of the Parallel Taxiway. All of the sediment traps and associated sediment and erosion control devices originally located north and south of the centerline of the Parallel Taxiway were eliminated. These changes substantially reduced the sediment and erosion control excavation required of the contractor in the Parallel Taxiway area.

19. The May 25, 1993 transmittal also included field revisions G-1 through G-10, which related to construction of Sediment Basin No. 2 (G-1 - G-3) and the Parallel Taxiway (G-4 - G-8), and which added in pavement lights (G-9). Field Revision G-10 extended the time period in which grading could be performed before the institution of stabilization measures. None of these revisions restrained Appellant's ability to start work in Area A or delayed completion of Phases 1 and 2.

Upon receipt of the May 25, 1993 transmittal, Appellant could commence work in all areas designated as work area A, with two exceptions. Pending issuance of a wetlands permit, no work could be performed within 25 feet of wetlands located at the high-speed exit taxiway and at the existing Stoney Run Road Interchange, and relocation of the existing Stoney Run Road could not commence until SHA issued an access permit. Neither the wetlands permit nor the SHA access permit had been issued as of May 25, 1993. However, the lack of either permit did not have an affect on the contractor's ability to start and perform various work activities, including but not limited to, trenching for RVR conduit. The record further reflects that the SHA permit could have been obtained earlier to accommodate any date that Appellant chose to start work. However, the record also reflects that as of June 3, 1993, Appellant was still in the process of finalizing its subcontracts.

Parsons forwarded to Appellant the Nontidal Wetlands and Waterways Permit on June 17, 1993; the SHA Access Permit on June 17, 1993; the MDE General Permit for construction activity

on June 21, 1993; and the MDE Water Quality Certification on June 24, 1993. The dates these permits were issued had no effect on Appellant's ability to start work in Area A.

20. As noted above, Red Line Revision No. 2 was issued on June 29, 1993. The Revision consisted of 30 drawings which revised sediment and erosion control items in Area B, primarily representing fill operations north of the Runway 10 centerline. Red Line Revision Nos. 1 and 2 reduced by over 7,000 cubic yards the amount of sediment and erosion control excavation required before mass grading in Phase 2 could begin. Upon receipt of these drawings, the entire job was available to Appellant. As of June 29, however, Appellant was not yet ready to perform work in Area B because the RVRs and threshold had not yet been relocated[6], and because Sediment Basin No. 2 had not yet been installed.

21. Contract General Provision GP-8.04 made provision of project schedules a requirement of the contract. The clause provides:

> GP.8.04 Progress Schedule
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> A. Within 30 days after notice to proceed, the Contractor shall furnish the Procurement Officer a "Progress Schedule" showing the proposed order of work and indicating the time required for the completion of the work. Said progress schedule shall be used to establish major construction operations and to check on the progress of the work. The Contractor shall submit revised progress schedules as directed by the Procurement Officer.
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> B. If the Contractor fails to submit the progress schedule within the time prescribed, or the revised schedule within the requested time, the Procurement Officer may withhold approval of progress payment estimates until such time as the Contractor submits the required progress schedules or may terminate the contract for default.
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> C. If, in the opinion of the Procurement Officer the Contractor falls significantly behind the approved progress schedule, the Contractor shall take any and all steps necessary to improve his progress. This may require the Contractor to increase the number of shifts, initiate or increase overtime operations, increase days of work in the work week, or increase the amount of construction plants, or all of them. The Procurement Officer may also require the Contractor to submit for approval supplemental progress

[6] See Findings of Fact 39-53 below.

schedules detailing the specific operational changes to be instituted to regain the approved schedule, all without additional cost to the administration.

D. Failure of the Contractor to comply with the requirements of the Procurement Officer under this provision shall be grounds for determination by the Procurement Officer that the Contractor is not prosecuting the work with such diligence as will insure completion within the time specified. Upon such determination, the Procurement Officer may terminate the Contractor's right to proceed with the work, or any separable part thereof, in accordance with GP-8.08 of these General Provisions.

22. GP-8.04 is supplemented by Special Provision SP-5.21, Schedules, that requires the Critical Path Method (CPM) to be used: "The Schedule shall be developed and maintained, and actual progress monitored in accordance with accepted practices for Critical Path Method (CPM) management."

23. On June 1, 1993, Appellant submitted a 60 day schedule that was based on the NTP issued on May 11 and a start date of May 21. Appellant also asserted that a constructive suspension of work had occurred. A "Preliminary CPM Schedule" covering Phases 1 and 2 and also based on the start date of May 21 was submitted on June 7. This schedule showed completion of Phases 1 and 2 by December 7, 1993. On June 25, 1993[7] Appellant submitted a Project CPM Schedule covering all three phases. In the transmittal letter Appellant stated that this schedule was predicated on the May 11 NTP and did not "reflect any impacts occurring after award," including the alleged premature issuance of the May 11, 1993 NTP and revisions to contract work made after May 11. While a December 7, 1993 completion date for Phases 1 and 2 was shown, Appellant continued to insist that NTP was premature because the QCP plan had not been approved and argued that a constructive suspension of work had occurred.

24. The State, through Parsons, responded to Appellant's assertion that NTP was premature, that there had been a constructive suspension of work, and that there were other post-NTP "impacts," in letters written on June 29, 1993, reaffirming that the May 11 NTP was effective and

[7] The October 21, 1993 termination for default notice indicates that while the transmittal letter is dated June 25, 1993, the letter and schedule were not received until June 28, 1993. For purposes of this opinion the Board finds that the schedule was received on June 25, 1993.

that work could commence without a QCP plan. In addition, MAA directed Appellant to perform so as to complete Phases 1 and 2 by December 7, 1993:

> Accordingly, you are required to finish all work related to Phases I and II by December 7, 1993, in compliance with your preliminary CPM schedule. As I indicated to you in our meeting of June 3, 1993, timely completion of this project is of profound importance to the MAA. Delay in reopening the Runway 10 including activation of navigational instruments required for Category II Approach may significantly disrupt the Airport operation.

25. Notwithstanding differences regarding the NTP date and the time for QCP plan submission, on July 13, 1993 Parsons approved the Project CPM Schedule submitted on June 25, 1993 because "it meets the contract duration." The schedule was referred to as the baseline schedule and Parsons indicated that this schedule would be used to evaluate the impact of any changes. This Project CPM Schedule is sometimes referred to in the record and hereafter as BWI-4. The approval letter also confirmed that Appellant would submit a revised schedule by July 26 that would show "a realistic completion date including the impact of all known changes to date."

26. On July 27, 1993 Appellant submitted two schedules, one called "Initial Planned Schedule" (BWI-1) and the other "Revised Schedule includes Revs 1 & 2" (BWI-2). Appellant described the "Initial Planned Schedule" as a revised planned schedule reflecting an NTP date of June 9. However, this schedule showed start of contract time on June 18, 1993 and a Phases 1 and 2 completion date of January 4, 1994. The "Revised Schedule includes Revs. 1 & 2" purported to show the impact of "major changes" on the "time and logic" of the Initial Planned Schedule. The Revised Schedule showed completion of Phases 1 and 2 on April 22, 1994. One of the "impacts" was that paving, a weather sensitive activity, had been pushed into late November and December, 1993. Appellant indicated that, because of anticipated adverse weather and asphalt plant shutdown, paving could not be completed at that time of year in accordance with contract specifications and therefore would have to await completion until the spring of 1994. This situation would have deprived the State of the use of NAVAIDS for Runway 10 during winter and spring months.

27. The State held a meeting with Appellant on July 30, 1993 to discuss the situation. Appellant was advised that the two most recently submitted schedules were unacceptable. The alleged "major changes" were discussed. Appellant agreed that project completion was not affected by added Sediment Basin No. 4 prior to Vortac area work, by Sediment Basin No. 3 construction required

prior to Runway No. 10 excavation, by Revised Traffic Control Plan at Stoney Run Interchange, or by Field Revisions G-1 through G-29.

28. The State asserted that added runway and taxiway lights and revised erosion control sequencing at the 60" reinforced concrete pipe under Taxiway Charlie (C) had no impact on project completion because the approved Project CPM Schedule had sufficient float. However, the State agreed that additional time might be due Appellant to accommodate the need to order materials and for other preparatory work on account of revisions to the drawings. In consideration of these issues, the State offered to measure contract time beginning on June 14, 1993. Appellant agreed to this and indicated that this would resolve Appellant's contention regarding a premature NTP and associated constructive suspension.

