# Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

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DENIED: April 8, 2005

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GSBCA 15979-ST

THOMSON & PRATT INSURANCE ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Joseph R. Cruse, Jr., Long Beach, CA; and Kevin M. Murphy and Valerie G. Preiss of Carr Maloney P.C., Washington, DC, counsel for Appellant.

Luisa M. Alvarez, Office of the Legal Adviser, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **PARKER**.

**NEILL**, Board Judge.

This dispute concerns the termination for default of a contract awarded by the Department of State (DOS) to appellant, Thomson & Pratt Insurance Associates, Inc. (T&P). The contract was for insurance coverage for works of art on loan to DOS and exhibited at posts worldwide as part of the Department's Art in Embassies Program. By letter dated October 2, 2002, DOS terminated appellant's contract for default. T&P appealed the contracting officer's decision to terminate its contract.

In reply to T&P's appeal, the Government filed a motion for summary relief. In that motion, DOS argued that there were no material facts in dispute and that the Government's decision to terminate the contract was correct as a matter of law. We denied the Government's motion on the ground that there were disputed questions of material fact regarding the issue of whether T&P was excused from further performance. *Thomson & Pratt Insurance Associates, Inc. v. Department of State*, GSBCA 15979-ST, 04-1 BCA ¶ 32,538. Among the arguments raised by T&P was the allegation that the Government had imposed a cardinal change on the contractor subsequent to contract award and that this excused the contractor from further performance. At the heart of this argument were two hotly disputed factual issues. The first was whether the Government had changed its contract

requirement after award and the second was whether such a change -- if it did occur -- was a cardinal change.

After denying the Government's motion, we invited counsel to supplement the record on these two factual issues. In response, the Government submitted a declaration from the contract specialist assigned to the procurement in question. The Government also provided an affidavit from an insurance professional and adjunct professor of insurance law whom it retained as a consultant in this case. In an affidavit provided for the record, this individual commented on the solicitation issued by DOS and on the resulting contract. Appellant, for its part, was authorized to engage in discovery regarding one of T&P's competitors on the procurement, which was the contractor on the contract for coverage of items in the Art in Embassies Program immediately prior to the contract which was awarded to T&P. Counsel for appellant also provided an affidavit from an experienced insurance professional. This individual, like the Government's retained consultant, provided comments and insights into the solicitation and contract which are the subject of this appeal.

After briefing their respective positions regarding the issues of whether there was a change in the Government's requirements following award and, if so, whether this was a cardinal change, counsel for each party elected to have the case decided on the basis of a record submission rather than a hearing. Rules 109, 111.[1] Counsel for appellant also proposed for inclusion in the record new evidence of alleged gross procurement improprieties which counsel for appellant believed to be relevant to the issues before us. Both parties have had an opportunity to comment on this evidence, and we have considered it in arriving at our conclusion in this case.

Upon review of the entire record before us, we affirm the Government's decision to terminate appellant's contract for default and deny the appeal.

## Findings of Fact

### The Government's Requirement

1. The Department of State's Art in Embassies Program has been in existence for thirty-eight years. Appeal File, Exhibit 1 at 4. The program manager testified that, over the years, DOS has purchased specific amounts of coverage for works on loan to the program. The annual average of insurance coverage is $50,000,000. Typically, rather than purchase several policies, the Department would purchase what the program manager considered to be a blanket agreement for worldwide coverage up to a given cap of seventy or eighty million dollars. Two types of caps would be involved, one being an overall cap while the other would be for lesser amounts and would apply to specific locations and to art in transit. For such coverage, however, it has been the practice of DOS to provide the insurance carrier or broker with a schedule or list of art that was in the program at various intervals during the

[1] 48 CFR 6101.9, .11 (2003).

policy. Deposition of Cohn Drennan (Drennan Deposition) (June 19, 2003) at 17, 26-28. The program manager also explained that the amount of art actually in the program at any one time can often be significantly lower than what the existing policy coverage may be. The reason for this is that the amount of art on loan varies depending on the tenure of various ambassadors -- particularly as that tenure may be affected by a change in Presidential administrations or reelection of a President to a second term. As an example, the program manager referred to the two terms of the Clinton administration. For the first four years, the value of the art on loan was around $50,000,000. During Mr. Clinton's second term, the value rose quickly to $80,000,000 but then fell abruptly to $18,000,000 within a six-month period. During the next six-month period, the value again began to rise. *Id.* at 28-31.

2. The program manager for the Art in Embassies Program also provided background information regarding lists of items on loan to the program which have in the past been provided to firms interested in bidding on insurance required by DOS. He explained that initially no list was provided with the solicitation, but rather, information was furnished on request when firms interested in responding made inquiry as to the program and where the art in question would be located. Later, to save time, it was decided to provide this information with the solicitation. The program manager stressed, however, the importance of explaining to potential vendors that such lists are only "snapshots" of what might be in the program at any given time. Given the nature of the program, different items on loan are continually passing in and out of the program or are on display at one embassy and then another. Drennan Deposition at 12-15.

3. The program manager for the Art in Embassies Program also testified that, until the time of the contract which is the subject of this appeal, not all art on loan was listed on the policy schedule. He explained that a prior insurer, although assuring the Department that all items in the program were covered, did not actually include in the policy schedule works valued below a certain dollar threshold. This, according to the program manager, created problems for some owners of art on loan to the program. On learning that their art was not scheduled, owners were fearful that it was not covered by the Government's policy. To remedy the situation, the program manager drafted language which was included in the solicitation that led to the award made to appellant. The language read: "There is no unscheduled property. All property is scheduled and documented as such in the loan agreement. No object is insured without one." Drennan Deposition at 23-24.

4. The contract specialist assigned the task of preparing for the procurement which is the subject of this dispute, has stated in a sworn declaration that he began his work as a contract specialist on January 11, 2001. He states that his first involvement in purchasing insurance coverage for the Department's Art in Embassies Program was the negotiation of a purchase order with the incumbent insurance agent, A. I. King Insurance Agency (A. I. King), to extend coverage for an additional four-month period, starting on November 1, 2001, and concluding on February 28, 2002. Declaration of Kevin McGhee (McGhee Declaration) (Mar. 12, 2004) ¶¶ 2-3.

5. The contract specialist has further explained that in late 2001, when he was assigned to the task of preparing the solicitation for the procurement in this case, he contacted the program manager for the Art in Embassies Program and asked him to identify the program's requirements for the period to be covered by the solicitation. The specialist

states that the program manager advised him the program would require "$30,000,000 worth of insurance coverage worldwide." The program director also provided the specialist with a draft statement of work. McGhee Declaration ¶¶ 2-3; Deposition of Kevin McGhee (McGhee Deposition) (June 5, 2003) at 15, 23. The specialist states that he thereupon prepared a solicitation to procure insurance coverage for $30,000,000. He does not profess to be an expert in insurance and contends that, at the time he did a market survey for this procurement prior to drafting the solicitation, he had no knowledge of what a blanket or scheduled insurance policy was. His professed object was simply to obtain a total aggregate of coverage in the amount of $30,000,000. This is what he intended to buy. McGhee Declaration ¶ 4; McGhee Deposition at 59-60.

