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

August 29, 2005

GSBCA 16565-FAA
(ODRA Docket No. 04-TSA-0007)

GLOBE AVIATION SERVICES CORPORATION,

Contractor,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Agency.

Drew A. Harker, Jeffrey L. Handwerker, and Joseph M. Meadows of Arnold & Porter LLP, Washington, DC, counsel for Contractor.

Anthony L. Washington, Virginia G. Farrier, and Adeel Ahmed, Office of General Counsel, Transportation Security Administration, Washington, DC, counsel for Agency.

HYATT, Board Judge, acting as Special Master.

This matter arises from a dispute between Globe Aviation Services Corporation (Globe) and the Transportation Security Administration (TSA). The dispute concerns alleged breaches of a letter contract awarded by TSA, acting initially through the Federal Aviation Administration (FAA), to Globe for the provision of baggage and passenger

security screening services at various commercial airports located in the United States. The letter contract was never definitized in a formal contract award and Globe and the agency now disagree as to whether Globe is entitled to further payments, including incentive bonuses, or the Government is entitled to repayment of amounts already paid to the contractor. Globe and TSA disagree about the need to definitize the letter contract's terms and price at this point. In particular, they dispute whether it is appropriate to conduct negotiations on billing rates applicable to the full term of the contract.

Following limited discovery, Globe and TSA have reached an agreement to ask for an opinion with respect to two issues in this matter that they believe are susceptible to resolution on the existing written record. They have each filed opening and reply briefs in support of their joint motions for resolution of the following stipulated issues:

1. To what extent were the labor rates of the letter contract, executed in February 2002, binding upon the parties, as governed by the letter contract provisions regarding definitization of prices and any other relevant facts and law; and

2. Given that the letter contract labor prices were never definitized, how should the contract be priced?

Globe contends that the labor rates used in the letter contract were a negotiated rate and were intended to be binding until replaced prospectively by a negotiated definitized rate. TSA maintains that the rates were not binding from the inception, but were intended to be replaced retroactively with a negotiated, supported rate applicable to the entire contract period.

This dispute was filed with the FAA's Office of Dispute Resolution for Acquisition (ODRA). ODRA asked the Chairman of the General Services Board of Contract Appeals (GSBCA) to designate one of the Board's judges to serve as special master for the purpose of considering the above-stipulated issues and providing recommendations as to their resolution. The undersigned has been designated the special master, and this opinion is provided in response to ODRA's request.

Findings of Fact[1]

Aviation and Transportation Security Act

Prior to the terrorist attacks of September 11, 2001, airport security was the responsibility of the commercial airlines, which had contracts in place with various commercial companies to provide aviation screening services. The Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001), was enacted in response to the events of September 11. It took effect when signed into law on November 19, 2001. Among other things, this statute created the Transportation Security Administration (TSA) within the Department of Transportation and vested in TSA the responsibility for securing all modes of public transportation against terrorist threats, sabotage, and other acts of violence. Specifically, the statute charged TSA with carrying out civil aviation security functions, including security screening operations for passenger air transportation, by shifting the responsibility for performing screening operations from private airlines to TSA. The statute mandated that TSA assume these security screening functions and responsibilities no later than three months after the date of enactment (February 19, 2002). Further, TSA was required to have federalized screeners in place at all domestic commercial airports within one year after the date of enactment (November 19, 2002).[2]

TSA had neither staffing nor an infrastructure during its initial year, and the FAA, under a special agreement, awarded the screening contracts and performed contract administration until TSA could fully assume operational responsibility for the screening program. The FAA assembled a team of contracting officials and legal advisors to review available contracting strategies -- i.e., to assume existing contracts or enter into new ones, to catalog the existing air-carrier screening arrangements, and to develop a timetable for the Government's assumption of responsibility for screening protection. The members of this group were denominated the "TSA GO Team 19" (hereinafter

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[1] The record consists of documents filed by the parties. The main filing was made by Globe on July 2, 2004. This is the six-volume Globe Dispute File Supplement of that date, and citations to the sequentially numbered exhibits in those volumes are referred to herein as Dispute File, Exhibit __. Subsequently, the agency filed two volumes of exhibits supplementing Globe's Dispute File. Citations to these exhibits are referred to herein as TSA Dispute File Supplement, Exhibit __.

[2] For a more comprehensive discussion of the legislative process underlying the creation of TSA and the deployment of a federal work force to perform airport screening services, *see Huntleigh USA Corp. v. United States*, 63 Fed Cl. 440, 442 (2005) (asserting taking claims in connection with the federalization of the screening contracts).

referred to as "the Government" or "the GO Team"). TSA Dispute File Supplement, Exhibit 63.

One of the GO Team's first undertakings was to survey the industry to familiarize itself with existing practices and capabilities. In conjunction with this effort, the Government determined that the majority of airport screening security services were provided by nineteen commercial companies at 391 of the nation's 442 commercial airports. These companies employed a workforce exceeding 18,400 employees. Another fifty-four companies, with a total of 1207 screener employees, served the remaining airports. The Government further found that a single airport could have several different companies providing passenger and/or baggage screening services, including the operation of differing kinds of baggage screening equipment. The commercial contractual arrangements varied considerably from company to company, and the screening firms were generally unacquainted with federal contracting standards and procedures, including the requirements for preparation of a proposal. TSA Dispute File Supplement, Exhibits 1, 64.

