Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTIONS TO DISMISS AND FOR SUMMARY
RELIEF DENIED: March 31, 2004

GSBCA 15934-IBB

P.I.O. GMBH BAU UND INGENIEURPLANUNG,

Appellant,

v.

INTERNATIONAL BROADCASTING BUREAU,

Respondent.

John A. Ordway of Berliner, Corcoran & Rowe, L.L.P., Washington, DC, counsel for appellant.

Kasey Sox and Timi Kenealy, Office of General Counsel, International Broadcasting Bureau, Broadcasting Board of Governors, Washington, DC, counsel for respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **HYATT**.

HYATT, Board Judge.

This appeal arises from a contract to perform renovations to the Voice of America's (VOA's) medium wave broadcast facility in Munich, Germany. Appellant, P.I.O. GmbH Bau und Ingenieurplanung (PIO), seeks an equitable adjustment arising from alleged changes to the work required to be performed under the fixed-price contract. Respondent, the International Broadcasting Bureau (IBB), Broadcasting Board of Governors (BBG), has filed a motion seeking dismissal of the subject appeal on numerous grounds, alleging that (1) PIO no longer exists and lacks the capacity to maintain an appeal; (2) the Board lacks jurisdiction to hear the appeal because PIO failed to file within ninety days after the issuance of the contracting officer's decision; (3) the Board lacks jurisdiction over the appeal because the certification of PIO's claim was fatally defective; (4) the appeal is barred by laches; (5) the appeal is barred because of failure to give notice of claimed changes under the contract; and (6) the appeal is barred by a general release of claims executed on September 1, 1995.

Background

Appellant, a small German construction company, entered into contract number IA-240-1288 (contract 1288) with the VOA on May 30, 1994. The contract was for the renovation of a forty-year-old building, located in Munich, Germany, to provide appropriate work and technical facilities for VOA's Medium-Wave Munich Relay Station. The contract contained four line items -- (1) interior renovation work, (2) exterior renovation work, (3) basement insulation work, and (4) safe haven work.

The contract contained, in full text or through incorporation by reference, various clauses required by the Federal Acquisition Regulation (FAR). These included the Changes clause (FAR 52.243-4) (AUG 1987), the Disputes clause (FAR 52.233-1) (DEC 1991), the Differing Site Conditions clause (FAR 52.236-2) (APR 1984), and the Payments Under Fixed Price Construction Contract clause (FAR 52-232-5) (APR 1989). Appeal File, Exhibit 1.

In a letter dated May 31, 1994, VOA stressed the importance of completing all work under the contract prior to December 31, 1994, to enable VOA to vacate the space it was then leasing in another building in Munich and to move into the renovated space. Appeal File, Exhibit 7.

Although VOA awarded the contract, its successor agency, the United States Information Agency (USIA), administered the contract. A notice to proceed was issued and PIO commenced work under the contract on June 1, 1994. Shortly thereafter, PIO began notifying USIA, in writing and orally, of defects in the technical specifications. In all, seven modifications to the contract were issued. PIO alleges that USIA was not always timely in responding to PIO's concerns, particularly in light of the deadline for contract completion. Because of the numerous technical issues arising during the course of contract performance, and the need to meet the deadline completion date of December 31, 1994, PIO increasingly was forced to dedicate all of its resources to timely contract completion. In its complaint, PIO has identified numerous changes to the scope of the work that were allegedly directed by USIA, but for which PIO was not compensated. These include installation of a stairway not specified in the statement of work, the performance of extra screeding work, reinforcement of roof purlins, changes to tile ceilings, and changes to the ventilation system in the building. Appeal File, Exhibit 29.

A certificate of final acceptance was executed by USIA in August 1995. By this time, PIO alleges, it had performed considerable extra and changed work under the contract, at the direction of USIA, for which it had not been compensated, although USIA was aware of its claims. PIO needed to obtain a final disbursement of funds remaining under the contract so it could pay its subcontractors. In order to receive the five percent retainage of the contract price, however, PIO was required to execute a release of claims. In pertinent part, the release of claims stated:

> The Contractor hereby certifies that Contract No. IA-240-1288, is final and complete and [there are] no equitable adjustments for Contractor proposals or claims whatsoever arising out of, or resulting from, and/or directly related to the above contract, and

> any and all modifications and hereby releases, remises, and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims, and demands whatsoever, in law and equity, under or by virtue of the said contract.

Appeal File, Exhibit 16.

PIO did not expressly reserve any claims from the terms of the general release that it executed. PIO states that it was advised, prior to completion of the required release, that USIA would continue to process its existing claims as equitable adjustment requests. In addition, PIO says it informed USIA that it was executing the release solely to obtain the retainage amount so that it could pay its subcontractors for work performed under the contract.

The release was executed by PIO's principal, Ozden Daglioglu, on September 1, 1995. This same day, PIO sent a separate, unsigned document to the contracting officer's field representative, stating that:

> [R]elating to our last conference in [y]our office, I will deliver the signed release of claims, that the 5% will be transferred to our account, because we really are in difficulties for payments, although I want to discuss with [y]ou about many works, which could not be counted at the beginning and caused us a lot of expense. I hope for [y]our objective assessment.

Appeal File, Exhibit 9 at 99. One week later, PIO filed an invoice for the cost of performing additional work, not required by the contract or specification documents, under the contract. The invoice was not paid.

On October 30, 1995, in response to a request from Mr. Daglioglu, the contracting officer's representative faxed a copy of three contract clauses -- the Disputes clause, the Changes clause, and the Differing Site Conditions clause, to PIO. Supplemental Appeal File, Exhibit 47.

On January 31, 1996, PIO submitted its first written communication denominated as a request for equitable adjustment based on costs attributable to (1) extra work caused by defective specifications, (2) additional work, outside the scope of the contract, that was ordered by the Government, and (3) Government-caused delays. The letter, which is signed by Mr. Daglioglu, provided an explanation of the three bases for recovery and contained the following language:

> I certify this Request for Equitable Adjustment is true and correct, to the best of my knowledge at this time.

Appeal File, Exhibit 14.

On February 29, 1996, the contracting officer then responsible for this contract responded to PIO's January 31 letter, stating that under FAR 52.243-4(f), USIA must "deny your claim because your company has already received final payment" under the contract. He added that the claim was barred by the release executed by PIO on September 1, 1995, observed that the claim was not properly certified as required by the FAR, and invited PIO to contact him if it had any further questions. Appeal File, Exhibit 19.