6. The same contract specialist has also testified that, to the best of his recollection, at the time he did his market survey for this procurement, the individuals with whom he spoke did not specifically refer to blanket or schedule coverage. McGhee Declaration ¶ 4. Rather, he recalls that, without exception, every insurance company he contacted advised him, in the wake of the incidents of September 11, 2001, that the only way he would be able to get a realistic estimate of the cost of insurance coverage for the Art in Embassies Program would be to provide information on which embassies would house the art and how much art would be at each embassy. McGhee Deposition at 14, 55-56. The specialist states that, in recognition of this alleged need, he retrieved from the program office the list of known values as of January 2002, as a representative sample of what the program inventory would be. McGhee Declaration ¶ 7.

The Solicitation

7. On January 11, 2002, a FedBiz Opps notice advising the public of the procurement which is the subject of this dispute was issued on the internet. McGhee Deposition at 23. An amended version posted on January 18, 2002, is contained in the appeal file for this case. Appeal File, Exhibit 1. The notice stated that the Department of State was interested in "the [c]ontinuation of fine arts insurance coverage for works of art valued at $30,000,000 on loan to the Department of State, Art in Embassies Program and exhibited at posts worldwide." *Id*. at 1. The notice further explained that, for the most recent five years, including the policy then in force, coverage had been provided by Lloyds of London through A. I. King. The notice also contained the language drafted by the program manager for the Art in Embassies Program to the effect that all property to be covered is scheduled and documented as such in loan agreements. Appeal File, Exhibit 1 at 1, 4.

8. On February 5, 2002, DOS issued a solicitation for commercial items (standard form 1449) in the form of a request for quotations (RFQ). The RFQ sought quotes for a single fine art insurance policy. The base period for the policy was to run for six months starting February 28, 2002, and was to include an option to extend coverage for an additional six months. The scope of work read:

> SCOPE OF WORK: Continuation of fine arts insurance coverage for works of art valued at $30,000,000 on loan to the Department of State, Art in Embassies Program and exhibited at posts worldwide.

Appeal File, Exhibit 1, solicitation at 2.

9. In describing the coverage being sought, the solicitation stated:

> a. PROPERTY COVERED
> This policy covers only property described in the schedule dated January 2002 and any items added thereto, on file with the Art in Embassies Program.
>
> b. PERILS COVERED
> This policy covers the described property against all risk of loss or damage to such property including War and Terrorism, except hereinafter excluded.

Appeal File, Exhibit 1, solicitation at 2.

10. In describing the limits of coverage, the solicitation stated:

> 2. LIMIT OF COVERAGE
> This company shall not be liable for more than:
>
> > a. $5,000,000 while in transit or otherwise within the policy limits.
> >
> > b. $5,000,000 in any one loss, disaster or casualty which is the aggregate amount insured.
> >
> > c. The aggregate amount insured is $30,000,000.

Appeal File, Exhibit 1, solicitation at 3.

11. The schedule dated January 2002, which was mentioned in the solicitation's description of property covered, was also contained in the solicitation itself. It consisted of seventy overseas locations with a specified dollar value listed for each location. For example:

> Abidjan
> $18,500.00
> Abuja
> $31,800.00
> Accra
> $31,800.00

Appeal File, Exhibit 1, solicitation at 8-10. The values thus listed totaled slightly more than $18,700,000. *Id.*

12. Shortly after issuing the solicitation, DOS issued to all vendors who had shown an interest in the RFQ information originally contained in the FedBiz Opps notice but apparently omitted from the solicitation. Included in this message was the wording of the program manager regarding unscheduled property, namely:

> Intent as respects unscheduled property.

> There is no unscheduled property. All property is scheduled and documented as such in the loan agreement. No object is insured without one.

Appellant's Supplement to the Appeal File, Exhibit 41.

13. On receiving DOS's RFQ, T&P's vice president in charge of fine arts insurance simply forwarded it to Huntington T. Block Insurance Agency (Huntington Block). Deposition of Thomas Vaughn Pratt (Pratt Deposition) (Aug. 21, 2003) at 12. Huntington Block is a fine arts specialty insurance agency which, in this case, was to serve as a wholesale broker for T&P. Huntington Block is a division of Aon Group Limited and worked closely with Aon to place coverage with Lloyd's of London. Deposition of Laura J. Condon (Condon Deposition) (June 19, 2003) at 7-9. This was the first time T&P's vice president had done business with the Federal Government. Pratt Deposition at 9. This same individual testified that, as he understood the scope of work statement, "Continuation of fine arts insurance coverage for works of art valued at $30,000,000 on loan to the Department of State" simply meant "[t]hat a policy was going to be continued when it expired." *Id*.

14. The official at Huntington Block who was responsible for the firm's direct dealings with T&P was the firm's senior vice president and manager for retail operations. She testified that her contact with T&P in this case was the first time she had ever dealt with T&P or worked on obtaining insurance for the art in the State Department's embassies. This official further stated that she and others at Huntington Block found the language of the RFQ confusing. In particular, the stated requirement for $30,000,000 coverage was puzzling since the RFQ stated that there was no unscheduled property but nevertheless listed scheduled property amounting to a value of little more than $18,000,000. Condon Deposition at 22-23, 27-29. She explained that T&P was asked, "What are they looking for with this thirty million?" In a similar vein, she testified that individuals at Huntington Block were asking among themselves, "What does this thirty million mean? There is no unscheduled property. There's only scheduled property. The schedule is this amount. What is this?" *Id*. at 97-98. According to this same official at Huntington Block, after consulting with T&P as well as with the London underwriters, the firm concluded that DOS was seeking schedule rather than blanket coverage but intended to add more property to the schedule at a later date and, when doing so, would expect the rate quoted for the $18,000,000 already on the schedule to remain the same until the scheduled values reached a total of $30,000,000 -- no matter where the additional property might be. *Id*. at 26-27, 97-99.

15. Another official at Huntington Block, the firm's underwriter manager, recalls discussions regarding the meaning of the RFQ's reference to an aggregate of $30,000,000 in contrast to a schedule valued at only $18,000,000. Deposition of Linda Sandell (Sandell Deposition) (July 28, 2003) at 29. She testified that, in her opinion, the DOS statement that there would be no coverage for unscheduled property convinced her that the Department was seeking schedule rather than blanket coverage. She did not recall anything in the solicitation that would have led her to believe that the State Department was looking for a blanket policy as opposed to a scheduled value policy. She likewise stated that she did not recall anyone from London, either at Aon or from the underwriters, questioning at any point in time whether the State Department was looking for a blanket policy as opposed to a scheduled policy. *Id*. at 69-70.

16. T&P's vice president does not recall having been asked any questions by Huntington Block regarding the $30,000,000 requirement mentioned in the RFQ. Pratt Deposition at 19. He also does not recall if he ever asked the Government to clarify its reference to $30,000,000. *Id*. at 18.

17. The incumbent contractor, A. I. King, was also interested in responding to the RFQ in this case. A spokesman for the company, with personal knowledge of A. I. King's response to the RFQ, testified that his company, in reviewing the RFQ, noticed that, although the Department of State was seeking $30,000,000 of coverage, the values listed came to little more than $18,000,000. This employee of A. I. King testified that this prompted his company to ask where the property not yet on the schedule might be located. He explained that on the earlier contract, when the Government had asked for an increase in coverage to $20,000,000, King's underwriters had insisted on having some indication of where the property to be covered would be located before quoting any premium. Appellant's Supplemental Appeal File, Exhibit 59 (Deposition of Al Brown (Brown Deposition) (July 29, 2004) at 42, 58-59, 63).