29. Appellant was also told at this July 30 meeting that it must complete Phases 1 and 2 by December 31, 1993 (200 days from June 14) and that it must submit a conforming schedule. Appellant was also advised, as discussed below, of MAA's concern regarding the slow progress of the work and the need to increase manpower. Appellant agreed to submit a revised schedule by August 11, with an end constraint of December 15, 1993 and adjust the schedule as best as possible to meet this finish date.

30. There also was a discussion at the meeting regarding a few of the details of the most recently submitted schedules. Appellant was asked why it had changed its logic and sequencing in its approved Project CPM Schedule (BWI-4) to the differing logic and sequencing shown in the Initial Planned Schedule and the Revised Schedule. Appellant stated that this was attributable to "optimum resource allocation," but declined to be more specific.

31. The approved Project CPM Schedule (BWI-4) indicated that earthwork at the Runway 10 extension and at the Parallel Taxiway (which is at the opposite end of the runway) would be performed concurrently. In both schedules (BWI-1; BWI-2) submitted on July 27, completion of earthwork at the Parallel Taxiway is shown as preceding and restraining the start of earthwork at the Runway 10 extension. This is accomplished by a logic tie or restraint between these two sets of activities. This represents a major change in work sequence resulting in substantial delay in the completion of Phases 1 and 2 - to April, 1994 - shown on the Revised Schedule.

32. In the approved Project CPM Schedule (BWI-4), Runway 10 earthwork is shown as beginning prior to completion of the new, and demolition of the existing, interchange. Runway 10

earthwork could not begin until completion of Sediment Basin No. 2 which, in turn, could not be constructed until the old interchange was demolished. The correct sequence, which Appellant included in both schedules (BWI-1; BWI-2) submitted on July 27, was construction of the new interchange and demolition of the old one, construction of Sediment Basin No. 2, and commencement of Runway 10 earthwork. If Appellant had used the correct sequence in the approved Project CPM Schedule, with its original activity durations, the project would have extended beyond the required 200 days for Phases 1 and 2. In its Initial Planned Schedule, Appellant reduced durations of later project activities. However, the Initial Planned Schedule was not realistically achievable.

33. The July 30 meeting was discussed in Parson's Letter No. CMC-050 to Appellant dated August 3, 1993. This letter states that:

1. Appellant's performance time would be measured from June 14, 1993;
2. The completion date for Phases 1 and 2 was December 31, 1993;
3. Appellant was entitled to no further extension of time; and
4. The Initial Planned Schedule and the Revised Schedule were rejected.

Appellant was also directed to submit a revised schedule showing its intent to complete Phases 1 and 2 by December 31, 1993. The revised schedule with supporting detail was to be submitted no later than August 13, 1993. If duration of activities changed significantly, Appellant was directed to explain why and to provide equipment and manpower utilization.

34. Appellant replied by letter dated August 11, 1993 defending the schedules it submitted on July 27, 1993, claiming that CMC-050 was an acceleration of work order and a major constructive change to the contract and asking for ". . . a change order to cover the costs of submitting a CPM with the revised criteria of SP5.21 and performing work to overcome owner caused delays by December 31, 1993." Appellant stated that by August 20, 1993 it could prepare a proposal to submit a revised CPM and to complete by December 31, 1993.

35. Parsons replied for the MAA on August 13, 1993 by facsimile.

> "We do not agree with the content of your letter and will more fully address various statements contained in this letter at a later date.

> Pursuant to General Provision GP-8.04, Paragraph C, it is the opinion of the Procurement Officer that you are significantly behind the approved progress schedule. Therefore, The Driggs Corporation has been directed to provide the revised progress schedule. Pursuant to Special Provision SP-5.21, Paragraph B, the schedule shall be satisfactory to the Engineer.
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> The Driggs Corporation is hereby directed to provide the revised Project CPM Schedule, meeting the requirements detailed on our Serial Letter No. CMC-050, by the close of business Monday, August 16, 1993."

36. Appellant sent three schedules, under cover of an August 13, 1993 letter, which were received by MAA on August 14, 1993. None of the three schedules contained a plan to fully complete Phases 1 and 2 by December 31.

37. Schedule One (also called BWRO) was a revised version of the "Initial Planned Schedule" showing a completion date of December 30, 1993, but it did not include all of the required work.

Schedule Two (also called BWR1) purported to include the impact of all changed work. The completion date for Phases 1 and 2 was shown as May 5, 1994.

Schedule Three (also called BWR2) was the same as Schedule Two with a new logic tie pursuant to which earthwork on the Parallel Taxiway was to follow rather than be concurrent with Runway 10 earthwork. Completion of Runway 10 construction was scheduled to occur on January 6, 1994, with completion of the remainder of Phase 2 on May 17, 1994.

38. In addition to the lack of timely completion set forth in these schedules, Appellant's actual progress through August 16, 1993 cast significant doubt on Appellant's ability to complete Phases 1 and 2 by December 31, 1993.

A. RVR and Threshold Relocation

39. The Contract required the Runway 10 threshold to be temporarily relocated prior to its re-establishment. This relocation would adversely affect functioning of navigation aids during inclement weather. To mitigate this situation the Contract required that prior to relocating the threshold that the capabilities of another runway be enhanced by moving midfield Runway Visual Range (RVR) equipment located south of Runway 10 to another location between Runway 33 left and Taxiway Delta.

Appellant's progress on the RVR and threshold relocation through August 16, 1993 was behind BWI-4[8].

One of the two subcontractors who were to accomplish the bulk of the work required to relocate the RVRs and threshold, began trenching for the RVR relocation on June 17, 1993, one week after the early start date of June 10, 1993 shown on BWI-4. This work could have commenced any time after issuance of Red Line Revision No. 1 in late May, 1993.

40. To relocate the RVRs by July 10 as shown on BWI-4, Appellant needed to complete trenching and conduit installation by early July to allow sufficient time for follow-on activities. However, trenching and conduit installation was only approximately 40% completed by July 10, and was not entirely finished until August 10, 1993.

41. Appellant had difficulty installing concrete foundations for the RVRs. Concrete was poured by Appellant's subcontractor without prior testing to assure compliance with the Contract's strength requirements. The subcontractor attempted to install the anchor bolts for the foundations after the concrete was poured and beginning to set. Appellant was required to rip-out and re-install the affected foundations and to install steel shim plates in order to correct the elevation of RVR foundations poured in place by the subcontractor's forces.

42. As part of the RVR relocation, Appellant had to install nine underground structures (handholes) to serve as splicing and pulling points for the underground electrical cable along the route of the trenching/conduit installation, extending from the northwest side of Taxiway O to Taxiway Delta. Appellant's handhole submission contained design errors which delayed the approval process, thereby preventing the handholes from being delivered to the project until after the date projected for RVR relocation by BWI-4.

43. On May 18, 1993, Appellant submitted for approval a drawing of the handhole which it proposed to install on the project. Parsons transmitted Appellant's submittal to Greiner (the project designer) where it was rejected on May 27, 1993, because the wall of the structure was not designed to withstand the loads which would be expected from the tire of a Boeing 727-200 aircraft when

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[8] The Board recognizes that BWI-4, the approved Project CPM Schedule, was never updated to reflect the change in completion date from December 7, 1993 to December 31, 1993 and therefore termination may not be based solely on any perceived failure to timely perform activities as set forth in BWI-4.

crossing the taxiways. Resubmitted design calculations were received by Parsons from Appellant on June 24 and "approved as noted" by Greiner on June 25, 1993.

44. As a result of the time expended to correct the deficiencies in Appellant's handhole submittal, the handholes were not delivered to the jobsite until July 12, 1993, and since the cable for the RVR relocation could not be pulled through the conduit until after the handholes were installed, the July 12 delivery date prevented Appellant from performing the RVR relocation by the July 10 date projected on BWI-4.

45. When the handholes arrived on the jobsite on July 12, 1993 the surfaces of the handholes exhibited open and rough spaces, and faces which were not true to the horizontal planes as a result of improper concrete mix design resulting from Appellant's failure to submit a concrete mix design for the handholes as required by the Contract specifications. The corrected mix design was "approved as noted" by Greiner on July 19, 1993 and Parsons waived the defects in the handholes and allowed them to be installed. Appellant commenced handhole installation on July 20, 1993 at which point most of the trenching and conduit installation had been accomplished.

