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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Understanding Uses of and Limitations on Liquidated Damages for Delays in Federal Government Contracts

*By Brian A. Darst**

Liquidated damages are amounts that are fixed, settled, and agreed upon in advance by parties to a contract to avoid future litigation as to the damages actually sustained by one party due to a specified breach by the other.[1] Liquidated damages provisions take many forms and can be found in a variety of private and public sector contracts.[2] Even without a liquidated damages provision, a nonbreaching party has the right to pursue common law damages based on its actual losses, including damages resulting from a contractor's failure to deliver products, perform services, or complete construction on time.[3] However, in the absence of a liquidated damages clause, not only must the nonbreaching party prove entitlement, but it must also quantify the amount of damages it sustained—a task that can be difficult when dealing with damages resulting from missed delivery or completion dates.

This BRIEFING PAPER addresses the uses of and limitations on clauses prescribed by Federal Acquisition Regulation (FAR) Subpart 11.5 that impose liquidated damages on prime contractors for delays in delivering supplies, performing services, and completing construction projects under their contracts with the U.S. Government.[4] Understanding these uses and limitations as prescribed by the FAR and agency FAR Supplements and as clarified by courts and administrative bodies is critical because an assessment or threatened assessment of liquidated damages can be devastating for a contractor. Not only can the amount of damages be substantial, but an actual or a threatened assessment of liquidated damages can adversely affect a contractor in many other ways. Indeed, an assessment of liquidated damages by the Government can affect not only the prime contractor; it can also adversely affect third parties, including a contractor's sureties or guarantors[5] and even subcontractors and suppliers that have agreed to similar liquidated damages or indemnification provisions as part of their subcontracts.[6] This BRIEFING PAPER will discuss several important substantive

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issues surrounding the Government's use and enforcement of these liquidated damages clauses. It is hoped that through an overview of the issues discussed in this PAPER Government contracts practitioners will be better prepared to manage the risks that each party faces when confronted with the use and enforcement of the FAR's liquidated damages provisions.

The Federal Government's Liquidated Damages Clauses

The FAR's Liquidated Damages Clauses

The purpose of FAR's liquidated damages clauses is "to allocate the consequences of a breach before it occurs,"[7] so as to "save the time and expense of litigating the issue of damages."[8] Once agreed to, liquidated damages specified in a contract and payable in the event of a specified breach will bind both parties to their agreement. The specified amount of liquidated damages will normally be enforced regardless of whether the actual damages sustained by the Government, as the nonbreaching party, exceed or fall short of the contractually specified amount.[9]

Liquidated damages clauses can be beneficial to both contracting parties by providing greater predictability of damage payments if one party fails to fulfill its delivery or performance obligations to the other party.[10] On the one hand, the FAR's clauses allow the Government to recover damages for a contractor's breach at the specified liquidated damages rate(s) without having to prove the actual amount of monetary damages it sustained. On the other hand, except as otherwise provided in the clauses, the Government is precluded from recovering both its actual and the specified liquidated damages amount(s) for the same breach or from reaching beyond the stipulated liquidated damages amount(s) to which the parties agreed.[11] As such, liquidated damages clauses can actually shield a contractor from the imposition of higher common law damages that the Government might otherwise be able to successfully claim for a breach of the contractor's obligation to deliver or complete the contract on time.

FAR Subpart 11.5 prescribes two liquidated damages clauses for use by federal contracting officials: (1) FAR 52.211-11, "Liquidated Damages—Supplies, Services, or Research and Development," which may be used in fixed-price contracts for supplies, services, or research and development when the Contracting Officer (CO) determines that liquidated damages are appropriate;[12] and (2) FAR 52.211-12, "Liquidated Damages—Construction," which may be used in contracts for construction, other than cost-plus-fixed-fee type contracts.[13] FAR 52.211-11 and 52.211-12 are short, and, at first, appear to be relatively straightforward. FAR 52.211-11 consists of three paragraphs; FAR 52.211-12 consists of only two paragraphs. These two FAR clauses are similar to one another in that they both provide that, if the prime contractor fails to complete the work, deliver the supplies, or perform the services within the time specified by the contract, it must pay liquidated damages in a specified amount for each calendar day of delay to be determined by the CO prior to the time of award.[14]

FAR 52.211-11 and 52.211-12 also provide that, even if the Government terminates the contract, the contractor continues to be responsible for payment of the liquidated damages. In the case of supply or service contracts, a defaulted contractor's responsibility for liquidated damages continues until the Government reasonably obtains

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delivery or performance of similar supplies or services.[15] In the case of construction contracts, liquidated damages may be assessed against a defaulted contractor until the work is completed.[16] Both FAR clauses state that liquidated damages are in addition to a contractor's responsibility for any excess repurchase costs under the applicable FAR "Termination" clause.[17]

As discussed below, there are some minor wording differences between FAR 52.211-11 and 52.211-12 regarding the Government's right to assess liquidated damages following a termination of the contractor's right to proceed.[18] At first, this might suggest that Government officials have greater rights to assess liquidated damages against a delinquent or terminated contractor under a construction contract than similarly situated contractors under supply, services, or research and development contracts. In truth, these are differences without a distinction.

Neither FAR clause limits the amount or duration that liquidated damages continue to accrue. However, just because a liquidated damages clause does not include a time limit or maximum amount, that in itself is not considered unreasonable or a penalty.[19] To the contrary, an assessment of liquidated damages has even been upheld where the total amount of damages recoverable by the Government exceeds the contract price.[20] The FAR's prescriptive language allows COs to specify a maximum amount or maximum period for assessing liquidated damages if such limits reflect the maximum probable damage to the Government.[21]

In the case of construction contracts, if the contract specifies more than one completion date for separate parts or stages of the work, FAR 52.211-12(a) must be revised to identify separate amounts of liquidated damages for each part or stage of the work to be performed.[22] When FAR 52.211-12 is modified to provide for more than one completion date for separate parts or stages of a construction project, the CO must also insert FAR 52.211-13, "Time Extensions," in the contract.[23] That clause, which only applies to construction contracts, provides that, if a Government-issued change order to the contract requires a time extension, it may limit the extension to the contact completion to only those specific elements related to the changed work. The contact completion date for other portions of the work need not be modified in such cases. Nonetheless, the change order may provide for an equitable adjustment to liquidated damages under the new completion schedule prescribed in the change order.[24]

FAR Supplement Liquidated Damages Clauses

With the exception of the General Services Administration (GSA), no other federal executive agency has prescribed any liquidated damages provisions beyond those identified in FAR Subpart 11.5. In February 2019, as part of an effort to clarify, update, and incorporate existing construction contract administration guidance previously implemented through internal GSA Public Building Service (PBS) policies, the GSA promulgated two new liquidated damages clauses, along with other related clauses and provisions, for use in construction contracts. These clauses are intended to supplement FAR 52.211-12 and FAR 51.211-13.[25] The new General Services Administration Acquisition Regulation (GSAR) clauses consist of GSAR 552.211-12, "Liquidated Damages-Construction," and GSAR 552.211-13, "Time Extensions."[26] Both GSAR clauses became effective on March 15, 2019, and tie the assessment of liquidated damages to a contractually defined "substantial completion" date rather than the contract completion date. They also prescribe various procedures by which the parties are to determine when "substantial completion" occurs.[27]

The Government's Decision To Rely On Liquidated Damages Provisions

On occasion, Government contracts have been characterized as "contracts of adhesion," in that they are based on standard forms and boilerplate clauses that are designed to fit a wide variety of situations by filling in appropriate blanks or annexing detailed technical specifications. Because, in general, contractors have weaker bargaining positions than the Government, if they want to do business with the Government, they must accept these contracts as presented and have very little opportunity to negotiate different terms.[28] The FAR's liquidated damages clauses do not fall within that category. In the vast majority of cases, use of a FAR liquidated damages clause in a contract is largely within the discretion of the CO, theoretically giving contractors a greater degree of flexibility to vary the terms of the standard clause. Indeed, the terms of a liquidated damages clause, including the liquidated damages rate, must be identified

in the Government's solicitation, and those terms must be agreed to by the contractor prior to award. The Government may not add a liquidated damages provision to a previously awarded contract without the contractor's consent.[29]

Having said this, for Department of Defense (DOD), the liquidated damages clause appearing at FAR 52.211-12 is mandatory for solicitations and contracts for construction projects exceeding $700,000, other than cost-plus-fixed-fee contracts. Even there, however, DOD contracting officials have a certain amount of flexibility since the clause is not required where the contractor cannot control the pace of the work.[30] Beyond that, there is no requirement that DOD or any civilian agency contracting officials insert either of the FAR's liquidated damages clauses in any solicitation or contract.[31] Instead, they are optional and are to be used only where the CO determines that "liquidated damages are appropriate."[32]

Various factors must be considered in determining whether the use of a liquidated damages clause is "appropriate" and when establishing the liquidated damages rate that reflects a reasonable forecast of just compensation for any harm that may be caused by a late delivery or untimely performance.[33]

When Inclusion Of A Liquidated Damages Clause Is Appropriate

In practice, liquidated damages clauses in Government contracts are most often used in contracts for the construction, alteration, or repair of buildings, structures, or other real property.[34] This has been the case since at least the mid-1950s if not earlier.[35] On occasion, liquidated damages clauses may also be found in Government supply contracts, including ship repair and shipbuilding contracts, and in leases of real estate. On rare occasions, liquidated damages clauses may even be found in federal research and development contracts.

The FAR's liquidated damages provisions are not, however, appropriate for every type of contract. For services, supplies, or research and development, FAR 52.211-11 is to be used only in fixed-price contracts.[36] For construction contracts, FAR 52.211-12 and GSAR 552.211-12 are to be used only in contracts for construction, other than those consisting of cost-plus-fixed-fee type contracts.[37] In addition, since both of the FAR's liquidated damages clauses revolve around a contractor's failure to deliver or perform by a contractually specified delivery date, performance date, or completion date, these clauses may only be used (1) when the time of delivery or timely performance is so important that the Government may reasonably expect to suffer damages if the delivery or performance is delinquent; and (2) the extent or amount of such damage would be difficult or impossible to estimate accurately or prove.[38]

FAR Subpart 11.5 gives Government COs a significant amount of discretion in determining when liquidated damages are appropriate.[39] At the same time, the FAR provides very little guidance on the factors that COs should consider when making that determination. All FAR 11.501(a) says is that, in determining the appropriateness of liquidated damages clause, COs must consider the potential impacts on (1) pricing, (2) competition, and (3) contract administration.[40] Beyond that, the FAR is silent on how any of these or other factors might influence a CO's decision to include a liquidated damages provision in a solicitation and resulting contract.

Nonetheless, the presence of a liquidated damages clause can increase the costs to the Government since a prudent offeror or bidder should consider the risks associated with such provisions as well as the liquidated damages rates when developing its proposed prices. The higher the liquidated damages rate, the greater the likelihood that a bidder or offeror will increase its proposed price to account for the risks associated with a failure to deliver or perform on time. Similarly, the presence of a liquidated damages clause may reduce the number of firms willing or able to compete for a contract. Some vendors may choose not to submit bids or proposals in response to a solicitation that includes a liquidated damages clause—especially one that includes a seemingly high liquidated damages amount. Other firms, especially small business concerns, may be unable to obtain necessary financing or performance bonds from a surety for projects that prescribe liquidated damages for a failure to deliver or perform.

Finally, the Government's and contractor's abilities to administer a contract efficiently and effectively is an important, albeit often overlooked factor that must be considered when determining whether to include a liquidated damages clause in a Government contract. If the

project's design is not yet complete, more than one prime contractor may be performing work on the project, or the contractor is otherwise unable to control the pace of the work,[41] liquidated damages may not be appropriate. Such matters increase the possibility of excusable delays and make enforcement of a liquidated damages provision in a Government contract more difficult. These are only a few of the difficulties that might arise during contract performance that need to be considered by COs before determining whether to include a liquidated damages clause in a solicitation or contract.

How COs Determine The Amount & Duration Of Liquidated Damages

Another important determination that COs must make before issuing a solicitation containing a liquidated damages clause is the rate(s) or amount(s) of liquidated damages that will be assessed against a contractor if it fails to perform by the delivery or completion date.[42] Both of the FAR's liquidated damages clauses, as well as the GSA's clause, provide that, if a contractor fails to perform within the time specified, the contractor must pay liquidated damages based on a specified amount or rate for each calendar day of delay.[43] Unless otherwise specified in the clause, credit is not given for intervening Saturdays, Sundays, or legal holidays.[44] Moreover, a delinquent contractor continues to be responsible for this daily liquidated damages rate until the supplies are delivered, services are performed, or the construction project is completed.[45]

Despite this, Government COs have the flexibility to specify a maximum amount or prescribe a maximum period for assessing liquidated damages in the clause. These limitations must reflect the maximum probable damages to the Government, but recognizing this fact makes it possible to negotiate limits on the overall impact to a delinquent contractor by modifying the standard FAR clauses. In addition, while the standard FAR clauses are based on the use of only a single liquidated damages rate, COs may insert more than one liquidated damages rate into the clause when he or she expects the probable damage to the Government to change over the contract's period of performance.[46] This is most often seen in phased construction contracts involving different parts or stages of the work. In such cases, FAR 11.503(b) directs COs to revise paragraph (a) of FAR 52.211-12 to identify a separate amount for delay for each part or stage of the work.[47] Other circumstances may dictate the use of different liquidated damages rates for different aspects of the performance.

The FAR provides very little guidance as to how to determine the daily amount of liquidated damages to be specified, beyond a statement that the liquidated damages rate must be a "reasonable forecast of just compensation for the harm" caused by the contractor's late delivery or untimely performance.[48] In the case of supply, service, or research and development contracts, the FAR provides no guidance at all regarding how a CO is to determine the appropriate amount. For construction contracts, the FAR simply states that the daily liquidated damages rate should include the estimated daily costs of Government inspection and superintendence, as well as an amount for other expected expenses associated with the contractor's delayed completion such as (1) renting substitute property, or (2) paying additional allowances for living quarters.[49] Beyond that, the FAR is silent on how a CO should go about determining an appropriate liquidated damages rate to compensate the Government for its probable damages.

This lack of guidance has led agencies to adopt different methodologies in determining the appropriate liquidated damages rate or amount. Some agencies, like the U.S. Army Corps of Engineers (USACE) and the GSA have developed sample liquidated damages calculation spreadsheets that can be used to determine the liquidated damages rate by building up this rate based on individual cost elements, such as average or actual salaries of different Government personnel involved in the administration of the contract, other costs likely to be incurred by the Government, etc. The USACE also encourages project managers and customers to include anticipated actual damages (including customer's estimated damages), when appropriate, as part of the agency's liquidated damages calculation.[50] Other agencies, like Naval Facilities Engineering Command (NAVFAC), have developed standard formulas to calculate liquidated damages rates based on the Government's independent cost estimate without regard to individual cost elements associated with the project in question. Thus, for example, while additional adjustments are possible for different types of construction projects, under NAVFAC's guidelines, if the estimate of construction costs for a project is between $50,000

and $100,000, the daily liquidated damages rate will be $140 per day; if the estimate of construction costs is between $100,000 and $200,000, the daily liquidated damages rate will be $200 per day, etc.[51] These rates are not dependent on the value of the contract ultimately awarded. Still other agencies have expressed the daily liquidated damages rate in terms of a percentage of the contract price. For example, in *DJ Manufacturing Corp. v. United States*, the liquidated damages rate in a supply contract for combat field packs to support troops participating in Operation Desert Storm was stated as 1/15 of 1% of the contract price for each day of delay.[52] Under that approach, even though the daily percentage does not change, the liquidated damages actually assessed vary from contractor to contractor depending on the contract value of the successful offeror or bidder. The higher contract value, the greater the amount of liquidated damages will be—regardless of the Government's actual damages resulting from a delay.