18. An e-mail message of January 9, 2002, from the program manager of the Art in Embassies Program to A.I. King provided an updated list of current exposures worldwide and explained that projections were another process since they are not based on any information in the program's data base. The program manager, however, agreed to look into the matter. Appellant's Supplemental Appeal File, Exhibit 44. In a subsequent e-mail message to A. I. King, dated January 23, 2002, the program manager provided these projections. A. I. King thereupon forwarded this information to its underwriters. *Id*., Exhibits 45-46.

19. A. I. King's spokesman testified that the premium quoted by his company in this case was based upon a value of $30,000,000. Brown Deposition at 44-46. When asked how it was possible to insure the value of $12,000,000 which was not on the schedule, he replied:

> Well, it really wasn't unscheduled. . . . I mean, in one sense it really wasn't unscheduled because we had asked for and were provided an indication as to . . . where the art was going to be and how much was going to be there. And so, I mean, it really wasn't unscheduled.

*Id*. at 45-46.

T&P's Response to the RFQ

20. By letter dated February 10, 2002, T&P submitted a response to DOS's RFQ. The letter introducing the quote read in part:

> The enclosed is designed to complete the solicitation by the Department of State to provide a quotation for loaned art valued at $30,000,000 under the Art in Embassies Program and Exhibit[ed] at posts world wide. The stated price of the contract to be held for 30 days is proposed as per the following:

T&P thereupon provided a summary of its three options set out in the enclosed, executed standard form 1449. The first option was to select six months of coverage from February 28 to August 31, 2002, for a total premium of $372,106.20. The second option was to select an additional six months of coverage from August 31, 2002, to February 28, 2003, for a total premium of $351,706.20. The third option was to select coverage for a twelve-month period from February 28, 2002, to February 28, 2003 for a total premium of $644,461.50. Appeal File, Exhibit 2 at 1.

21. On page two of its cover letter, T&P wrote:

> The Sum Insured on a worldwide basis is as follows:
>
> $ 5,000,000 while in transit, or otherwise within the policy limits
> $ 5,000,000 any one loss or disaster or casualty, which is the aggregate amount insured
> $ 30,000,000 aggregate amount insured

Appeal File, Exhibit 2 at 2.

22. Page two of T&P's cover letter of February 10 also lists the materials enclosed with the cover letter, namely: (1) an executed form 1449; (2) a contractor/vendor file; (3) a technical description of supplies/services (specific policy wording for all risk fine art insurance, terrorism insurance T-3, and war direct physical damage); (4) various Federal Acquisition Regulation (FAR) clauses for commercial item purchases; and (5) a company profile. Appeal File, Exhibit 2 at 2.

23. Within minutes of submitting its response to the RFQ, T&P submitted to the contract specialist a single sheet which purported to be a revision of page one of the cover letter which accompanied this initial submission. This revision consisted of one change only. To the second paragraph on page one, which referred to the seventy locations with a total scheduled value of $18,744,410, T&P had added the following sentence in bold type:

> **No premium adjustment will be made unless totaled scheduled values exceed $20,150,000.00.**

*Id*., Exhibit 3 at 1.

24. T&P's vice president and others have referred to this sentence added to page one of T&P's cover letter as the "margin clause." T&P's vice president has testified that it was added at the direction of his contact at Huntington Block. T&P's understanding was that this statement represented a value-added benefit for the State Department, to which the underwriter had agreed, which "would give [the Department] a buffer, so that they wouldn't have to pay additional premium . . . unless they exceeded that $20,000,000 value of scheduled items." Pratt Deposition at 27, 31.

25. The explanation offered by Huntington Block for this last-minute addition to T&P's cover letter is somewhat different. The Huntington Block official who directed T&P to revise the cover letter testified that her firm had asked T&P for an opportunity to review

the final quote before it was submitted. T&P did submit the quote to Huntington Block but apparently not before submitting it to the Government. On reviewing the quote, Huntington Block concluded that the submission did not adequately address the issue of whether or not there would be additional premiums. Hence, T&P was directed to revise the cover letter to include the statement that no adjustment of the premium would be made unless the "totaled scheduled values" were to exceed $20,150,000. Condon Deposition at 37-39.

26. Two other replies to the RFQ were received by DOS in addition to that submitted by T&P. One was from the incumbent contractor, A. I. King, which offered a six-month premium of $662,400 for $30,000,000 in coverage. A third bidder quoted a six-month premium of $124,167 but specified that the aggregate amount for terrorism coverage was limited to $5,000,000. Appeal File, Exhibit 4.

27. The contract specialist testified that he did not specifically discuss with T&P the revision on page one of T&P's cover letter of February 10. Rather, his attention was drawn to a broader issue, the adequacy of terrorism coverage offered by T&P. In the post 9-11 environment, the specialist was aware that the cost of terrorism coverage had "skyrocketed." He explained: "The majority of the premium that these people were quoting was for terrorism coverage." McGhee Deposition at 81-82. Given the limitation of terrorism coverage to $5,000,000 in the third quote, the contract specialist expected T&P's quoted premium of $372,106 to be far higher than it was for a coverage of $30,000,000. He also noted that the premium quoted by A. I. King for six months of coverage, $662,400, was nearly the same as T&P's quote of $644,461 for one year of coverage. *Id*.

28. On February 19, after review of T&P's quote, the contract specialist sent an e-mail to T&P requesting clarification on three items mentioned in the quote, namely, a surplus lines tax, the aggregate terrorism coverage offered, and terrorism coverage for property in transit. Appeal File, Exhibit 5. A statement for the record dated February 19 and signed by the contract specialist states that T&P's representative promptly responded by phone on the same date and, among other matters, assured the contract specialist that the terrorism coverage was for $30,000,000. *Id*., Exhibit 6. T&P's representative admits that he did receive an e-mail message from the contract specialist which contained three questions. However, he claims to be unable to remember whether he responded to the message by phone or what he may have said to the contract specialist if he did respond to the message. Pratt Deposition at 40.

29. Later that same day, February 19, 2002, the contract specialist and his contracting officer met with government counsel to determine whether the e-mail inquiry sent to T&P and the subsequent phone conversation with T&P's vice president constituted an opening of discussions with offerors. They concluded that perhaps these contacts did amount to discussions. Consequently, the contracting officer decided to open discussions formally with two of the three offerors, T&P and A. I. King. The third offeror was not considered to be in the competitive range because of its inability to offer more than $5,000,000 in terrorism coverage. A second statement for the record dated February 19 and prepared by the contract specialist after this meeting with counsel, states in part:

> We formally went into discussions with Thomson and Pratt and A. I. King this afternoon. We decided to add an additional note on page 10 of the solicitation which reads "In the event of a conflict between policy and contract, the

> contract will prevail" because after reviewing the contracts submitted by Thomson and Pratt and A. I. King, our counsel felt that the submitted contracts in certain areas seem to conflict with the Department of State[']s solicitation.

Appeal File, Exhibit 6. The same statement for the record notes that a revised solicitation was then sent to the two offerors with a deadline for submission of revised quotes set for 5:00 p.m. the following day. *Id*.