In 1997, PIO retained counsel in the United States to assist it in pursuing its claims under this contract and with claims under a separate contract, also involving work performed for VOA's Medium-Wave Munich Relay Station. To this end, counsel for PIO contacted USIA and sought to discuss these matters with the appropriate personnel. Counsel was directed to the Deputy Director of USIA's Office of Contracts, Mr. Edward Muller. In October 1997, PIO's counsel met with Mr. Muller. According to counsel, Mr. Muller indicated that USIA would be willing to consider PIO's claim under the subject contract in conjunction with the finalization of issues under contract 1317. PIO thereafter supplied Mr. Muller with a copy of PIO's 1995 claim letter, the agency's response letter, and the amount of the claim.

In December 1997, Mr. Muller called PIO's counsel to discuss a settlement offer for finalizing contract 1317. Negotiations were conducted thereafter and continued until June 1998, "when PIO provided USIA wire instructions for transmission of the final settlement proceeds under Contract 1317." Complaint ¶ 48.

In April 1998, PIO, again through its counsel, initiated a further round of correspondence concerning its request for additional money under the contract at issue in this case. In this letter, PIO stated that it "wanted to inquire . . . as to USIA's current position with respect to PIO's claim for DM 522,891.63." Appeal File, Exhibit 22. USIA's successor contracting officer, Mr. Edward Pritchard, responded in a letter dated October 20, 1998, pointing out that Mr. Daglioglu had executed a release of claims, acknowledging that payment under contract IA-240-1288 was "final and complete," and stating that no further equitable adjustments would be made under the contract. USIA also pointed out that "[t]his was not Mr. Daglioglu's first experience in signing such a release on a U.S. Government contract" and that "[t]he release was signed without any reservations" of future claims. The letter ended with a statement to the effect that if no satisfactory explanation as to why the release should not be deemed binding was received within thirty calendar days from receipt of the letter, "a contracting officer's final decision would be rendered" formally denying monetary relief. Appeal File, Exhibit 23.

In a letter dated December 4, 1998, PIO set forth its bases for asserting that the claim should not be barred by the execution of the final release. Following this, USIA apparently sent PIO yet another letter raising the issue of the release that was executed prior to receipt of final payment. PIO responded in a letter dated December 10, 1998, asking for an opportunity to address USIA's concerns about the release. Appeal File, Exhibits 25-26.

In a letter dated December 17, 1998, the USIA contracting officer wrote to PIO's counsel acknowledging that PIO had raised "interesting" case law with respect to whether its claims were barred by the execution of the release, and adding that USIA was reviewing these cases. In addition, the contracting officer noted that he had a limited file to work with

and that PIO's claims appeared to be "stand alone" in nature, which he explained to mean "without any linkage to specific contract specifications, or work orders issued or notices given by the Contractor to the Contracting Officer as required in the case of differing site conditions by the applicable Federal Acquisition Regulation clause." PIO responded to this letter in another letter submitted in March 1999. This letter stated that the documents alone were misleading, but did not explain why the release of claims was not applicable. Appeal File, Exhibit 27.

On August 18, 1999, PIO sent yet another letter to USIA, again requesting that the agency consider waiving its assertion of the final payment and release of claims as affirmative defenses to PIO's claims under contract 1288. Appeal File, Exhibit 28. In response to this letter, the USIA contracting officer then designated to receive PIO's inquiries, Mr. Pritchard, by letter dated August 23, 1999, wrote the following:

> As a Request for Equitable Adjustment can not be honored after the regular last routine "Final Payment" has been submitted and processed, the following statement applies only to a new properly certified claim, tied into the cost loaded schedule of the subject contract in a professional manner as a claim should be and as you earlier had offered to create. I as the Contracting Officer find that the U.S. Government was placed on adequate notice of further items to be negotiated/discussed (Reservations) from the PIO Bau firm's letter which transmitted the contract release of claims for the subject contract. Therefore, I will not, be I in USIA or[,] after September 30, 1999[,] in the Broadcasting Board of Governors (International Broadcasting Bureau/Agency)[,] raise as a defense to such claim to be created, certified and submitted the fact that the Reservations did not appear on the face of the Release of Claims.
>
> You did not mention, in your letter of August 18th the other matter of the other contract for which I require the number. It may be that is the form of an RFA [request for equitable adjustment] too, which would not be allow-able [sic] after receipt and processing of the normal routine contract Final Payment.

Supplemental Appeal File, Exhibit 50. This letter, at the top of the page, however, expressly references "Contract IA-240-1317," which was the companion matter that PIO had been pursuing with USIA. Id.

Counsel for BBG has advised that Mr. Pritchard is now deceased and obviously cannot now be consulted for clarification of the intended subject matter of this letter. The Board has not been informed of the date of Mr. Pritchard's demise. Counsel for PIO, Mr. Ordway, in a declaration submitted as Attachment 2 to Appellant's Reply to Respondent's Motion to Dismiss, attests that he began dealings with Mr. Pritchard in 1998, when Mr. Pritchard became the point of contact for USIA, with respect to both the subject contract and contract 1317. With respect to inquiries directed to resolving the issues raised by PIO under

the subject contract, counsel for appellant states that, after he responded to the issues raised in the October 20, 1998, letter, he and Mr. Pritchard addressed the claims forming the subject of this appeal. According to Mr. Ordway, "[a]fter lengthy substantive discussions between Mr. Pritchard and me regarding the facts and law involved in the issue of the Release, Mr. Pritchard ultimately agreed with PIO that no release had occurred." Mr. Ordway asserts in his declaration that the letter dated August 23, 1999, was the written confirmation of these discussions and thus implies that the letter was intended to refer to contract 1288. Declaration of John A. Ordway (Ordway Declaration) (Nov. 12, 2002).

Following receipt of the August 23, 1999, letter, counsel for appellant undertook to assist PIO in preparing a properly certified claim. Since the detailed documentation was located in Germany, he traveled to Munich in the spring of 2001 to review and obtain the information be needed to complete the claim. Ordway Declaration. When the revised draft was available, Mr. Daglioglu was in a remote location in Turkey and could not be reached. In late 2001, he returned to Germany and reviewed the draft claim. He executed a certification on December 27, 2001. Thereafter, the claim underwent some revisions, and it was actually submitted to BBG, which had become the successor agency to USIA, on March 26, 2002. BBG denied the claim and PIO filed this appeal.

PIO, which was organized as a corporation under German law, was dissolved on October 19, 2000, and is no longer listed on Germany's commercial register. Its former principal, Mr. Daglioglu, has been appointed by the German courts to serve as the liquidator of PIO.