The Contracting Process

Given these circumstances, the FAA team charged with initiating the transfer process developed a model indefinite delivery, indefinite quantity (IDIQ) contract for screening services to be procured on a sole-source basis from the companies currently providing those services to the commercial airlines. This was intended to make the process more manageable by allowing the Government to use a single contract vehicle in lieu of individually renegotiating the wide variety of disparate commercial arrangements then in place with the companies that performed these services. TSA Dispute File Supplement, Exhibit 66 at 767-69.

The FAA team released a request for proposals on January 14, 2002. The solicitation initially required that proposals be submitted by February 4, 2002. It stated that:

> The Government anticipates awarding indefinite delivery, indefinite quantity (IDIQ) contracts to security screening companies who currently provide airport checkpoint screening services. The contract terms and conditions will be negotiated, but the requirement **will not be competed** in the interest of time and maintaining quality of services. (Emphasis in original.)

TSA Dispute File Supplement, Exhibit 4 at 124. Each company then performing airport screening services was requested to submit a proposal for each airport at which it already provided screening services, and include in that proposal an estimated number of labor hours for each relevant labor category. Proposed hourly prices for each labor category were supposed to capture all costs (direct and indirect) and profits for that labor category. The solicitation further advised that the Government might need to award additional task orders to a screening company for services that another existing screening company could no longer provide. TSA Dispute File Supplement, Exhibit 4 at 154.

Following the release of the solicitation, the Government conducted several industry meetings to address questions and concerns about the process by which TSA would assume responsibility for airport screening services. On January 18, 2002, the Government met with industry representatives and several air carriers; on January 22 there was a meeting with several screening companies; and on January 24 there was a public pre-solicitation meeting. TSA Dispute File Supplement, Exhibit 66.

During this period, the Government also received written correspondence from Globe, seeking clarification and modification of the solicitation. For example, Globe desired clarification of the pricing methodology, voiced concerns as to appropriate pricing to ensure continuity of services, asked for indemnification coverage under Public Law 85-804, and proposed that a force majeure clause be added to the contract. Globe was especially troubled by the Government's proposed pricing methodology in light of its commercial billing system, which did not comply with Government accounting principles, and expressed particular concern that it could not track costs in the manner required under cost accounting standards and principles enunciated in the FAA's Acquisition Management System (AMS). Dispute File, Exhibits 5-6, 10-11.

After further review of the solicitation, on January 29, 2002, Globe informed the Government that, based on draft task orders it had prepared for its screening locations, it expected the "key driver" of revisions to the task orders to be the "estimated staffing levels in general and at the gates specifically." Globe further advised that "[w]e will work with local TSA reps to control the man hours and believe the real cost on a nationwide basis will be significantly lower than presented, however we need this conservative approach to protect each airport." Dispute File, Exhibit 9.

On January 30, 2002, the Government extended the deadline for submission of proposals for two days, until February 6, 2002. Initial proposals, including one from Globe, were submitted on that date. TSA Dispute File Supplement, Exhibit 4 at 248.

The Model Letter Contract

On February 5, 2002, just prior to the extended due date for initial proposals, the Government faxed a preliminary letter contract document to the prospective offerors, including Globe, for informational purposes. The draft set forth a description of an interim contract, with the intent to include sufficient detail that with an executed letter contract, a screening company could begin to perform screening services immediately. The interim agreement would then be superseded by a negotiated definitized contract. The draft stated in pertinent part:

> This document is an undefinitized letter contract and constitutes an authorization for you to commence work on the enclosed proposed contract, baggage-screening services, subject to the conditions noted below. This letter contract is valid if, and only if, the contractor accepts the following conditions:
>
> a. The parties hereby agree to the terms and conditions specified per the enclosed proposed contract (Sections B-I of the Screening Information Request for Airport Security Screening Services as updated on 1/30/02), <u>on an unpriced basis</u>.
>
> b. <u>On an unpriced basis</u>, the Government hereby orders baggage screening service to be performed at the airports and screening locations listed on the attachment . . . . This contract shall be definitized in accordance with the dates in AMS clause 3.2.4-23.

Dispute File, Exhibit 13 at 50 (emphasis added).

Two days later, on February 7, the Government faxed a modified proposed model letter contract, which no longer provided for contracting on an "unpriced basis." The terms of the revised model contract were similar to the one circulated earlier in that they also provided that, if entered into by the parties, the letter contract would constitute authorization for the contractor to commence work and provide baggage-screening services subject to certain conditions. These conditions included the following:

> a. . . . . The contract shall be definitized in accordance with the dates in AMS Clause 3.2.4-23, "Contract Price Definitization" (April 1996). . . .
>
> . . . .

> e. The contract for these services will be definitized on a firm fixed-price basis with an incentive bonus.
>
> . . . .
>
> j. The Contractor agrees to provide cost or pricing information requested by the Contracting Officer to accomplish Definitization of this letter contract.

Dispute File, Exhibit 14.

AMS Clause 3.2.4-23, Contract Price Definitization, was set forth in full in enclosure (1) to the model contract. This clause provided in pertinent part:

> (a) An [sic] Fixed Price IDIQ contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the price and any price related terms of an IDIQ contract. The Contractor agrees to submit a proposal and cost or pricing data supporting its proposal.
>
> (b) The schedule for negotiating the price of this contract is:
>
> (1) Complete proposal due 30 days after date of award.
>
> (2) Evaluation/negotiations complete 45 to 60 days after receipt of complete proposal.
>
> (3) The target date for contract award is 90 days after date of [letter contract] award.
>
> c) If agreement on the contract price is not reached by the target date in paragraph (b) above, or within any extension granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee, subject to Contractor appeal . . . .