30. A third statement for the record, also prepared by the contract specialist and dated February 19, 2002, reports on the contracting officer's discussions with the two offerors on that date. Both offerors were said to be in agreement with the proposed addition to the solicitation of a provision regarding possible conflict between the contract and policies. Discussion with A. I. King also touched on what appeared to be an excessively high quote. Discussion with T&P touched on issues raised in the contract specialist' e-mail message sent earlier in the day which by then had apparently been resolved. The contracting officer also is reported to have discussed with T&P the exclusion of confiscation, expropriation, and deprivation coverage from T&P's quote. Appeal File, Exhibit 6. The T&P representative with whom the contracting officer spoke on February 19 does recall discussing with her the surplus lines tax and confiscation and expropriation. Pratt Deposition at 39.

31. By letter dated February 20, 2002, T&P faxed a newly executed copy of the revised solicitation (form 1449). A cover letter referred to discussions with the contracting officer the day before and provided clarifications regarding the surplus lines tax and the confiscation, expropriation, and deprivation coverage touched on during these discussions.[2] The six- and twelve-month premiums set out in the cover letter and in the newly signed form 1449 were the same as those quoted in the submission of February 10. No mention was made, however, in this cover letter of February 20 of the margin clause provision which Huntington Block had directed T&P to add to the cover letter of February 10 which had accompanied T&P's initial quote. Appeal File, Exhibit 7; Appellant's Appeal File, Exhibit 7.

32. A. I. King's final quote after discussions and in response to the revised RFQ, although now close to that of T&P, was still slightly higher. McGhee Deposition at 86.

The Contract

33. On February 21, 2002, DOS offered to T&P a contract to provide twelve months of coverage at the premium quoted. The scope of work and description of coverage for the contract were exactly as set out in the solicitation. In particular, the provision dealing with "property covered" read, as was originally stated in the solicitation:

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[2] T&P explained that the surplus lines tax is not so much a tax as a fee that goes directly to the Insurance Guarantee Fund, which is similar to the Federal Deposit Insurance Corporation for banks. It is normally required that the fee be shown and paid separately rather than simply added into the premium. Appeal File, Exhibit 7.

> This policy covers only property described in the schedule dated January 2002 and any item added thereto, on file with the Art in Embassies Program.

Appeal File, Exhibit 8 at 2. The proposed contract also contained a copy of this January 2002 schedule. *Id*. at 8-10. At the end of this listing was the provision added to the solicitation at the close of discussions on February 19: "In the event of a conflict between policy and contract, the contract will prevail." *Id*. at 10.

34. The limits of coverage stated in the contract were likewise the same as those originally stated in the solicitation, namely:

> a. $5,000,000 while in transit or otherwise within the policy limits.
>
> b. $5,000,000 in any one loss, disaster or casualty which is the aggregate amount insured.
>
> c. The aggregate amount insured is $30,000,000.

T&P accepted the Department's offer of February 21 and, on the same date, signed the contract. Appeal File, Exhibit 8.

35. The awarded contract incorporates by reference FAR clause 52.233-1, DISPUTES (DEC 1998), which requires the contractor to proceed diligently with performance pending final resolution of any dispute arising under the contract. Appeal File, Exhibit 8 at 21.

36. The contract also contained FAR clause 52.212-4, CONTRACT TERMS AND CONDITIONS -- COMMERCIAL ITEMS (MAR 2001). Under paragraph m of this clause, the Government has the right to terminate the contract, or any part thereof, for cause in the event of any default by the contractor, or if the contractor fails to comply with any contract terms and conditions or fails to provide the Government, upon request, with adequate assurances of future performance. Appeal File, Exhibit 8 at 22.

37. The awarded contract makes no mention whatsoever of the insurance premium being adjusted subject to an increase in the actual value of art loaned to the Art in Embassies Program beyond a total value of $20,150,000. Appeal File, Exhibit 8.

Expanding the List of Covered Items

38. Soon after contract award, DOS began adding works on loan to the January 2002 schedule. The program manager for the Art in Embassies program testified that, by early May, the $30,000,000 limit had already been reached. T&P was well aware of the increase in the works of art in the program's inventory both as a result of spreadsheets provided to the firm by the program manager as well as by the number of certificates of insurance the contractor was ask to issue confirming that specific works were, in fact, insured. Drennan Deposition at 32-34.

39. On March 19, 2002, T&P sent to the contract specialist, by telefacsimile, a copy of the All Risk Policy issued for the Art in Embassies Program by Huntington Block. The message on the cover sheet advised that T&P was still awaiting the Terrorism and War policies and planned to hand-deliver them upon receipt. Appeal File, Exhibit 9 at 1. The final section in the All Risk Policy contained various special conditions and attachments. Among them is "Endorsement #5, AGGREGATE AMOUNT INSURED ENDORSEMENT." The two principal paragraphs of this endorsement read as follows:

> In consideration of the premium charged for this policy, it is agreed that the aggregate amount insured under this policy shall not exceed $30,000,000.
>
> It is further understood and agreed that the U. S. Department of State shall regularly furnish to the underwriters a current list of items and locations covered hereunder. Values at risk as of the inception date of the policy are $18,744,410 at 70 locations worldwide as per schedule of locations on file with the underwriters at 1120 20th Street, NW Washington, DC 20036. It is agreed that the premium paid for this policy is based upon the total values at risk of $18,744,410 and that no adjustment in premium will be made unless the values at risk exceed $20,150,000.

Appeal File, Exhibit 9.

40. On May 1, 2002, T&P asked for an opportunity to meet with Department of State officials to discuss the Art in Embassies Program, the current state of the insurance market, pending claims, claims handling procedures, and the values of art in the embassies as of April 30. Appeal File, Exhibits 10-11. A meeting was scheduled for Tuesday, May 7. Appellant's Appeal File, Exhibit 9. A schedule provided to the program manager by T&P prior to the meeting lists, by location, the values of the art on loan. The total, as of April 18, 2002, was said to be $33,066,310. Subtracting from this total the maximum margin clause value of $20,150,000, a balance of "add[itional] values" was calculated to be $12,916,310. Appeal File, Exhibit 11.

41. The record contains a statement for the record prepared by the contract specialist regarding the meeting of May 7. In attendance were the president and vice president of T&P, three representatives of Huntington Block, the program manager for the Art in Embassies Program, the contracting officer (who left shortly after the start of the meeting), and the contract specialist. The contract specialist's statement explains that the meeting began with a presentation on the Arts in Embassies Program by the program manager. This was followed by comments from Huntington Block's senior vice president/underwriter manager. She spoke briefly about the state of the insurance industry since September 11, 2001. In particular, she mentioned that only seven organizations insure worldwide for terrorism. Appeal File, Exhibit 12.

42. The contract specialist's statement for the record also reports that this same Huntington Block official then became critical of the Department's solicitation for the Art in Embassies coverage. She stated that the language of the solicitation was very ambiguous and that probably, in the past, the Department never had the coverage it believed it had. This same representative of Huntington Block is then said to have pointed, as an example of

incorrect drafting, to the solicitation's coupling of a requirement for a continuation of the fine arts insurance coverage for works of art valued at $30,000,000 with a statement that the policy covered only property described in a schedule of embassies listed at the back of the solicitation. The contract specialist writes in his statement for the record that he disagreed with this Huntington Block official and reminded her that the solicitation also stated that the coverage would be for the items listed in the January 2002 schedule as well as any items added thereto. When asked how she would have stated the requirement, this insurance specialist said that the solicitation should have stated, "Blanket policy for $30,000,000 worldwide with no embassy to exceed X and a limit over all embassies of X." Appeal File, Exhibit 12.