Regardless of how the liquidated damages figure was arrived at, a liquidated damages clause will be enforced if the amount is reasonable for the particular agreement at the time it was made.[53] Liquidated damages rates based on a buildup of the Government's supervision and administration costs have been found to be reasonable ways to establish foreseeable damages that the Government may suffer as a result of delayed contract completion.[54] At the same time, liquidated damages rates need not be tailor-made for each contract.[55] The use of standard rates derived from a manual that is part of the agency's procurement regulations, like that used by NAVFAC, is also presumed to be reasonable.[56] Of course, if an agency applies these guidelines improperly or incorrectly, the liquidated damages provisions may be stricken.[57] Also, while less common, other standard liquidated damages rates based on percentages of the total contract price have also found to be reasonable where the amount expressed was not so exorbitant in light of the prospective injury to the Government that it was plainly penal in nature.[58]

The Contractor's Ability To Influence Decisions Regarding Liquidated Damages Prior To Award

Because contracting agencies are most familiar with the conditions under which services and supplies will be used, the Government Accountability Office (GAO) will not normally question an agency's decisions concerning the best methods of accommodating its needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable.[59] Yet, like any other solicitation provision, it is possible for a potential bidder or offeror to challenge the inclusion of a liquidated damages clause or its terms prior to submission of its bid or proposal by filing a bid protest with the procuring agency, the GAO, or the U.S. Court of Federal Claims.[60] There are, of course no reported agency-level bid protest decisions, and there appear to be no reported decisions of the Court of Federal Claims involving bid protests challenging liquidated damages provisions in a Government contract. Nevertheless, in the past, the GAO has considered several bid protests alleging that a solicitation's liquidated damages clause improperly imposes a penalty on contractors. The GAO has almost always deferred to a procuring agency's discretion and denied the protest.[61] Even where the GAO has recognized that there might be some cost savings realized through lower prices resulting from the omission of a challenged liquidated damages clause, the Government has been given broad discretion.[62]

Despite this, liquidated damages fixed without any reasonable reference to probable actual damages will be held to be an unenforceable penalty.[63] To prevail, however, a protester must establish that there is "no possible relationship" between the amounts stipulated for liquidated damages and losses that are contemplated by the parties. Given such a high burden of proof, it is not surprising that the GAO has routinely denied protests challenging liquidated damages clauses in solicitations based on allegations that they impose improper penalties on a contractor.[64] This may also explain why there have been very few published GAO decisions since the mid-1990s involving challenges to the inclusion of a liquidated damages clause in a Government solicitation. The protester's success rate is extremely low.

This does not mean that potential offerors or bidders have no ability to influence the CO's decision on the use of a liquidated damages clause in a Government contract. Potential vendors may always raise questions regarding the propriety of liquidated damages clauses or suggest changes to their terms prior to submission of a bid or proposal without filing a formal bid protest. Depending on the circumstances, potential offerors may also try to negotiate limitations on the amount or duration of liquidated damages during the solicitation process. However,

if a contractor wishes to influence the Government's decision to include a liquidated damages clause or its terms, it must initiate this process before submission of proposals or the bid opening date. Liquidated damages clauses are considered "material" provisions. A bidder or offeror that fails to acknowledge a liquidated damages clause, or takes exception to it, will be eliminated from further consideration as being "nonresponsive" under a FAR Part 14 sealed bidding procurement[65] or may be excluded from further consideration as being materially noncompliant in a FAR Part 15 negotiated procurement.

Postaward Issues Related To Liquidated Damages Clauses

Since 1863 when the U.S. Court of Claims issued its first published decision declaring a "liquidated damages" clause in a Government contract to be an unenforceable penalty/forfeiture,[66] trial and appellate courts, boards of contract appeals, and the GAO have issued hundreds of decisions addressing the Government's and contractors' substantive rights under liquidated damages provisions, as well as the procedures that each party must follow to preserve those rights. Time and space constraints prohibit a discussion of every federal court and administrative decision involving disputes between the Government, private contractors, their sureties, and their subcontractors regarding the use and enforcement of liquidated damages provisions. Nonetheless, a number of core concepts have been developed by these courts and administrative bodies that provide an overview of how and when liquidated damages properly may be assessed against a Government contractor and when a contractor can avoid such damages or seek remission of liquidated damages improperly assessed by the Government.

Even if a contractor does not file a bid protest challenging a liquidated damages clause and executes the contract without objection, it may still challenge the Government's enforcement of a liquidated damages clause after award.[67] Following award, a court or board of contract appeals is limited to an examination of the conditions that existed at the time of contract formation to determine whether a liquidated damages clause or the amounts stated therein are appropriate. That, however, does not prevent a court or board of contract appeals from examining those conditions after an alleged breach has occurred, even though the breach upon which the Government bases its actual or threatened assessment of liquidated damages may occur several years later.

Not only may a contactor challenge the propriety of a liquidated damages clause or amount after award, but various events can arise during performance that provide additional substantive defenses excusing a contractor from payment of the specified liquidated damages rate or requiring remission of previously assessed liquidated damages by the Government. These challenges may take the form of claims by the contractor against the Government for improper withholdings of contract payments or actual assessments of liquidated damages or as affirmative defenses in response to a Government claim or counterclaim for liquidated damages.

Note, however, that while the scope of this BRIEFING PAPER is limited to substantive issues surrounding the use of liquidated damages clauses, in recent years, there have been a number of important federal court and boards of contract appeals decisions addressing certain procedural requirements of pursuing claims and defenses surrounding disputes over the enforcement of liquidated damages under the Contract Disputes Act of 1978 and its implementing regulations.[68] These procedural requirements must carefully be considered; otherwise meritorious claims and defenses may be dismissed or denied based on nonsubstantive grounds, leaving the affected party without any adequate remedies at law.[69]

Liquidated Damages Are Not Penalties Or Negative Performance Incentives

FAR 11.501 advises contracting officials that "[l]iquidated damages are not punitive and are not negative performance incentives."[70] Instead, the purpose of liquidated damages is to compensate the Government for probable damages resulting from a contractor's breach.[71] As such, one possible defense to the Government's attempt to assess liquidated damages against a delinquent contractor revolves around situations in which the clause represents an impermissible penalty rather than a means to reasonably forecast just compensation for the harm caused to the Government by the contractor's late delivery or untimely performance. Liquidated damages clauses will be enforced only if the parties did not intend them to be penalties.[72]

Prior to the first decade of the 20th century, courts

routinely refused to enforce liquidated damages provisions in both private and Government contracts as being improper penalties or forfeitures.[73] In 1902, this began to change. In *Sun Printing & Publishing Association v. Moore*, a case involving a dispute over the lease of a yacht between two private parties, the U.S. Supreme Court held that, except where "the sum fixed is greatly disproportionate to the presumed actual damages," a court "has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves."[74] Later, in 1907, in *United States v. Bethlehem Steel Co.*, the Supreme Court upheld a liquidated damages clause in a Government contract on the basis that "[t]he amount [was] not so extraordinarily disproportionate to the damage which might result from the [breach] as to show that the parties must have intended a penalty, and could not have meant liquidated damages."[75]

Today, the law does not look with disfavor upon liquidated damages provisions in contracts, and such clauses will be enforced when they represent fair and reasonable attempts to fix just compensation for anticipated loss to the Government caused by a contractor's breach of contract. Courts and boards of contract appeal routinely uphold the validity of liquidated damages in Government contracts.[76] As such, liquidated damages clauses will generally be upheld so long as three factors are present: "First, the injury caused by the breach must be difficult or impossible to estimate accurately; second, 'the parties must intend to provide for damages rather than for a penalty,' and; third, 'the sum stipulated must be a reasonable pre-estimate of the probable loss.' "[77] Nonetheless, if a liquidated damages clause is a disguised penalty or forfeiture, courts and boards of contract appeal will refuse to enforce them against a contractor.[78]

A contractor attempting to invalidate a liquidated damages clause based on an argument that it is an unenforceable penalty faces a difficult challenge. Although liquidated damages in Government contracts may not be used as penalties, when dealing with disputes over the enforceability of such damages clauses, courts and boards of contract appeals have found that "[if] the amount of damages is difficult to predict, a liquidated damages clause will generally be upheld unless [a] court [or board of contract appeals] determines that the parties must have intended a penalty rather than liquidated damages."[79] On occasion, courts will refuse to allow the Government to enforce a liquidated damages clause when the amount of liquidated damages is "plainly without reasonable relation to any probable damage which may follow a breach,"[80] or is "so extravagant, or so disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression."[81] Under such circumstances, imposition of liquidated damages would amount tantamount to imposition of an improper penalty.[82]

At the same time, a contractor wishing to avoid an assessment of liquidated damages or seeking remission of previously assessed liquidated damages by invalidating the clause on the basis that it is an unenforceable penalty bears the burden of proof.[83] This burden is an exacting one, because the use of liquidated damages clauses in Government contracts is premised on the fact that "[t]he extent or amount of such damages would be difficult or impossible to estimate accurately or prove."[84] When actual damages are uncertain or difficult to measure at the outset of performance, it naturally follows that it will be equally difficult for a court or a board of contract appeals to conclude that a liquidated damages amount or rate is an unreasonable projection of what those damages might be.[85] The Government need only establish that the damages claimed were reasonably anticipated when the contract was formed to defeat an assertion that the clause constitutes an impermissible penalty.[86] Because of this, a court or board of contract appeals generally will not "inquire into the process that the [CO] followed in arriving at the liquidated damages figure that was put forth in the solicitation and agreed to in the contract."[87]

Not only must a contractor prove that the liquidated damages rate is "unreasonable," but to invalidate a liquidated damages clause as an improper penalty, the contractor must also establish that the liquidated damages rate specified in the clause is unreasonable as a whole for that particular contract.[88] The courts' or boards of contract appeals' analyses of this issue are objective ones and focus on what damages were reasonably foreseeable at the time the contract was made.[89] The fact that a liquidated damages rate in a contract may reflect inaccurate estimates of individual cost elements is not a basis to vitiate the enforceability of the clause.[90] If a liquidated damages rate otherwise reflects a reasonable forecast of just

compensation for late deliveries or untimely performance it will be enforced—regardless of how that amount was calculated.[91] There must, however, be some relationship to the Government's anticipated damages resulting from a delay in performance. Thus, for example, in *D.E.W., Inc.*, the Armed Services Board of Contract Appeals (ASBCA) held that a liquidated damages rate in a contract for construction of a fuel cell shop based largely on the users' costs of another unrelated facility did not have a reasonable relationship that the Government could expect to suffer if the facility that was the subject of that dispute was not completed on time and, thus, the liquidated damages provision was unenforceable.[92]

Nonetheless, the fact that the actual damages incurred by the Government may not equal or be less than the liquidated damages amount or rate specified does not render the clause unenforceable. To the contrary, because the inquiry of whether the liquidated damages rate is a reasonable forecast, at the time the contract was made, of the damages the Government could expect to suffer in case of a future breach, courts and boards of contract appeals have routinely held that a liquidated damages clause is not rendered unenforceable just because actual damages are not equal to the contractual liability incurred as a result of the breach.[93] Liquidated damages clauses have been enforced at the prescribed amount or rate against a contractor even where no actual damages may have been sustained by the Government.[94] This is because, when presented with a challenge to a liquidated damages clause, a court or board of contract appeals must judge the appropriateness of the clause "as of the time of making the contract" without regard to the amount of damages, if any, actually incurred by the nonbreaching party.[95]

As the sovereign, money has never been much of a concern for the Government. Contracting officials may be far more interested in obtaining timely performance of a contract, whether that contract is for supplies, services, or construction, than in collecting monetary damages from a delinquent contractor.[96] Based on this, sometimes a contractor has tried to challenge the enforceability of a liquidated damages clause in a Government contract because it is really designed to act as "negative performance incentive" rather than a way to compensate the Government for its probable damages. This defense is often raised in conjunction with an argument that the liquidated damages clause is nothing more than a disguised penalty.

Liquidated damages clauses, whose sole purpose is to "spur performance" of a contractor or simply seek to extract a punishment for a breach that could produce no possible damage, will be found to be unenforceable penalties.[97] Nonetheless, just because FAR 11.501(b) states that liquidated damages are not to be used as negative performance incentives does not mean that they may not serve as security for timely performance. Liquidated damages clauses may, in addition to providing a means to establish and recover probable damages that the Government expects to incur, also induce due performance of a contract in itself without invalidating the clause on the basis that it is an improper penalty.[98]

Thus, in *Robinson v. United States*, the Supreme Court held that, in the case of Government construction contracts, "a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform."[99] Simply put, there is no inconsistency or prohibition on liquidated damages provisions serving a dual purpose of establishing a reasonable forecast of just damages while also seeking assurances of performance through a guarantee of fair compensation for a breach.[100] At the same time, an assessment or threatened assessment of liquidated damages may not be used solely as a negotiation tool to counter a potential claim or request for equitable adjustment (REA) by a contractor. This is especially true where the agency itself is responsible for many of the underlying delays.[101]

The Contract Completion Date & The Effect Of Excusable Delays

An assessment of liquidated damages under FAR 52.211-11 or 52.211-12 turns on the contract's delivery or completion date. For liquidated damages to be assessable against a contractor, a completion date or delivery date must be specified in the contract.[102] On the one hand, if a contractor fails to deliver the supplies, perform the services, or complete construction by a contract's due date, the Government's right to assess liquidated damages will begin once that delivery or completion date passes; they will continue to accrue until the supplies are delivered, the services are performed, or the construction is completed. On the other hand, if a contractor is able to complete a contract within the prescribed schedule, notwithstanding interim delays that precede the due date, no liquidated damages may be assessed against it.

So, establishing when performance is due is critical to determining whether the Government may assess liquidated damages against a contractor. This is not always easy because, while many contracts' delivery or completion dates are specified in terms of calendar dates, contract schedules can be expressed in a variety of different ways. For contracts for supplies or services, delivery or performance schedules may be expressed in terms of specific calendar dates, specific periods from the date of the contract (i.e., from the date of award, acceptance by the Government, or from a date shown as the "effective date" in the contract), specific periods from the date of receipt by the contractor of the notice of award or notice of acceptance by the Government, or a specific time for delivery after receipt of an individual order issued under an indefinite-delivery type contract or GSA Federal Supply Schedule contract.[103] Contract delivery dates in supply or service contracts may also be expressed in terms of desired delivery dates and required dates of delivery.[104] In the case of fixed-price construction contracts, COs are to insert FAR 52.211-10, "Commencement, Prosecution, and Completion of Work," which identifies a single completion date for the construction project.[105] But even there, the completion date may be based on the contractor's receipt of a notice to proceed by a certain day, in which case Alternate I to FAR 52.211.10 is to be used. In addition, in construction contracts, the contract may specify separate completion dates for separable items of work. In such cases, COs are directed to modify FAR 52.211-12 to provide for different liquidated damages for each completion date.[106]

Even after determining a contract's delivery or completion date, the problem with enforcing a liquidated damages clause as written is that, at varying times throughout performance, a contractor may be entitled to schedule relief due to the occurrence of one or more excusable delays. Sometimes those "excusable delays" overlap with "concurrent" nonexcusable delays—leading to questions of whether the contractor should be relieved of any liquidated damages or whether the amount of liquidated damages should be apportioned.