Discussion

BBG has asserted numerous defenses to the pending appeal. First, it contends that appellant no longer exists and thus lacks capacity to bring the appeal, or even to assert a claim. BBG also alleges that the appeal was untimely filed and that the underlying claim was improperly certified not only by reason of appellant's lack of existence, but because the certification was signed several months before the claim was signed and submitted to respondent. Additionally, BBG maintains that appellant's claims are barred by the terms of the contract because the claims assert entitlement to an equitable adjustment in the absence of timely written notice to the Government under the applicable contract clauses and were lodged after final payment was rendered. Moreover, respondent contends that appellant's claims are barred by the terms of the general release it signed prior to receipt of final payment. Finally, BBG asserts, the appeal should be barred by laches because of the inordinate delay in bringing the claim and the resultant prejudice to BBG's ability to defend against it. Citing these defenses, respondent has moved for dismissal or summary denial of this appeal on a number of grounds.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); US Ecology, Inc. v. United States, 245 F.3d 1352, 1355 (Fed. Cir. 2001); Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996). As the moving party, BBG bears the burden of establishing the absence of any genuine issue of material fact. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v.

Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Washington Development Group-JWB, LLP v. General Services Administration, GSBCA 15137, et al., 03-2 BCA ¶ 32,319, at 159,879. All reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977. A motion to dismiss for lack of jurisdiction similarly requires that the allegations of the complaint be construed favorably to the party opposing the motion. Sheuer v. Rhodes, 416 U.S. 232, 236 (1974); accord Hamlet v. United States, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

Capacity to Pursue This Claim

BBG's first challenge to this appeal is based on its contention that PIO no longer exists as an entity and thus lacks the capacity to bring the appeal. Specifically, BBG notes that, as stated in the complaint, PIO was liquidated in 1999. BBG submits that, according to publicly available German corporate records, and as conceded in the complaint, appellant was dissolved under German law. This, BBG asserts, requires dismissal of the appeal because the contractor is no longer capable of maintaining this action.

Certainly, a showing of corporate incapacity may require that an appeal be dismissed. See Carillon Corp., ASBCA 36290, 91-2 BCA ¶ 23,901; Micro Tool Engineering, Inc., ASBCA 31349, 87-1 BCA ¶ 19,372 (1986). In general, we follow the laws under which a legal entity was organized to determine what powers may have survived its dissolution. See, e.g., Talasila, Inc. v. United States, 240 F.3d 1064, 1066 (Fed. Cir. 2001); accord P.A.L. Systems Co., GSBCA 10858, 91-3 BCA ¶ 24,259; DCO Construction, Inc., ASBCA 52701, et al., 02-1 BCA ¶ 31,851; Rosinka, ASBCA 48143, 97-1 BCA ¶ 28,653 (1996). Under analogous precedent involving domestic corporations, the lack of corporate capacity may constitute a bar to an action for a variety of reasons, most notably when the entity lacked the capacity to enter into the contract. See Rosinka, 97-1 BCA at 143,138 (citing Services, Inc., ASBCA 42929, 93-1 BCA ¶ 25,514 (appeal dismissed because dissolved South Carolina corporation lacked capacity to enter into contract from which appeal was taken); West Point Research, Inc., ASBCA 27185, 83-2 BCA ¶ 16,845 (appeal dismissed because dissolved Connecticut corporation lacked capacity to enter into contract from which the appeal was taken); HTC Industries, Inc., ASBCA 45062, 93-1 BCA ¶ 25,560, aff'd on reconsideration, 93-2 BCA ¶ 25,701, aff'd, 22 F.3d 1103 (Fed. Cir. 1994) (table) (under Connecticut law action by or against a dissolved corporation could proceed and corporate name available to shareholder prosecuting or defending in a derivative capacity); Carillon Corporation, ASBCA 36290, 91-2 BCA ¶ 23,901 (surety failed to show that incorporation laws of Florida permitted a representative to pursue claims of an inactive corporation)). In P.A.L. Systems we recognized that in most domestic jurisdictions a corporate survival statute will operate to permit a dissolved or liquidated corporation to participate in litigation for some period of time after dissolution. 91-3 BCA at 121,286-87.

Since PIO was organized in the Federal Republic of Germany, we look to its status under German law to ascertain whether it is capable of maintaining this action.[1] The parties also agree that German law should control whether PIO continues to be capable of pursuing this claim and have separately provided input from German lawyers on this issue. Appellant has submitted the affidavit of PIO's German attorney, who is admitted to practice in Munich, Germany. PIO's attorney, who specializes in tax and corporate law, has submitted an affidavit affirming that, under German federal law, dissolved corporations retain the capacity to sue. Affidavit of Hubertus Hohenlohe (Hohenlohe affidavit) (Nov. 12, 2002).

In reply, BBG disputes whether the Hohenlohe affidavit meets appellant's burden to show that PIO retains the capacity to pursue this appeal. Specifically, BBG has provided an opinion, asserting that PIO, as a Gesellschaft mit beschränkter Haftung (GmbH), or limited liability corporation, came into existence when it was added to the commercial register in Germany. According to BBG, PIO was deleted from the commercial registry in October 2000, which terminated its legal existence. BBG has produced the legal opinion of another German attorney, averring that the deletion of a GmbH from the corporate register suffices to terminate its legal existence and thus its capacity to sue. Respondent's Reply Brief, Exhibit A. (Legal Opinion of Matthias Dörsam, (Dörsam Opinion)).

In response to this contention, appellant points out that although PIO has been dissolved as a corporate entity, and removed from the commercial register, it nonetheless still has assets, including this claim, and is undergoing a liquidation process in accordance with provisions of German law. Mr. Daglioglu has been duly appointed as the corporation's liquidator by a German court of competent jurisdiction. This is enough, according to appellant's expert, to establish the requisite capacity to bring an action. Appellant's expert, Mr. Hohenlohe, further attests that, under German law, in appropriate circumstances, a

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[1] It does not appear that this Board has previously had occasion to resolve the application of foreign law to a jurisdictional issue of this nature. We note that the Armed Services Board of Contract Appeals has addressed such situations:

> In determining questions of foreign law, we follow Board Rule 6(c) which, in turn, reflects Federal Rule of Civil Procedure (FRCP) 44.1. Gesellschaft, 81-1 BCA ¶ 14,924 at 73,847. Under FRCP 44.1 and Board Rule 6(c) determinations of foreign law are treated as questions of law. We may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The rule provides a considerable degree of discretion in determining the appropriate method for ascertaining what the foreign law is, whether it be by independent research or reliance on the parties. See Twohy v. First National Bank of Chicago, 758 F.2d 1185, 1191-95 (7th Cir. 1985).