43. The contract specialist's statement for the record on the May 7th meeting closes with a brief report on the discussion which ensued regarding amounts said to be owed by DOS for the balance of coverage for which it had allegedly not yet paid a premium, namely, the difference between coverage for $18,000,000 and coverage for $33,000,000, the value of the current program inventory. Appeal File, Exhibit 12 at 2.

44. By letter dated May 24, 2002, to the contracting officer, T&P took up in more detail the matter raised during the meeting on May 7 regarding an unpaid premium for coverage above $18,000,000. First, T&P recognized that, even under its own and Huntington Block's interpretation of the contract, the original premium provided coverage up to $20,150,000. Second, the balance allegedly uncovered by the initial premium was calculated using an aggregate value of $30,000,000, not $33,000,000. The total additional amount T&P claimed to be due was $352,354. Appeal File, Exhibit 13. Shortly thereafter, T&P, by e-mail message dated June 3, advised the contract specialist that it was in receipt of endorsements and invoices increasing the War, Terrorism, and Fine Art limit to $30,000,000. *Id*., Exhibit 18. Huntington Block's senior vice president/underwriter manager testified that, in agreeing to provide coverage up to $30,000,000, the underwriters had calculated the additional premium using the same rate as previously used for the original quote. Sandell Deposition at 155.

45. By letter dated June 5, 2002, the contracting officer rejected T&P's demand for an additional premium. She noted that, from what was said at the May 7th meeting, Huntington Block had obviously misinterpreted the Government's requirement for $30,000,000 of coverage. T&P was then directed to immediately resolve any misinterpretation issues it might have with its subcontractors and to confirm to the contracting officer within twenty-four hours that it would provide the contractually required $30,000,000 coverage at the agreed-upon price of $644,461.50. Appeal File, Exhibit 21.

46. In reply of the same date to the contracting officer's letter of June 5, T&P wrote that it was already looking into this matter and would attempt to resolve matters in a timely manner. Appeal File, Exhibit 22. By letter dated June 17, T&P advised the contract specialist that payment of invoices (sent under separate cover) for the additional premium was due June 27. *Id*., Exhibit 31. On receipt of the invoices, the Government responded to T&P that its position on this matter remained unchanged and that it would terminate T&P's contract if not advised within ten days that the full $30,000,000 coverage would be provided for the contract price of $644,461.50. *Id*., Exhibit 32.

47. The ongoing disagreement between the parties ultimately led to the issuance of a contracting officer's decision on July 9, 2002, formally denying T&P's claim for an additional premium.[3] Appeal File, Exhibit 39. This, in turn, prompted letters from the underwriters advising DOS directly that it was their intent to cancel all coverage for failure to make payment for additional values. *Id*., Exhibits 43, 46. By telefacsimile dated September 19, T&P confirmed to DOS that coverage would terminate on September 26 pursuant to the underwriters' notices. *Id*., Exhibit 46.

48. By letter dated October 3, 2002, the DOS contracting officer terminated T&P's contract for cause. The contracting officer's decision states:

> You have breached your contract by failing to continue providing insurance coverage to the Government as required under the contract. Although your contract expires on February 28, 2003, and you have been paid in full for the entire contract period, you have illegally terminated the contract and cancelled the insurance coverage as of September 27, 2002. Therefore, the Government hereby terminates your contract for cause pursuant to FAR clause 52.212-4(m) in your contract.

Appeal File, Exhibit 49.

49. Counsel for T&P appealed the contracting officer's decision by letter dated October 22, 2002. Appeal File, Exhibit 50.

Blanket Coverage

50. Counsel for appellant, with the Board's leave, submitted for the record an affidavit provided by an insurance professional with many years of experience. In her affidavit, this individual commented on the meaning of the term "blanket" coverage or a "blanket" policy. She states:

> This only refers to the situation where an insurance policy for an insured covers property at the insured's various locations under a common policy, subject to a single shared limit of liability. . . . This allows the policy to have one single limit available to pay for loss at any single location, regardless of whether the value specified for that location on the insured's property schedule is exactly accurate. The insured can then move property between locations without a concern. Sometimes the "blanket" policy may also include a per location limit, as in the policies provided here to the State Department.

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[3] T&P filed a notice appealing this decision and the dispute was docketed by the Board as GSBCA 15963-ST. Thereafter, the Government moved for dismissal of the case for lack of jurisdiction upon discovering that the claim for the adjusted premium, which was the subject of the contracting officer's decision and in excess of $100,000, was uncertified. T&P did not oppose the Government's motion and we subsequently dismissed the appeal. T&P's claim was not resubmitted, however, since the policies for which the adjusted premium was sought were subsequently canceled.

Affidavit of Kathrine Salomonson Gish (Gish Affidavit) (Aug. 30, 2004) ¶ k.

51. The spokesman for A. I. King, who had personal knowledge of A. I. King's response to the RFQ and who was himself an experienced insurance professional, testified in a similar vein. He stated that blanket coverage is a means by which an insurance carrier offers to its insured the ability to have an overall blanket coverage for items in multiple locations. If, however, it should occur that, at a given point in time, all items covered by the policy happen to be in one of those multiple locations, the policy would still respond. Nevertheless, this individual also admitted that such a policy could have some sub-limits and still be considered a blanket policy. In discussing the nature of blanket coverage, this insurance professional acknowledged that, whereas prior to September 11, 2001, a carrier's primary concern was with the value of the item insured, since that date a much greater importance is attached to the location of the value. Brown Deposition at 133-35.[4]

52. Counsel for the Government, with the Board's leave, submitted for the record an affidavit provided by an attorney who has worked in the insurance business for many years. In addressing the meaning of the term "blanket" coverage or "blanket" policy, this individual observed that, in this case, the issue is ultimately irrelevant. He writes that the meaning of the term has been raised by appellant in order to demonstrate that T&P and its underwriters could not quote a premium for coverage without knowing the specific locations where the covered art would be displayed. This, however, in the opinion of this consultant, conflicts with the willingness of the underwriters to provide coverage under the "margin clause" without knowing the location of art which would be added to the items on the January schedule up to the amount of $20,150,000. This contention likewise conflicts with the calculation of the premium alleged by appellant to be due for values between this figure of $20,150,000 and $30,000,000. Regardless of the location of items whose value would be included in this additional coverage, the premium was calculated using the same rates that had been used in determining the cost of coverage up to $20,150,000. Government's Response to Appellant's Supporting Memorandum of Points and Authorities, Exhibit 8 (Affidavit of Joseph A. Carabillo (Carabillo Affidavit) (Oct. 7, 2004) ¶ 22).

Aggregate Amount

53. The insurance professional retained by appellant as a consultant in this case also addressed the meaning of "the aggregate amount insured is $30,000,000." She stated:

> The phrase . . . does *not* mean to an insurance professional that the policy is covering property that is valued at $30,000,000. Rather, "aggregate" is a term of art used in many insurance policies. It refers to the total dollars that the insurer will pay out for all *claims* combined in the policy period (in this case, the total aggregate was $30,000,000 and the policy period was one year).

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[4] We realize that this same individual also testified within the context of the instant procurement that once A. I. King and its underwriters received a general indication of where the as-yet unscheduled values on the contract might be located, the contract, in a manner of speaking, resembled more a "schedule" contract. *See* Finding 19.