In disputes involving whether liquidated damages should be assessed against a delinquent contractor, the Government bears the initial burden of proving that liquidated damages were properly assessed by showing that the contract was not completed by the agreed contract completion or delivery date and that the period of time for which it assessed liquidated damages was correct.[107] The burden then shifts to the contractor to show that any delays were excusable.[108] Because of this, a judicial review of a liquidated damages assessment can be quite fact-intensive. Determining whether either party has met its burden of proof is particularly difficult in cases involving concurrent delays because, even though the contractor may have the burden to establish an excusable delay, as the claimant, "[t]he [G]overnment continues to have the overall burden of proof, and if the responsibility for days of delay is unclear, or if both parties contribute to the delay, for the [G]overnment to recover liquidated damages the [G]overnment must prove a clear apportionment of the delay attributable to each party."[109]

In the case of supply, service, or research and development contracts, FAR 52.211-11(c) states that a delinquent contractor may not be charged with liquidated damages when the delay in delivery or performance is beyond the control and without the fault or negligence of the contractor as defined by FAR 52.249-8, "Default—Fixed-Price Supply and Service."[110] FAR 52.211-12, the liquidated damages clause used in construction contracts, does not expressly state this, but liquidated damages also may not be assessed against a delinquent construction contractor for any periods of excusable delay.[111] Indeed, the default clause used in fixed-price construction contracts, FAR 52.249-10(b), "Default (Fixed-Price Construction)," provides that the contractor's right to proceed may not be terminated for default and, more importantly, that the contractor may not be charged with damages under that clause if two conditions are met. First, the delay in completing the work must arise from causes that are unforeseeable, beyond the contractor's control, and not resulting from the contractor's fault or negligence. Second, the excusable delay must affect the overall contract completion.[112]

Examples of excusable delays include, but are not limited to, acts of God or the public enemy, acts of the Government acting in either its sovereign or contractual capacity, acts of another contractor in performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers at any tier that arise from unforeseeable causes that are beyond the control and without the fault or negligence

of both the prime contractor and the subcontractors or suppliers.[113] As the FAR's default clauses state, these are only examples of excusable delays. If a contactor can show that its inability to complete the project on time was caused by an unforeseeable cause that was beyond its or its subcontractors' or suppliers' control, or without the fault or negligence of the contractor or its subcontractors or suppliers, liquidated damages may not be assessed against a contractor. At the same time, a prime contractor's problems with its subcontractors or suppliers alone do not automatically excuse that contractor's delays.[114] The contractor must be prepared to show that it or its subcontractors and suppliers experienced an excusable delay that was beyond their control and without their fault or negligence.[115]

A contractor asserting that the Government's assessment of liquidated damages is improper because of an excusable delay must also establish the extent of excusable delays to which it is entitled.[116] In particular, a contractor asserting that liquidated damages have improperly been assessed against it because of an excusable delay must also show that the contractor "took reasonable action to perform the contract notwithstanding the occurrence of such excuse," and the unforeseeable cause delayed the overall contract completion, i.e., the excusable delay affected the critical path of performance.[117] Even if a delay is the result of an unforeseeable cause, if a contractor cannot establish that the cause is beyond its control and without its fault or negligence, it will fail to meet this burden of proof.[118] All of these elements must be satisfied to effectively avoid the imposition of liquidated damages based on excusable delays.[119]

Normally, a delay that affects the overall completion of the contract work is a delay to work on the critical path.[120] As such, just because a contractor claims that it has experienced an excusable delay, if that claim is not supported by a critical path analysis or other reliable form of time impact analysis, a contractor cannot prevail in its challenge to the assessment of liquidated damages.[121] To avoid liquidated damages, a contractor claiming excusable delay must be prepared to present a detailed analysis, but that analysis and the underlying scheduling information upon which it is based must be credible.[122] As stated by the ASBCA in *Robust Construction, L.L.C.*:

> [A] credible [critical path] time impact analysis should take into account and give appropriate credit for all of the impacts to the project[.] *Norair Engineering Corp*., ENG BCA Nos. 3804, et al., 90-1 BCA ¶ 22,327 at 112,205) ("[a] contractor's initial network analysis. . .is constantly changing. . .. Activities which were not critical prior to the new event may be rendered critical;. . .. Whether the change or delay affects the critical path must be determined on the basis of conditions existing *immediately prior to its occurrence*[,] not on how it might have changed what someone planned (or should have planned) months or years previously[.]")[123]

Therefore, it is essential for contractors to maintain accurate schedules and supporting reports. Daily inspection reports have been held to be prima facie evidence of the daily conditions, as they existed at the time of performance.[124] A contractor may provide persuasive evidence of what were critical activities and what the proximate cause of delay in contract completion even without a critical path method analysis.[125] Nonetheless, there must be specific proof of not only the excusable delay, but also the effect that delay had on not only one item of work, but on the completion of the project as a whole.[126] Finally, it must be emphasized that contractors wishing to avoid the assessment of liquidated damages against it or seeking remission of previously assessed liquidated damages may not demonstrate excusable delay based solely on a "total time theory," in which the contractor just asserts that some wrongful Government action or other excusable delay contributed to the delay of the contract completion date by blaming the Government or some other event for the entire delay between the original and extended completion dates.[127]

The Effect Of Concurrent Delays & Apportionment

Excusable delays rarely occur in a vacuum. Delays often overlap with one another, some of which may be excusable and some of which may not be excusable. One of the more controversial and unresolved issues that arises in the context of excusable delays is the effect that concurrent excusable and nonexcusable delays have on the Government's ability to assess liquidated damages against a contractor that fails to deliver or perform a contract on time. This applies to all types of concurrent delays involving excusable and nonexcusable delays—not just Government-caused delays that would entitle the contractor to financial reimbursement or damages from the Government.[128] Thus, for example, if the contractor or its subcontractor is experiencing a nonexcusable delay,

but at the same time, an act of God, embargo, quarantine, epidemic, etc. is also delaying completion of the contract by the due date, there is a concurrent delay. Under the applicable default clause, the contractor may be entitled to an extension in the contract's schedule.[129] If a contractor can show that an excusable delay affected the critical path of performance, the Government may recover liquidated damages only to the extent that there were additional delays for which the contractor was responsible (beyond those that were excusable) and that "there is in the proof a clear apportionment of the delay and the expense attributable to each party."[130]

The effects of concurrent delays on the Government's right to assess liquidated damages against a delinquent contractor are especially challenging where the excusable portion of the delay is the result of some action or inaction on the part of the Government. In 1914, the Supreme Court held in *United States v. United Engineering Co.* that "when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party [i.e., the Government] must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived."[131] Based on this holding, if a contractor and the Government both contribute to a delay that ultimately causes the contractor to be unable to deliver or complete the contract on time, i.e., the delay is "concurrent," as a general rule, neither the Government nor the contractor can recover damages from the other. Liquidated damages will be excused if the contractor can demonstrate that the Government caused the delay, even if the contractor may also have contributed to the delay during the same time period.[132]

The question that has remained unresolved since the Court's decision in *United Engineering Co.* 115 years ago is whether a Government-caused delay impacting the delivery or completion schedule should relieve a contractor from all liquidated damages, even if the contractor shares some of the responsibility for this delay, or whether a contractor may still be assessed some liquidated damages if the delay can be apportioned among excusable and nonexcusable events. Under the traditional view, which is known as the "rule against apportionment," if the Government is responsible for part of the delay, the Government may not recover any liquidated damages from the contractor. Under the rule against apportionment, a court or board of contract appeals will not attempt to apportion the delay, but will simply hold that the liquidated damages provision in the contract is "annulled."[133]

The rule against apportionment was extensively followed by the court and boards of contract appeals for many years.[134] Despite this, more recently, a number of court and board of contract appeals decisions have allowed for a partial assessment of liquidated damages if the Government can prove a clear apportionment of delay attributable to each party.[135] This is sometimes referred to as the "clear apportionment rule." It allows a court or board of contact appeals to reduce the amount of liquidated damages assessable against a contractor during a concurrent delay without voiding the clause in its entirety. Thus, in *R.P. Wallace, Inc. v. United States*, rather than void the liquidated damages clause where the Government was partly responsible for the delay, the Court of Federal Claims found that the Government's and contractor's delays were, in fact, sequential rather than truly concurrent, and reduced the number of days in which liquidated damages could be assessed against a contractor from 250 days to 229 days by apportioning responsibility for the overall delay in a renovation and repair contract between the Navy and the contractor.[136]

The current status of the rule against apportionment in Government contracts remains unsettled. The traditional rule against apportionment and the more modern clear apportionment rule continue to coexist at the Court of Federal Claims and the boards of contract appeals,[137] leading to potentially conflicting results. As the Court of Federal Claims observed in one case:

> In light of the extensive discussions in [*PCL Constr. Servs., Inc. v. United States*, 53 Fed. Cl. 479 (2002)] and [*R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, (2004)] of the rule against apportionment and the conflicting rule allowing apportionment of liquidated damages, and in the absence of a precedential decision resolving the apparent conflict between these two analyses of controlling precedent on this issue, the court here will examine the facts of this case under both the rule that forbids apportionment and the rule that permits apportionment of liquidated damages.[138]

Nonetheless, despite the continuing uncertainty, one fact remains. If the contractor and the Government both contribute to a delay affecting the critical path or completion date—i.e., the delay is considered to be "concurrent," as a general rule, neither party can recover damages from the other, unless there is in the proof a clear apportionment of the delay and expense attributable to each party. Thus, in *KERMON Environmental Services Corp*., the ASBCA held that "[i]n general**,** liquidated damages will be excused if a contractor demonstrates that the Government caused the delay, even if the contractor also contributed to the delay during that same time period."[139]

The contractor bears the burden of proving that the Government caused or contributed to the delay and that the delayed items complained of caused a delay to the completion of the project as a whole.[140] Again, like any other excusable delay, the contractor must also prove that the Government's actions or inactions caused a delay to the completion of the project as a whole.[141] This can be particularly daunting when dealing with different causes of delay affecting different aspects of the work, whether the delays occurred at the same time or at different times during the course of the contract.[142]

The Effect Of A Waived Delivery Or Completion Date—The *DeVito* Rule

Time is of the essence in every Government contract that incorporates a fixed date for performance.[143] Under some conditions, however, the delivery or completion date may be "waived" by the Government where the Government elects to allow a delinquent contractor to perform past the contract's due date. According to the FAR, when considering whether to terminate a contract for default for failure to make delivery of supplies or perform services within the time specified in a contract, if the Government has taken any action that might be construed as a waiver to the contract's delivery or performance date, the CO must send a notice to the contractor setting forth a new date for the contractor to make delivery or complete performance and this notice must reserve the Government's rights under the default clause.[144] This is because, if a waiver has occurred, the Government surrenders its right to terminate a contractor for default based on the original delivery or completion date. Indeed, if the Government improperly terminates a contractor under the default clause based on a contractor's failure to perform by this waived delivery date, the contractor's rights will be the same as though it was terminated for the Government's convenience.[145]

In addition, in the event of a waiver, the Government surrenders its right to assess liquidated damages against the delinquent contractor. This is frequently referred to as the "*DeVito* rule." To establish a waiver of the contract's delivery or completion date, which is in reality an "election" not to terminate the contractor for default, and successfully invoke the *DeVito* rule, a contractor must prove the following:

- There was a failure by the Government to terminate the contract within a reasonable time after the default under circumstances indicating the Government's forbearance, and
- The contractor relied on the Government's failure to terminate and continued performance by it under the contract, with the Government's knowledge and implied or express consent.[146]

Both conditions must arise after the date of the default in order to establish a waiver.[147] Nonetheless, when the fixed delivery dates in a contract, which have passed, "the inference is created that time is no longer of the essence so long as the constructive election not to terminate continues and the contractor proceeds with performance."[148] Time does not become of the essence again until establishment of a new completion date through a bilateral modification or unilaterally by the Government under the applicable FAR default clause.[149]

The case stating the rule, *DeVito v. United States*, involved a waiver of the Government's fixed delivery dates under a supply contract and has been used successfully on a number of occasions to overturn a default termination of supply and service contracts. The *DeVito* rule of waiver has rarely been applied to construction contracts to either declare a default termination improper or preclude the Government from assessing liquidated damages against the contractor. This is because, in most cases, a construction contractor will receive payment for work completed past the specified completion date, and the Government may seek liquidated damages for late completion under FAR 52.211-12.[150] In fact, the presence of a liquidated damages clause in a contract can mitigate against the finding that the Government has simply

waived the delivery or completion date. As explained by the ASBCA in *Nisei Construction. Co.*, the *DeVito* rule—

> is not normally applicable where the contract contains the usual provisions applicable to construction contracts entitling the contractor to payment for work performed subsequent to the specified completion date but also entitling the Government to recover liquidated damages for late completion. With such provisions in the contract, detrimental reliance on the contractor's part cannot be found merely from a period of Government forbearance coupled with continued contractor performance in reliance thereon . . .. Moreover, with these provisions in the contract Government encouragement to expedite completion during a forbearance period should not be interpreted as a disestablishment of the contractually-prescribed completion date absent further manifestation by the Government that it no longer considered that date to be enforceable. [Where such a disestablishment was found], the *DeVito* doctrine was invoked with recognition that the case was unusual.[151]

Whether "unusual circumstances" involving an alleged waiver under a construction contract exist is fact specific and turns on (1) the Government's conduct with respect to the length of the forbearance period, (2) the Government's conduct regarding its intent to assess liquidated damages, and (3) whether the Government treated the contract completion date as no longer of the essence.[152] The mere fact that a contractor misses the contract's completion date, continues performance past the scheduled completion dates, and may be allowed to complete construction itself does not establish a waiver or preclude the Government from asserting liquidated damages. With construction contracts, Government encouragement to expedite completion during a forbearance period should not be interpreted as a disestablishment of the contractually prescribed completion date absent further manifestation by the Government that it no longer considered that date to be enforceable.[153]

Again, the contractor bears the burden of proving those facts to support a finding that the Government has waived a default on a public contract, and that burden is heavier where the right to terminate has been expressly reserved by the Government or when liquidated damages have been assessed against the contractor.[154] At the same time, a failure by the Government to mention or assess liquidated damages has been considered to be an indicator that time was "no longer of the essence," and that the scheduled completion date is no longer enforceable for terminating the contractor for default or for assessing liquidated damages. Nonetheless, in determining whether "unusual circumstances" exist, the Government's failure to mention or assess liquidated damages has been considered an indicator that time was no longer of the essence in the contract, and the scheduled completion dates were no longer enforceable for assessing liquidated damages.[155]

Thus, for example, in *Martin Construction, Inc. v. United States*, the Court of Federal Claims stated that the USACE's issuance of two modifications changing the scope of work under a construction contract after the completion date had passed and after the USACE began to assess liquidated damages against the contractor, may have been one of those rare or exceptional circumstances under which waiver should be applied under the *DeVito* rule.[156] The court described the Government's statements that it wanted the contractor to "perform the additional work specified in the modifications, but you are still in default because the completion date remains the same" to be "nonsensical."[157]

The Effect Of A Termination Of The Contract's Right To Proceed

Every fixed-price contract for supplies, services, and construction includes a clause giving the CO the right to terminate the contract for the Government's convenience.[158] Every fixed-price contract for supplies, services, and construction also includes a clause giving the Government the right to default a contractor for, among other things, failure to deliver or complete the project by the contractually specified due date.[159] The circumstances giving rise to the Government's right to default contractors before or after the contractor fails to deliver supplies, perform services, or complete a construction project by the due date specified in the contract differ from clause to clause.

Just because a contract contains a liquidated damages clause does not prevent the Government from exercising its right to terminate the contractor for default under these clauses.[160] Similarly, it is not necessary to default a contractor to assess liquidated damages against it. As a general rule, in construction contracts, since the Government must pay the contractor for that part of the work satisfactorily completed prior to default, the Government

typically does not terminate for default just because the complete date passes. Instead, it frequently relies on surety takeover agreements, completion by third parties, assessments of liquidated damages, or both.[161] At the same time, just because the Government chooses to terminate a contract for default does not preclude the Government from continuing to assess liquidated damages against the contractor following the termination. FAR 52.211-11(b) and 52.211-12(b) state that liquidated damages continue to accrue even after a termination occurs.

In the case of contracts for supplies, services, and research and development, if the Government terminates the contract for default under the FAR's "Default-Fixed-Price Supply and Service" clause, the contractor remains liable for liquidated damages until the Government reasonably obtains delivery or performance of similar supplies or services.[162] Liquidated damages would not accrue if the Government terminates the contract for its own convenience.

The liquidated damages clause used in construction contracts similarly provides that, if the Government terminates the contractor's right to proceed, liquidated damages will continue to accrue until the work is completed.[163] Unlike FAR 52.211-11(b), the FAR's liquidated damages clause used in construction contracts does not mention the "Default (Fixed-Price Construction)" clause appearing at FAR 52.249-10. Instead, FAR 52.211-12 (b) simply refers to the Government's right to assess liquidated damages even if the Government "terminates the Contractor's right to proceed" and makes reference to a nonexistent "Termination" clause. Nor does FAR 52.211-12 provide that a construction contractor will not be charged with excusable delays referenced in that clause. Despite this, as long ago as 1955, the Court of Claims, the U.S. Court of Appeals for the Federal Circuit's predecessor, held that the Government may not recover prospective liquidated damages if the Government terminates a construction contract for its own convenience.[164] A termination for convenience would cut short the continued accrual of such damages until the work is completed by another party.

A termination for the Government's convenience alone would not necessarily relieve the contractor of liquidated damages occurring between the missed delivery or completion date and the date of termination. It would, however, insulate a delinquent contractor from the assessment of liquidated damages for any period following the termination.[165] Nonetheless, even after a termination for the Government's convenience, to avoid an assessment of liquidated damages for the time between the missed delivery or completion date and the date of termination, a delinquent contractor may still have to establish that the delay preceding the Government's termination was caused by some other excusable delay, that it was entitled to additional time under another remedy-granting FAR clause, or that the delivery or completion date had otherwise been waived.