Dispute File, Exhibit 14.

Globe's Initial Proposal

Globe's initial proposal submission included separate pricing for screening services at fifty-nine airport locations, reflecting sixty-one task orders for the requisite services. The proposal reflected total estimated staffing, or labor hours, of 12,948,944, which represented a total task order value of $396 million for a projected nine-month contract performance period. Dispute File, Exhibit 297.

Globe's Executive Summary[3] of its proposal expressed some of its concerns with the procurement, in particular its misgivings about pricing methodology:

> Globe's pricing model is built around the direct labor ratio (DL) . . . . Historically, we have tried to maintain a DL of 65 %, which has allowed us to average a 5% (of gross billings) pre-tax profit. The unique circumstances surrounding the current situation include: new risk factors, unknown time frame, increased insurance costs, and continued staff increases resulting in additional overhead. Traditionally, Globe has billed its customers for other direct costs.

Dispute File, Exhibit 297 at 2884.

Communications on Pricing Issues Following Receipt of Initial Proposals

After Globe submitted its initial proposal, its chief executive officer (CEO) met with a representative of the FAA negotiating team to discuss his company's proposal and to address the basis for the company's pricing assumptions for the continuation of pre-board screening operations. In a memorandum to the file memorializing this meeting, the CEO noted that he had explained that the company's proposed forty-five percent direct labor ratio (resulting in a substantially higher actual labor rate being charged to the Government than the historical rate described above in the executive summary) was deemed appropriate given the short-term nature of the contract, the uncertainty of the

[3] The solicitation required each offeror to provide an "Executive Summary" of its proposal for the purpose of familiarizing "the Government with the key elements and unique feature of the Offeror's approach." TSA Dispute File Supplement, Exhibit 4 at 178.

revenue stream, the risks of acts of war and terrorism, and the need for insurance and indemnity. Globe's CEO also agreed, in response to the FAA's representation that at least a ninety-day contract was guaranteed, that if that was the case, labor rates could be reduced by up to ten percent after ninety days, assuming costs were at or near the company's expectations. Dispute File, Exhibit 15.

Subsequently, in response to the FAA's expression of concern about the proposed costs under Globe's initial proposal, Globe concluded that its estimate of necessary staffing had been "overly aggressive" and reduced its projected level of manning at the airports. Globe also concluded that it could reduce its labor markup with a slight increase to its risk calculation. Dispute File, Exhibit 31. This reduction in required staffing levels and labor hours resulted in a decrease of the estimated total order value for all tasks to $250 million for nine months of screening services. *Id.*

In conjunction with its agreement to reduce estimated staffing and labor rates, Globe also requested that the Government permit it to invoice on a bi-monthly basis. Dispute File, Exhibit 31.

On February 12, 2002, Globe corrected its adjusted total task order value to add two new sites previously overlooked, resulting in a revised total task order value of $255 million (before taxes) and $262 million (after taxes). Dispute File, Exhibit 25. Globe provided revised proposal sections reflecting the volume and pricing adjustments. *Id.*, Exhibit 27. These revisions remained unchanged in the executed letter contract. *Id.*, Exhibit 65.

Globe continued to express concern about the level of risk it would undertake in performing the screening services contract. The parties eventually agreed that Globe would be a third party beneficiary of risk liability insurance that had been issued to certain air carriers. Dispute File, Exhibit 20.

Government Funding Constraints

One of the many significant challenges faced by the Government in awarding the initial letter contracts for screening services at the Nation's commercial airport locations was the potential overall cost of funding the program, as various commercial entities, unfamiliar with government contracting in general, and troubled by operating risks in the post-September 11 environment, were inclined to estimate their potential costs to be on the high side. At the time it initiated this procurement effort, the FAA anticipated that

$750 million in program funds would be available.[4] TSA Dispute File Supplement, Exhibit 12. As initial proposals were received, the potential costs escalated to some $2.5 billion for the expected nine-month period of the program. TSA Reply Brief, Exhibit 1. The projected shortfall made it necessary for the Government to start contacting the screening companies on Friday evening, February 8, 2002, to press for reductions in projected costs. *See, e.g.*, Dispute File, Exhibit 20.

Globe was aware of TSA's funding limitations because prior to receiving the contract award, it inquired why the proposed funding limitation in its draft letter contract reflected a "two-month burn rate" and wondered if it should reflect three months since the letter contract period was for three months. Dispute File, Exhibit 42. The Government responded that "the two-months is based on our funding profile" and added that Globe was the sole contractor covered for two months, with all other companies receiving a one-month funding limitation. *Id.*

On February 11, 2002, Globe's CEO sent the following electronic mail message to the FAA's chief counsel:

> Based on our conversation on Saturday, I have the following "commercial" comments . . . .
>
> The nine month task orders we sent to you last week can be generally summarized as $18M a month for the gate and selected screening and $25M a month for checkpoints and hold baggage screening (total before sales tax of $387M).
>
> Our review yesterday and today leads me to believe we can accommodate a rate reduction (small increase in our risk) of $26M for the nine months (I assume I can get bi-monthly billing with 15 day payment terms).
>
> The big story is the volume of hours and the fact that the airlines are banging on the door for more gate screening and adding x-rays in many cities. We are running the revised task orders under the assumption that when we hit the task order run rate and the airlines ask for more, more, more, we can direct them to TSA.