Rosinka, 97-1 BCA at 143,139. We find this reasoning to be persuasive and follow its guidance in addressing the issue presented in the instant appeal.

dissolved corporation has the capacity to sue and be sued through the offices of its liquidator. BBG's expert does not conclusively demonstrate otherwise and appears to agree. There is no contention that PIO lacked the capacity to enter into the contract. Both experts appear to agree that under German law there is a corporate survival statute, akin to those discussed in P.A.L. Systems, under which the dissolved or liquidated corporate entity may continue to sue or be sued. Mr. Daglioglu is authorized to pursue the collection of PIO's remaining assets, which would include this claim, and has initiated this suit on behalf of PIO. On the record established here, we conclude that PIO continues to have the capacity to bring this action.

Timeliness of the Appeal

BBG initially contended that PIO did not appeal the 1996 contracting officer's decision in a timely manner. That argument was readily addressed by PIO, which pointed out that neither the 1996 letter nor any of the other written communications that were sent to PIO by BBG and its predecessor agencies prior to May of 2002, contained all of the requisite elements of a final contracting officer's decision such that the failure to file a timely appeal would bar the contractor's claim. In the main, the letters failed to state expressly that they were intended to serve as "final decisions" under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2000), and also did not advise the contractor of its right to appeal. See 48 CFR 33.211(a) (1996).[2] Ordinarily, in the absence of proper notification of appeal rights, a contracting officer's decision does not trigger the CDA's time limits for pursuing an appeal. E.g., Pathman Construction Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987); Monique K. Nguyen-Auto Wholesale v. General Services Administration, GSBCA 13516, 96-2 BCA ¶ 28,313; P. A. Cavanagh Co. v. General Services Administration, GSBCA 12661, 94-2 BCA ¶ 26,772. Although this general rule has been modified somewhat by Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996), to suggest that when a contractor is not misled by inaccurate or incomplete information concerning appeal rights the statute of limitations will not necessarily be tolled, there is no basis for applying this approach here. This is not a case where the letter contained only minor defects or misinformation concerning the contractor's appeal rights. See, e.g., Philadelphia Regent Builders, Inc. v. United States, 634 F.2d 569 (Ct. Cl. 1980). This case is more akin to the situation in Pathman, where the absence of a decision meant that the contractor had received no notification whatever of appeal rights. Here, the agency's written communications prior to the formal denial of the March 2002 claim submission are silent with respect to the intended finality of the decision and the contractor's right to appeal under the CDA. Thus, there were no communications on the part of the contracting officer that could conceivably

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[2] Whether or not this letter constituted a "final decision" such that PIO could have filed an appeal need not be resolved here. We have recognized that it is not necessary to style a denial of a claim as a "final decision" or to include the boilerplate language provided for the protection of the contractor for the contracting officer's response to a contractor's written communication to constitute an appealable decision. Kevin J. LeMay v. General Services Administration, GSBCA 16093, 03-2 BCA ¶ 32,345 (citing Placeway construction Corp. v. United States, 920 F.3d 903 (Fed. Cir. 1990); Midwest Properties, LLC v. General Services Administration, GSBCA 15822, 03-2 BCA ¶ 32,344 (2002)). Certainly, this letter made clear that the Government was rejecting the certified claim, but, as we explain in the text above, PIO was not required to appeal this decision to preserve its rights under the CDA.

be regarded as triggering the limitations period so as to make the "decision" final. See George Ledford Construction, Inc., VABCA 6630, et al., 02-1 BCA ¶ 31,662 (2001).

In summary, while the agency repeatedly rejected PIO's efforts to put forward its claims for additional compensation under the subject contract, the communications declining to consider PIO's requests do not expressly purport to be formal contracting officer decisions denying these claims for purposes of the CDA and its implementing regulations. For the most part, the communications appear to have been fairly informal in nature, consisting, at least in the earlier years, of apparent attempts by the agency to discourage PIO's efforts to obtain further redress by invoking the fact of the general release. None of the letters apprise PIO of its right to appeal the contracting officer's rejection of the claim. Absent some basis to conclude that PIO had reason to understand that the denials were intended to serve as final decisions under the CDA and was aware that it should appeal these denials, there is no reason to conclude that PIO was obligated to exercise its right to appeal or otherwise forfeit the ability to pursue its claims any further. The failure to appeal the earlier denials of PIO's claim does not make those denials conclusive and does not constitute a jurisdictional bar to this action. BBG's denial of the detailed claim submission made by PIO in March 2002 was timely appealed.

Certification

Another jurisdictional challenge raised by BBG concerns the certification of the claim submitted in March of 2002. The certification executed by Mr. Daglioglu is dated December 27, 2001, while the claim was dated and formally submitted on March 26, 2002. BBG thus questions whether this certification satisfies the requirements of the CDA.

For claims in excess of $100,000, the CDA requires that the contractor "certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." 41 U.S.C. § 605 (c)(1) (2000). The purpose of certification is to facilitate settlements based upon a truthful submission of the contractor's costs and to discourage the submission of fraudulent or inflated claims by making contractors liable for fraudulent representations. See J&E Salvage Co. v. United States, 37 Fed. Cl. 256, 263 (1997), aff'd, 152 F.3d 945 (Fed. Cir.), cert. denied, 525 U.S. 827 (1998); Fischbach and Moore International Corp. v. Christopher, 987 F.2d 759, 763 (Fed. Cir.1993) (determining that certification requirement "trigger[s] a contractor's potential liability for a fraudulent claim under section 604 of the [CDA]") (citation omitted).

Proper certification of a claim requires that "a contractor must make a statement which simultaneously makes all of the assertions required by 41 U.S.C. § 605(c)(1)." D.L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997); accord Santa Fe Engineers, Inc. v. Garrett, 991 F.2d 1579, 1583 (Fed. Cir.1993), overruled on other grounds, Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995) (en banc); W.H. Moseley Co. v. United States, 677 F.2d 850, 852 (Ct. Cl.), cert. denied, 459 U.S. 836 (1982). In the absence of a proper certification of the claim, the contracting officer has no authority to issue a valid final decision and the Board can have no jurisdiction over the matter. Braughler; Skelly & Loy v. United States, 685 F.2d 414, 419 (Ct. Cl. 1982).