Gish Affidavit ¶ j. This consultant likened the situation to an auto policy on a car valued at $20,000 but with an aggregate of $30,000. The auto could be damaged in three different accidents during the life of the policy, but the insurer would pay repair bills only up to a total of $30,000 -- even if these bills total an amount in excess of $30,000. *Id*.

54. The insurance attorney retained by the Government disagreed with appellant's consultant. He wrote:

> The phrase "the aggregate amount insured is $30,000,000" can and should mean that there is thirty million dollars of coverage.

Carabillo Affidavit ¶ 21. This consultant also likened the situation in this case to an auto policy, but not to the insurance for the vehicle itself -- rather, to liability coverage. He explains that, in the instant contract, the Government is covering its liability to the actual owners of each piece of art. The Government's insurable interest is a matter of contract as specified in the individual art loan agreements and the schedules attached thereto. *Id*.

## Discussion

Despite the complex factual background of this case, the fundamental issue is a relatively simple one. We must determine whether or not the Government's termination of T&P's contract was proper. It is, of course, well settled that, in cases such as this, it is incumbent on the Government to prove that the termination was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Given the record before us, we conclude that the Government has met its burden.

Based upon our findings regarding (1) the dispute between the parties over the payment of additional premium, (2) T&P's final warning of September 19 to the Government that coverage would terminate effective September 26, and (3) the ultimate cancellation of coverage on that date by the insurance carriers, it is clear that T&P, as of that point in time and thereafter, failed to provide the insurance coverage it was committed to provide pursuant to its contract with the Department of State. Findings 43-48.

This failure on the part of T&P to continue performance -- even in the face of an ongoing dispute with the Government -- is a serious matter. In the law of Government contracts, a dispute regarding contract interpretation does not normally discharge a contractor from its obligation to continue performance. Traditionally, the Government, in awarding its contracts, has required that contractors covenant that they will continue contract performance even in the event of dispute. This is a highly significant provision which is obviously inserted into Government contracts to protect the public interest. It assures that the Government will not suffer loss or detriment from the interruption of contract performance occasioned by an administrative appeal. *Dynamics Corp. of America v. United States*, 389 F.2d 424, 432-33 (Ct. Cl. 1968); *C. W. Schmid v. United States*, 351 F.2d 651, 655 (Ct. Cl. 1965). The Government's right to use a provision of this nature is recognized in the Contract Disputes Act, which expressly acknowledges the right of executive agencies to include a clause in government contracts requiring contractors to proceed diligently with performance pending resolution of any contractual dispute. 41 U.S.C. § 605(b) (2000).

The requirement to continue performance in the event of contract dispute is found in FAR clause 52-233-1 DISPUTES (DEC 1998), which, as already stated, was incorporated by reference into T&P's contract. Finding 35. FAR 33.214 requires contracting officers to insert the Disputes clause in solicitations and contracts. In entering its contract with DOS, T&P clearly agreed to the provision. T&P's subsequent failure to arrange for alternative coverage following cancellation of the original coverage, therefore, normally would justify the Government's decision to terminate the contract for default.

As noted at the outset of this decision, however, we refrained from granting the Government's motion for summary relief on the propriety of its termination of T&P's contract for default because of one lingering issue which involved what we perceived to be a dispute between the parties regarding material facts. Among the arguments raised by T&P was the allegation that the Government had imposed a cardinal change on the contractor subsequent to contract award and that this excused the contractor from further performance.

In our decision denying the Government's motion we had the following to say regarding the nature of a cardinal change and the effect its imposition has on the contractor's obligation to continue performance. We wrote:

> A cardinal change is said to occur:
>
> > when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties material[ly] different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract and thus renders the government in breach.
>
> *Allied Materials & Equipment Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978). It is, of course, well settled that a cardinal change constitutes a material breach of a contract and thus frees the contractor of its obligations under the contract, including its obligations under the Disputes clause. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999); *General Dynamics Corp. v. United States*, 585 F.2d 457, 462 (Ct. Cl. 1978). Whether a change is cardinal, however, is principally a question of fact requiring that each case be analyzed individually in light of the totality of the circumstances. *Allied Materials & Equipment*, 569 F.2d at 565.

*Thomson & Pratt*, 04-1 BCA at 160,922-23.

In that same decision denying summary relief, we concluded that there were two material questions of fact that had to be resolved before we could conclude that the Government had, in fact, called for a cardinal change after award. First was the question of whether the Government changed the contract requirement after award. Second, if indeed there was a change, then it would be our task to determine whether this was a cardinal change -- a determination principally of fact.

Of the two questions, obviously the more critical is the second, for even if the Government had changed its requirement after award, for T&P to have been excused, it would be obliged to demonstrate that the change was a cardinal change.

Was There a Cardinal Change in the Government's Requirement?

Given the definition of cardinal change set out above, we conclude that, even if a change in the Government's requirement did occur after award, it did not amount to a cardinal change. The suggestion has been made that, in insisting on something akin to blanket coverage, the Government was demanding of its insurance carriers a radical and fundamental change in the exclusively schedule coverage it had allegedly sought in the solicitation. From the facts, as further developed, we are unpersuaded that there was a great and fundamental difference between the types of coverage actually offered by Huntington Block and what it perceived, after award, was expected of it.

The margin clause, to which Huntington Block was apparently prepared to agree, already would have provided coverage for additional values between approximately $18,700,000 and $20,150,000 without any indication of what those additional items increasing the values would be or where they would be located. *See* Findings 23, 52. Similarly, in its willingness to use the *same rates* for adjustment of the premium to values beyond $20,150,000, Huntington Block hardly was suggesting that the location of the items added to the schedule was of critical importance. Finding 14. Finally, once Huntington Block learned what coverage the Government was insisting on -- as opposed to what it had provided in its policies -- it was willing to accommodate the Government provided the Government was prepared to pay an increased premium. Finding 44. This simply is not the stuff out of which a cardinal change is made. When the Government seeks a change in contract requirements and the contractor is prepared to meet this demand solely by a proportional increase in contract price, this is obviously not a change outside the scope of the contract or one representing an "alteration in the work so drastic that it effectively requires the contractor to perform duties material[ly] different from those originally bargained for."

Did the Government Change the Contract Requirement After Award?

T&P's argument that there was a cardinal change is further undermined by the fact that we are not even convinced in this case that there was a change in the Government's requirement after award. Evidence in the record readily convinces us that the Government consistently sought, both before and after award, blanket coverage in the amount of $30,000,000. The program manager of the Art in Embassies Program showed himself to be well versed in the purpose and history of the program. It is his understanding that the insurance traditionally purchased for the program has been in the nature of a blanket agreement for worldwide coverage up to a given cap. Finding 1. While the contract specialist was highly inexperienced and professed to be unaware of the distinction between blanket and schedule coverage at the time he conducted his market survey and prepared the solicitation, we are nonetheless convinced that he was well aware of the nature of the coverage the program manager expected him to procure -- regardless of what it might be called. Findings 4-5.