46. It took Appellant from July 20, 1993 to August 5, 1993 to install the handholes. The 16 days expended by Appellant to accomplish handhole installation is equal to the time projected in BWI-4 for performing all of the work required to relocate the RVRs.

47. After installation of the handholes, the next major activity for the RVR relocation was pulling FAA-supplied communications cable from handhole to handhole, over the entire length of the conduit installed between the airfield utility vault and the new location of the RVRs beyond Taxiway Delta. Cable pulling began on August 12, 1993.

48. BWI-4 showed a late finish date for the RVR relocation of July 10, 1993. Between June 17, the date work on the RVR relocation actually commenced, and July 10, work was performed by one subcontractor on 21% of the available day shifts, and 4% of the available night shifts, and by the other subcontractor performing RVR and threshold relocation work on only 10% of the available day shifts, and on no night shifts. The subcontractors jointly averaged 5.6 men on the job between June 17 and July 10, which was substantially less than the average of 15.7 men required by Appellant's bid to accomplish the RVR relocation by July 10.

49. BWI-4 showed a late finish date for the threshold relocation of July 12, 1993. To reduce interference with the runway, work on the threshold relocation could only be performed at night.

Between June 17 and July 12, work on the threshold relocation was performed by one of the subcontractors on only 4% of the available night shifts, and no work was performed by the other subcontractor.

50. As of July 12, 1993, the scheduled date of threshold relocation per BWI-4, the subcontractors had expended a total of 1,205 hours on the BWI project. These hours were expended in the performance of work related to the RVR and threshold relocation, as well as other, unrelated activities. These 1,205 hours represent only 41% of the man-hours bid by Appellant to accomplish relocation of the RVRs and the threshold indicating that the RVR and threshold relocation was not pursued by Appellant in the manner necessary to achieve projected completion.

51. By August 17, 1993, Appellant's subcontractors had completed the operations preparatory to the RVR relocation, but not the work preparatory to threshold relocation. Neither the RVRs nor the threshold had been relocated as of August 17. From June 17, when work related to the RVR/threshold relocation began, through August 17, work on the RVR relocation was performed by one subcontractor on 32% of the available day shifts, and 20% of the available night shifts, and by the other subcontractor on 40% of the available day shifts, and 28% of the available night shifts. On threshold relocation, for the same period of time, one subcontractor worked on 17% of the available night shifts and the other subcontractor worked on 20% of the available night shifts.

52. The time expended on the project by the subcontractors through August 17, 1993 for all work, including but not limited to work related to the RVR and threshold relocations, totals 4,313 man-hours. Deducting from that figure the hours spent by the subcontractors on Stoney Run Road and on other, non-RVR/threshold items yields a figure comparable to the 2800-2900 man-hours which Appellant's bid estimated would be needed to relocate the RVRs and threshold. This would convey that the failure of Appellant to meet the July 12 milestone of BWI-4 was not the result of impacts or changes increasing the time required to accomplish the work, but a factor of how leisurely the contractor opted to pursue the work.

53. Appellant's failure to relocate the RVRs and threshold by August 17, 1993 meant that, as of that date, Appellant was unable to commence performance of the substantial amount of electrical work associated with construction of the Runway 10 extension. As of August 17, Appellant also had not commenced the substantial amount of Phase 2 electrical work outside of the Runway 10 extension. In order to complete the electrical work remaining to be performed in 1993, a greater

level of effort was required of Appellant than that expended through August 17 on the RVR and threshold relocations.

B. Earthwork

54. On June 15, 1993, Appellant commenced earthwork in the Vortac area south of Runway 28 installing Sediment Basin No. 4 and the sediment traps associated with the stockpile by June 21, 1993. Thereafter, Appellant commenced excavating the permanent swale and slopes westward from the sediment basin outside the vehicle-restricted runway safety zone which runs for 150 feet south of the edge of the runway. This runway safety area or zone running 150 feet from the edge of the runway along the whole length of the runway could only be graded at night when aircraft were not using the runways. Appellant's excavation outside the runway safety zone was performed by one daytime crew and, when it finished this operation in early August, the same crew graded inside the runway safety zone at night. Through August 7, 1993 the late finish for all Vortac work per BWI-4, Appellant performed work on 60% of the available day shifts, and on only 8% of the available night shifts (five occasions). For the entire period through August 17, the numbers are only slightly higher: 63% of the available day shifts were worked by Appellant and 14% of the night shifts. Most of this work consisted of earthmoving operations which were performed at a lower rate of productivity than estimated by Appellant in its bid. The percentages of available day/night shifts which were worked in the Vortac area by Appellant's subcontractors ranged from a high of 13% to a low of 1%.

55. While performing excavation outside the runway safety area in June 1993, Appellant's forces strayed into the Runway 28 glide slope critical area, forcing the premature shutdown of that navigational device. To readjust the disturbed terrain to allow for the glide slope to be recommissioned, Appellant was directed in July, 1993 to complete the Phase 3 grading commenced in June.

56. Appellant performed mass earthwork with scrapers in the Vortac area from June 21, 1993 to August 10, 1993. During that period, no other mass earthwork was performed by Appellant in Grading Unit No. 2, which encompassed the Parallel Taxiway as well as the Vortac area. Based upon survey data of quantities of earth moved by Appellant, the daily productivity of the earthwork performed by Appellant in the Vortac area was only 34-35% of that estimated by Appellant in its bid for Grading Unit No. 2. The August 10, 1993 completion of this earthwork activity was over

one month later than the July 8 late completion date for "Excavation - Vortac Area" depicted on the approved schedule, BWI-4, and also later than the July 23 completion date projected by BWI-1.

57. At Runway 10, no earthwork could be performed nor was any earthwork in fact performed by Appellant prior to July 12, 1993 when MAA decommissioned the glide slope to allow excess material cut from Stoney Run Road to be placed as fill south of the Runway 10 centerline.

58. After July 12, in addition to the placement of Stoney Run fill, Appellant constructed the sediment and erosion control devices indicated on the plans south of the runway. However, mass earthwork, i.e., excavation of material from south of the runway and placing it as fill north of the runway, could not commence because Sediment Basin No. 2 had not yet been constructed.

As an accommodation to Appellant the State authorized relocation of the sediment basin on August 4, 1993 and installation of the basin and its associated earth dikes was completed on August 11, 1993. Although Appellant had not yet dismantled the NAVAIDS, and had not yet installed the sediment and erosion pipe to drain the sediment basin, as shown on sheet 79 of the Contract drawings, MAA accommodated Appellant by permitting Appellant to commence stripping topsoil and hauling material northwards. Embankment fill first was placed north of the Runway 10 centerline on August 13. The work was significantly behind the scheduled date in BWI-4, which showed Runway 10 earthwork with a late start date of July 13, 1993, nearly one month earlier than the actual commencement of this activity. Only a small percentage of mass earthwork had been performed by Appellant on the Runway 10 extension as of August 17, 1993.

59. Prior to placing fill north of the Runway 10 centerline in the Stoney Run Road area, the Contract required the construction of Retaining Wall Number One in order to contain the fill and prevent it from intruding upon a wetlands area and from intruding upon an area where a service road was to be constructed. Prior to placing fill north of the Runway 10 centerline at the new exit taxiway, Retaining Wall Number Two had to be constructed to prevent the fill from impeding upon an FAA substation which controlled the Runway 10 NAVAIDS.

Pursuant to the Contract special provisions Appellant was obligated to submit its planned design for the retaining walls for approval before commencing their construction. The embankment at Runway 10 in the areas serviced by the retaining walls could not be constructed until Appellant's design for the walls had been submitted and approved. As of August 25, 1993, the date of MAA's show cause letter concerning default termination discussed below, Appellant had not submitted

shop drawings for either retaining wall. Even had Appellant submitted designs for the retaining walls by the end of August, the record reflects that the review process and the material-ordering process would not have allowed wall construction to begin until the latter part of October, 1993.

60. During the time it was on the project in 1993, Appellant excavated a total quantity of 96,116 cy from the Runway 10 area. A portion of the total represents topsoil which Appellant removed prior to August 13, 1993; the majority, approximately 83,000 cy., was not moved by Appellant until after August 17.

C. 60" Pipe Installation

61. Appellant and its utility subcontractor failed to comply with MAA's directive to work a second crew at Taxiway C at night, to overcome unexpected conditions. As a result, completion of the 60" pipe installation was delayed, which in turn delayed the start of earthwork at the Parallel Taxiway.