Respondent asserts that "a claim certified by the supposed president of a presently non-existent corporation, months apart . . . from the actual finalization of that claim, does not satisfy the statutory requirement for claim certification." As to the first component of respondent's objection, the corporate status of PIO, we have already discussed this issue above. Mr. Daglioglu, as the owner of the small corporation, and the person appointed to pursue remaining corporate assets for the completion of liquidation, would presumably be the proper person to make the certification. The remainder of respondent's challenge -- that the prospective certification of the claim was invalid -- requires further analysis.

Respondent, in support of its contention that a prospective certification is invalid, refers us to a decision of the Armed Services Board so holding in "similar circumstances." In that case, the board explained its reasoning as follows:

> [A]ppellant's November 1988 certification lacks contemporaneous significance when applied prospectively to the December 1989 letter. We cannot harmonize prospective application of appellant's certification with the purpose underlying 41 U.S.C. sec. 605 (c)(1). That purpose is "to push contractors into being careful and reasonably precise in the submission of claims to the contracting officer." That goal would be frustrated by giving effect to a certification that was submitted thirteen months before the December 1989 letter. The three elements of the certification are all couched in the present tense, not the future or the subjunctive. See 41 U.S.C. § 605(c)(1). Plainly, a contracting officer can have little assurance that a claim submitted thirteen months after certifying continues to be 'made in good faith,' that the supporting data still 'are accurate and complete,' and that 'the amount requested accurately reflects' what is believed to be due.

Oman-Fischbach International, ASBCA 41474, 91-2 BCA ¶ 24,018, at 120,269 (citations omitted). In a similar set of circumstances, the Federal Circuit cited this decision with approval and stated that a party may not rely on an earlier executed certification to support a claim submitted to the contracting officer for decision when a dispute had not existed at the time the certification was executed and the contractor had submitted additional data in the intervening period for which no certification was ever executed. Santa Fe Engineers, 991 F.2d at 1583. Both of these cases, however, involved disputes that arose prior to the amendment of the Contract Disputes Act in 1992 to permit the correction of a defective certification as an alternative to divesting the tribunal of jurisdiction to hear the dispute.

As a consequence of the amendment of the CDA in 1992, it is now settled law that technical deficiencies in a certification may be corrected at any time before final judgment is entered. 41 U.S.C. § 605(c)(6). Therefore, a technically deficient certification neither prevents a contractor from stating a claim nor precludes the appropriate tribunal from taking jurisdiction over the matter. Thomas Creek Lumber & Log Co., IBCA 4020-1999, 00-2 BCA ¶ 31,077; Hamza v. United States, 31 Fed. Cl. 315, 323 (1994); SAE/Americon--Mid-Atlantic, Inc. v. General Services Administration, GSBCA 12294, 94-2 BCA ¶ 26,890. On the other hand, the complete absence of a certification, or a certification only to matters

not relevant under the CDA, may not be deemed a defective certification capable of being corrected. 48 CFR 33.201; AT&T Communications v. General Services Administration, GSBCA 14932, 99-2 BCA ¶ 30,415; Lockheed Martin Tactical Defense Systems v. Department of Commerce, GSBCA 14450-COM, 98-1 BCA ¶ 29,717; Keydata Systems, Inc. v. Department of the Treasury, GSBCA 14281-TD, 97-2 BCA ¶ 29,330.

The issue raised here is whether a certification executed some months prior to the submission of the claim to the contracting officer satisfies the statutory requirement, is defective but subject to correction, or is tantamount to no certification whatever. PIO submits that the circumstances here fall in one of the first two categories; BBG maintains that the time gap, when certification of the claim precedes its submission, defeats the purpose of certification and must be regarded as a complete failure to certify.

Considerable guidance on this point is provided by the Federal Circuit in its Braughler decision. There, the Court considered a claim that had been submitted to the contracting officer, accompanied and supported by a certification that had been executed some twenty-six months earlier in conjunction with a letter addressed to and seeking relief from the contract's resident engineer. The claim that was eventually directed to the contracting officer was the same as the one set forth in the letter to the resident engineer. The Court held that this certification could properly apply to the submission of an identical claim with identical supporting data to the contracting officer. 127 F.3d at 1482-83. Thus, under Braughler, it is no longer a requirement that the certification literally be executed at the same time or after the claim is prepared, so long as the certification refers to the same supporting information that is used to justify the claim and is provided before the contracting officer issues a decision. See also J&J Maintenance, Inc., ASBCA 50984, 00-1 BCA ¶ 30,784 (quantification of claim and certification preceded request for contracting officer decision by several months); A&J Construction Co., IBCA 2376-F, 88-2 BCA ¶ 20,525 (letter seeking final decision followed by separate letter quantifying claim with supporting data, and final letter certifying claim); IPS Group, Inc., ASBCA 33182, 87-1 BCA ¶ 19,482 (uncertified claim followed by separate certification).

Here, counsel for appellant explains that the claim preparation process spanned many months and required coordination with an overseas client whose availability, for various reasons, was sporadic. Mr. Daglioglu signed the certification several months before the claim was actually finalized and submitted to the BBG contracting officer. It appears, from reviewing the claim and counsel's declaration, that Mr. Daglioglu essentially certified to the same facts and supporting data as were contained in the claim that was submitted in March 2002, although counsel has not expressly represented this to be the case. As such, under the reasoning of Braughler, the certification as submitted would seem to be proper. The circumstances described here do not necessarily give rise to a basis to divest the Board of jurisdiction over this claim. We recognize that the certification might be deemed defective or invalid if it were to be determined that some aspect of the claim was based on supporting documentation and cost data that had not been considered in connection with the draft claim that was reviewed by Mr. Daglioglu in late 2001 and thereafter certified on December 27, 2001. If this is eventually determined to be the case, BBG may raise this issue again based on the more developed record.

Notification Under the Changes Clause

Respondent maintains that PIO's claim must be denied as a matter of law because PIO filed its claim for equitable adjustment after it received final payment under the contract, in contravention of the express terms of the contract's Changes clause, which provided that "[n]o proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract." Appeal File, Exhibit 1 (48 CFR 52.243-4(f) (1994)). Respondent contends that even apart from the binding effect of the general release of claims, which is discussed in detail below, the failure to provide the required notice of a claim before receipt of final payment will bar the claim. Automated Power Systems, Inc., DOTBCA 2930, et al., 98-1 BCA ¶ 29,638. In addition, BBG contends that PIO failed to give proper timely written notice of claimed constructive changes under the contract, another basis for concluding that the claims cannot now be pursued. BBG asserts that the failure to give notice that the contractor intended to make a change claim prejudiced BBG's ability to take action to avoid potential liability for extra work. This, according to BBG, is now exacerbated by the lengthy delay preceding the filing of this appeal.