We also find it highly significant that one of the Huntington Block officials, who was personally convinced, after an initial review of the RFQ, that the Government was seeking schedule coverage, readily recognized that the type of coverage being sought was blanket coverage once the nature of the Art in Embassies Program and the insurance coverage DOS required was explained to her, well after award, at the meeting with DOS officials on May 7. *See* Findings 15, 42. In a similar vein, the comments of appellant's consultant regarding the nature of blanket coverage more or less coincides with the program manager's description of the type of coverage traditionally secured for the Art in Embassies Program. *Compare* Finding 50 *with* Finding 1. Even the comments of A. I. King's employee regarding the general nature of blanket coverage tend to support the conclusion that the Government was seeking blanket coverage -- notwithstanding an observation made earlier in his deposition that somehow the coverage being sought by the Government subsequently morphed into de facto schedule coverage once the underwriters were given a general idea of where the art in the program might be located. *See* Findings 19, 51.

Was the Government's Description of Its Requirement Ambiguous?

The record amply supports the conclusion that the Government's requirement, as stated in the RFQ, was decidedly ambiguous. The principal sources of the confusion in this case were a stated requirement in the solicitation for coverage in the amount of $30,000,000, a further statement that there would be no unscheduled properties, and a listing in the solicitation of specific properties whose values totaled little more than $18,700,000. *See* Findings 7-12. Furthermore, as the insurance consultants retained by the parties have pointed out to us, reference to $30,000,000 as the "aggregate amount insured" was susceptible to different interpretations. Findings 53-54.

During the course of discovery, counsel for both parties have succeeded in shedding considerable light on the origin of these various provisions. As already noted, the stated amount of coverage reflected a desire on the Government's part to secure a traditional blanket coverage for items on loan to the Art in Embassies Program. Findings 1, 5. The statement that there would be no unscheduled properties was merely intended to ensure that any listing of items covered by the policy would be all-inclusive in order to assure the owners of lesser valued items in the program that their works of art were also covered by the Government's policy. *See* Finding 3. The inclusion of a list of locations with a dollar value assigned to each location was the continuation of an already established practice of furnishing interested vendors with a "snapshot" of what might be in the program at any given time. After the incidents of September 11, 2001, the inclusion of this list of locations and values was intended also to provide potential carriers with some idea of the location of the items for which coverage was being sought. *See* Findings 2-3, 6. Explanations, however, regarding the origin of these various provisions do nothing to resolve the confusion created by them.

We are persuaded that, in this case, the Government's insurance requirement was stated with patent ambiguity. "A patent ambiguity is one that is glaring, substantial, or patently obvious." *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1365 (Fed. Cir. 2002) (citing *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993)). In this case, the testimony of two officials at Huntington Block underscores this ambiguity -- particularly for a firm such as theirs which had no previous experience with the

Government's Art in Embassies Program. One official described the confusion that resulted among the employees who, after reviewing the RFQ, asked:

> What does this thirty million mean? There is no unscheduled property. There's only scheduled property. The schedule is this amount. What is this?

Finding 14. The other official likewise recalled the discussion at Huntington Block regarding the meaning of the RFQ but was personally of the firm opinion that the RFQ envisioned only schedule coverage. Finding 15. Even the incumbent contractor, A. I. King, although apparently aware that it was expected to offer a quote based on a value of $30,000,000, nevertheless saw the need to make inquiry since the January 2002 schedule included in the solicitation fell considerably below the required coverage figure of $30,000,000. Finding 17.

What is particularly puzzling in this case is that, despite the obviously confusing nature of the Government's stated requirement, there is no evidence that appellant sought any clarification either from the contracting officer or the contract specialist. Although this was the first time T&P's vice president had ever done business with the Federal Government, he nonetheless simply turned the materials received directly over to Huntington Block. Finding 13. The official at Huntington Block who was working with him has testified that, in view of the confusion regarding the provisions of the RFQ, the firm conferred with its underwriters and with T&P and ultimately concluded that what the Government sought was schedule coverage for the items listed in the solicitation at a value of slightly over $18,000,000 and additional coverage at the same rates for items subsequently added to that schedule up to a total of $30,000,000. Finding 14. T&P's vice president, however, does not recall any such consultations. He likewise does not recall if he ever asked the Government for clarification regarding the required coverage. Finding 16.

Subsequent to contract award, as the Government began to add items to the January 2002 schedule which was contained in the solicitation and the contract, it gradually became apparent that Huntington Block had an understanding of the RFQ and resulting contract which was significantly at variance with the Government's understanding. The reappearance of the "margin clause" in endorsement five of the All Risk Policy gave to the aggregate value of $30,000,000 a meaning altogether different from the Government's understanding of the term. At the meeting on May 7, 2002, of Department of State officials with representatives of T&P and Huntington Block, the disagreement between government officials and Huntington Block representatives became even more apparent. During that meeting, a Huntington Block official reportedly chided the contract specialist for the ambiguity of the solicitation and advised him that the Government, with the present contract as well as past contracts, probably had not secured the coverage that it thought it had secured. *See* Findings 38-42.

Huntington Block's belated criticism of the Government's solicitation was ill-timed to say the least. The moment for resolving ambiguities in the solicitation was obviously prior to the submission of T&P's quotes. It is regrettable that Huntington Block ultimately fell back on its own professional expertise and that of its underwriters to resolve the conflicts apparent on the face of the RFQ rather than press T&P to seek clarification from the DOS. If the information regarding the Art in Embassies Program and the Government's requirement for coverage, which was provided by the Government to T&P and Huntington

Block at the meeting of May 7th, had been sought prior to award, there is no doubt in our minds that this dispute would not now be before us.

The Court of Appeals for the Federal Circuit has succinctly set out the consequences of a contractor not making inquiry when confronted with a patent ambiguity. It wrote:

> Ambiguities in a government contract are normally resolved against the drafter. An exception to that general rule applies, however, if the ambiguity is patent. *See Interstate Gen. Gov't Contractors, Inc. [v. Stone]*, 980 F.2d [1433,] 1434-35 [(Fed. Cir. 1992)]. The existence of a patent ambiguity in a government contract "raises the duty of inquiry regardless of the reasonableness of the contractor's interpretation." *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985). That duty requires the contractor to inquire of the contracting officer as to the true meaning of the contract before submitting a bid. *See Newsom v. United States*, 230 Ct. Cl. 301, 676 F.2d 647, 649 (1982). Absent such inquiry, a patent ambiguity in the contract will be resolved against the contractor. *See Beacon Constr. Co. [v. United States]*, 314 F.2d [501,] 504 [(Ct. Cl. 1963)].

*Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997).

Appellant contends that the RFQ, as issued, envisioned nothing more than a schedule contract. The Government, on the other hand, contends that it sought basic coverage in the amount of $30,000,000 for the items set out in the January 2002 schedule contained in the solicitation and for items which would be added to that schedule over the life of the contract up to the aggregate sum of $30,000,000. Whatever the merits of appellant's interpretation of the solicitation and resulting contract may be, any ambiguity in the solicitation must now be resolved in the Government's favor, given T&P's failure to seek clarification of the RFQ's purpose prior to award.

Did the "Margin Clause" Serve to Clarify the Ambiguity Inherent in the RFQ?

Huntington Block appears to have been very much aware that, without a specific provision that no adjustment of premium would be made until schedule values reached $20,150,000, T&P's quote could be understood as applicable to the full coverage of $30,000,000. Hence it insisted that T&P's cover letter of February 10 be revised to include that provision. Findings 23-25. T&P's vice president does not appear to have appreciated this fact and maintains instead that this addition to his cover letter was simply a value added benefit which Huntington Block insisted be included in the cover letter. Finding 24. Accordingly, there is no guarantee that any discussion between himself and the contract specialist or contracting officer regarding this provision would have brought to light Huntington Block's real purpose in insisting on its inclusion in the initial cover letter.