At the Parallel Taxiway, earthwork could not commence until Appellant installed the 60" pipe across Taxiway C, and installed Sediment Basins 5A and 5B. Sheet 9 of the Contract drawings required Appellant to schedule its work to minimize closure of Taxiway C and Appellant was reminded of this requirement at a meeting on June 23, 1993. A tenant's advisory was issued notifying the Airlines that Taxiway C would close June 28, 1993 and re-open July 26, 1993 and work on the 60" pipe commenced on June 28, 1993.

The plan detail showed unsupported 1:1 slopes for the 60" pipe trench. However, OSHA requirements led to the use of a trench box for the 60" pipe earthwork. FAA cables that crossed the trench were required to be supported. The parties were aware of these situations when the work commenced on June 28, 1993. To overcome the impact of the need to use a trench box and support the FAA cable, and thereby minimize closure of the taxiway, Parson's Mr. Paton directed Appellant and Appellant's utility subcontractor, to employ a second crew to work on the pipe at night. However, there was no work performed on Taxiway C at night until August 22, 1993.

62. The last section of the 60" pipe was installed on July 30, allowing Appellant to install the two sediment basins required to commence work at the Parallel Taxiway. However, Appellant did not start work on Sediment Basin 5B until August 3, and after completing installation of 5B on August 5, waited until August 12 to start Sediment Basin 5A. This chronology reflected an attitude suggesting a lack of urgency which contradicted the depiction of the Parallel Taxiway in BWI-1

and BWI-2 as a critical restraint on Runway 10 earthwork. Although Appellant commenced grading the Parallel Taxiway on August 13, 1993 before the riser for Basin 5B was installed, it performed a minimal amount of earthmoving at the Parallel Taxiway in the short period preceding August 17. By August 17, Appellant had worked on the basins and on the Parallel Taxiway itself on only 22% of the day shifts available since July 30, and its utility subcontractor had worked on only 11% of these same day shifts. Neither Appellant nor its utility contractor performed any work on these items between July 30 and August 17 at night.

63. Taxiway C remained closed as of August 17, 1993. On August 14, 1993, Parsons wrote a letter to Appellant confirming the parties' agreement to prosecute the work on the taxiway to allow for its re-opening on or about August 23, 1993. However, Appellant did not complete Taxiway C until September 28, 1993, at which time it was re-opened for use by the airport.

D. Sediment Basin No. 2

64. Appellant acknowledged at the meeting of July 30, 1993 that the approved schedule BWI-4 failed to recognize that work on Runway 10 could not commence until the work on the Stoney Run Road interchange was sufficiently advanced to permit installation of Sediment Basin No. 2. Temporary relocation of the sediment basin was discussed at the July 30 meeting with Appellant agreeing to inform MAA within the next several days as to whether its progress on the project would benefit from relocation.

65. To finalize approval of the relocation, Parsons on August 3, 1993 transmitted to the Maryland Department of Environment (MDE) various calculations and computations generated by Greiner regarding the design of the relocated sediment basin. On August 4, 1993, Parsons transmitted to Appellant the alternate design, generated by Greiner and approved by MDE, relocating the basin.

66. In the August 4, 1993 letter transmitting the alternate design, Parsons advised Appellant that the MAA "hereby reserves the right to apply any time (schedule) savings associated with this alternate design to any further contract time extensions that may become due The Driggs Corporation." As of August 4, 1993, Appellant had several work weeks of critical work remaining to be performed before the existing interchange could be demolished and the basin installed at its original location. That time was saved by allowing the basin to be constructed prior to demolition of the interchange. This time savings exceeded the 24 extra calendar days allotted to Appellant at

the July 30 meeting extending the time for completion of Phases 1 and 2 from December 7, 1993 to December 31, 1993.

67. Nevertheless, relocation of Sediment Basin No. 2 did not decrease the importance which attached to the completion of Stoney Run Road. While the relocation opened up portions of Runway 10 for earthwork operations, construction of the Runway 10 extension required the placement of approximately 15 feet of material as fill over the existing interchange. To place this fill, the existing interchange had to be demolished and removed from service. Fill placement also remained contingent upon relocation of the threshold and dismantling of existing NAVAIDS.

Notwithstanding the urgent nature of this work at no time did Appellant accelerate its work on Stoney Run Road by working a second shift. Appellant worked on Stoney Run Road 63% of the available day shifts, but on only two occasions worked at the interchange on a night shift.

This then was the picture that was painted through August 16, 1993 as set forth above (Findings of Fact 39 through 67) and the State was legitimately concerned.

68. By letter dated August 17, 1993, MAA directed Appellant to suspend all Runway 10 extension work. Appellant was told that termination of the contract was under consideration and was invited to meet with MAA on August 19 to discuss that matter.

69. Appellant asserts that the reason for the suspension involved the State's attempt to deal with concerns of the Federal Aviation Administration and the Air Transport Association that Runway 10 be operational by early to mid November of 1993 rather than December 31, 1993. Appellant further asserts that termination of the contract for default was under consideration based on a desire to appease the FAA and ATA and to retaliate against Appellant for indicating Appellant would exercise its rights to file a claim. The State denies these assertions and contends that the suspension and consideration of termination resulted solely from the State's concern that Appellant would not complete Phases 1 and 2 by December 31, 1993. The record reflects that the suspension and considera-tion of termination resulted solely from the State's concern that Appellant would not complete Phases I and 2 by December 31, 1993.

70. At the meeting of August 19, Appellant presented "an accelerated schedule to finish this job [Phases 1 and 2] this year," i.e., on December 30, 1993. Appellant alleged that it was one day ahead of this "Accelerated Schedule"; according to Appellant's project manager:

> [the "Accelerated Schedule"] is feasible, it is doable, it takes a lot more effort and as I mentioned that last time we met, one of the problems that we all face is the job is basically very sensitive and is getting pushed into the later half of the year, and neither of us has a lot of control over that. Basically, last time when we talked, we said if we want to make absolutely sure that the runway does get open this year, we need to finish the paving by November 15th, and that is from experience, that at that time you have some control to be able to do what you have to do. Beyond that you may be able to do, but you may not be able to do much based on the weather and the temperature sensitivity of the work that has to be done in the winter time. . . . if I am going to be held responsible for weather in December, I don't think that is very fair. Work that I intended to do in September and October, I am still not saying that I don't want to do it, but I was advising rather that if the weather doesn't cooperate might create a problem.

Appellant further explained that its "Accelerated Schedule" made allowance only for adverse weather normally expected in the September through December period. It contained no "con-tingencies" to accommodate delay from more severe weather.

71. Based on this discussion and the information available, MAA on the next day, August 20, 1993, informed Appellant that the partial suspension of work would be maintained. This was followed by an August 25, 1993 letter requesting Appellant to show cause why the contract should not be terminated for default.

72. Parsons and MAA had been monitoring Appellant's progress against the approved Project CPM Schedule. Appellant had been advised that it was behind schedule. The show cause notice listed three areas of work considered critical that, based on a June 14, 1993 start date, Appellant had failed to timely perform as of August 25, 1993.

1. The relocated Stoney Run Road Interchange should have been in operation by August 23, 1993. The then-current projection for completion was early September, 1993.

2. Runway Visual Range (RVR) equipment should have been relocated by July 10, 1993. At the time of the show cause notice Appellant was behind schedule by one-and-one half months.

3. The Runway 10 threshold should have been relocated by July 12, 1993 and this also was a month-and-a-half behind schedule.

73. This show cause notice (as paraphrased in the termination for default notice of October 21, 1993) went on to note that MAA compared the planned duration of activities deemed critical with the actual duration to date, finding the actual durations substantially greater than the planned durations. MAA concluded that Appellant failed to start critical work on schedule and performed the work slower than planned. With the RVR relocation and many other critical activities, Appellant had not come close to achieving its planned durations.

MAA stated its concern was aggravated because MAA had assisted Appellant in saving time in areas MAA considered critical, to wit:

1. MAA provided Appellant a revised Traffic Control Plan for installation of the double 54-inch pipe crossing Maryland Route 170 (the first critical item) and agreed to pay the extra costs. This resulted in a savings of 12 work days from the planned duration of this activity.

2. MAA advanced the Runway 10 Glide Slope navigation aid deactivation without a relocated threshold (due to Appellant's failure to relocate the RVR's and threshold on schedule) to allow excavation from the interchange to be placed as embankment (south of center line) for the Runway 10 extension. This allowed interchange work to continue and Runway 10 embankment south of center line to begin 34 days prior to threshold relocation [as] projected based on then-current progress.