There does not seem to be any dispute that PIO did not provide the requisite written notice of its potential claims for equitable adjustments. PIO's explanation is that, notwithstanding the absence of written notice, the contracting officer's representative was well aware of the fact that PIO was being asked to perform considerably more work than was required under the contract specifications and that PIO expected to be paid for that extra work. PIO further states that, in response to its protests, the contracting officer's representative pressured PIO to proceed forthwith because of the need for VOA to occupy the renovated premises, leading PIO to understand that it should perform the work and seek financial redress later. The letter directed to that individual on the same date that PIO executed and forwarded the general release provides some contemporaneous support for PIO's position.

Although the Changes clause contains a requirement for written notification, within a fixed period of time, that a request for equitable adjustment will be made when the contractor perceives a Government action as increasing the scope of work, this requirement has not been rigidly enforced in all circumstances. The seminal decision in this regard is Hoel-Steffen Construction Co. v. United States, 456 F.2d 760 (Ct. Cl. 1972). There, in discussing such a contract requirement, the Court of Claims cautioned:

> To adopt [a] severe and narrow application of the notice requirements . . . would be out of tune with the language and purpose of the notice provisions, as well as with this court's wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the Government is quite aware of the operative facts.

Id. at 767-68; see also Imbus Roofing Co., GSBCA 10430, 91-2 BCA ¶ 23,820; Max Blau & Sons, Inc., GSBCA 9827, 91-1 BCA ¶ 23,626; Powers Regulator, Inc., GSBCA 4668, et al., 80-2 BCA ¶ 14,463.

BBG also objects to the failure to present a written equitable adjustment for this changed work prior to acceptance of final payment under the contract. In response, PIO

states that this requirement also is not rigidly enforced. Final payment will not necessarily act as a bar to a request for equitable adjustment:

> [w]here the contracting officer knows, or is properly chargeable with knowledge, that at the time of final payment the contractor is asserting a right to additional compensation, even though formal claim therefor has not been filed, the fact of final payment does not bar consideration of a later formal claim. Nor are any special words or formal means of communications required in presenting a claim for additional compensation.

Jo-Bar Manufacturing Corp. v. United States, 535 F.2d 62, 66 (Ct. Cl. 1976); accord Navales Enterprises, Inc., ASBCA 52202, 99-2 BCA ¶ 30,528. BBG counters that while this may be the case, Jo-Bar also concluded that the bar should apply on the facts of that case, because an oral statement that the contractor "would have to get more money" or planned "to ask for more money" was "at best [an] ambiguous and casual statement, to one authorized to provide plaintiff only technical assistance." This did not amount to "a proper assertion of a claim to an equitable adjustment in the contractually prescribed manner." 535 F.2d at 64-66.

On the record before us, the adequacy of the notice given by appellant at the time extra or changed work was allegedly directed, and prior to final payment, requires the resolution of material factual disputes. Similarly, whether the contracting officer is charged with actual or constructive notice of the claim prior to final payment also raises questions of material fact. These circumstances preclude the entry of summary relief on these issues.

The Release

Respondent further asserts that this appeal should be summarily denied based on the general release that was signed by the contractor. As a general proposition, in the absence of special, limited circumstances, a general release bars claims based upon events occurring prior to the date of the release. J.G. Watts Construction Co. v. United States, 161 Ct. Cl. 801, 806-07 (1963). The policy underlying the requirement for a release is that it achieves finality with respect to the contract process. The primary purposes of a release are to finalize the rights of the parties and to evidence completion of performance. Singleton Contracting Corp. v. General Services Administration, GSBCA 12642, 94-2 BCA ¶ 26,716 (citing Dawson Construction Co., GSBCA 5611, et al., 83-1 BCA ¶ 16,160). Consequently, except in narrow circumstances, a release bars further consideration of any claim not expressly exempted from its scope. Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 03-1 BCA ¶ 32,251 (citing Winn-Senter Construction Co. v. United States, 75 F. Supp. 255 (Ct. Cl. 1948)). Those circumstances include plain conduct indicating the Government's consideration, post release, of a claim, as well as economic duress,[3] fraud, mutual mistake,

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[3] PIO adverts to its precarious financial situation prevailing at the time it executed its release, noting that Mr. Daglioglu signed the release because economic necessity dictated that he obtain the remaining monies due under the contract. PIO does not press the argument that this amounted to the type of economic duress that would invalidate the finality of the release. The type of showing contemplated for invocation of the duress exception is

or obvious unilateral mistake by the contractor. Mingus, 812 F.2d at 1395; Ben M. White Co., ASBCA 36496, 91-1 BCA ¶ 23,401, at 117,414. If a contractor wishes to preserve the right to assert a claim under that contract later, it bears the burden to modify the release before signing it. Mingus, 812 F.2d at 1393-94. To the extent that a contractor later contends it did not intend for the release to discharge a particular claim, we must review the Government's conduct after the contractor signed the release to see whether it "makes plain that [the parties] never construed the release as constituting an abandonment of the claim." Trataros; J.G. Watts, 161 Ct. Cl. at 807.

The letter sent by PIO to the contracting officer's representative on the same date that it executed the release is inadequate to serve as the type of exception that excludes a pending claim from the scope of a general release. Even if we were to overlook the fact that it did not specifically accompany the release, but was sent to someone other than the contracting officer, the content of the letter lacked the requisite specificity required by applicable case law. The courts and boards have unequivocally held that a generalized, "blunderbuss" approach, such as that adopted in PIO's letter, does not serve to put the Government on notice of excepted claims such that the release would not foreclose additional recovery on said claims. To reserve claims from the coverage of the release, the contractor is expected to delineate what the claims are and to specify a stated amount of expected recovery. Mingus, 812 F.2d at 1393 (citing H.L.C. & Associates Construction Co. v. United States, 367 F.2d 586, 592 (Ct. Cl. 1966)). It is not enough to "assert no more than a naked intention to file an indeterminate future claim in an undetermined amount as a precursor to subsequent development of arguable and previously unknown claims." Mingus, 812 F.2d at 1394; accord Eagle Asphalt & Oil Co., IBCA 4173-1999, 01-1 BCA ¶ 31,234.

On the record presented for the resolution of these motions, prior to August of 1999, there is no evidence of post-release conduct on the part of the Government that would suggest that it did not construe the release as discharging any remaining claims that PIO might have had. While the Government politely responded to PIO's efforts to recover additional monies under the contract, it consistently raised the fact of the release as a bar to recovery and rejected PIO's efforts to obtain an equitable adjustment for changed work under the contract.