If the Government terminates a contractor for default, the Government—not the contractor—bears the burden of proving that the termination was justified.[166] To satisfy this burden, the Government must demonstrate that there was an existing ground for default at the time of termination.[167] The FAR default clauses used in fixed-price supply, service, and construction contracts state that, if following such a termination, it is determined that the contractor was not in default or that the default was excusable, the default termination will be converted into a termination for convenience, and the rights and obligations of the parties shall be the same as if the termination had been for the Government's convenience.[168] Thus, if the Government fails to establish this, or the default was excusable, the Government may not recover liquidated damages under FAR 52.211-11(b) or 52.211-12(b).[169]

As stated in *Timberland Paving & Construction Co. v. United States*, "[w]here a termination for default is. . .in the contemplation of the law one for the convenience of the [G]overnment, neither liquidated damages for any period following the termination nor common law damages for a breach may properly be assessed against a [G]overnment contractor."[170] Despite this, in *K-Con Building Systems, Inc. v. United States*, the Court of Federal Claims held that, under the express terms of the liquidated damages clause for construction, FAR 52.211-12(b), so long as work is not completed or accepted, a contractor is liable for liquidated damages regardless of whether its contract had been terminated, even if the Government erroneously terminated the contractor for default.[171] The court refused to apply the doctrine of prior material breach, holding that, even though the Government had improperly terminated K-Con's contract for default prior to the assessment of liquidated damages.

The standard FAR liquidated damages clauses do not impose a ceiling on the amount of liquidated damages that can be assessed against a delinquent contractor or otherwise limit the duration that such damages continue to accrue. Yet, it is always possible for the CO to establish maximum amounts or maximum periods for assessing liquidated damages if such limits reflect the maximum probable damage to the Government.[172] Even without these limitations, and even where the Government properly terminates a supply or service contract for default (e.g., where the contractor is in default and there are no excusable delays), courts and boards of contract appeals will refuse to allow the Government to assess liquidated damages against a contractor where the Government ultimately chooses not to issue a reprocurement contract for the supplies or services.[173] This is because, under FAR 52.211-11(b), the contractor's continued liability for liquidated damages is based on when the Government "reasonably obtains delivery or performance of similar supplies or services."[174]

The nature of construction contracts, as well as differences in the wording of FAR 52.211-11(b) and 52.211-12(b), make it more difficult to argue this. Nonetheless, if, after a default termination, the Government chooses not to complete the project or otherwise fails to mitigate its damages as discussed below, the same line of reasoning that has even been used to prevent the Government from assessing liquidated damages in a supply contract could be equally effective in challenging an assessment of liquidated damages following the default termination of a construction contract.

The Effect Of Other FAR Remedy-Granting Clauses

Many of the substantive defenses to an actual or threatened assessment of liquidated damages discussed thus far have involved the Government's rights and obligations under the applicable default clause, whether the Government has waived a contract's delivery or completion date, and whether a contractor has experienced one or more excusable delays. There are other remedy-granting provisions in a Government contract, many of which are prescribed by the FAR, that may also be used to avoid liquidated damages for a contractor's failure to meet the contract's delivery or completion date. These clauses require the Government to grant time extensions and/or limit the Government's ability to assess liquidated damages against a contractor that is unable to complete the contract on time. In fact, many of the events that trigger these remedy-granting FAR clauses are also "excusable" delays under the applicable default clause—especially those caused by actions or inactions of the Government acting in its contractual capacity. However, it is equally important to recognize that these clauses independently provide for schedule relief or other equitable adjustments to the time of performance.

Although not intended to be all-encompassing, the following are among some of the more frequently encountered FAR clauses that require the Government to provide an equitable adjustment to the time of performance:

- The "Differing Site Conditions" clause,[175] used in construction contracts, requires the Government to grant an equitable adjustment for certain subsurface or latent physical conditions encountered at the work site;

- The "Use and Possession Prior to Completion" clause[176] gives the Government the right to take possession of any completed or partially completed part of a construction project and also requires the Government to provide an equitable adjustment in the contract price or the time of completion caused by that possession or use;

- The "Suspension of Work" clause[177] and "Stop-Work Order" clause[178] require equitable adjustments in supply and service contracts that result from an actual or constructive interruption or delay of the work;[179]

- The "Changes" clauses[180] require equitable adjustments if a Government-directed or constructive change increases or decreases the contractor's costs of, or the time required for, performance of any part of the required work regardless of whether it was changed by the order itself; and

- The "Government Property" clause[181] requires COs to consider an equitable adjustment if Government-furnished property is not delivered to the contractor by the dates specified or if such Government-furnished property is in a condition that is not suitable for its intended purpose.

The circumstances, under which the Government must grant a contractor relief under any of these or other remedy-granting clauses, as well as the timing, form, and content of a contractor's request for such relief differ from clause to clause. Each clause imposes its own notification requirements on the contractor, and, ultimately, like any other claim or request for equitable adjustment, a contractor must establish its entitlement under the clause and quantify the amount of monetary or schedule relief to which it is entitled. Nonetheless, all of these FAR clauses can form an independent basis to obtain schedule relief and an adjustment to the contract completion date and may be used to avoid the imposition of liquidated damages by the Government. Depending on the facts, it may even be possible to combine more than one of these remedy-granting FAR clauses to avoid the effects of a liquidated damages clause.

There are two limitations on the use of certain FAR remedy-granting clauses that must be recognized by construction contractors seeking schedule relief or objecting to an assessment of liquidated damages against it.

First, the "Suspension of Work" clause, FAR 52.242-14, which appears in fixed-price construction contracts, may not be used to avoid an assessment or seek remission of liquidated damages. Paragraph (b) of the clause only allows for the recovery of increased costs of performance of the contract (excluding profit) if performance of all or any part of the work is suspended, delayed, or interrupted for an unreasonable period of time by (1) an act of the CO in the administration of the contract or (2) by the CO's failure to act within the time specified in the contract, or within a reasonable time if not specified.[182] In contrast, paragraph (b) of the "Stop-Work Order" clause, FAR 52.242-15, which is used in supplies, services, and research and development contracts, requires the CO to make an equitable adjustment in the delivery schedule or contract price or both if a stop-work order is issued, and that order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of the contract.[183] Similarly, under paragraph (a) of the "Government Delay of Work" clause, FAR 52.242-17, which is used in fixed-price supply contracts, if performance of all or any part of the work is delayed or interrupted by actions or failures to act by the Government like that specified in FAR 52.242-14, in addition to an adjustment to contract price for any increases in the costs of performance (excluding profit) caused by the delay or interruption, an "[a]djustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption."[184] It may still be necessary for a contractor to show that any delay or interruption was not caused by any delay or other cause, including the fault or negligence of the contractor to obtain relief under FAR 52.242-17(a), but it and FAR 52.242-15 can provide additional bases to claim schedule relief due to actions or inactions on the part of Government officials in addition to the "excusable delays" under a default termination.

Second, if a construction contract contains the liquidated damages clause at FAR 52.211-12 and the contract specifies more than one completion date for separate parts or stages of the work, not only must the liquidated damages clause be modified to identify different amounts for liquidated damages for each separate part or stage of the work, but the CO must also insert FAR 52.211-13, "Time Extensions."[185] This clause allows COs to limit any extensions to the contract completion date required by the "Changes" clause to only those specific elements related to the changed work without changing the other contract completion dates for other portions of the work that will not be altered.[186] The effect of FAR 52.211-13 is to permit the Government to continue to assess liquidated damages based on the original completion date—at least for those portions of the work unaffected by a change, even though such change would otherwise preclude a contractor from completing the construction project by the original contract schedule. Although the clause goes on to state that a "change order may provide an equitable readjustment of liquidated damages under the new completion schedule," there is nothing in the clause that requires such readjustment or that describes how they are to be determined.

At first, the effects of FAR 52.211-13 appear to be limited to those construction contracts that specify separate completion dates and liquidated damages rates for different phases or elements of the work, but in 2018, the ASBCA held that FAR 52.211-13 may be inserted in contracts other than those in which the liquidated damages clause has been revised to reflect different liquidated damages amounts for different aspects of a project.[187] The ASBCA went on to hold that, under FAR 52.211-13, the Government may add work to a construction contract

unilaterally, while retaining its right to liquidated damages that already withheld since the clause allows COs to grant a time extension "only for those specific elements related to the changed work" and provide "that the remaining contract completion dates for all other portions of the work will not be altered."[188]

It is always possible for the parties to a contract to enter into a bilateral modification or supplemental agreement following the issuance of a change order to add time to discrete aspects of a project, but to retain liquidated damages already withheld even without FAR 52.211-13.[189] Thus, in *Sundt Construction, Inc.*, the ASBCA held that in a contract that provided for separate liquidated damages assessments for late completion of the project and for individual housing units, the parties had agreed by bilateral modification to extend the completion date for one of the units in which changes were made, but that, based on the language of the modification, the Government had preserved its right to retain liquidated damages that had already been assessed.[190] By giving the Government the right to unilaterally determine which aspects of the project should be extended even though no separate completion dates or liquidated damages rates had previously been agreed to by the parties, while reserving for itself the right to continue to insist on payment of liquidated damages based on the original completion date, the board appears to have negated many of the protections afforded to construction contractors under the "Changes" clause. It is something of which construction contractors must be aware of when negotiating the terms of the initial contract, but also any requests for change order proposals issued by the Government.[191]

The Effect Of Substantial Completion & Beneficial Occupancy

Under FAR 52.211-12(a), if a contractor fails to complete a construction project within the time specified in the contract and no other viable defense exists, it must pay the Government the liquidated damages at the prescribed rate until the work is "completed or accepted."[192] FAR 52.211-11 does not include similar language, but because the purpose of liquidated damages is to compensate the Government for its probable damages due to late delivery or untimely performance,[193] the Government only has the right to assess liquidated damages at the prescribed rate in the clause until the supplies are delivered, and the services are completed and accepted.

Once completion or acceptance takes place, the Government is still entitled to recover any liquidated damages that have accrued up to that point, but no future liquidated damages may be assessed against a contractor under FAR 52.211-11 or FAR 52.211-12. Of course, if the Government unreasonably delays the inspection or approval process,[194] imposes unspecified test requirements on a contractor,[195] or erroneously rejects compliant end items, services, or construction work, the Government may not assess liquidated damages resulting from any delays caused by the improper action or inaction.[196] These are considered "excusable delays."

There are subtle, albeit important, differences between "completion" and "acceptance." "Acceptance" is defined in the FAR as an acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in FAR Subpart 46.5 and subject to other terms and conditions of a contract.[197] Acceptance may take place before delivery, at the time of delivery, or even after delivery, depending on the terms of the contract; it may take place at the source or at destination, or at some other place specified in the contract,[198] and it can be accomplished formally through Material Inspection and Receiving Reports or constructively.[199]

The FAR, on the other hand, does not define "completion." Nonetheless, the contractor's completion may not coincide with the Government's "acceptance." In some cases, completion can occur before possession by the Government. In other cases, completion may occur after the Government takes possession, but before final acceptance, such as where the Government exercises its rights under the FAR's "Use and Possession Prior to Completion" clause[200] in construction contracts or, on rare occasion, conditionally accept nonconforming supplies, subject to correction, replacement, or repair.[201] In fact, in some cases, if the contractor has continuing obligations, completion of a contract may not occur until long after acceptance has taken place.

The fact that "acceptance" and "completion" are not synonymous with one another has led to the development of the concepts of "substantial completion" and "beneficial occupancy"—at least in the context of construction contracts. The terms "substantial completion" and "beneficial occupancy" are often used interchangeably, but they

are not the same.[202] Beneficial occupancy occurs when the Government, prior to final acceptance, takes and uses the work prior to completion. Beneficial occupancy can be temporary—in which the Government takes and uses the work only for a limited time and then returns the work to the contractor, or it may be permanent beneficial occupancy, in which the Government takes and uses the work prior to completion, but does not return it to the contractor prior to acceptance. If the Government takes beneficial occupancy, the contractor is relieved of the responsibility for any losses or damages to the work resulting from the Government's use or possession. However, it is important to note that just because the Government takes beneficial occupancy, that does not mean that the work is substantially complete.[203]

The effect of beneficial occupancy on a contractor's liability for liquidated damages can be particularly challenging where the Government only takes beneficial occupancy of a portion of the work because, as previously stated, beneficial occupancy does not necessarily represent that the work is substantially complete. This is one reason why the FAR directs COs to identify separate liquidated damages amounts for delays of separate parts or stages or the work where a construction project specifies more than one completion for separate parts or stages or the work.[204]

Substantial completion, on the other hand, occurs when all major components that make up a project are completed by the contractor, and the project is functional for its intended use by the Government. The Government may not assess liquidated damages once a project is "substantially complete."[205] Unlike beneficial occupancy, the Government need not take physical possession or use the work for substantial completion to occur. Instead, a project is considered substantially complete—

> when it is capable of being used for its intended purpose. In determining whether the project is capable of being used for its intended purpose, it is necessary to consider the specific provisions laid out in the contract. Thus, it is first necessary to identify the contract provisions defining the parties' expectations as to the owner's reasonable use of its facility.[206]

Disputes involving whether a project has been substantially completed frequently involve fact-intensive analyses. Substantial completion of work on a contract occurs only when a high percentage of work is complete and the project is available for its intended use.[207] However, as a general rule, a finding of substantial completion is only proper where the Government has obtained, for all intents and purposes, all the benefits it reasonably anticipated receiving under the contract.[208] This can be a particularly difficult burden to meet. Thus, for example, establishing that substantial completion has occurred requires more than a showing that the project has been tendered for acceptance, and that only a limited number of defects or nonconformances in a building are noted on a punch list that are later corrected by a contractor. Instead, substantial completion is determined by "whether the project is capable of being occupied or used by the Government for its intended purpose, notwithstanding that work on punchlist items may remain to be done."[209] If one of the deficiencies noted in a punchlist that needs to be corrected is considered to be material, a board of contract appeal or court will likely find that that the contractor has not substantially completed the contract and, barring any other excuse, uphold the Government's assessment of liquidated damages against the contractor until the deficiency is corrected and the building is accepted by the Government. Because of this, uncompleted or defective items involving essential safety features generally will preclude a finding that a construction project has been substantially completed because the facilities being constructed cannot adequately serve their intended purpose.[210]

The new GSAR clauses recognize that there may be different completion dates required for different phases or portions of the work, but GSAR 552.211-70, "Substantial Completion," goes on to state that construction work will only be deemed "substantially complete" if and only if the contractor has "completed the work and related contract obligations in accordance with the contract documents, such that the Government may enjoy the intended access, occupancy, possession, and use of the entire work without impairment due to incomplete or deficient work, and without interference from the Contractor's completion of remaining work or correction of deficiencies in completed work."[211] In addition, this clause states that the work will not be deemed to be substantially complete unless all fire and life safety systems are tested and accepted by the authority having jurisdiction where such acceptance is contractually required, and that, "unless otherwise specifically noted or otherwise clear from context, all references in the contract to 'acceptance' shall

refer to the issuance of a written determination of substantial completion by the Contracting Officer."[212]

The Government Duty To Mitigate Its Damages

Another possible defense against the assessment of liquidated damages relates to the Government's duty to mitigate its damages notwithstanding a contractor's failure to deliver or perform the contract by the required due date. The doctrine of mitigation requires a nondefaulting party to act within a reasonable time after default to mitigate its damages.[213] Accordingly, FAR 11.501(c) directs COs to take "all reasonable steps to mitigate liquidated damages."[214] The FAR does not describe what steps must be taken or otherwise define what is "reasonable," but it does encourage COs who may be considering terminating a contract containing a liquidated damages clause for default to (1) obtain performance by the contractor or (2) terminate the contract and repurchase the goods, services, or construction in accordance with FAR Subpart 49.4. These actions must be taken "expeditiously," since, according to the FAR, prompt action will prevent excessive loss to the defaulting contractor and also protect the interests of the Government.[215]

The Government's duty to mitigate is important because FAR 52.211-11(b) and FAR 52.211-12(b) expressly state that the contractor continues to be liable for liquidated damages even after a default termination and those damages continue to accrue until the Government "reasonably obtains delivery or performance of similar supplies or services," or until the work is completed in the case of construction. Failure to mitigate these damages could result in a court or board of contract appeals ordering a reduction in the amount of damages or precluding the Government from exercising its rights under FAR 52.211-11 or FAR 52.211.12 at all.[216] The issue of whether the Government has acted to mitigate its damages within a reasonable time after default is a question of fact,[217] but ultimately, the contractor bears the burden of proof to establish a prima facie case for the Government's failure to mitigate under the circumstances to avoid an otherwise appropriate assessment of liquidated damages.[218]

With regard to FAR 11.501(c)'s directive to seek to obtain performance by the contractor expeditiously, it must be emphasized that the FAR's default clauses do not compel a termination in the event of a default. Instead, they simply permit termination for default if such action is appropriate in the business judgment of the responsible Government officials.[219] Before exercising the Government's right to terminate a contractor for default, COs must consider various factors in determining whether to terminate a contractor for default.[220]

A default termination may not be in the Government's interests. As such, FAR 49.402-4 sets forth several alternative courses of contact that are available to Government COs in lieu of a default termination. These actions may also serve to mitigate the adverse effects of a liquidated damages clause on the contractor. They include:

- Allowing the contractor, its surety, or its guarantor to continue performance of the contract under a revised delivery schedule;
- Allowing the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided that the Government's rights are adequately preserved; and
- Executing a "no-cost" termination settlement agreement in the case of contracts for supplies or services where the requirement for such supplies or services no longer exists.[221]

FAR 49.404 goes on to state that, in lieu of a termination for default, if a contract includes a performance bond, in which a surety is liable for damages resulting from the contractor's default, the surety and the Government may enter into a takeover agreement to allow the surety or, most likely, a completion contractor hired by the surety, to complete the contract in exchange for the right to payment of unpaid prior earnings.[222]

None of these alternatives to a default termination acts as a release of liquidated damages otherwise owed to the Government under the liquidated damages clause. Nor do they require the CO to adjust the daily liquidated damages rate or remit a portion of the damages due. Nonetheless, if reasonably exercised, the foregoing actions can effectively reduce time and costs needed to repurchase supplies or services from a third party pursuant to FAR 49.402-6, or having another contractor complete the

contract under FAR 49.405.[223] The resulting savings could ultimately benefit a contractor by reducing the time required to complete performance under the contract, as well as potential excess reprocurement costs for which the defaulted contractor would otherwise be liable under the contract's termination clause.[224]

There are limitations on each of the foregoing. FAR 49.402-4(c) provides that no-cost termination settlement agreements are not appropriate if the contractor is liable to the Government for damages as provided in FAR 49.402-7. The FAR goes on to state that, regardless of whether the Government terminates a contract for default or follows an alternative course of action like those described in FAR 49.402-4, the CO must promptly assess and demand any liquidated damages to which the Government is entitled under the contract.[225] This may restrict the ability of the parties to enter into a true "no-cost" termination settlement, but it would not preclude the Government and the contractor from settling on the amount of liquidated damages owed.