3. The Stoney Run Road Interchange should have been completed, to allow for placement of Sediment Basin No. 2, before the beginning of earthwork for the Runway 10 extension. However, MAA agreed to pay Appellant to temporarily relocate Sediment Basin No. 2 so that the Runway 10 earthwork could begin before the Interchange work was completed. A saving of approximately 25 work days on the critical path was realized by installation of the temporary sediment basin.

4. Ten work days were saved by allowing embankment for the Runway 10 extension to be placed north of center line while the runway was operational, without the required threshold relocation.

74. Appellant responded by letter of August 30, 1993. Appellant maintained that it was not behind schedule and that MAA was wrong on every point raised in its show cause notice. Appellant's position on these issues is predicated in part on the various CPM schedules it submitted prior to August 19, 1993.

75. Appellant asserted, inter alia, that (1) it was "promised" NTP by April 15, 1993; (2) that MAA agreed that June 14, 1993 would be the start date without regard to the changes that Appellant alleged delayed the project; (3) that it was ahead of its schedules, whether the 200 days for Phases 1 and 2 commenced on April 15, 1993 or June 14, 1993; and (4) that its performance of certain work (e.g., work relating to the Stoney Run Road Interchange, RVR relocation, and Runway 10 threshold relocation) did not delay the project because the work was not critical at the time it was performed or scheduled to be performed.

76. The record does not support the validity of these four assertions by Appellant. The April 15, 1993 NTP date was negated by Appellant's failures in regard to its DBE package. The record reflects that Appellant agreed that the June 14, 1993 start date resolved issues of contract time and alleged premature NTP and alleged constructive suspension. As discussed above, MAA argues and the Board concurs that work on Stoney Run Road Interchange, RVR relocation and Runway 10 threshold relocation was critical. The record also reflects that Appellant was behind schedule no matter how time was measured.

In regard to Appellant's argument that it was ahead of its schedules we also note that a comparison of planned versus actual earnings also indicates that Appellant was behind schedule. The cost schedule summary submitted with BWI-4 in June 1993 showed Appellant's anticipated earnings through August, 1993 of $6,742,120 based upon the schedule's early completion dates, and $3,877,300 based upon the late completion dates. It is reasonable to expect that a contractor on schedule normally would generate actual earnings which fall roughly between the early and late planned earnings. The actual amount indicated by Appellant to have been earned through August 27, 1993 was $2,003,827, far less than both Appellant's anticipated early planned earnings and the late planned earnings. This disparity was considered by the State in the decision that it reached that Appellant had not been diligently performing.

Based upon a construction start date of June 14, 1993, as of August 27, 1993, Appellant had consumed 38% of the 200 days allotted for completion of Phases 1 and 2. However Appellant had only earned 22% of the $9 million which it bid for completing Phases 1 and 2.

Through August 27, 1993, when 38% of the contract time had been exhausted, Appellant invoiced MAA approximately $237,000 to perform those bid items which relate to electrical work.

This represents only about 10% of the total amount bid by Appellant to perform the electrical work required to be completed as part of Phases I and 2 of the Contract.

77. Appellant also asserts that other occurrences for which MAA was responsible delayed Appellant's progress. As discussed in Finding of Fact 61, the work involved in excavating for the 60" pipe at Taxiway C was increased on account of two causes. Because of OSHA requirements, the excavation had to be wider and the technique somewhat different than originally contemplated. Certain FAA communications cables that ran through the trench had to be supported and Appellant had to work around them. Appellant asserts this delayed project completion. The record does not support the assertion that this delayed project completion.

The plans depicted a transformer in the Stoney Run Interchange area that had to be relocated so that work in the area could progress. Appellant contends that it was delayed by Baltimore Gas and Electric Company's tardy relocation efforts and that MAA is responsible for that delay. The record reflects that Appellant is responsible for this delay.

78. By letter dated October 21, 1993, which letter was drafted by the Office of the Attorney General and executed by the Procurement Officer upon his belief that the letter reflected the true state of events that led the Procurement Officer to recommend termination for default and with the approval of the agency head, the contract was terminated for default pursuant to General Provisions GP-8.08 and GP-8.04, effective October 22, 1993.

79. From this final action of October 21, 1993, Appellant noted a timely appeal to this Board.

Decision

Based on the record the Board determines as set forth above that at the time of the suspension of work directive on August 17, 1993 and at the time of the show cause notice on August 25, 1993 Appellant was in breach of the contract concerning timely performance and that Appellant would not have cured any such breach had its contract not been terminated for default. The record is clear that MAA and its representatives directed Appellant to complete Phases 1 and 2 by December 31, 1993. Appellant had a duty to proceed in accordance with such directive. See GP-4.06 and GP-5.15 of the Contract General Provisions. The duty to proceed obligated Appellant to comply with this directive, even if it was entitled to a time extension due to owner-caused changes, and even if compliance required Appellant to accelerate its work. See S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014 (S.D.N.Y 1984), aff'd, 762 F.2d 990 (1985); Fermont

Division, Dynamics Corp. of America, 75-1 BCA ¶11,139 (ASBCA No. 15806, Feb. 20, 1975), aff'd, 216 Ct.Cl.448(1978).

In determining whether Appellant failed to comply with the directive to complete Phases 1 and 2 in 1993, thus subjecting itself to termination, the State need only show that it was "justifiably insecure" about the contract's timely completion. Discount Co., Inc. v. United States, 213 Ct.Cl. 567 (1977)at p. 575, 554 F.2d 435 at p. 441 (majority opinion). See also American Dredging Co., ENGBCA 2920, 72-1 BCA ¶9316, Aff'd, 207 Ct.Cl. 1010 (1975). Pursuant to GP-8.08, MAA was entitled to terminate Appellant for failing to comply with the State's direction to complete Phases 1 and 2 by December 31, 1993 "if a demonstrated lack of diligence indicated that the Government could not be assured of timely completion." Discount Co., Inc. v. United States, supra. However, the State "does not have to prove that it was actually impossible for the contract to have been completed by the specified delivery date but only that completion by that date was being endangered by the lack of progress." RFI Shield-Rooms, 77-2 BCA ¶12,714, at 61,735 (ASBCA Nos. 17374, 17991, Aug. 11, 1977).

It suffices if the government can demonstrate--

> that the contracting officer who terminated the contract for default had a reasonable belief that there was no reasonable likelihood that the contractor could perform all that was required by the contract within the time remaining for performance.

Cox & Palmer Construction Corp., 92-1 BCA ¶24,756 at 123,527 (ASBCA Nos. 38739, 38746, Jan. 23, 1992), aff'd on reconsid., 93-1 BCA ¶25,219. Accord, Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir., 1987). In the context of Maryland State procurement, the mandatory termination for default provisions for construction contracts as set forth in COMAR 21.07.02.07 provide for termination if a contractor "refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified" in the contract. The focus is an objective one. An objective view of the facts herein supports the decision of the Procurement Officer and agency head in regard to termination. The Appellant's actual progress, schedules it submitted, and responses to the expressed concerns of MAA about timely completion objectively depict a failure or refusal to prosecute the work to insure its completion within the time specified.

The record herein reflects that Appellant failed to pursue contract work in a manner that would ensure completion of Phases 1 and 2 by December 31, 1993 as it was required to do even though MAA made major concessions and accommodations which specifically reduced the time required by Appellant to perform the work. Appellant received MAA's communication to the Board of Public Works in which MAA related how imperative it was for the airport that work on Phases 1 and 2 commence as soon as possible, in order to complete the work prior to the onset of bad weather. However, Appellant ignored the Notice to Proceed issued by MAA on May 11, 1993 arguing that MAA was precluded from issuing NTP because the contractor's quality control plan had not yet been submitted and approved and unreasonably maintained this position even after being advised that the State was not requiring the plan in its entirety. The record further indicates that MAA advised the Appellant on several occasions between May and July of the need to pursue the work diligently.

The Contract allotted 200 calendar days from Notice to Proceed to complete Phases 1 and 2. Prior to the July 30 meeting, this meant that work had to be completed by December 7. By failing to commence work until well into June, Appellant allowed itself substantially less than 200 calendar days to achieve timely completion, thereby requiring of itself a greater level of effort to meet the contract milestone, a level of effort that it never put forth.