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[4] As noted in the paragraphs describing Globe's initial proposal above, Globe's proposed estimated contract costs alone would have absorbed more than one-half of that funding.

> I expect to have the new task orders total $250M for the nine months reduced as follows: gate screening from $18M to $6M and the checkpoint related costs from $25M to $22M.
>
> Before we rerun the task orders, I would like to get your comments on these targeted totals.
>
> I want to reassure you we will work with local TSA to minimize the hours and I am sorry to have to do this on a "top down" basis but, I believe it is the best approach.

Later that day, the FAA chief counsel responded, "Ron -- You're a breath of fresh air; go ahead and prepare the TOs [task orders]. . . ." Dispute File, Exhibit 19.

The next day, after preparing the task orders as requested, Globe's CEO contacted FAA's chief counsel again. He advised that, owing to the addition of two new operations that had previously been overlooked, the final total was somewhat higher -- $255 million and $262 million after sales tax -- and expressed the hope that the Government would not consider this to be "material." In response, FAA's chief counsel stated: "Let's roll. Give me a call to discuss final details." Dispute File, Exhibit 25.

In continuing negotiations on the letter contract terms, in another electronic mail communication, one of Globe's attorneys noted that Globe's CEO had:

> agreed to lower prices in exchange for, among other things, twice a month billing, and payment within 15 days of receipt of a bill. We understood that the FAA was agreeable to that. Globe's price reductions assumed those payment terms. We will prepare language reflecting that in the draft we send to you later.

Dispute File, Exhibit 40.

Other Proposed Revisions to the Model Contract

During the negotiation process, Globe proposed a number of revisions to the model letter contract's provisions. For example, on February 8, 2002, Globe submitted a redlined version of the Government's model letter contract seeking a number of changes to that vehicle, some of which were adopted and some of which were not. Globe requested that language requiring the contractor to submit cost or pricing information in support of its definitization proposal be deleted and replaced with new language stating "[t]he contractor agrees to provide information reasonably requested by the Contracting Officer to accomplish Definitization of this letter contract." Dispute File, Exhibit 16 at 72.

Globe also wanted deletion of language in subparagraph (c) of the AMS Contract Price Definitization clause that would allow the contracting officer to unilaterally determine a reasonable contract price in the event the parties were unable to agree. Globe proposed instead that this be replaced with a new subparagraph (c), stating that "[b]oth parties shall use good faith efforts to negotiate the price and terms and conditions of the definitive contract." Dispute File, Exhibit 16 at 74.

The above two proposed modifications were ultimately agreed to by the Government. Other last minute requests for modifications, proposed by Globe a short time later, were not accepted, but rather were described as matters that could be discussed "further when we definitize the contract." One suggestion in particular evoked the following response from the Government team:

> We are executing a letter contract and will agree to make appropriate changes [5] once we have the opportunity to definitize. If it is a real problem we will modify the letter contract next week.

Dispute File, Exhibit 52 at 419.

Execution of the Globe Letter Contract

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[5] These concerned minor issues with the wording of language in section G.10 to conform to agreements on biweekly payments and a question as to whether section H.13(b)(11) should be deleted since it referenced clauses that had been deleted.

The Government and Globe conducted discussions addressing Globe's general concerns with the letter contract provisions and its staffing obligations. After Globe revised its proposed staffing levels downward, and agreed that a variance of ten percent of the estimated labor hours would be considered to be within the scope of the contract, the parties reached agreement on an interim approach that ensured sufficient funding for a two-month initial contract period. The Globe letter contract, with the above-noted revisions to the model letter contract, was executed on February 14, 2002. It contained the following pertinent language:

> This letter contract constitutes an authorization for the contractor to commence work on the enclosed proposed contract, baggage-screening services, subject to the conditions noted below. The letter contract is valid if, and only if, the contractor accepts the following conditions:
>
> a. The parties hereby agree to the terms and conditions specified in the proposed contracts, Section B - 1 of the Model contract, Enclosure (4).
>
> b. The Government hereby directs baggage screening services to be performed at the airports and screening locations listed in the attachment of [Globe's] proposal dated February 6, 2002 . . . . This contract shall be definitized in accordance with the dates in AMS Clause 3.2.4-23, "Contract Price Definitization (April 1996)," as modified . . . . The extent of the Government liability under this letter contract is specified in AMS Clause 3.2.4-22, "Limitation of Government Liability (April 1996)" . . . .
>
> c. Work is authorized to begin at the date of contractor acceptance of this letter.
>
> d. The contract for these services will be definitized on an Indefinite Delivery/Indefinite Quantity ("IDIQ") basis with an incentive bonus.
>
> . . . .

> i. The contractor agrees to provide information reasonably requested by the Contracting Officer to accomplish Definitization of this letter contract.

Dispute File, Exhibits 65, 313.

Enclosure (1) of Globe's letter contract set forth AMS Clause 3.2.4-23, Contract Price Definitization, as follows:

> (a) An IDIQ contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the price and any price related terms of an IDIQ contract.
>
> (b) The schedule for negotiating the price of this contract is:
>
> 1) Complete proposal due 30 days after date of award.
> 2) Evaluation/negotiations complete 45 to 60 days after receipt of complete proposal.
> 3) The target date for contract award is 90 days after date of award.
>
> c) Both parties shall use good faith efforts to negotiate the price and terms and conditions of the definitive contract.