Another important limitation involving surety takeover agreements is that, when negotiating the terms of such agreements, although the Government must pay the surety's costs and expenses up to the balance of the contract price up to the point of termination, the surety will continue to be bound by the contract's terms governing liquidated damages for delays in completion of the work, unless the delays are excusable under the contract.[226] Even without a takeover agreement, contractors and their sureties are liable to the Government for any resulting damages. Thus, the FAR directs COs to use all retained percentages of progress payments previously made to a contractor and any future progress payments due for work completed before a termination for default to liquidate a contractor's and its surety's liability to the Government.[227]

If a CO terminates a contract for default and proceeds to repurchase the goods or services under FAR 49.402-6, or have the construction performed by a third party pursuant to FAR 49.405, that does not mean that the Government may ignore its obligation to mitigate the liquidated damages assessed against a contractor under FAR 52.211-11 or FAR 52.211-12. Undue delays in reawarding a reprocurement contract or a failure to obtain similar items or services pursuant to FAR 49.402-6 or FAR 49.405, could also be failure by the Government to "take all reasonable steps to mitigate liquidated damages," and, thus, excuse a contractor from payment of at least part, if not all, of damages prescribed by the liquidated damages clause.[228] Indeed, because liquidated damages continue to accrue until the Government reasonably obtains delivery or performance of similar supplies or services[229] or until the work is completed in the case of construction contracts,[230] it may even be possible to argue that actions or inactions on the part of the Government that would otherwise constitute an excusable delay for the replacement contractor also constitute a failure by the Government to mitigate liquidated damages as required by FAR 11.501(c).

Equitable Remission Of Liquidated Damages Under FAR 11.501(d)

A discussion of the parties' rights and obligations under the FAR's liquidated damages clauses would not be complete without mentioning the U.S. Department of the Treasury's authority to approve equitable waivers or reductions of liquidated damages under FAR 11.501(d).[231] Under this provision, the head of a procuring agency may reduce or waive the amount of liquidated damages assessed under a contract if the Commissioner for the Department of the Treasury's Financial Management Service (FMS) or designee approves such action.[232]

This FAR provision implements two statutes: 10 U.S.C.A. § 2312, which applies to the DOD, the Coast Guard, and the National Aeronautics and Space Administration,[233] and 41 U.S.C.A. § 4707, which applies to other civilian executive agencies that are subject to the Federal Property and Administrative Services Act of 1949.[234] Both 10 U.S.C.A. § 2312 and 41 U.S.C.A. § 4707 state that waivers of or reductions in liquidated damages are equitable remedies and are to be made on such bases as the Secretary of the Treasury considers to be "just and equitable."[235] The legislative history behind 10 U.S.C.A. § 2312, which came into being as § 6 of the Armed Services Procurement Act of 1947[236] and which was subsequently codified at 10 U.S.C.A. 2312 in 1956,[237] shows that Congress intended this statute to provide relief from "[n]umerous instances. . .in which the strict application of liquidated damages provisions results in deduction of amounts which are out of proportion to the contract price of the items involved and to any damage actually suf-

fered by the Government."[238] Congress went on to make clear that the Comptroller General (now the Treasury Department) "should have the power to waive the whole or any part of such liquidated damages irrespective of whether timely notice is given with respect to the delay."[239] Despite this broad grant of authority, early in its history of addressing requests for remission under these statutes, the GAO took the position that its remitting authority was for application "only where strong and persuasive equities exist on behalf of the claimant" and that such remitting authority could not be used to relieve a contractor from the consequences of its own negligence.[240]

There are a few challenges for contractors and Government personnel face when determining whether a waiver or remission (in whole or in part) of liquidated damages is appropriate under FAR 11.501(d).

First, since authority to grant such waivers or reductions in liquidated damages was transferred from the GAO to the Treasury Department in 1996, there have been no reported decisions addressing such waivers or remissions. The frequency that this has been used since 1996 or the standards that the Treasury Department will consider in determining whether a waiver or remission is appropriate is uncertain. Yet, in 1993, the DOD's Advisory Panel on Streamlining and Codifying Acquisition Laws, also called the "Section 800 Panel," recommended that Congress retain 10 U.S.C.A. § 2312 as that statute continued to provide a useful and important function in the acquisition process, and while the Panel noted that there had been some questions regarding the consistency of that provision with the Contract Disputes Act, it concluded that the authority to remit or forgive obligations owed to the Government under certain circumstance was consistent with the Comptroller General's basic authority, at the time, to remit or forgive obligations to the Government under certain circumstances at that time.[241]

It appears that, in many cases, resolution of disputes involving the assessment of liquidated damages is being handled either informally by the parties or through the formal disputes process prescribed by the Contract Disputes Act and its implementing regulations at FAR Part 33. This is true despite the limitations imposed on contracting officials following a determination that the contractor owes money to the Government under a contract.[242] Nonetheless, this equitable remedy still exists and may be the last resort for a contractor that is unable to avoid imposition of liquidated damages based on any of the foregoing legal defenses or in situations in which contracting officials may be uncertain regarding their authority to compromise and settle previously assessed liquidated damages.

A second hurdle that exists to contractors and Government personnel wishing to take advantage of this equitable relief is that, beyond referring to Treasury Order 145-10,[243] nothing in FAR 11.501(d) describes procedural or substantive guidelines as to how, or under what circumstances the head of a procuring agency or his or her designee should recommend a waiver or reduction of liquidated damages to the Treasury Department. Nor does the FAR address the procedures the Treasury Department should follow or which substantive factors that should be considered when deciding to approve or reject an agency's recommendation.[244] Despite the lack of current guidance, until 1996, the GAO had authority to review and approve agency recommendations under 10 U.S.C.A. § 2312 and 41 U.S.C.A. § 4707 when Congress and the Office of Management and Budget (OMB) transferred that function to the Treasury Department in 1996. The GAO did issue a number of published decisions, which could be helpful in determining whether a request for equitable remission or reduction is appropriate. At the same time, because of a lack of published guidance, it is unclear to what extent the Treasury Department continues to adhere to the GAO's underlying policies or decisions regarding equitable remission or waivers.

Conclusion

The Government has a long history of relying on liquidated damages clauses to compensate it for probable damages caused by a contractor's late deliveries or untimely performance. Over time, the policies and procedures for including liquidated damages clauses in solicitations for contracts for supplies, services, research and development, and construction have changed. Today, liquidated damages clauses, like those prescribed by FAR Subpart 11.5, will be enforced when "damages are uncertain or difficult to measure . . . as long as 'the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensa-

tion was not the object aimed at or as to imply fraud, mistake, circumvention or oppression' " by the Government.[245]

Despite this, there are some important substantive limitations on the Government's use and enforcement of liquidated damages clauses. Not only is it necessary for Government officials to understand that liquidated damages are not penalties and are not to be used as negative performance incentives, but both contracting parties must understand that a number of events can arise after contract award that may preclude the Government from assessing liquidated damages against a delinquent contractor. These include the occurrence of excusable delays or concurrent delays, waivers of the contract's delivery or completion dates, beneficial occupancy or substantial completion, and the effect of terminations on the contractor's right to proceed. In addition, the parties must be aware that there are a number of other remedy-granting FAR clauses throughout a contract that may entitle a contractor to an equitable adjustment to the contract's performance schedule that otherwise precludes an assessment of liquidated damages against the contractor. In the end, regardless of the Government's right to assess liquidated damages, contracting officials must take all reasonable steps to mitigate liquidated damages that might otherwise be assessed against a contractor and that, in some cases, it may be appropriate to equitably reduce or waive the amount of liquidated damages by seeking approval from the Department of the Treasury under FAR 11.501(d).

To avoid potential problems and unwelcome surprises, contractors, Government procurement professionals, and third parties that may be affected by an assessment of liquidated damages should make every effort to understand not only the FAR and FAR Supplement clauses and how they operate with one another in different types of contract settings, but also the core concepts that have been developed by courts and administrative bodies over the last 150 years to better determine the parties' rights and obligations in the event of a preaward or postaward dispute involving the use or enforcement of liquidated damages.

Guidelines

These *Guidelines* are intended to assist you in understanding the basic concepts regarding the use and limitations on the enforceability of the FAR's liquidated damages clauses. They are not, however, a substitute for professional representation in any specific situation. For the most part, based on court and administrative decisions, all of which are highly fact specific, the following core concepts can be applied to the FAR's liquidated damages clauses:

1. Even in the absence of an enforceable liquidated damages clause, the Government may still recover common law damages resulting of delays caused by a contractor, but it may be difficult for the Government to prove or quantify the amount of such damages.

2. Liquidated damages clauses should be drafted in a way to reasonably forecast just compensation for the Government for its probable damages caused by a contractor's late delivery—not as penalties or negative performance incentives.

3. To manage risk effectively, prior to contract award, consider negotiating maximum amounts and/or a maximum period for assessing liquidated damages pursuant to FAR 11.501(b). Also consider separate liquidated damages amounts for different phases or delivery dates under a contract where appropriate.

4. Once the parties agree to the liquidated damages clause and applicable daily rate, unless a viable defense exists, that liquidated damages amount will be enforced regardless of whether the Government's actual damages exceed or fall short of the established rate.

5. To preserve its rights, a contractor must follow certain requirements concerning notification, the filing of claims under the Contract Disputes Act, and other procedural requirements if it wishes to challenge an assessment or seek remission of liquidated damages following contract award.

6. Because claims of excusable delays, concurrent delays, improper default terminations, etc. can be factually intensive, the parties should maintain current, accurate, and complete schedules, daily reports, and other records to show the existence and extent of excusable or concurrent delays and their effects on the delivery or completion date.

7. Other FAR remedy-granting clauses should not be overlooked as means to obtain schedule relief or as ad-

ditional defenses against an actual or threatened assessment of liquidated damages.

8. Unless otherwise limited in the clause, liquidated damages continue to accrue even after the Government terminates a contractor for default at the specified rate until delivery of supplies, performance of services, or completion of construction projects.

9. The Government must take all reasonable steps to mitigate the amount of liquidated damages assessable against a delinquent contractor.

10. If no other legal remedies are available, the parties should consider requesting approval of an equitable reduction or waiver of liquidated damages assessed under a contract from the Department of the Treasury pursuant to FAR 11.501(d) and Treasury Order 145-10.

ENDNOTES:

[1]Pac. Hardware & Steel Co., 48 Ct. Cl. 399, 406 (1913); Wheeler Bros., Inc., Comp. Gen. Dec. B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575 at 6; see also 24 R.A. Lord, Williston on Contracts § 65:1, at 212 (4th ed. 2002); Restatement (Second) of Contracts § 356 ("Liquidated Damages and Penalties") (1981).

[2]See, e.g., American Institute of Architects (AIA) Form A101™-2017 §§ 3.33, 4.5, and AIA Form A102™-2017 §§ 4.33, 5.1.6 (long-form construction contracts intended for use between private owners and contractors); Uniform Commercial Code (U.C.C.) §§ 2-718, 2A-504 (Am. L. Inst. & Unif. L. Comm'n 2017) (providing for liquidated damages involving sales and leases of goods).

The Federal Acquisition Regulation (FAR), 48 C.F.R. ch. 1, and the Department of Defense FAR Supplement (DFARS), 48 C.F.R. ch. 2, prescribe other clauses imposing liquidated damages for failures to comply with socioeconomic and labor-related provisions of a Government contract. See FAR 11.500 and DFARS 211.500. Those liquidated damages provisions are beyond the scope of this Briefing Paper.

[3]Cascade Pac. Int'l v. United States, 773 F.2d 287, 293 (Fed. Cir. 1985) (citing Rumley v. United States, 285 F.2d 773, 777 (Ct. Cl. 1961)); Jacqueline Howell, Ltd., ASBCA No. 27026, 82-2 BCA ¶ 16,086 at 78,788 (holding that the absence of a liquidated damages clause "does not leave the Government without a remedy; actual damages may be proved if any occurred"); see also FAR 52.249-8(h); FAR 52.249-10(d) (reserving for the Government the right to seek "any other rights and remedies" provided by law or contract in the event of a default termination).

[4]FAR subpt. 11.5.

[5]FAR 49.404(e)(2); FAR 49.406.

[6]See United States ex rel. Richardson v. Mack Mech., Inc., No. 2:12–cv–00109, 2017 WL 1175660 (M.D. Tenn. Mar. 30, 2017), (in which the court ruled that a general incorporation-by-reference clause in a construction subcontract was sufficient to make the prime contractor's liquidated damages clause at FAR 52.211-12 applicable to the subcontractor under Tennessee and Missouri law).

[7]Jennie–O Foods, Inc. v. United States, 217 Ct. Cl. 314, 333, 580 F.2d 400, 412 (1978) (per curiam).

[8]DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1133 (Fed. Cir. 1996).

[9]Pac. Hardware & Steel Co., 48 Ct. Cl. at 406, Priebe & Sons, Inc. v. United States, 332 U.S. 407, 412 (1947).

[10]Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 502 (1993).

[11]Stone, Sand & Gravel Co. v. United States, 234 U.S. 270 (1914) (The standard form of contract used by the War Department in the late 1800s, which gave the Government the right to "annul" a contractor for its failure perform (i.e. terminate the contract for default) and assess a "forfeiture" of all money or reserved percentage due or to become due, precluded the Government from seeking additional damages it may have incurred beyond the specified amount.); see also United States v. O'Brien, 220 U.S. 321 (1911).

[12]FAR 11.503(a).

[13]FAR 11.503(b).

[14]FAR 52.211-11(a); FAR 52.211-12(a); see also FAR 11.502(a).

[15]FAR 52.211-11(b).

[16]FAR 52.211-12(b).

[17]FAR 52.211-11(b); FAR 52.211-12(b).

[18]Compare FAR 52.211-11(b), (c), with FAR 52.211-12(b).

[19]Hughes Bros., Inc. v. United States, 133 Ct. Cl. 108, 134 F. Supp. 471 (1955).

[20]But see Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190 at 130,381 (Government's calculation of the hourly liquidated damages rate was inherently unreasonable and unconscionable as demonstrated by a comparison of the contractor's bid price to the liquidated damages assessment).

[21]FAR 11.501(b); see, e.g., Winfield Mfg. Co., ASBCA No. 36046 et al., 89-2 BCA ¶ 21,837 at 109,866–68 (CO placed a 25% cap on the total amount of liquidated damages to serve as a protection against potentially penal circumstances of the open-ended accrual of per diem damages).

[22]FAR 11.503(b).

[23]FAR 11.503(c).

[24]FAR 52.211-13.

[25]See generally 84 Fed. Reg. 3,716 (Feb. 13, 2019).

[26]General Services Administration Acquisition Regulation (GSAR) 552.211-12, "Liquidated Damages-Construction," and GSAR 552.211-13, "Time Extensions." The GSAR is codified at 48 C.F.R. ch. 5.