At the meeting of July 30, MAA agreed to a June 14 start date in an effort to accommodate the Appellant's concerns about notice to proceed and alleged owner-caused delays. Although the use of June 14 as the start date of construction extended the completion date to December 31, the time extension had no practical effect on the realistic dates for completion of weather-sensitive critical activities, which prudence dictated must be completed before the end of November. The danger that performance of weather-sensitive items would be pushed into the bad weather season, and delay the availability of Category II capability, was increased by Appellant's failure to start work in May when directed to do so.

During the course of construction Appellant failed to meet critical milestones and failed to progress with work items as per scheduled durations. Critical dates for construction activities which would impact airport NAVAID facilities and operations were recorded in Appellant's preliminary CPM, verified by Appellant's superintendent and forwarded by Mr. Paton to FAA, only to be missed or ignored by Appellant during construction.

Not until June 25, 1993 did Appellant submit a CPM schedule, which became the approved Project CPM Schedule, showing the proposed order of work, and the time required to complete the work, for all three contract phases. This schedule, BWI-4, was approved by MAA for use as a baseline schedule against which the impact of changes could be evaluated. The variations of baseline schedules which were subsequently submitted by Appellant either failed to address all necessary work or showed completion after December 31, 1993. The utility of BWI-4 as a baseline remained true even after the July 30 meeting, for two reasons:

1) The June 14 date established at the July 30 meeting for the start of construction time was only 4 days later than the (June 10, 1993) date construction activity is shown starting on BWI-4; and,

2) Appellant was directed at the July 30 meeting to schedule its work with an end-restraint of December 15, which is only 8 days later than the December 7 date depicted on BWI-4 for completion of Phases 1 and 2.

In the absence of a valid updated schedule which measured performance from June 14, 1993 it was reasonable for MAA to assess Appellant's progress based upon BWI-4.

By late July, MAA was justifiably concerned about whether Appellant would timely complete Phases 1 and 2. The milestone established by BWI-4 for relocating the RVRs and threshold had passed, and substantial work remained to be completed before the relocation of those critical items could occur. The mass earthwork operations necessary for constructing the Runway 10 extension, and scheduled by BWI-4 to start in mid-July after threshold relocation, had not yet commenced. Because construction of the new Stoney Run Road ramps was far from complete, Appellant could not relocate Sediment Basin No. 2, a prerequisite for starting Runway 10 earthwork. Vortac area earthwork, scheduled for completion in early July, was still ongoing.

Concern about the status of the project and the likelihood of Appellant finishing Phases 1 and 2 were increased upon review of schedules BWI-1 and BWI-2, submitted by Appellant on July 27, 1993, which reflected that Phases 1 and 2 would not be completed until the spring of 1994. Rather than minimizing airfield impacts, the schedules depicted work being pursued in a manner which maximized airfield impacts by exposing BWI to the winter of 1994 without Category II capability, notwithstanding the mandate that BWI must have Category II capability.

Appellant argues that the late completion of work set forth in BWI-2 was a consequence of delay in installation of the 60" pipe for which MAA bore responsibility. The record does not support Appellant's argument. In June and July, Appellant experienced significant delays in the installation of the 60" pipe crossing Taxiway C. The delays to completion of the 60" pipe restrained Appellant from starting earthwork at the Parallel Taxiway. However, since the Parallel Taxiway was not in the critical path on BWI-4, the problems at Taxiway C had no effect on the timely completion of Phases 1 and 2. Before Appellant submitted the schedules of July 27, Appellant did not ever notify MAA that the changes at Taxiway C were endangering timely completion. Instead by late July, timely completion was endangered by Appellant's lack of progress in areas where Appellant had caused its own delays -- i.e., Stoney Run Road, Runway 10, and the RVR/threshold relocation -- not at Taxiway C or the Parallel Taxiway.

The delays at Taxiway C assumed critical importance solely as a result of the artificial earthwork logic tie which appeared in Appellant's schedules for the first time on July 27, 1993. The logic tie affected the three major areas requiring significant earth work operations during Phase 2: the Vortac area, Runway 10, and the Parallel Taxiway. BWI-4 showed work in these areas being performed concurrently, and the evidence demonstrated conclusively that no construction or contractual reason precluded concurrent operations. It only required that sufficient resources be devoted to the task, but Appellant did not apply sufficient resources.

A suggested baseline schedule (BWI-1) submitted on July 27, departed from the original plan by restraining the start of Runway 10 earthwork until the Parallel Taxiway was complete, and restraining the start of the Parallel Taxiway until earthwork in the Vortac area was completed. As a result, when Appellant inserted the delay experienced at the 60" pipe at Taxiway C into BWI-2 the Parallel Taxiway earthwork was pushed into a later time period, which in turn delayed the start of Runway 10 earthwork, which had the cumulative result of pushing the completion of Phases 1 and 2 into the Spring of 1994.

Even prior to receiving BWI-1 and BWI-2, MAA reasonably believed that Appellant was falling significantly behind schedule on items MAA reasonably considered important. BWI-1 and BWI-2 confirmed that slow progress would continue. Despite the need to expedite RVR and threshold relocation, both schedules added significant amounts of float to these activities, which were already past due; 29 days of float are depicted in BWI-1, and 50 days in BWI-2. BWI-2

pushed commencement of mass cut and fill operations at Runway 10 from the July 13 late start date of BWI-4 to near the onset of cold weather conditions in early October.

On July 30, 1993, MAA addressed its concerns in some detail:

1. MAA gave Appellant additional time to perform, which should have ensured that Appellant had ample time to finish Phases 1 and 2 in 1993;

2. MAA rejected BWI-1 and BWI-2 for being substantially incomplete and failing to meet the provisions of the contract;

3. MAA directed Appellant to complete Phases 1 and 2 in 1993;

4. MAA directed Appellant to submit a schedule by August 11, 1993 that placed an end constraint on December 15, 1993, thus accounting for all weather-sensitive work, and to make the necessary adjustments to the schedule to meet the finish date; and

5. MAA directed Appellant to construct a conforming schedule by giving priority first to the Runway 10 extension, next to the Parallel Taxiway, and then to the runway shoulders.

These were confirmed in CMC-050, which directed with specificity how the conforming schedule was to be constructed and supported.

Appellant's response to these directives reinforced MAA's sense of insecurity. Instead of complying, Appellant demanded that MAA first issue Appellant a change order. Even then, Appellant would not commit to submitting the requested schedule showing timely completion. Appellant wrote that it could make a "proposal," but not until August 20, the very eve of threshold relocation as then scheduled. That MAA would not receive what it had directed was underscored by the schedules MAA received from Appellant on August 14, 1993 (BWR0, BWR1, BWR2) one of which did not include all required work and two of which continued to show Phases 1 and 2 completing in the spring of 1994.

In determining whether a contractor is performing its work with the diligence necessary to insure timely completion, any one of the following factors is appropriate for consideration: the contractor's failure to submit a work schedule showing that it is ready, willing and able to make progress; the percentage of progress achieved by the contractor as compared to that work schedule as of the date of termination; and the extent of the workforce on the job. Cox & Palmer

Construction Corp., supra; Olympic Painting Contractors, ASBCA No. 15773, 72-2 BCA ¶9549; J.E. DeKalb Construction Co., VACAB 1317, 79-2 BCA ¶13,939. Assessment of these objective factors validates the determination by MAA that permitting Appellant to proceed with threshold relocation on the weekend of August 21-22, 1993 would have presented an unacceptable risk of the airport being without Category II capability over the winter of 1994 and early spring of 1994.

On June 25, 1993, Appellant submitted BWI-4, showing Phases 1 and 2 completed by December 7, 1993. The Board continues to recognize that BWI-4 was never updated to reflect the change in completion date from December 7, 1993 to December 31, 1993 and that termination may not be based solely on any perceived failure to timely perform activities as set forth in BWI-4. However, on no less than six occasions between Appellant's submittal of BWI-4 on June 25 and the August 17 suspension of work, Appellant was directed by MAA to complete all of Phases 1 and 2 work in 1993. However, Appellant submitted schedules which clearly indicated that it was neither ready nor willing to perform in accordance with these directives. Each of the three "impacted" schedules, BWI-2, BWR1 and BWR2, (submitted after BWI-4) projected that Phases 1 and 2 would not be finished until the spring of 1994.