The contract specialist readily admits that he did not focus on this last-minute addition to T&P's cover letter of February10. Instead, he reports that his attention was drawn to a slightly different issue, namely, the adequacy of the terrorism coverage. Given the amount of premium quoted -- when compared to the quotes of other vendors -- the

contract specialist questioned whether T&P was offering terrorism coverage amounting to $30,000,000. Findings 26-27. We note that this concern on the part of the contract specialist was basically the same as any concern which might have arisen had he focused instead on the language Huntington Block insisted on including in the cover letter of February 10. In both cases, the ultimate question would have been whether the premium offered was for $30,000,000 of coverage. The contract specialist contends that, in response to his request for confirmation that T&P was, in fact, offering a full $30,000,000 for terrorism coverage, T&P's vice president assured him that the terrorism coverage was for that amount. Findings 27-28.[5]

T&P would have us look upon the cover letter of February 10 and the provision added to it at the last moment at the insistence of Huntington Block as an integral part of its final quote. We decline to do so. Evidence in the record persuades us that the cover letter of February 10 and its last-minute revision were, for all intents and purposes, replaced by the cover letter of February 20. The events following receipt of T&P's February 10 submission clearly involve more than informal clarifications. After conferring with counsel, the contracting officer formally reopened discussions with vendors considered to be in the competitive range. The solicitation or RFQ (form 1449) was revised slightly and reissued. Vendors were directed to submit their final quotes by 5 p.m. the following day, February 20. Findings 29-30.

In accordance with the Government's instructions, T&P did submit a final quote on February 20. A new cover letter confirmed the matters discussed the day before with the contracting officer and set out the premiums offered in the same manner in which they were set out in the initial cover letter. This second letter, just as the initial letter, also served as cover letter for an executed copy of form 1449. In this case, however, the form 1449 was the revised version sent to T&P only the day before. Finding 31.

Conspicuous by its absence from T&P's cover letter for its final submission on February 20 was any reference to the last-minute revision of the initial cover letter of February 10 regarding adjustment of premium for coverage above $20,150,000. *See* Finding 23. This does not surprise us. On its face, this limitation of coverage to a value of $20,150,000 when added to the initial cover letter contrasted sharply with express representations on both pages one and two of the same letter that the premium quoted was for coverage of art valued at $30,000,000. *See* Findings 20-21. More importantly, however, we would expect any cover letter accompanying T&P's final submission of February 20 to be in accord with discussions between its vice president and DOS contracting personnel the day before. Despite the failing memory of T&P's vice president, we remain persuaded that, during at least one of these discussions, T&P's vice president provided the assurance that

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[5] We note in passing that the memory of T&P's vice president is vague and somewhat selective regarding his conversations at this time with the contract specialist and the contracting officer. *See* Findings 28, 30. Since his statements do not amount to a contradiction of the contract specialist's testimony, we have no reason to doubt the testimony of the contract specialist -- particularly since it is supported by contemporaneous documentary evidence in the record.

T&P was, in fact, offering terrorism coverage in the amount of $30,000,000. Findings 28, 30. As noted, the margin clause added at the last minute to T&P's submission of February 10th limited coverage to $20,150,000. Obviously, retention of that provision would have run counter to the assurance given by T&P's vice president to the contract specialist the day before that the quote being offered was for $30,000,000 of terrorism coverage.

Once the Government determined that the premium quoted by T&P for a twelve-month period best suited its interest, it proposed a contract to appellant which was accepted. Finding 34. Just as T&P's final quote of February 20 contained no reference to Huntington Block's margin clause, so also the contract, based on that final quote, is devoid of any reference to an adjusted premium for coverage beyond a value of $20,150,000. Finding 37.

In short, we conclude that, if Huntington Block's proposed margin clause was intended to clarify the nature of the coverage being sought/offered, this effort was either purposely or inadvertently thwarted by T&P in discussions with the Government prior to award and ultimately by T&P's decision to agree to the contract as proposed. It is, of course, true that Huntington Block resurrected the margin clause in endorsement five of the All Risk Policy it issued to the Government and which T&P did not deliver to the Government until several weeks after contract award. Finding 39. Nevertheless, this policy provision obviously can have no effect on T&P's continuing obligation under its own contract with the Government to provide the coverage called for therein. Indeed, in accordance with the final amendment to the RFQ on February 19, the contract expressly provides that, in the event of a conflict between policy and contract, the contract will prevail. Findings 29-30, 33.

Release of Procurement Data to A. I. King

We have examined the evidence provided by counsel for appellant regarding contacts between DOS personnel and A. I. King during the competition which led to award of the contract from which this dispute arises. We have found that, once the incumbent contractor, A. I. King, realized that there was a notable discrepancy between the Government's requirement for $30,000,000 coverage and the value of items listed on the January 2002 schedule contained in the solicitation, inquiry was made regarding the location of items not on that schedule. Finding 17. In response to the inquiry, the Art in Embassies Program manager provided A. I. King with some projections of where these items might eventually be located. A. I. King passed this information on to its underwriters. Finding 18.

Undoubtedly, this information should have been provided to all interested vendors. We are not persuaded, however, that the information provided to A. I. King and allegedly withheld from T&P was all that critical. First, it did not come from the Art in Embassies Program data base, but rather, involved only projections. Finding 18. Second, from the testimony of the program manager, we have learned that the program, by its very nature, was continually in flux. Not only items but also the locations of items were subject to change, and any data in this regard would be little more than a "snapshot." Findings 1-2. Finally, the coverage being sought was of a blanket nature and, therefore, even after September 11,

2001, the location of the items covered would not necessarily be of paramount importance. *See* Findings 1, 51.

Whatever the importance of the information may have been, however, we are not persuaded that its improper disclosure would in any way excuse T&P from its own obligation under the contract to provide insurance coverage for twelve months as agreed -- even in the face of disagreement with the Government over the nature of that coverage. This impropriety in the process of contract formation is far removed from T&P's failure to meet its contractual obligations. Most telling of all, the impropriety did not prejudice T&P since the latter went on to compete successfully for award. Finding 32.

Conclusion

Given the facts of this case, we are persuaded that the Government's termination of T&P's contract was entirely justified and was supported by an express contract provision permitting termination under such circumstances. Finding 36. Quite apart from any insurance policies issued to the Government by insurance carriers at the behest of T&P, T&P itself was obligated under its contract with the Department of State to ensure that, in exchange for the payment of an agreed-upon fixed premium, insurance coverage in the amount of $30,000,000 would be provided over a twelve-month period for items on loan to the Department's Art in Embassies Program. Any efforts on the part of Huntington Block to have T&P's contract read otherwise ultimately proved futile and ineffectual.

Further, we remain unpersuaded that appellant's abandonment of the contract was justified because the Government imposed a cardinal change in its requirement subsequent to award. Even if we were of the opinion that there was a change in the Government's requirement after award (which, of course, we are not), nothing in the record persuades us that such an alleged change amounted to a cardinal change.

Decision

Accordingly, the contracting officer's determination to terminate appellant's contract for default is affirmed. The appeal is, therefore, **DENIED**.

EDWIN B. NEILL
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ROBERT W. PARKER
Board Judge