[27]84 Fed. Reg. at 3,719; see also GSAR 552.211–70, "Substantial Completion."

[28]Robert S. Pasley, "The Interpretation of Government Contracts: A Plea for Better Understanding," 25 Fordham L. Rev. 211, 213 (1956); "Government Contracts—An Analysis of Liquidated Damages, Default and Impossibility of Performance," 16 Cath. U. L. Rev. 418, 420 (1967). But see Nebco & Assocs. v. United States, 23 Cl. Ct. 635, 645–46 (1991) (explaining elements of an "adhesion contract," and why a Government contract for the sale of a restaurant was not that kind of "take-it-or-leave-it" proposition).

[29]Jacqueline Howell, Ltd., ASBCA No. 27026, 82-2 BCA ¶ 16,086 at 78,788 (because the contractor had not agreed to the liquidated damages amount; the Government could not unilaterally impose one upon the contractor).

[30]DFARS 211-503(b).

[31]This has not always been the case. As early as 1874, Congress enacted legislation requiring that contracts for carrying the U.S. mail be accompanied by a performance bond issued by an approved surety, stating that, in the event of a performance failure, the contractor and its surety would be liable to the Government for the amount of the bond as "liquidated bond damages." Act of June 23, 1874, ch. 456, § 12, 18 Stat. 235 (1874). In addition, from 1902 until 1951, liquidated damages provisions were required for almost all contracts involving the construction of public buildings. Act of June 6, 1902, ch. 1036, § 21, 32 Stat. 310, 326 (1902) (previously codified at 40 U.S.C.A. § 269). Even with the repeal of that statute, as recently as the late 1970s, liquidated damages clauses were required for all GSA construction contracts unless a Regional Administrator or an Assistant Commissioner of the GSA's PBS approved its omission. See Casson Constr. Co., GSBCA No. 4884, 78-1 BCA ¶ 13,032 at 63,5634 n.2.

[32]FAR 11.503(a), (b); GSAR 511.504(a).

[33]FAR 11.501 (a), (b); FAR 11.502.

[34]FAR 36.206; DFARS 236.206; DFARS 211.503. The definition of "construction" appears at FAR 2.101 and encompasses a variety of buildings, structures, and other real property, whether owned or leased by the Government.

[35]John E. Coons & John W. Whelan, "Default Termination of Defense Department Fixed Price Supply Contracts," 32 Notre Dame L. Rev. 189, 250 n.164 (1957); Walter F. Pettit & Gerald K. Gleason, "Liquidated Damages in Government Contracts: A Comment on Defenses," 25 SMU L. Rev. 264 (1971).

[36]FAR 11.503(a).

[37]FAR 11.503(b); DFARS 211.503(b); GSAR 511.504(a).

[38]FAR 11.501(a).

[39]FAR 11.503(a), (b).

[40]See also FAR 36.106 (directing COs to evaluate the need for liquidated damages in construction contracts pursuant to FAR 11.502 and agency regulations).

[41]DFARS 211.503(b).

[42]FAR 11.502(a).

[43]FAR 52.211-11(a); FAR 52.211-12(a); GSAR 552.211-12(a).

[44]B.W. Farrell, Inc., ASBCA No. 53311, 06-2 BCA ¶ 33,322 at 165,224 (citing W. Mech. Contractors, Inc. & Ben Matto (Joint Venture), ASBCA No. 26117 et al., 85-3 BCA ¶ 18,417 at 92,489).

[45]FAR 52.211-11(a); FAR 52.211-12(a); GSAR 552.211-12(a).

[46]FAR 11.501(b).

[47]See also FAR 11.503(c). The FAR only requires this revision in construction contracts, but the Government has the flexibility to also establish liquidated damages rates based on partial deliveries in supply and service contracts. Failure to take into account partial performance or deliveries could be an indicator that a single liquidated damages rate was intended as an unenforceable penalty. See, e.g., Graybar Elec. Co., IBCA No. 773-4-69, 70-1 BCA ¶ 8,121 at 37,732 (holding that a liquidated damages clause, providing for a single $50 flat rate for each calendar day of delay, regardless of whether all items of supply or one item was shipped late, was a penalty).

[48]FAR 11.501(b).

[49]FAR 11.502(b).

[50]See Engineering Pamphlet No. 415-1-260, Construction Area/Resident Engineer Management Guide (Dep't of the Army, Army Corps of Engineers, Mar. 31, 2016); Memorandum of Assistant Regional Administrators, BPS Regional Contracting Services Officers, No. RSL-2008-04 (Aug. 22, 2008) (suggesting methods for calculating liquidated damages in GSA leases of real property).

[51]See Naval Facilities Acquisition Standards (NFAS) 11.502 (Feb. 2016) (Estimated Liquidated Damages Per Calendar Day). This table used to be part of NAVFAC P-68, Contracting Manual, and does not appear to have been updated for at least 20 years.

[52]DJ Mfg. Corp., 86 F.3d at 1132.

[53]Weis Builders, Inc., ASBCA No. 56306, 10-1 BCA ¶ 34,369 at 169,721–22 (citing Young Assocs., Inc. v. United States, 200 Ct. Cl. 438, 455, 471 F.2d 618, 622 (1973)).

[54]Amigo Bldg. Corp., ASBCA No. 54329, 05-2 BCA

¶ 33,047 at 163,822 (citing Perini Corp., ASBCA No. 51160 et al., 04-1 BCA ¶ 32,530 at 160,898).

[55]Young Assocs., Inc., 200 Ct. Cl. at 445, 471 F.2d at 622.

[56]See, e.g., Fred A. Arnold, Inc. v. United States, 24 Cl. Ct. 6 (1989), aff'd in part, rev'd in part, 979 F.2d 217 (Fed. Cir. 1992); JEM Dev. Corp., ASBCA No. 45912, 94-1 BCA ¶ 26,407 at 131,366–67; Safeco Credit v. United States, 44 Fed. Cl. 406, 412 (1999) (citing P & D Contractors, Inc. v. United States, 25 Cl. Ct. 237, 240–41 (1992)); Pete Vicari Gen. Contractor, Inc., ASBCA No. 54982, 06-1 BCA ¶ 33,136 at 164,212 (citing Atl. Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323 at 141,416); see also Technocratica, ASBCA No. 48924 et al., 99-2 BCA ¶ 30,391 at 150,235.

[57]Dave's Excavation, ASBCA No. 35956, 88-3 BCA ¶ 20,911 at 105,710 (citing Orbas & Assocs., ASBCA No. 33569, 87-3 BCA 20,051 at 101,524).

[58]See, e.g., DJ Mfg. Corp., 86 F.3d at 1137–38 (citing Pac. Hardware & Steel Co. v. United States, 49 Ct. Cl. 327 (1914); Morris v. United States, 50 Ct. Cl. 154 (1915); Crane Co. v. United States, 46 Ct. Cl. 343 (1911)) (all of which upheld liquidated damages provisions providing for a standard deduction of 1/10 of 1% of the contract price for each day of delay); Blue Shield of Mass., Inc., ASBCA No. 26758, 82–2 BCA ¶ 15,991 at 79,291; Prestex, Inc., ASBCA No. 22552, 81-2 BCA ¶ 15,195 at 75,229, aff'd sub nom. Prestex, Inc. v. United States, 746 F.2d 1489 (Fed. Cir. 1984) (unpub. table decision).

[59]Environmental Aseptic Servs. Admin., Comp. Gen. Dec. B- 207771, Feb. 28, 1983, 62 Comp. Gen. 219, 83-1 CPD ¶ 194 (citing Sunrise Maint. Sys., Comp. Gen. Dec. B-219763.2, Nov. 26, 1985, 85-2 CPD ¶ 603).

[60]See generally FAR 33.103; FAR 33.104; FAR 33.105.

[61]S. Scrap Material Co., Comp. Gen. Dec. B-401059, Apr. 29, 2009, 09-1 CPD ¶ 106; R Squared Scan Sys., Inc., Comp. Gen. Dec. B-249917 et al., Dec. 23, 1992, 92-2 CPD ¶ 437; RMS Indus., Comp. Gen. Dec. B-247465 et al., June 10, 1992, 92-1 CPD ¶ 506, aff'd, Comp. Gen. Dec. B-247465.2 et al., July 22, 1992, 92-2 CPD ¶ 39; H & K Builders, Comp. Gen. Dec. B-237885, Mar. 30, 1990, 76-2 CPD ¶ 161; Sentinel Protective Servs., Inc., Comp. Gen. Dec. B-186375, Aug. 16, 1976, 90-1 CPD ¶ 349.

[62]Ingersoll-Rand Co., Comp. Gen. Dec. B-126434, Feb. 27, 1956, 35 Comp. Gen. 484.

[63]Sea-Land Serv., Inc., Comp. Gen. Dec. B-270504, Mar. 15, 1996, 96-1 CPD ¶ 155 at 5–6; Crown Mgmt. Servs., Inc., Comp. Gen. Dec. B-232431.2 et al., Jan. 24, 1989 89-l CPD ¶ 64.

[64]See, e.g., Massman Constr. Co., Comp. Gen. Dec. B-204196, June 25, 1982, 82-1 CPD ¶ 624; Ameriko Maint. Co., Comp. Gen. Dec. B-224087, Dec. 19, 1986, 86-2 CPD ¶ 686; Wheeler Bros., Inc., Comp. Gen. Dec. B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575; Int'l Bus. Invs., Inc., Comp. Gen. Dec. B-213723, June 26, 1984, 84-1 CPD ¶ 668.

[65]Dubie-Clark Co., Comp. Gen. Dec. B-186918, Aug. 26, 1976, 76-2 CPD ¶ 194 at 2; Reliable Bldg. Maint., Inc., Comp. Gen. Dec. B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344 at 2; Dutra Constr. Co., Comp. Gen. Dec. B-241202, Jan. 31,1991, 90-2 CPD ¶ 97 at 2; Alcon, Inc., Comp. Gen. Dec. B-228409, Feb. 5, 1988, 88-1 CPD ¶ 114 at 2.

[66]Lester v. United States, 1 Ct. Cl. 52 (1863).

[67]K-Con Bldg. Sys., Inc. v. United States, 107 Fed. Cl. 571, 596 (2012); K-Con Bldg. Sys., Inc. v. United States, 100 Fed. Cl. 8, 22 (2011); K-Con Bldg. Sys., Inc. v. United States, 97 Fed. Cl. 41, 49–50 (2011).

[68]Pub. L. No. 95-563, Nov. 1, 1978, 92 Stat. 2383 (1978) (codified as amended at 41 U.S.C.A. ch. 71); FAR subpt. 33.2; FAR 52.233-1, "Disputes."

[69]See, e.g., M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1331 (Fed. Cir. 2010) (a Contract Disputes Act "claim" is a prerequisite to "seeking an adjustment of contract terms" regardless of whether the claim challenging the assessment of liquidated damages is asserted as an affirmative claim or as a defense to some Government action); ECC CENTCOM Constructors, LLC, ASBCA No. 60647, 18-1 BCA ¶ 37,133 at 180,700 (denials of requests for equitable adjustment (REA) do not confer jurisdiction on the board); N. Am. Landscaping v. United States, 142 Fed. Cl. 281, 291 (2019) (granting summary judgment to the Government on a liquidated damages claim because the contractor failed to provide notice of an excusable delay within the 10-day time period required by FAR 52.249-10(b)(2)); ASFA Int'l Constr. Indus. & Trade, Inc., ASBCA No. 57880, 14-1 BCA ¶ 35,736 at 174,909–10 (portions of a Government's assessment of liquidated damages were time barred because the Government failed to issue a "claim" within six years of accrual as defined by FAR 33.201).

[70]FAR 11.501(b).

[71]FAR 11.501(b). The Government may use negative, as well as positive performance incentives based on objectively measurable tasks related to a product's characteristics, cost growth, schedule, or a combination of the foregoing, into an incentive-based contract—especially ones that involve performance-based service acquisitions. See FAR 16.402-2(b); FAR subpt. 37.6. Such negative performance incentives should not be confused with liquidated damages imposed on a contractor for untimely performance or delivery failures.

[72]Higgs v. United States, 212 Ct. Cl. 146, 546 F.2d 373 (1976).

[73]See, e.g., Lester, 1 Ct. Cl. at 59, Davis v. United States, 17 Ct. Cl. 201, 215 (1881), Parker v. United States, 26 Ct. Cl. 344 (1891); United States v. Alcorn, 145 F. 995 (C.C.S.W. D. Mo. 1906); see also 35 Cong. Rec. 4,835

(1902) (expressing the Treasury Department's frustration with the courts' reluctance to enforce liquidated damages provisions in federal construction contracts); 4 Comp. Gen 306 (1924); 9 Comp. Gen. 406 (1930) (discussing the purposes and use of liquidated damages provisions under the Act of June 6, 1902).

[74]Sun Printing & Publ'g Ass'n v. Moore, 183 U.S. 642, 674 (1902).

[75]United States v. Bethlehem Steel Co., 205 U.S. 105, 121 (1907).

[76]Wyoming Nat'l Bank of Wilkes-Barre, Pa. v. United States, 154 Ct. Cl. 590, 292 F.2d 511 (1961); N. Denver Bank v. United States, 193 Ct. Cl. 225, 432 F.2d 466 (1970); Young Assocs., Inc., 200 Ct. Cl. at 438, 471 F.2d at 618; Jennie-O Foods Inc., 217 Ct. Cl. at 314, 580 F.2d at 400; Cegers v. United States, 7 Cl. Ct. 615, 618–19 (1985).

[77]Seaboard Lumber Co. v. United States, 41 Fed. Cl. 401, 411 (1998) (quoting Calamari & Perillo, Contracts 640–641 (3d ed. 1987)), aff'd, 308 F.3d 1283 (Fed. Cir. 2002); L & A Jackson Enters. v. United States, 38 Fed. Cl. 22, 42 (1997) (citing Higgs, 212 Ct. Cl. at 151–52, 546 F.2d at 377).

[78]Priebe & Sons, Inc., 332 U.S. at 411–12.

[79]Safeco Credit, 44 Fed. Cl. at 412 (citations omitted); U.S. Floors, Inc., ASBCA No. 36356, 88-3 BCA ¶ 21,153 at 106,792.

[80]Kothe v. R.C. Taylor Trust, 280 U.S. 224, 226 (1930).

[81]Wise v. United States, 249 U.S. 361, 365 (1919).

[82]Priebe & Sons, Inc., 332 U.S. at 413; Bethlehem Steel Co., 205 U.S. at 118–21.

[83]DJ Mfg. Corp., 86 F.3d at 1136; Jennie–O Foods, Inc., 217 Ct. Cl. at 337, 580 F.2d at 414; Amigo Bldg. Corp., ASBCA No. 54329, 05-2 BCA ¶ 33,047 at 163,822; N. Mgmt. Servs., Inc. v. Dep't of Agric., CBCA No. 1009, 09-2 BCA ¶ 34,160 at 168,896.

[84]FAR 11.501(a)(2).

[85]DJ Mfg. Corp., 86 F.3d at 1134 (citing Restatement (Second) of Contracts § 356 cmt. b (1981)) ("The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty . . . the easier it is to show that the amount fixed is reasonable."); K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1008 (Fed. Cir. 2015).

[86]Jennie–O Foods, Inc., 217 Ct. Cl. at 334, 580 F.2d at 412 (quoting Priebe & Sons, 332 U.S. at 411–12).

[87]DJ Mfg. Corp., 86 F.3d at 1136–37.

[88]Young Assocs., Inc., 200 Ct. Cl. at 445, 471 F.2d at 622.

[89]Higgs, 212 Ct. Cl. at 152, 546 F.2d at 377.

[90]K-Con Bldg. Sys., Inc., 107 Fed. Cl. at 596–97; K-Con Bldg. Sys., Inc., 100 Fed. Cl. at 23; K-Con Bldg. Sys., Inc., 97 Fed. Cl. at 50; Mitchell Eng'g & Constr. Co., ENG BCA No. 3785, 89-2 BCA ¶ 21,753 at 109,471–72.

[91]DJ Mfg. Corp., 86 F.3d at 1137 (quoting Young Assocs., Inc., 200 Ct. Cl. at 445, 471 F.2d at 622); Gassman Corp., ASBCA No. 44975 et al., 00-1 BCA ¶ 30,720 at 151,743.

[92]D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840 at 1234,935 (citing Dave's Excavation, ASBCA No. 35956 et al., 88-3 BCA ¶ 20,911 at 105,706; Orbas & Assocs., ASBCA No. 32922 et al., 87-3 BCA ¶ 20,051 at 101,510).