Given that Appellant's schedules showed that contract work would not be completed within the time remaining thus leaving BWI without Category II capability over the winter and early spring of 1994, MAA reasonably suspended all further work on the RVR and threshold relocations on August 17. MAA also informed Appellant that MAA was considering termination, upon which advice Appellant submitted to MAA a schedule (BWR-3) which showed completion of Phases 1 and 2 by the end of 1993. However, this schedule was accompanied with conditions and caveats which jeopardized the achieving of timely completion. Paving, the most weather sensitive item, was scheduled to be performed as a continuous operation between mid-October and mid-December, without any allowance for abnormal weather conditions. The schedule contained no float or "contingency" time to absorb any lost time even though Appellant recognized that November 15 was the date by which paving needed to be completed in order to avoid bad weather and low temperatures. Indeed, on August 19, 1993 Appellant's project manager, admitted that Appellant "might have some difficulty to achieve the work" as shown in the schedule, and that "everything has got to work pretty well according to plan for it to work..."

Given (1)the reservations and requirements expressed by Appellant's project manager; (2)the expressed need for the airport to have Category II capability by the end of December; and (3)Appellant's record of performance through August 17, 1993, MAA was justified in rejecting the BWR-3 schedule and terminating Appellant's right to proceed with performance.

Through August 27, 1993 Appellant had consumed 38% of the contract time which, per the meeting of July 30, commenced running on June 14, 1993. However, based upon the amount invoiced at that time by Appellant to MAA only about 22% of the work had been completed. The invoiced amount represented only 30% of what Appellant should have earned by then based upon the early completion dates of BWI-4, and just 52% of what Appellant should have earned by then based upon the late completion dates of BWI-4, the approved Project CPM Schedule. These figures support the reasonableness of the Procurement Officer's conclusion in August, 1993 that Appellant was behind schedule at the time work was suspended, and that if allowed to continue with threshold relocation, Appellant was unlikely to finish Phases 1 And 2 within the required time.

One of the key elements of the project which Appellant allowed to lag behind schedule was the relocation of the RVR's and the threshold. According to BWI-4 by July 12, 1993, Appellant was scheduled to have completed the RVR and threshold relocation. When work was suspended on August 17, Appellant was projecting that the threshold would be relocated the weekend of August 21 -- over 40 calendar days later than planned. Had Appellant successfully completed re-locating the threshold on the August 21 weekend, the amount of time expended would have been over 150% more than that originally scheduled.

Since Appellant allowed its subcontractor to defer trenching for the RVR's in the Vortac area until Appellant removed the material as part of its mass excavation, the rate of progress of Appellant's excavation activities in the Vortac area had important consequences. Approximately one week prior to the August 17 sus-pension of work, Appellant finished excavating the Vortac area. The time consumed on this activity exceeded the approved schedule by more than 200%; the work was depicted on BWI-4 as a 14 day activity with one day of float, but actually took some 50 days to complete. This in turn delayed trenching for the RVRs, which impacted relocation of the threshold.

According to the rate of progress shown on BWI-4, by August 17, 1993 Appellant should have been one to two weeks away from commencing the placement of crushed aggregate base at

the Runway 10 end. By the time Appellant submitted BWR-3 on August 19, that activity was not projected to start until mid-September, 1993.

Instead of being able to start installation of in-pavement lighting per BWI-4 on September 1, after finishing the crushed aggregate base, Appellant's actual progress through August 17, 1993 as reflected in BWR-3 would not have allowed Appellant to install the lights until late September. Pursuant to BWI-4, by August 17, Appellant should have performed enough of the Runway 10 work so as to complete excavation by October 11, 1993. On BWR-3 Appellant projected that Runway 10 earthwork would continue well into November. In sum, a comparison of the planned progress through August 17, 1993 per BWI-4 with the work remaining to be performed per BWR-3 after August 17, 1993 clearly evidences that the percentage of work on Runway 10 accomplished by Appellant through August 17 (when the threshold relocation was suspended) was far below that originally forecast as being necessary for timely completion.

It appears that Appellant's slow progress on the RVR/threshold relocation, as well as on other portions of the work, is attributable to the insufficient resources which it committed to the project. After work on the RVR relocation began on June 17, 1993 the average manning was only 35% of that required to relocate the RVRs by the scheduled milestone of July 10. Less than half of the available day and night shifts were worked by Appellant's electrical subcontractors on the RVR/threshold relocation between June 17 and August 17. Likewise, Appellant and its utility subcontractor restricted its work at Stoney Run Road to the day shift on all but two occasions. No night work was ever performed on Taxiway C, despite the directive from Parsons to increase resources.

In order to obtain assurance that Appellant would finish in 1993, Appellant was directed at the July 30 meeting to submit a schedule showing Phases 1 and 2 finishing by December 31, 1993. This directive was confirmed in writing by letter CMC-050, dated August 3, 1993. CMC-050 was clear and unequivocal. Among other things, CMC-050; (1)set the Phases 1 and 2 completion date at December 31, 1993; (2)rejected all extensions of contract time; (3)rejected Appellant's schedules (BWI-1 and BWI-2) submitted on July 27, 1993; (4)directed Appellant to complete Phases 1 and 2 by December 31, 1993; (5)directed Appellant to submit a conforming schedule, supported in detail, and to do so by a date certain; and (6)placed Appellant on notice of the contractual remedies provided in General Provision GP-8.04 for failure to submit the Project CPM Schedule as directed.

The record reflects that Appellant understood the basic requirements of CMC-050 exactly as MAA intended them to be understood and that Appellant also recognized that its rate of performance did not lead to completion by December 31, 1993 and that it would have to "speed up" and apply additional resources. However, Appellant was unwilling to recover the time lost unless MAA agreed to pay it for accelerating. Moreover, it would submit its "proposal" for accelerating, not when directed, but at the time of its own choosing. MAA thus reasonably understood that Appellant would not proceed as directed.

Similar circumstances supported termination for default in RFI Shield-Rooms, supra. In that case, the contractor failed to provide the "planned working schedule" requested by the government. The Armed Services Board of Contract Appeals found that this refusal "merely bolstered the already strong belief, considering what had already transpired and the current reports that the contracting officer was getting from his assistants, that performance of the contract was being endangered by Appellant's lack of progress." Id. At 61,732. Likewise, in violating its duty to submit the schedule required of it by CMC-050, Appellant justified MAA's concern that Appellant would not complete Phase 1 and 2 work in 1993 if allowed to continue.

Appellant ignored MAA's request concerning a schedule demonstrating how Appellant would finish in a timely fashion, and indicated that MAA would have to pay for a response. In these circumstances, the conclusion that Appellant did not intend to and would not perform as directed was reasonable.

Similarly in Discount Co., Inc. v. United States, 213 Ct.Cl. 567, 554 F.2d 435(1977) (majority opinion) lack of progress on the part of the contractor prompted the government to issue a cure notice demanding the resumption of work and directing the contractor to submit a schedule for the work not yet begun or completed. The Court of Claims held that the contractor's failure to furnish the schedule "served to bolster the Government's position that it was justifiably insecure about the contact's timely completion," and upheld the default termination. Id. at 576, 554 F.2d at 441.

Nothing that Appellant did after MAA suspended critical work served to undo the message that Appellant had clearly sent by its refusal to comply with CMC-050. Its August 19 schedule did not meet the requirements of MAA's directive. It was without any meaningful support or commitment.

The Contract obligated Appellant to finish Phases 1 and 2 in 1993, even if it encountered excusable delays which entitled it to additional time. In this appeal, Appellant's obligation to finish Phases 1 and 2 in 1993 is even more pronounced because the evidence of record does not support entitlement for additional time. The record reflects that there were no owner-caused delays that materially affected the completion date for Phases 1 and 2 or entitled Appellant to a time extension beyond December 31, 1993.

Prior to suspending work on the threshold relocation on August 17, MAA had received three schedules from Appellant forecasting the untimely completion of Phases 1 and 2: BWI-2, submitted by letter dated July 27, 1993, and BWR1 and BWR2, submitted under cover of a letter dated August 13, 1993. According to the letters accompanying these schedules, the late completion dates depicted therein were a consequence of owner revisions and changes. However, the record reflects that the late completion dates resulted from the contrived logic tie inserted into BWI-1 and BWR0 which distorted the effect of the problems encountered by Appellant while installing the 60" pipe at Taxiway C. Red Line Revision No. 1 changed the sequence of operations to mandate installation of the pipe prior to construction of the Parallel Taxiway, but only the earthwork logic tie inserted by Appellant into its schedules mandated that the pipe's restraint on Parallel Taxiway earthwork have the ripple effect of delaying excavation at Runway 10.