Dispute File, Exhibits 65, 313.

AMS Clause 3.2.4-22, Limitation of Government Liability (April 1996), was also included in its entirety:

> (a) In performing this letter contract, the Contractor is not authorized to make expenditures or incur obligations exceeding $67,000,000, without the consent of the Contracting Officer.
> (b) The maximum amount for which the Government shall be liable if this letter contract is terminated is $67,000,000.
>
> c) In the event that the Contractor's expenditures total seventy-five percent of the Government's limitation of

> liability amount, the Contractor shall notify the Government of that fact and the Government shall, within 10 calendar days of receiving such notice, notify the Contractor whether additional funds will be added to the Government's liability limitation. In the event that funds are not added and the Contractor reaches the total amount of the Government's limitation of liability, the Contractor shall have the right to stop work under this letter contract.

Dispute File, Exhibits 65, 313.

The contract also recognized impending Department of Labor (DOL) wage determinations, which were expected but had not been released at the time contracts were awarded. Since the wage determinations could impact the wages required to be paid for screening services, the contract contained the customary language calling for an equitable adjustment in the event it was necessary:

> At the present time, the Department of Labor (DOL) has not issued Wage Determinations. However, DOL should issue the wage determinations within the next few weeks. As soon as the wage determinations are available, the information will be made available to the contractor and the contract price shall be equitably adjusted as necessary to account for the wage determinations.

Dispute File, Exhibits 65, 313.

Contract Performance

After the letter contract was awarded, the Government continued to issue modifications under the letter contract, increasing available funding and the price ceiling, and extending the dates of performance. *E.g.*, Dispute File, Exhibits 99,118; TSA Dispute File Supplement, Exhibits 1-21. Additionally, the Government expanded the scope of Globe's letter contract, adding a variety of screening sites previously served by a debarred contractor and again increasing the available funding and contract ceiling price to allow for the additional work. TSA Dispute File Supplement, Exhibit 1. These modifications were based on the labor rates adopted in Globe's letter contract.

Globe's Voluntary Adjustment of the Billing Rates

In June 2002, Globe informed the Government that it had determined that it was operating more efficiently than it had anticipated in February 2002. Accordingly, it voluntarily reduced its billing rates on a prospective basis by increasing its direct labor ratio from fifty to fifty-five percent.[6] Dispute File, Exhibit 122.

Efforts to Pursue Definitization of the Contract

By letter dated June 13, 2002, Globe's outside counsel sent a letter to TSA's acting deputy chief counsel on the subject of "Contract Definitization." The letter pointed out that the ninety-day target date for "contract price definitization" and "final contract award" under the February 15, 2002, letter contract had elapsed in May. The letter offered Globe's surmise that due to "the need to address other high-priority issues" the timetable for definitizing the letter contract may have required some adjustment, and it confirmed Globe's continued willingness to meet with the Government "to negotiate the terms of a final, definitized contract." Dispute File, Exhibit 121.

On June 21, 2002, the Government sent letters to Globe and the other security screening companies operating under letter contracts. The letters referred the contractors to an FAA website set up for the purpose of facilitating TSA airport screening contract definitization and reminded contractors that they were operating under interim contracts subject to the AMS Contract Price Definitization clause, with the concomitant obligation to submit a proposal and supporting cost or pricing data. Dispute File, Exhibit 125. Each contractor was prompted to submit a proposal and supporting data which would "start the definitization process, and . . . be the basis of negotiations that will formally establish the final contract price." *Id.*

An attachment to this letter contained generic instructions for preparing a cost proposal with contract pricing potentially applicable to "the entire maximum performance period of the contract, from February 17, 2002 through November 19, 2002." Dispute File, Exhibit 125 at 847. The instructions specified that cost proposals be supported by cost or pricing data derived from records of the company's business operations. The definitization instructions also asked contractors to put their proposals in the posted formats. Included in the instructions were recommendations and guidelines for calculating loaded direct labor rates for review by the Government in the negotiation process. The instructions addressed such items as calculation of overhead and profit, and they cautioned that contractors intending to claim profit rates in excess of what was normally considered reasonable -- a range of six to ten percent -- should be prepared to

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[6] In its brief, Globe explains that this meant that since it continued to pay the same wages to its employees but lowered its bill rate, the wage rate as a percentage of the rate it billed to the Government went from fifty percent to fifty-five percent.

support a higher rate with documentation showing that their claims were warranted by past experience with similar contracts. The Government asked contractors to submit proposals by July 23, 2002. *Id.*, Exhibit 125 at 838-72.

In response to this communication, by letter dated July 3, 2002, Globe's CEO formally requested an extension of time to submit a definitization proposal, explaining that the requested information appeared to differ substantially from that required under the letter contract and that the company would need to retain an accounting firm with the necessary expertise in government contracting to assist in assembling a proposal. Dispute File, Exhibit 128.

In August 2002, TSA authorized the FAA to turn over contract administration responsibilities to the Defense Contract Management Agency (DCMA) office in Cleveland, Ohio. Dispute File, Exhibit 150. In a letter dated September 24, 2002, DCMA contacted Globe, stating that to date the Government had not received from it a definitization proposal as requested in the FAA's June 21, 2002, letter. DCMA requested that Globe submit a proposal by September 30, 2002, accompanied by cost or pricing data, and cautioned that failure to make a suitable submission by that date could result in the Government unilaterally definitizing the contract. *Id.*, Exhibit 193 at 1084-85.