[93]See, e.g., Priebe & Sons, 332 U.S. at 412; Fred A. Arnold, Inc., 24 Cl. Ct. at 14; Cegers, 7 Cl. Ct. at 620; K-Con Bldg. Sys., Inc., 97 Fed. Cl. at 41; P & D Contractors, Inc., 25 Cl. Ct. at 237; JEM Dev. Corp., ASBCA No. 42645, 91-3 BCA ¶ 24,428 at 123,339; Am. Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009 at 120,171; Brooks Lumber Co., ASBCA No. 40743, 91-2 BCA ¶ 23,984 at 120,034.

[94]See Skip Kirchdorfer, Inc. v. United States, 229 Ct. Cl. 560, 567 (1981); Cegers, 7 Cl. Ct. at 615; Am. Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009 at 120,171; Atlantic Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323 at 141,416.

[95]Priebe & Sons, Inc., 332 U.S. at 412; accord Bethlehem Steel Co., 205 U.S. at 119; Steve Kirchdorfer, Inc., 229 Ct. Cl. at 565–67; Young Assocs., Inc., 200 Ct. Cl. at 445, 471 F.2d at 622; see also M. Maropakis Carpentry, Inc. United States, 84 Fed. Cl. 182, 208 (2008), aff'd, 609 F.3d 1323 (Fed. Cir. 2010); Cegers, 7 Cl. Ct. at 615; Am. Constr. Co., ENGBCA No. 5728, 91-2 BCA ¶ 24,009 at 120,171; U.S. Floors, Inc., ASBCA No. 45915, 94-2 BCA ¶ 26,636 at 132,486.

[96]Walter F. Pettit & Gerald K. Gleason, "Liquidated Damages in Government Contracts: A Comment on Defenses," 25 SMU L. Rev. 264, 265 (1971).

[97]Priebe & Sons, Inc., 332 U.S. at 413.

[98]Bethlehem Steel Co., 205 U.S. at 121; Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257, 271 (1986), vacated on other grounds, 852 F.2d 540 (Fed. Cir. 1988).

[99]Robinson v. United States, 261 U.S. 486, 488 (1923); see also Wise, 249 U.S. at 366.

[100]DJ Mfg. Corp., 86 F.3d at 1136.

[101]Bell BCI Co. v. United States, 81 Fed. Cl. 617, 640 (2008), aff'd, 530 F.3d 1337 (Fed. Cir. 2009) (in which the Government asserted a claim for liquidated damages "only upon the advice of counsel to create negotiating leverage in the event Bell filed a claim against the [agency]").

[102]FAR 52.211-11(a); FAR 52.211-12(a); see also FAR 11.502(a). GSAR 552.211-12, on the other hand, ties the assessment of liquidated damages to the "substantial completion" date rather than the contract completion

date.

[103]FAR 11.403.

[104]FAR 11.404(a)(3); FAR 52.211-9.

[105]FAR 11.404(b). This clause may be modified to accommodate the issuance of orders under indefinite-delivery type contracts.

[106]FAR 11.503(b).

[107]See, e.g., PCL Constr. Servs., Inc. v. United States, 53 Fed. Cl. 479, 484 (2002) (Government must show that contract performance was not substantially completed and that the period for which the assessment was made was proper), aff'd, 96 Fed. App'x 672 (Fed. Cir. 2004); George Sollitt Constr. Co. v. United States, 64 Fed. Cl. 229, 243 (2005); OCCI, Inc., ASBCA No. 61279, 18-1 BCA ¶ 37,062 at 180,415 (citing KERMON Envt'l Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,399); C.H. Hyperbarics, Inc., ASBCA No. 49375 et al., 04-1 BCA ¶ 32,568 at 161,152 (citing Idela Constr. Co., ASBCA No. 45070, 01-2 BCA ¶ 31,437 at 155,257; Skip Kirchdorfer, Inc., ASBCA No. 40515 et al., 00-1 BCA ¶ 30,622 at 151,170); Technocratica, ASBCA No. 48924 et al., 99-2 BCA ¶ 30,391 at 150,237; Scott Peterson Constr. Co., ASBCA No. 47028, 94-3 BCA ¶ 27,021 at 134,697, recons. denied, 94-3 BCA ¶ 27,081; Bradford Elec. Co., ASBCA No. 43356, 94-2 BCA ¶ 26,755 at 133,099.

[108]Sauer Inc. v. Danzig, 224 F.3d 1340, 1347 (Fed. Cir. 2000) (citing Dean Constr. Co. v. United States, 188 Ct. Cl. 62, 66-67; 411 F.2d 1238, 1240–41 (1969)); OCCI, Inc., ASBCA No. 61279, 18-1 BCA ¶ 37,062 at 180,415 (citing Chem-Care Co., ASBCA No. 53614, 06-2 BCA 33,427 at 133,427); KERMON Envt'l Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,400; Scott Peterson Constr. Co., ASBCA No. 47028, 94-3 BCA ¶ 27,021 at 134,697.

[109]C.H. Hyperbarics, Inc., ASBCA No. 53077 et al., 04-1 BCA ¶ 32,568 at 161,152 (citing Idela Constr. Co., ASBCA No. 45070, 01-2 BCA ¶ 31,437 at 155,257 and Skip Kirchdorfer, Inc., ASBCA No. 40515 et al., 00-1 BCA ¶ 30,622 at 151,170); B.W. Farrell, Inc., ASBCA No. 53311, 06-2 BCA ¶ 33,322 at 165,224.

[110]FAR 52.249-8(c).

[111]John A. Johnson Contracting Corp. v. United States, 132 Ct. Cl. 645, 661, 132 F. Supp. 698, 706 (1955); Timberland Paving & Constr. Co. v. United States, 8 Cl. Ct. 653, 662 (1985); Int'l Fidelity Ins. Co., ASBCA No. 44256, 98-1 BCA ¶ 29,564 at 146,551.

[112]ECC, Int'l, ASBCA No. 55781, 13 BCA ¶ 35,207 at 172,741; Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865 at 128,694; see also Morris Mech. Enters., Inc. v. United States, 1 Cl. Ct. 50, 57, 554 F. Supp. 433, 440 (1982) (describing one of the original purposes of the liquidated damages clause as a contingency-eliminating provision, in which the contractor would not have to ensure against delays that it may be powerless to prevent), aff'd, 728 F.2d 497 (Fed. Cir. 1984).

[113]FAR 52.249-10(b)(1); FAR 52.249-8(c).

[114]Decker & Co. v. West, 76 F.3d 1573, 1581 (Fed. Cir.1996); accord Wescor Forest Prods., Co., AGBCA No. 96–154–1, 97-2 BCA ¶ 29,242 at 145,454 (stating that contractors are not excused for failing to provide necessary equipment, for failing to provide adequate workforce, for losses of key employees, for being engaged in other contracts, or where it "has difficulty obtaining a subcontractor or supplier").

[115]K-Con Bldg. Sys., 97 Fed. Cl. at 56 ("A contractor seeking the remission of liquidated damages on account of excusable delay bears the burden of proving 'the extent of the excusable delay to which it is entitled.' " (quoting Sauer Inc., 224 F.3d at 1345)).

[116]Sauer Inc., 224 F.3d at 1347; Weston/Bean Joint Venture v. United States, 123 Fed. Cl. 341, 385 (2015), aff'd, 652 Fed. App'x 972 (Fed. Cir. 2016).

[117]Sauer Inc., 224 F.3d at 1345 (citing Int'l Elecs. Corp. v. United States, 646 F.2d 496, 510 (Ct. Cl. 1981)); Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 314 (1999), aff'd, 652 F. App'x 972 (Fed. Cir. 2000).

[118]RDA Constr. Corp. v. United States, 132 Fed. Cl. 732, 787 (2017), aff'd, 739 Fed. App'x 644 (Fed. Cir. 2018); N. Va. Elec. Co. v. United States., 230 Ct. Cl. 722 (1982) (per curiam).

[119]Am. Int'l Contractors, Inc./Capitol Indus. Constr. Grps, Inc., A Joint Venture, ASBCA No. 39544 et al., 95-2 BCA ¶ 27,920 at 139,337.

[120]States Roofing Corp., ASBCA No. 54860 et al., 10-1 BCA ¶ 34,356 at 169,661, aff'd in part, rev'd in part sub nom. States Roofing Corp. v. Winter, 587 F.3d 1364 (Fed. Cir. 2009).

[121]Mega Constr. Co., 29 Fed. Cl. at 423; CEMS, Inc. v. United States, 59 Fed. Cl. 168, 232–33 (2003), recons. denied, 65 Fed Cl. 473 (2005).

[122]Hedgecock Elec., Inc., ASBCA No. 56307, 12-2 BCA ¶ 35,086 at 172,315.

[123]Robust Constr., L.L.C., ASBCA No. 54056, 05-2 BCA ¶ 33,019 at 163,649 (emphasis in original).

[124]See Aerial Serv. Corp., ASBCA No. 36392, 91-1 BCA ¶ 23,582 at 118,229–30.

[125]Frontier Contracting Co., ASBCA No. 33658, 89-2 BCA ¶ 21,595 at 108,734–37, aff'd on recons., 89-2 BCA ¶ 21,802 at 109,700; David Builders, Inc., 98-2 BCA ¶ 30,021 at 148,538. See generally Jay P. Altmayer v. Gen. Servs. Admin, GSBCA No.12639, 95-1 BCA ¶ 27,515, aff'd in part, rev'd in part sub nom. Altmayer v. Johnson, 79 F.3d 1129 (Fed. Cir. 1996).

[126]G. Bliudzius Contractors, Inc., ASBCA No. 42366 et al., 93-3 BCA ¶ 26,074 at 129,592–93.

[127]Morganti Nat'l, Inc., 49 Fed. Cl. 110, 134 (2001),

aff'd, 36 Fed. App'x 452 (Fed. Cir. 2002); Law v. United States, 195 Ct. Cl. 370, 382 (1971); Fireman's Fund Ins. Co. v. United States, 92 Fed. Cl. 598, 669 n.88 (2010) ("It is well settled that this 'total time' theory of proving delay is insufficient to meet the contractor's burden to prove that [G]overnment-caused delay actually delayed the overall completion of the project.").

[128]Yates-Desbuild Joint Venture v. Dep't of State, CBCA No. 3350 et al., 17-1 BCA ¶ 36,870 at 179,686.

[129]FAR 52.249-8; FAR 52.249-10(b).

[130]Yates-Desbuild Joint Venture v. Dep't of State, CBCA No. 3350 et al., 17-1 BCA ¶ 36,870 at 179,686 (quoting Sauer Inc., 224 F.3d at 1347).

[131]United States v. United Eng'g Co., 234 U.S. 236, 241 (1914).

[132]Blinderman Constr. Co., ASBCA No. 24445, 84–3 BCA ¶ 17,527 at 87,267; KERMON Envt'l Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,400 (citing William F. Klingensmith, Inc. v. United States, 731 F.2d 805 (Fed. Cir. 1984)); S.W. Elecs. & Mfg. Corps., ASBCA No. 20698 et al., 77-2 BCA ¶ 12,631 at 61,221, aff'd in part, rev'd in part sub nom. S.W. Elecs. & Mfg. Corp. v. United States, 228 Ct. Cl. 333, 342 (Fed. Cir. 1981) ("the facts warrant application of the rule that where delays are caused by both parties to the contract. . .the liquidated damages will be annulled").

[133]Acme Process Equip. Co. v. United States, 171 Ct. Cl. 324,367, 347 F.2d 509, 535 (1965), rev'd on other grounds, 385 U.S. 138 (1966); Fortec Constructors v. United States, 8 Cl. Ct. 490, 508 (1985), aff'd, 804 F.2d 141 (Fed. Cir. 1986).

[134]PCL Constr. Servs., Inc., 53 Fed. Cl. at 485 (citations omitted); Youngdale & Sons Constr. Co., v. United States, 27 Fed. Cl. 516, 566 (1993).

[135]See, e.g., Sauer Inc., 224 F.3d at 1347; Essex Electro Eng'rs, Inc. v. Danzig, 224 F.3d 1283, 1292 (Fed. Cir. 2000); P.R. Burke Corp. v. United States, 277 F.3d 1346, 1359 (Fed. Cir. 2002); William F. Klingensmith, Inc., 731 F.2d at 809 (quoting Blinderman Constr. Co. v. United States, 695 F.2d 552, 559 (Fed. Cir. 1982)); T Brown Constructors, Inc. v. Pena, 132 F.3d 724, 734 (Fed. Cir. 1997); Coath & Goss, Inc. v. United States, 101 Ct. C1. 702, 714-15 (1944)); KERMON Envt'l Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,401; see also S.W. Elecs. & Mfg. Corps., ASBCA No. 20698 et al., 77-2 BCA ¶ 12,631 at 61,220–21, aff'd in part, rev'd in part sub nom. S.W. Elecs. & Mfg. Corp. v. United States, 228 Ct. Cl. 333 (Fed. Cir. 1981); Blinderman Constr. Co., ASBCA No. 24445, 84-3 BCA ¶ 17,527 at 87,270 (admitting the board's inability to apportion delays, but stating that it was clearly able to segregate the amount of damages).

[136]R.P. Wallace, Inc. v. United States, 63 Fed. Cl. 402, 411-12 (2004).

[137]PCL Constr. Servs., Inc., 53 Fed. Cl. at 487.

[138]George Sollitt Constr. Co., 64 Fed. Cl. at 244.

[139]KERMON Envt'l Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,400.

[140]David Builders, Inc., ASBCA No. 51262, 98-2 BCA ¶ 30,021 at 148,538.

[141]G. Bliudzius Contractors, Inc., ASBCA No. 42366 et al., 93-3 BCA ¶ 26,074 at 129,592.

[142]See, e.g., Fischbach & Moore Int'l Corp, ASBCA No. 18146, 77-1 BCA ¶ 12,300 at 59,232–34; see also W. Stephen Dale & Robert M. D'Onofrio, "Legal Issues in Construction Schedule Delay Analysis," 14-8 Briefing Papers 1 (July 2014).

[143]DeVito v. United States, 188 Ct. Cl. 979, 413 F.2d 1147, 1154 (1969).

[144]FAR 49.402-3(c).

[145]FAR 52.249-8(g); FAR 52.249-10(c). Notwithstanding this, FAR 49.401(e) states that, in appropriate cases, COs may, with the consent of the contractor, reinstate the terminated contract by amending the notice of termination after it is determined that the supplies or services are still required and reinstatement is advantageous to the Government.

[146]DeVito, 188 Ct. Cl. 188 Ct. Cl. at 990, 413 F.2d at 1153–54 (quoting 5 S. Williston, A Treatise on the Law of Government Contracts § 683 (3d ed. 1961)). See also S.T. Res. Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 at 123,926–27; Composites Horizons, ASBCA No. 25529, 85-2 BCA ¶ 18,059 at 90,651–52.

[147]Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1354 (Fed. Cir. 2004).

[148]DeVito, 188 Ct. Cl. at 991, 413 F.2d at 1154.

[149]Olson Plumbing & Heating Co., ASBCA No. 17965 et al., 75-1 BCA ¶ 11,203 at 53,336, aff'd, 221 Ct. Cl. 197, 602 F.2d 950 (Ct. Cl. 1979); Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,194.

[150]Indemnity Ins. Co. of N. Am. v. United States, 14 Cl. Ct. 219, 224 (1988).

[151]Nisei Constr. Co., ASBCA No. 51464, 99-2 BCA ¶ 30,448 at 150,444 (quoting Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,194–95); see also Luther Benjamin Constr. Co., ASBCA No. 40401 et al., 93-1 BCA ¶ 25,459 at 126,810–11; Dante A. Jones, Inc., ASBCA No. 32051, 88-3 BCA ¶ 21,106 at 106,551.

[152]AmerescoSolutions, Inc., ASBCA No. 56811, 10-2 BCA ¶ 34,606 at 170,550 (citing Overhead Elec. Co., ASBCA No. 25656, 85-2 BCA ¶ 18,026, aff'd sub. nom., Overhead Elec. Co. v. United States, 795 F.2d 1019 (Fed. Cir. 1986) (unpub. table decision).

[153]Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,195; see also Technocratica, ASBCA No. 47992 et al., 06-2 BCA ¶ 33,316 at 165,188.

[154]Abcon Assocs., Inc. v. United States, 44 Fed. Cl. 625, 629 (1999); State Corps v. United States, 142 Fed.

Cl. 21, 32 (2019); Arens Corp., ASBCA No. 50289, 02-1 BCA ¶ 31,671 at 156,507–08; ADT Constr. Group, Inc., ASBCA No. 55358, 13-1 BCA ¶ 35,307 at 173,313, recons. denied, 14-1 BCA ¶ 35,508.