Again, however, appellant has introduced sufficient evidence to cause us to conclude that there are material factual disputes that prevent a summary resolution of this matter based on the execution of the release. This evidence is presented in the form of Mr. Pritchard's August 1999 letter, as elaborated upon by counsel's declaration. The letter from Mr. Pritchard, who identifies himself as the cognizant contracting officer, to PIO's counsel, states that USIA considered correspondence accompanying the release to hold open the claims for equitable adjustments based on various change orders. The letter further states that neither USIA, nor its successor agency, would raise as a defense the fact that the exceptions to the

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Government conduct forcing the contractor to execute the release. It is not enough to show that the contractor was suffering financial embarrassments that made the execution of a release an economic necessity. See Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002); G.M. Shupe, Inc. v. United States, 5 Cl. Ct. 662 (1984).

release were not set forth within the release document itself. We recognize the validity of BBG's objections to the use of this document as proof of a waiver. It unambiguously references in the heading a different contract from the one that constitutes the subject of this dispute. The text of the letter does not make clear that it refers to the subject contract and could be read otherwise, particularly since the author refers to two different contract matters, making it difficult to know which one he means when he states he will not rely upon the release. On the other hand, the letter specifically references counsel's August 18, 1999, inquiry, which did clearly refer to the subject contract and asked for confirmation that the release would not be asserted against the contract 1288 claim. The letter itself is far from definitive as a source of proof that the contracting officer intended to waive and had waived the application of the release to the subject contract.

The only other source of evidence in the record that the letter may have been intended to apply to contract 1288, rather than to contract 1317, is the representation to this effect of counsel for PIO, who, in his declaration, implies that the reference to contract 1317 was a typographical error and that the waiver of the release language was meant to apply to the instant contract. This is somewhat supported by allegations in the complaint that contract number 1317 was fully resolved at some time prior to August of 1999. It is simply not possible to determine Mr. Pritchard's intent in a more direct manner -- he is now deceased. Were it not for counsel's declaration, we would be inclined to disregard this letter and find that the release as executed served to preclude consideration of PIO's claims. This is the case because aside from the anomalous exception of the August 23, 1999, letter, which is inconclusive on its face, the Government has consistently invoked the release as a bar to appellant's claims. Coupled with the allegations of the complaint and counsel's declaration, however, there is enough evidence to create a disputed issue of material fact. Although the circumstances give rise to considerable skepticism as to whether this letter was meant to serve as a promise not to invoke the general release as a bar to further relief, we are mindful that the legal standards applicable in the context of a summary judgment type context do not permit us to weigh the evidence at this preliminary stage of the proceedings.

BBG's objections to the purported waiver of the release do not end with its observations concerning the evidentiary shortcomings of the August 18, 1999, letter authored by Mr. Pritchard. The agency also contends that even assuming, for the sake of argument, that Mr. Pritchard intended his August 1999 letter to apply to the subject contract, he did not have the authority to waive the application of the general release, and that since he did not actually enter into a binding contract action that would have the effect of waiving the release, the letter and counsel's declaration still cannot serve to provide a basis to defeat summary relief. That is, this letter cannot be said to serve as the type of "contractual act" by which the contracting officer could bind the Government. To the extent that this was not a binding "contractual act," the Government is free to reverse its position. PIO disagrees, asserting that a signed document, in effect agreeing to waive the release, was sufficient to bind the Government.

The binding effect of a contracting officer's action depends on the nature of the action taken. To the extent the facts and circumstances suggest that the action taken was within the authority of the contracting official, final in nature, and intended to bind the Government, the Government will not be free to reverse its position, even if it later determines that the action taken was precipitate or not an exercise of good judgment. Compare JC&N Maintenance,

Inc., ASBCA 51283, 02-1 BCA ¶ 31,799 (pre-dispute representations of contracting officers which were not labeled final decisions and were part of an evolving course of negotiations between the contractor and the agency were not binding actions) and Litton Systems, Inc., Guidance & Control Systems Division, ASBCA 45400, 94-2 BCA ¶ 26,895 (determination of Cost Accounting Standards (CAS) clause noncompliance not accorded finality where no contractual modification had followed and regulation did not accord finality to the determination) with Honeywell Federal Systems, Inc., ASBCA 39974, 92-2 BCA ¶ 24,966 (agency may not retract the exercise of what it subsequently deems to be poor judgment when binding action was taken within the scope of the contracting officer's authority) and Bell Helicopter Co., ASBCA 17776, 74-1 BCA ¶ 10,411 (contracting officer had authority to settle dispute and binding action was taken) and Liberty Coat Co., ASBCA 4119, et al., 57-2 BCA ¶ 1576 (contracting officer's agreement to deviation from specification followed by agreement between Government and contractor on cost reduction meant that decision must be accorded finality). See also Unisys Corp. v. General Services Administration, GSBCA 12823-COM, 95-2 BCA ¶ 27,353 (further development of record needed to determine whether contracting officer had taken binding action to accept commerciality exemption in a dispute over fair and reasonable cost of spare parts).

PIO, of course, characterizes the situation in this case as an effort on the part of BBG to back away from what it now regards as an exercise of poor judgment on the part of its contracting officer. BBG maintains that the letter, replete with ambiguities and internal inconsistencies, does not rise to the level of a binding contractual action. Once again, we are forced to conclude that this issue cannot be resolved at this juncture. Appellant has adduced sufficient evidence in rebuttal to BBG's contentions to raise material factual issues concerning whether the release was waived and the contracting officer had authority to take this action. These disputes must be resolved on a more fully developed record.[4]

With respect to the release issues, we note that BBG has questioned the propriety of counsel's actions in communicating with Mr. Pritchard without advising Government counsel of his intent to discuss contractual issues concerning PIO's contracts with USIA. Counsel for PIO responds that his actions were not improper and did not constitute the type of overreaching that USIA counsel implies was unethical or objectionable under the circumstances. PIO also contends that contracting officials employed by the Federal Government are generally assumed to be familiar with their legal rights and obligations and are in any event free to consult with their counsel if they deem it appropriate. PIO maintains that it is not incumbent upon the contractor's representative to advise such individuals to seek

[4] We note, also, that PIO contends that to the extent the Board becomes persuaded that Mr. Pritchard lacked authority to waive the release, or otherwise rules that the Government may disavow Mr. Pritchard's actions, the Board should find that the Government is now estopped from avoiding the waiver by reason of PIO's detrimental reliance on the waiver, which consisted primarily of proceeding to incur considerable expense traveling overseas and otherwise preparing the fully documented claim that was submitted in March 2002. Given that we have not yet found as a matter of law whether there was a waiver or whether the Government may somehow avoid that waiver if there was, it is unnecessary to address the estoppel argument.

legal advice prior to discussing the legal implications of contract issues with which they would ordinarily be expected to be familiar.