By letter dated September 30, 2002, Globe responded to DCMA's letter, advising that under its customized letter contract it was not required to submit cost or pricing data. Globe also pointed out that its contract did not include the provision authorizing the Government to establish a price unilaterally. Globe additionally noted in this letter that conforming its wage and benefits information to comply with the FAA's instructions for preparing a proposal had required a substantial undertaking, given the large number of airports it served, the issuance of DOL wage determinations after letter contract award, and the fact that Globe's letter contract had been far less detailed than the proposal required under the FAA's June 21 letter and its instructions. After affirming its intent to offer the Government "a definitized price that is fair and reasonable," Globe further stated its position that its "letter contract require[d] that adjustments to the fixed labor rates be on a 'go forward' basis only," and expressed the hope that Globe and the Government could continue to work together to resolve issues in "a way that is fair to both parties." Dispute File, Exhibit 196 at 1091-93.[7]

[7] This letter inspired a response from DCMA, suggesting that variances in Globe's customized letter contract might not have been properly authorized and perhaps showing a disinclination on the part of DCMA to accept Globe's representations that its definitization process was not necessarily on the same track with the others. Dispute File, Exhibit 211. In response to DCMA's communication, Globe sent another letter, dated October 11, 2002, identifying for DCMA the specific provisions in the AMS that

Globe submitted its definitization proposal to DCMA on November 1, 2002. The proposal consisted of two bound volumes containing upwards of 1350 pages. Globe summarized its pricing methodology in a fifteen-page cover letter, explaining that it had divided its proposed pricing into three distinct periods of performance under the letter contract. The first period was from February 17 to June 13, 2002; the second period was from June 14 to September 19, 2002; and the third period covered the dates from September 20 through the remainder of the contract term. For the first period, Globe took the position that it was entitled to retain the fixed-price per labor hour that had been adopted by the parties under the letter contract. For the second period, Globe applied the lowered rates it had voluntarily substituted for the initial rates. For the final period, Globe proposed rates that it believed represented its best efforts to comply with the Government's cost instructions for the definitization negotiation process. Dispute File, Exhibits 229-30.

In conjunction with the submission of its proposal, Globe initiated a request to meet with the Government in Washington, D.C., in early November 2002, to discuss the definitization process. Dispute File, Exhibit 226. DCMA responded to this request in a letter dated October 31, 2002, expressing a preference for an initial conference to be conducted in Texas after November 7, and asking Globe to propose new dates for a conference. *Id.*, Exhibit 227. The parties never agreed to an in-person meeting to discuss Globe's definitization proposal.

In February 2003, the Defense Contract Audit Agency (DCAA) completed an audit of Globe's proposal and concluded that the proposal, which was priced at $255,799,699,[8] provided "an acceptable basis for negotiation of a fair and reasonable price." TSA Dispute File Supplement, Exhibit 2 at 44. DCAA questioned certain of the costs included in Globe's indirect cost pools and stated its understanding that claimed incentive bonus amounts would be negotiated separately from definitization. *Id.*

Relying upon its own assessment of Globe's proposal, as well as the DCAA audit report, DCMA adopted the position that Globe's contract should be valued at $198 million and advised Globe of this view in connection with questions concerning incentive bonus payments under the contract. DCMA has thus taken the position that Globe has

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authorized the FAA representatives to modify the clauses of the letter contract and pointing out that the modified clauses had been set forth in full in the letter contract awarded to Globe. *Id.*, Exhibit 214.

[8] Globe has recognized that this contract value was based on a projected workload after definitization that was higher than the actual workload that occurred and would have to be adjusted accordingly.

been overpaid by the Government, given that Globe was paid some $217 million under the letter contract before payments ended in November 2002. Dispute File, Exhibit 283.

This position prompted an exchange of correspondence between Globe and DCMA, in which Globe undertook to explain its views on the proper limits to the definitization process. *E.g.*, Dispute File, Exhibits 283-85, 292-93. By March 2004, Globe came to the conclusion that further attempts to negotiate with DCMA would not be fruitful and filed its dispute with ODRA.

Discussion

This dispute centers on the incompatible interpretations proposed by the parties with respect to the letter contract's requirements for definitization, their mutual obligations thereunder, and the consequences of the failure to definitize prior to the completion of performance thereunder. Ultimately, the failure to definitize leaves the parties with the dilemma of how to price services which have now been fully provided without the parties ever having undertaken to negotiate fixed-price labor rates as intended when the letter contract was awarded. Before we address these issues, however, there is a preliminary evidentiary matter, raised by the contractor, to which we turn first.

Alleged Spoliation of Evidence

This ancillary issue arises from the Government's inability to produce, in response to discovery requests, the complete personal files of three members of the government negotiation team with respect to the screening contract negotiations. The lack of separate files from these individuals is explained in a two-page letter submitted to ODRA by Government counsel, in which it is explained that, to a large degree, the members of the contracting team did not retain significant separate documentation outside the official contract file. All three individuals named in counsel's letter moved on to other assignments within the FAA and elsewhere in the Government and, as they deemed appropriate, either placed relevant materials in the official Globe contract files (which were produced in discovery) or discarded them. In addition, one of those individual; an FAA attorney reported that in September 2002 all of his files, including any documents that may have pertained to this matter, were damaged by flooding in his office. He disposed of numerous damaged files which he determined he no longer required, but has no specific recollection whether any of the papers so discarded involved the Globe contract negotiations. His computer hard drive was discarded by the FAA without being downloaded first.