Indeed, BWR-3, the so-called "accelerated schedule" which showed all of Phases 1 and 2 finishing in 1993, was in part created by Appellant's merely removing the logic tie from schedule BWR2.

The record reflects that MAA in October 1993 had a reasonable belief that (1) Appellant would not or could not complete Phases 1 and 2 by December 31, 1993; (2) that December 31, 1993 was the appropriate contractually mandated milestone based on a 200 day completion schedule for Phases 1 and 2; and (3) that completion of Phases 1 and 2 by December 31, 1993 was critical to ensure Category II capability in the winter and early spring months of 1994.

Accordingly, the record reflects that the State has met its burden in this affirmative State claim to show that the termination for default was justified. The record reflects that the allegations and recitals set forth in the default termination decision of October 21, 1993 are true and describe a material default sufficient to support a default termination under the terms of the contract. The record further reflects that the appropriate procedural steps were followed relative to notice,

opportunity to cure and implementation of the default termination of Appellant's contract for default.

Appellant also challenges the default termination on procedural grounds contending that the Procurement Officer did not personally make the decision to terminate nor exercise the discretion required by law in terminating Appellant's contract. Specifically, Appellant asserts that the Office of the Attorney General rather than the Procurement Officer made the decision to terminate the Contract, and that the Procurement Officer only signed what was presented to him without making an independent decision. The Appellant also asserts that the Procurement Officer did not personally investigate the facts and exercise his personal discretion in determining whether to terminate the Contract for default. The record reflects that the Procurement Officer and agency head made a personal, informed and independent judgment that Appellant was in breach of the contract and could not or would not cure such breach so as to complete Phases 1 and 2 by December 31, 1993. The Board notes parenthetically that neither the General Procurement Law nor COMAR Title 21 preclude the Procurement Officer or reviewing authority (agency head) from relying on advice and information from agents and attorneys in formulating judgments contained in the Procurement Officer's recommended decision and final agency action thereon.

We also are of the opinion that the language of COMAR 21.10.04.04C[9] that the "recommended decision of the Procurement Officer shall be submitted for review to the reviewing authority and the Office of the Attorney General" does not preclude the Procurement Officer from adopting as his recommended decision a document prepared by the Office of the Attorney General in the first instance, as long as the language of the recommended decision represents or reflects the Procurement Officer's informed, independent and personal assessment of the situation. While a literal reading of the language of 21.10.04.04C in isolation might suggest that the Procurement Officer may not request the Office of the Attorney General to draft his decision, review of the applicable provisions of Chapters 04 and 05 of Subtitle 10 of Title 21 makes clear that Appellant takes too narrow a view of the provisions of 21.10.04.04C.

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[9] COMAR 21.10.04.05 dealing with claims by the procurement agency or circumstances where notice of claim is not required directs the Procurement Officer to proceed in accordance with COMAR 21.10.04.04B, C, and D.

We recognize, as pointed out by Appellant, that in Md. Port Adm. v. Brawner Contracting Co., 303 Md. 44 (1985) the Court of Appeals in interpreting a COMAR provision dealing with mistakes in bids discovered after award of a contract applied a literal meaning to the words "changes in price are not permitted" to preclude the grant of an equitable adjustment for an alleged mistake in a bid price discovered after contact award. The Court of Appeals reasoned that to do otherwise would have made the language which prohibited changes in price nugatory, ignored its clear meaning and possibly opened up the bid process to "chicanery". In contrast, we note that COMAR 21.10.04.04C does not say that the Procurement Officer shall himself prepare the recommended decision. To apply a literal meaning to the words of COMAR 21.10.04.04C set forth above would not, therefore, preclude an Assistant Attorney General from preparing various drafts of a recommended decision provided that the final recommended decision as executed by the Procurement Officer reflects his informed, independent and personal assessment of the situation and is submitted for, perhaps redundant, final review by the Office of the Attorney General. This construction does no violence to the General Procurement Law and does not make the language nugatory in context with the remaining provisions of Chapter 04 of COMAR Title 21. The construction called for by Appellant would leave the Procurement Officer without benefit of the effective assistance of counsel at a crucial stage in the procurement process. We do not find that the Board of Public Works intended such a result in promulgation of COMAR 21.10.04.04C. We also note that the argument that the Procurement Officer must act as a totally independent entity who thus may not consult with counsel for the State in making the recommended decision ignores the fact that the agency head or reviewing authority may disapprove such decision pursuant to COMAR 21.10.04.04C.

Contract General Provision GP-8.08, the mandatory "Termination for Default - Damages for Delay - Time Extensions" provision as set forth in COMAR 21.07.02.07, provides that "the State may" terminate a contractor's right to proceed. Similar permissive language has given rise to the interpretation in federal procurement that termination is not an automatic consequence of an unexcused default but rather the government is required to exercise judgment or discretion in terminating for default. See Schlesinger v. United States, 182 Ct.Cl. 571, 390 F.2d 702(1968). We believe that the Board of Public Works in promulgating COMAR 21.07.02.07 intended that the State exercise judgment or discretion in terminating a contract for default.

The record in this appeal clearly reflects that the MAA and its Procurement Officer did not treat the termination decision at all lightly. The decision appears to have been arrived at in deliberative fashion, involving consultation among the Procurement Officer, the Procurement Officer's immediate superior Mr. West (Associate Administrator for the MAA Office of Planning and Engineering with responsibilities for the Runway 10-28 project), the agency head (Mr. Mathison) and counsel and reflects the exercise of discretion by the Procurement Officer and agency head as required. The Procurement Officer enlisted the assistance of persons who had important responsibilities for the project and in whom he had confidence to provide the information that went into the written decision and to review and revise drafts thereof so that he and MAA could be assured that the decision accurately reflected the facts and legally justified termination.

The Procurement Officer testified that he distributed the Appellant's August 30, 1993 response to the State's August 25, 1993 show cause letter for evaluation to Mr. West, Mr. Carrigan and Mr. Nessel of MAA, Mr. Paton and Mr. Mukhopdhyay of Parsons and two Assistant Attorneys General. Mr. West as noted was responsible for the MAA Office of Planning and Engineering. Mr. Mukhopdhyay was project manager for all Parson's projects at BWI and Mr. Paton's supervisor. Mr. Nessel was the director of the capital program division within the MAA Office of Planning and Engineering. Mr. Carrigan was manager of construction services in the MAA Office of Planning and Engineering.

In summary, we conclude that the record may be said to reflect that the Procurement Officer and "State" made a personal, independent, and informed decision and properly exercised their discretion in terminating the contract for default in light of applicable provisions of the General Procurement Law, COMAR Title 21 and the Contract to include GP-5.15 and GP-8.08[10]. The termination for default clause which is mandatory for all construction contracts and is set forth at COMAR 21.07.02.07 provides in relevant part that "[i]f the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in [the] contract, or any extension thereof, or fails to complete [the] work within this

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[10] GP-5.15 is the disputes clause and GP-8.08 is the termination for default - damages for delay - time extensions clause. Both are mandatory clauses in State procurement contracts. See Section 13-218, Division II, State Finance and Procurement Article. The language of the termination for default - damages for delay - time extensions clause is the mandatory language set forth in COMAR 21.07.02.07 for construction contracts.

time, the State may, by written notice to the Contractor, terminate his right to proceed with the work. . . ." As noted above the record reflects that in the summer of 1993 the contractor failed and refused to prosecute Phases 1 and 2 with such diligence as to insure their completion by December 31, 1993, and that such failure was material and was not excusable within the provisions of COMAR 21.07.02.07(4) and (5).[11]

Accordingly, the Appellant's appeal is denied.

Wherefore, it is ORDERED this 25th day of June 1996, that the appeal is denied.

Dated: 6/25/96

Robert B. Harrison III
Chairman

I Concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

[11] For application of standards of conduct constituting breach and excuse therefore in other forums under differing factual contexts, see generally: Delfour, Inc., VABCA No. 2049, 89-1 BCA ¶21,394 (1988); Darwin Construction Co., Inc. v. United States, 811 F.2d 593 (1987) and the majority opinion in Discount Co., Inc. v. United States, 554 F.2d 435 (1977).

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Decision in MSBCA 1775, appeal of The Driggs Corporation under Maryland Aviation Administration Contract No. MAA-CO-93-011.

Dated: June 25, 1996

Mary F. Priscilla
Recorder