Although it is not entirely clear what redress BBG seeks from the Board based on its complaint, we need not reach that issue in any event. This issue is readily disposed of by consulting the rules of ethical conduct applicable to the attorney representing the appellant. Counsel for PIO is licensed to practice in the District of Columbia, is a partner in a firm that is located in the District of Columbia, and met with the relevant Government officials in the District of Columbia. We thus look to the ethics rules promulgated by the District of Columbia Bar. This situation is addressed by D.C. Bar Rule 4.2, which governs the conduct of communications between a lawyer and opposing parties. Rule 4.2(a) generally provides that an attorney should not, during the course of representing a client, communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so. This general proviso is modified, however, by subparagraph (d) of this rule:

> This Rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.[5]

PIO counsel's prelitigation communications with USIA's contract personnel would appear to fall within the parameters of permissive contacts as delineated in subparagraph (d) and,

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[5] Further illumination as to the intent of this proviso is contained in the comments to the rule, which state:

> Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

thus, are not a matter of concern for this tribunal from the standpoint of the ethical rules applicable to attorney conduct.[6]

[6] For future reference, BBG notes, however, that counsel's continuing role in representing PIO may be impacted in the event that it would become necessary for him to actually testify to the discussions he held with the late Mr. Pritchard. D.C. Bar Rule 3.7 prohibits a lawyer from acting as an advocate at any trial in which the lawyer is likely to be a necessary witness except where the testimony is as to an issue that is undisputed, or relates to the value of legal services rendered in the case, or where a showing has been made that disqualification of the lawyer would work a substantial hardship on the client. See generally B.G.W. Limited Partnership, GSBCA 10501, 91-3 BCA ¶ 24,336. BBG did not raise this as a basis for rejecting the allegations set forth in his declaration or otherwise seek to disqualify counsel from proceeding with the defense of this motion.

Laches

Finally, BBG strongly urges that this appeal should be barred by the judicial doctrine of laches, which is intended to serve as a "'fairness doctrine' by which relief is denied to one who has unreasonably and inexcusably delayed in the assertion of a claim." A Olympic Forwarder, Inc. v. United States, 33 Fed. Cl. 514 (1995) (quoting S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985)). In essence BBG asserts, it has been prejudiced by PIO's unreasonably lengthy delay in prosecuting its claims and that this should bar the appeal. Additionally, the doctrine is intended to ensure that the tribunal is in a position to arrive at "safe conclusions as to the truth." Brundage v. United States, 504 F.2d 1382, 1384 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975).

Laches is an affirmative defense and, as such, the party raising it bears the burden of proof. The mere length of the delay is not sufficient to establish laches. The party asserting this defense must prove two elements necessary to support a finding that an appeal is barred by laches: (1) lack of diligence, or unreasonable and unexcused delay by the opposing party, and (2) prejudice to the party asserting the defense, either economic prejudice or impairment of its ability to defend, e.g., due to loss of records, destruction of evidence, or witness unavailability. JANA, Inc. v. United States, 936 F.2d 1265, 1269-70 (Fed. Cir. 1991), cert. denied, 502 U.S. 1030 (1992); Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992) (en banc); S.E.R., Jobs for Progress, Inc.; 2160 Partners v. General Services Administration, GSBCA 15973, 03-2 BCA ¶ 32,269; Adelaide Blomfield Management Co. v. General Services Administration, GSBCA 13929, 98-2 BCA ¶ 29,758; P.A.L. Systems Co.. These are independent and distinct prongs of the defense. The party asserting laches must prove both to establish the defense, and even then, the tribunal is not required to recognize the defense. Cornetta v. United States, 881 F.2d 1372 (Fed. Cir. 1988); C.I. Whitten Transfer Co., GSBCA 13911-RATE,
97-1 BCA ¶ 28,860.

Here, BBG asserts principally that the lengthy passage of time has prejudiced its ability to defend against this action for a number of reasons -- the agency has been reorganized several times since the events comprising contract administration occurred; nearly all of the personnel involved with this contract have retired or otherwise left the agency's employ; the memories of nearly all who were concerned with the contract have diminished; documents that should be in the contract file cannot be located; and a key witness -- the contracting officer whom appellant maintains agreed that appellant could still pursue its change claims -- has died. This type of prejudice is enough to satisfy the requirement to show prejudice to the Government's ability to mount a defense to the action. See LaCoste v. United States, 9 Cl. Ct. 313 (1986). In LaCoste, the contractor delayed for five years after the completion of performance before notifying the contracting officer that he had a claim to assert under a contract to build a sewer-holding tank system for the Army Corps of Engineers. The court found that the delay in that case prejudiced the Government's defense. The Government showed that in the intervening five years prior to submission of the claim, 'death, retirement or transfer' ha[d] diminished the number of government personnel familiar with the contract" in issue. The contractor's delay had thus placed "serious limitations on the Government's ability either to inquire into or to apprise itself of the facts surrounding" the case. This, coupled with the failure to advance a satisfactory reason for the

delay in pursuing the claim, sufficed to bar the claim under the equitable doctrine of laches. Id. at 316.

In contrast to the facts of LaCoste, however, this appellant has furnished a plausible explanation for the period of time taken to bring this claim to the point of litigation. Appellant is a small foreign enterprise, suffering economic setbacks, allegedly attributable in some part to its experience under the subject contract. Its owner speaks little English, necessitating the use of a translator. He also experienced some serious health problems during the period in question. Unlike the contractor in LaCoste, who made no effort whatever to press his claim for more than five years, PIO has, over the years, periodically contacted the Government about this claim. Moreover, although appellant's pursuit of the claim has not been particularly aggressive, the delays necessitated by the need for counsel to coordinate with a client and record located overseas are not necessarily unduly unreasonable under the circumstances. Thus, while we agree that the Government's defense has been significantly impaired by the delay in proceeding with this claim, we cannot, on the preliminary record available in this case, conclude that BBG has demonstrated the first prong of the test for a finding of laches so as to hold that the claim is barred. The facts applicable to the laches defense are disputed.

Decision

Respondent's motions to dismiss for lack of jurisdiction and for summary relief are **DENIED**.

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CATHERINE B. HYATT
Board Judge

We concur:

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STEPHEN M. DANIELS Board Judge	ANTHONY S. BORWICK Board Judge