Globe believes that the Government's inability to produce the personal files of these three individuals, and in particular the files discarded by the FAA attorney whose

office suffered flooding damage, constitutes spoliation of evidence and warrants the imposition of a sanction in the form of an adverse inference that the documents that were destroyed would have supported its position in this dispute, particularly its arguments concerning the binding nature of the labor rates used in the letter contract. Globe infers for several reasons that the documents were required to have been kept and were inappropriately discarded or destroyed. One is that TSA's privilege log identifies some documents generated in 2002 to 2003 as protected under the attorney work product privilege. This causes Globe to assert that TSA had reason to anticipate the instant dispute all along, and that it consequently should have taken care to preserve all of its files, documents, and screening contract related materials. Globe's other point is that the flooding, which TSA says occurred in September 2002, is ascribed to Hurricane Isabel. Hurricane Isabel, however, occurred in September 2003, at a time when the Government perhaps should have anticipated potential litigation.

Globe thus urges that the Government was obligated to preserve all of its files and that ODRA should infer that the absence of evidence from these sources should give rise to the inference that the personal files would have supported Globe's position. The duty to preserve evidence arises once an action is pending or a party has notice that litigation may occur. *See, e.g., United States v. Kitsap Physicians Service*, 314 F.3d 995 (9th Cir. 2002); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001); *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991), *Akiona, cert. denied*, 503 U.S. 962 (1992). Simply put, spoliation is the destruction of evidence in the control of one party to a matter in litigation or likely to be in litigation. A tribunal has the inherent power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence. *See, e.g., Medical Laboratory Management Consultants v. American Broadcasting Co.*, 306 F.3d 806, 824 (9th Cir. 2002). The spoliation of relevant evidence within a party's control may raise the presumption that its content would not have supported the party's position. *See Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 189 (D.D.C. 1984). Globe asks us to apply that presumption here.

In this matter, it is not at all clear that documents relevant to this dispute were in fact destroyed, nor is it clear that any materials that were discarded were discarded at a time when this litigation was either pending or should have been anticipated. It appears that the documents destroyed as a result of the flood and the subsequent transfer of the FAA attorney were disposed of well prior to the filing of the contractor's dispute with ODRA on July 2, 2004. Globe urges, however, that its claim of spoliation is supported by the Government's claim of attorney work product privilege for certain documents generated in 2002, as shown in the privilege log produced by the Government. Globe argues that this shows that the Government anticipated possible litigation from the outset and thus was under a duty to preserve evidence.

Globe's concerns about the possible destruction or loss of the above-described files potentially relating to the negotiation process do not persuade us that it would be appropriate to impose a sanction in the form of an adverse inference that the materials contained documents that would have supported Globe's position in this dispute. We are not convinced on this record that there was any duty to preserve the files in issue, to the extent any separate, distinct files, apart from the official contract files, were even maintained by these individuals. Apparently, two of the three team members in question forwarded some materials for inclusion in that file, as they deemed appropriate. The third member's files were extensively damaged by flooding and, to the extent they survived the flooding, were discarded some months later when he accepted a transfer, well prior to the institution of litigation in this matter. There is no way to evaluate whether any of these files were of relevance to the matter at hand. TSA has effectively addressed the attorney work product argument: it tells us that this was a mistake in its privilege log -- that it intended to assert the attorney-client privilege with respect to those documents and that this error has now been rectified. Thus, we do not find that the record supports an inference that TSA was under an obligation from as early as 2002 to preserve these documents in anticipation of litigation.[9] There is nothing sinister about the actions taken to consolidate files in a single location as team members moved to new assignments and agencies, particularly in light of the existence of an official contract file and the fact that the actions were taken well in advance of the point in time when a formal dispute process may have seemed inevitable to the contractor and the Government. We accordingly decline to draw any inference from TSA's inability to produce separate files for the negotiation team.

Definitization of the Letter Contract -- The Parties' Arguments

To resolve this dispute, we examine the letter contract entered into by these parties for screening services at various of the nation's airports in the context of the process and events that preceded and followed its execution. From an examination of the correspondence exchanged in this matter and the parties' respective briefs, it would appear that the parties entered into the letter contract with significantly differing expectations and intentions with respect to the ultimate process for pricing the screening services to be provided.

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[9] Globe makes much of the fact that TSA suggests that the files were destroyed by flooding in 2002, but attributes the flooding to Hurricane Isabel, which took place in 2003. Regardless of the cause of the flooding, the 2002 date seems most accurate and we are not persuaded there was any duty at that time to attempt to preserve the documents in anticipation of litigation which would not be initiated for nearly two years. At that point the contract was still ongoing and negotiations were proceeding.

Globe maintains that it engaged in vigorous pre-contract negotiations as to both price and terms and conditions, prior to receiving the award of the letter contract, and that under the unique circumstances of this case, it should be permitted to reap the benefits of what it perceives to be its bargain with respect to pricing -- at least as to some portion of contract performance, if not for the entire period of the contract. Indeed, much of the dispute centers around Globe's view of the meaning to be ascribed to what it denominates as the "price negotiations" between its principal and the Government's negotiation team. Globe imputes great significance to the electronic mail communications, quoted in the findings, responding to Globe's lowered hourly rates and staffing proposals. It is in these communications, in which the FAA lead attorney communicated to Globe's CEO, "you're a breath of fresh air" and "[l]et's roll" with the letter contract, that Globe finds the strongest basis for its contention that the Government knew (or should have known) and tacitly acknowledged that Globe intended its rates to be binding until such time as a definitized contract was negotiated modifying the rates prospectively. Globe also maintains that it took these responses to be a whole-hearted manifestation of the Government's acceptance of this understanding. At no time, Globe thus contends, would it ever have expected the Government to insist upon retroactive repricing of these rates.