[155]Technocratica, ASBCA No. 47992 et al., 06-2 BCA ¶ 33,316 at 165,188; Corway, ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804 (Government never mentioned or assessed liquidated damages and showed no urgency in resolving problems); Overhead Elec. Co., ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,473; JEM Dev. Corp., ASBCA No. 42872, 92-1 BCA 24,709 at 123,339; D&S Roofing Co., ASBCA No. 28130 et al., 85-2 BCA ¶ 18,114 at 90,947. But see Alvarez & Assocs. Constr. Co., ASBCA No. 49341, 98-1 BCA ¶ 29,559 at 146,535–36 (Government did not waive or abandon its right to assess liquidated damages even though it had reestablished the completion date without expressly reserving its rights; Government had previously started to assess liquidated damages against the delinquent contractor).

[156]Martin Constr., Inc. v. United States, 102 Fed. Cl. 562, 566 (2011).

[157]Martin Constr., Inc., 102 Fed. Cl. at 565–66.

[158]See, e.g., FAR 52.249-2, "Termination for Convenience of the Government (Fixed-Price)."

[159]See, e.g., FAR 52.249-8, "Default (Fixed-Price Supply and Service)"; FAR 52.249-10, "Default (Fixed-Price Construction)."

[160]Florida, Dep't of Ins. v. United States, 81 F.3d 1093, 1097 (Fed. Cir. 1996). Liquidated damages clauses used in Government construction contracts from the 1920s to the 1950s did limit the right to assess liquidated damages against a contractor to situations in which the Government, at its option, chose not to terminate the contractor and hold it and its sureties liable for any excess costs incurred by the Government in completing the project. See Brooks-Callaway Co. v. United States, 97 Ct. Cl. 689, 682–83 (1942); United States v. Am. Sur. Co., 322 U.S. 96, n.1 (1944); United States v. Utah Constr. & Min. Co., 384 U.S. 394, 397 n.1 (1966) (quoting Article 9, Delays—Damages, of Standard Form No. 23 in its entirety).

[161]La Grow Corp., ASBCA No. 42386, 91-2 BCA ¶ 23, 945 at 119,914 (citing Cities Serv.-Helex, Inc. v. United States, 241 Ct. Cl. 222, 234, 543 F.2d 1306, 1313 (1976); FAR 49.404; FAR 49.405.

[162]FAR 52.211-11(b).

[163]FAR 52.211-12(b).

[164]John A. Johnson Contracting Corp., 132 Ct. Cl. at 661, 132 F. Supp. at 698.

[165]Timberland Paving & Constr. Co., 8 Cl. Ct. at 662.

[166]Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987).

[167]Empire Energy Mgmt. Sys., Inc., 362 F.3d at 1357.

[168]FAR 52.249-8(g); FAR 52.249-10(c); Pinckney v. United States, 88 Fed. Cl. 490, 506, recons. denied, 90 Fed. Cl. 550 (2009) (citing Keeter Trading Co. v. United States, 79 Fed. Cl. 243, 253 (2007)).

[169]RDA Constr. Corp., 132 Fed. Cl. at 786–87.

[170]Timberland Paving & Constr. Co., 8 Cl. Ct. at 662.

[171]K-Con Bldg. Sys., Inc. v. United States, 131 Fed. Cl. 275, 332–33 (2017).

[172]FAR 11.501(b).

[173]Hydro Flex, Inc., ASBCA No. 20352, 77-1 BCA ¶ 12,353 at 58,782 (citing Manart Textile Co. v. United States, 111 Ct. Cl. 540, 77 F. Supp. 924 (1948)).

[174]FAR 52.211-11(b).

[175]FAR 52.236-2.

[176]FAR 52.236-11.

[177]FAR 52.242-14.

[178]FAR 52.242-15.

[179]A constructive suspension of work occurs when work is stopped absent an express order by the CO and the Government is found to be responsible for the work stoppage. P.R. Burke Corp., 277 F.3d at 1359 (citing John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts, 589–90 (3d ed. 1995)). Constructive suspensions have the same effect and consequences as an actual Government suspension, and relief should be granted in such cases as if an actual suspension order had been issued. Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 469, 587 F.2d 486, 493–94 (1978).

[180]FAR 52.243-1; FAR 52.243-4.

[181]FAR 52.245-1.

[182]FAR 52.242-14(b).

[183]FAR 52.242-15(b).

[184]FAR 52.242-17(a).

[185]FAR 11.503(b), (c).

[186]FAR 52.211-13.

[187]Am. Int'l Contractors, Inc., ASBCA No. 60948, 18-1 BCA ¶ 37,061 at 180,411, recons. denied, 18-1 BCA ¶ 37,194.

[188]Am. Int'l Contractors, Inc., ASBCA No. 60948, 18-1 BCA ¶ 37,061 at 180,412.

[189]See FAR 43.103; FAR 43.204.

[190]Sundt Constr., Inc., ASBCA No. 57358, 11-1 BCA 34,772 at 171,119, aff'd sub nom. Sundt Constr., Inc. v. United States, 469 F. App'x 916 (Fed. Cir. 2012). But see J.G. Watts Constr. Co., ASBCA No. 9462 et al., 1963 BCA ¶ 3,889 at 19,311 (by extending the completion date for the "all the work as revised," not just the "revised part of the work," the Government waived its right to assess liquidated damages based on the original completion date).

[191]This is especially true for GSA construction contracts since the GSA's newly adopted version of the

"Time Extensions" clause at GSAR 552.211-13 requires contractors to submit written requests and detailed analyses to justify any time extension based on "substantial completion" of the project and limits the Government's obligation to mitigate time impacts that occur less than 30 days after the date the contractor submits its request for a time extension.

[192]FAR 52.211-12(a).

[193]FAR 11.501(b).

[194]Arrow, Inc., ASBCA No. 39621, 90-3 BCA ¶ 23,217 at 116,506–07.

[195]Ace Constructors, Inc. v. United States, 70 Fed. Cl. 253, 295 (2006), aff'd, 499 F.3d 1357 (Fed. Cir. 2007).

[196]See TGS Int'l Ltd. v. United States, 949 F.2d 402 (Fed. Cir. 1991) (unpub.) (citing C.W. Schmid v. United States, 173 Ct. Cl. 302,311, 351 F.2d 651, 655–56 (1965)); H.W. Zweig Co. v. United States, 92 Ct. Cl. 472, 481 (1941).

[197]FAR 46.501.

[198]FAR 46.501; FAR 46.502

[199]FAR 46.601; DFARS 246.601.

[200]FAR 52.236-11.

[201]FAR 46.407(c)(1).

[202]Pathman Constr. Co., ASBCA No. 16781, 74-2 BCA ¶ 10,785 at 51,299-300; Lindwall Constr. Co., ASBCA No. 23148, 79-1 BCA ¶ 13,822 at 67,795.

[203]Haas & Haynie Corp., GSBCA No.5530 et al., 84-2 BCA ¶ 17,446 at 86,896 (Government occupancy of a building itself is not conclusive proof of substantial completion); Wilton Corp., ASBCA No. 39876, 93-2 BCA ¶ 25,897 at 128,825 (project not substantially complete, even if occupancy took place in the presence of the noise and dust occasioned by lintel repairs and replacements).

[204]FAR 11.503(b).

[205]Hill Constr. Corp., ASBCA No. 43615, 93-3 BCA ¶ 25,973 at 129,157, 129,159; Singleton Enters. v. Dep't of Transp., CBCA No. 2716, 12-2 BCA ¶ 35,069 at 172,264 (citing N. Mgmt. Servs., Inc. v. Dep't of Agric., CBCA No. 1009, 09-2 BCA ¶ 34,160 at 168,898 ("[l]iquidated damages are improperly assessed after the date of substantial completion of contract work."); see also J. Andrew Jackson & Merle M. DeLancey, Jr., "Substantial Completion in Construction Contracts," 96-4 Briefing Papers 1 (Mar. 1996).

[206]Kinetic Builder's Inc. v. Peters, 226 F.3d 1307, 1315 (Fed. Cir. 2000) (internal citations omitted); see also Blinderman Constr. Co. v. United States, 39 Fed. Cl. 529, 573 & n.40 (1997), aff'd, 178 F.3d 1307 (Fed. Cir. 1998).

[207]Strand Hunt Constr., Inc., ASBCA No. 55905, 13 BCA ¶ 35,287 at 173,188; N. Mgmt. Servs., Inc. v. Dep't of Agric., CBCA No. 1009, 09-2 BCA ¶ 34,160 at 168,898 (citing AMEC Constr. Mgmt., Inc. v. Gen. Servs. Admin., GSBCA No.16233, 06-2 BCA ¶ 33,410 at 165,653; Program & Constr. Mgmt. Grp., Inc. v. Gen. Servs. Admin., GSBCA No.14757 et al., 00-1 BCA ¶ 30,641 at 151,317).

[208]Kinetic Builder's, Inc., 226 F.3d at 1315–16.

[209]Conner Bros. Constr. Co., VABCA No. 2504 et al., 95-2 BCA ¶ 27,910 at 139,290 (quoting Dawson Constr. Co., VABCA No. 3306 et al., 93-3 BCA ¶ 26,177 at 130,324, aff'd sub nom. Dawson Constr. Co. v. Brown, 34 F.3d 1080 (Fed. Cir. 1996)), aff'd sub nom. Conner Bros. Constr. Co. v. Brown, 113 F.3d 1256 (Fed. Cir. 1997) (unpub. table decision)); Rodriguez Constr. LLC v. Gen. Servs. Admin., CBCA No. 4452, 16-1 BCA ¶ 36,351 at 177,229 (while work remained to be accomplished, the agency had not identified how its use and enjoyment of the facility was substantially diminished by the further work the contractor had to perform).

[210]Amigo Bldg. Corp., ASBCA No. 54329, 05-2 BCA ¶ 33,047 at 163,824 (project not substantially complete where a functional fire alarm system was still being installed in a building to be occupied by solders); Fortec Constr., ASBCA No. 25847 et al., 85-2 BCA ¶ 17,972 at 90,130 (flight simulator training facility not ready for beneficial occupancy where fire alarm system was inoperable); Saturn Constr. Co., ASBCA No. 22653, 82-1 BCA ¶ 15,704 at 77,690 (imposition of liquidated damages justified and substantial completion delayed until sprinkler system was installed in a mess hall).

[211]GSAR 552.211-70(a)(2).

[212]GSAR 552.211-70(a)(3), (4).

[213]Ketchikan Pulp Co. v. United States, 20 Cl. Ct. 164, 166 (1990); Martin J. Simko Constr., Inc., 11 Cl. Ct. at 272.

[214]FAR 11.501(c).

[215]FAR 11.501(c).

[216]Weis Builders, Inc., ASBCA No. 56306, 10-1 BCA ¶ 34,369 at 169,722 (citing Jennie-O Foods, Inc., 217 Ct. Cl. at 337, 580 F.2d at 414).

[217]Astro-Space Labs., Inc. v. United States, 200 Ct. Cl. 282, 308, 470 F.2d 1003, 1018 (1972); Udis v. United States, 7 Cl. Ct. 379, 387 (1985).

[218]See Ketchikan Pulp Co., 20 Cl. Ct. at 166.

[219]Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968).

[220]FAR 49.402-3(f).

[221]FAR 49.404(a)-(c).

[222]FAR 49.404(b)-(d). Despite this, the Government generally is precluded from requiring performance or payment bonds for contracts other than those involving construction. FAR 28.103-1(a).

[223]Even without a liquidated damages clause, the Government has an affirmative duty to mitigate its actual

damages on re-purchase. Ronald L. Collier d/b/a Carolina Maint. Co., ASBCA No. 26972, 89-1 BCA ¶ 21,328 at 107,557; Kessler Chem., Inc., ASBCA No. 25293, 81-1 BCA ¶ 14,949 at 73,989 (following default termination, the Government delayed reprocurement of supplies "inordinately").

[224]FAR 52.249-8(b); FAR 52.249-10(a).

[225]FAR 49.402-7(a).

[226]FAR 49.404(e)(2).

[227]FAR 49.406.

[228]FAR 49.402-6(a); FAR 49.405; see, e.g., M.E.S., Inc. v. United States, 104 Fed. Cl. 620 (2012); Ross McDonald Contracting, GmbH, ASBCA No. 38154 et al., 94-1 BCA ¶ 26,316 at 130,898 (Government failed to mitigate damages when exercising option on reprocurement contract awarded to next-low offeror on the original solicitation rather than compete the requirement for option year).

[229]FAR 52.211-11(b).

[230]FAR 52.211-12(b).

[231]This was not the first time the Treasury Department was given authority to determine whether it was appropriate to remit liquidated damages in federal construction contracts based on equitable principles. The Act of June 6, 1902, ch. 1036, § 21, 32 Stat. 310, 326 (1902), which was repealed in 1951, authorized the Secretary of the Treasury to remit liquidated damages in public building contracts "as in his discretion may be just and equitable."

[232]FAR 11.501(d). The FAR still refers to the Commissioner of the Financial Management Service (FMS), even though, in 2012, the Department of the Treasury consolidated the FMS with the Bureau of the Public Debt (BPD) to establish a new Bureau of the Fiscal Service (BFS). The Commissioner of the BFS has assumed all authorities, functions and duties that previously were delegated to the Commissioner of the FMS. See Treasury Order 136-01, "Bureau of the Fiscal Service" (Oct. 7, 2012), 78 Fed. Reg. 31,629 (May 24, 2013).

[233]10 U.S.C.A. § 2302(1); 41 U.S.C.A. § 3101(c)(1)(A).

[234]41 U.S.C.A. § 4707; Federal Property and Administrative Services Act of 1949, as amended, ch. 288, Title III, 63 Stat. 377 (1949).

[235]10 U.S.C.A. § 2312; U.S.C.A. § 4707.

[236]Armed Services Procurement Act of 1947, ch., 65, § 6, 62 Stat. 21, 24 (1947).

[237]Act of August 10, 1956, ch. 1041, 70A Stat. 132 (1956). In 1996, the Secretary of the Treasury was substituted for the Comptroller General as the authority responsible for granting remissions of liquidated damages under this statute. Pub. L. No. 104-316, tit. II, § 202(c), 110 Stat. 3826, 3842 (1996).

[238]H.R. Rep. No. 80-190 at 21 (1947) (quoted in Report of the Acquisition Law Advisory Panel, Streamlining Defense Acquisition Laws 2-105 (¶ 2.5.1.2) (Jan. 1993).

[239]H.R. Rep. No. 80-190 at 21.

[240]Sec'y of the Navy, Comp. Gen. Dec. B-125915, Dec. 9, 1955 (citing Fed. Bldg. Contractors, Comp. Gen. Dec. B-105789, 32 Comp Gen. 67, Aug. 4, 1952; Comp. Gen. Dec. B-101472, Apr. 13, 1951).

[241]Report of the Acquisition Law Advisory Panel, Streamlining Defense Acquisition Laws at 2-106 (¶ 2.5.1.4, "Recommendation and Justification") (Jan. 1993).

[242]See generally FAR subpt. 32.6, "Contract Debts."

[243]Treasury Order 145-10, "Remission or Waiver of Liquidated Damages" (Oct. 29, 1998) (reaffirmed Mar. 14, 2012), 63 Fed. Reg. 60,041 (Nov. 6, 1998).

[244]There are, in fact, only a few FAR Supplements that mention FAR 11,501(d). They do nothing more than identify those agency officials who are responsible for requesting waivers and reductions of liquidated damages. See 48 C.F.R. § 611.501(d) (Department of State Acquisition Regulation (DOSAR)); 48 C.F.R. § 1011.501(d) (Department of the Treasury Acquisition Procedures (DTAP)); 48 C.F.R. § 1311.501 (Department of Commerce Acquisition Regulation (CAR) and Commerce Acquisition Manual (CAM) 1301-70)); 48 C.F.R. § 1811.501(d) (NASA FAR Supplement (NFS)); 48 C.F.R. § 2911.501 (Department of Labor Acquisition Regulation (DOLAR)); 48 C.F.R. § 3011.501(d) (Homeland Security Acquisition Regulation (HSAR)).

[245]DJ Mfg. Corp., 86 F.3d at 1133–34 (quoting Wise, 249 U.S. at 365); see also Bethlehem Steel Co., 205 U.S. at 121 ("The amount is not so extraordinarily disproportionate to the damage which might result from the [breach] as to show that the parties must have intended a penalty, and could not have meant liquidated damages.").

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BRIEFING PAPERS