TSA counters that there was no such bargain with respect to Globe's labor rates. TSA fully expected that the parties would come to the drawing board and negotiate an entirely new set of rates to apply for the entire period of contract performance once the agency had had the opportunity to obtain sufficient information to evaluate price reasonableness and negotiate with Globe (and the other contractors) on a more even footing. For its part, the Government explains that the comments quoted by Globe ("you're a breath of fresh air" and "[l]et's roll") reflected little more than an expression of profound relief that a serious funding problem had been at least partially ameliorated so as to permit it to proceed with the award of a screening contract to Globe in compliance with its looming statutory deadline, and a desire to proceed forthwith with that award. Since the Government believed there would be a subsequent opportunity to negotiate appropriate rates during the contract definitization process, the amount by which Globe had lowered its rates and proposed staffing at this juncture satisfied the Government's immediate need to be able to fund an initial award.

In taking its position, TSA relies on several fundamental procurement principles applicable to letter contracts, which, in the context of a federal procurement, are traditionally understood to serve as temporary instruments allowing an urgent procurement to go forward with the understanding that the arrangement will ultimately be replaced by a negotiated, definitized contract. TSA maintains that the temporary nature of the letter contract, including the rates to be paid for screening services, was clear to all of the screening companies, including Globe. As such, TSA urges, the definitization

process must govern the entire period of contract performance, and discussions preceding the award of the letter contract in no way altered the applicable procurement principles.

The primary objective of contract interpretation is to give effect to the mutual intent of the parties at the time the contract was entered into. *See, e.g., Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562 (Fed. Cir. 1987); *see generally Restatement (Second) of Contracts* § 201 (1981). This requires the use of an "objective" standard -- one party's uncommunicated, or subjective, intentions are neither controlling nor relevant to the proper interpretation of a contract's terms. Moreover, the fact that the parties disagree over how the contract should be construed and enforced is not necessarily probative of the existence of an ambiguity, or suggestive that more than one reasonable meaning may be attributed to the contract language. Rather, the standard to be applied is what meaning would be ascribed to the instrument by a reasonably intelligent person familiar with the facts and circumstances under which the agreement was made. *See,* e.*g., Olympus Corp. v. United States*, 98 F.3d 1314 (Fed. Cir. 1996)*; ITT Arctic Service, Inc. v. United States*, 524 F.2d 680 (Ct. Cl. 1975). Although this standard has been consistently articulated with respect to federal contracts, its application is widespread with respect to contracts in general.

Given the unusual nature of the letter contract, the appropriate analysis is more effectively performed in its context, viewing the use of the letter contract vehicle in federal contracting, and in consideration of the reasonable expectations and special requirements that attach to this type of contracting specifically, as well as to public contracting in general, particularly when that contracting is done on a sole-source basis, as was the case here.

Letter Contracts

In general, letter contracts are a type of preliminary contractual instrument available to permit government agencies to authorize contractors to begin producing supplies or providing services for which there is an urgent or exigent need when there is not sufficient time to negotiate a definitive written contract covering all of the necessary terms and conditions before work must begin. *See, e.g.*, John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 1073 (3d ed. 1998); 48 CFR 16.603 (2002); *see generally Integrated Logistics Support Systems International, Inc. v. United States*, 47 Fed. Cl. 248, 258-60 (2000), *aff'd*, 36 Fed. Appx 650 (Fed. Cir. 2002). Because of the attendant uncertainty that accompanies the use of undefinitized contracts, these instruments are not favored, but may be used when authorized and in appropriate circumstances. The proper authorizations were obtained in this case.

The AMS, like the Federal Acquisition Regulation (FAR), authorizes the use of letter contracts in appropriate circumstances. Nothing in the record or the AMS suggests that the letter contract used by the TSA in this case was intended to operate any differently than the way in which one would operate under the FAR. Nor does the correspondence issued to the screening companies suggest that the Government's negotiation team envisioned a different use of the letter contract vehicle from what has traditionally been the case in federal contracting. Thus, we deem it appropriate to refer to federal case law involving letter contracts awarded under the FAR and its predecessor regulations to interpret the applicable provisions of the letter contract awarded by the Government's negotiation team to Globe and to develop an appropriate remedy for the impasse reached by the Government and Globe with respect to the finalization of the screening contract.

Globe argues that the contractor's intent, as manifested by the brief, but intense, negotiation process that took place between the submission of its proposal and the award of the letter contract, was that its pricing would be adjusted only prospectively. The primary difficulty with Globe's position is that this negotiation process was devoid of any meaningful ability on the part of the Government to verify the reasonableness of Globe's quoted labor rates. The Government had no prior experience in this area on which to base an analysis of probable costs, was not in a position to compete the work, and was under severe time constraints to have contracts in place by mid-February. It had nowhere near the usual lead time that would ordinarily be required to award a series of contracts of this nature, particularly for an undertaking, like this, that was entirely new to the agency.

It is axiomatic that Government officials are expected to purchase supplies and services at reasonable prices. This is the case whether a procurement is conducted under the FAR or the AMS. Indeed, the AMS, while less prescriptive than the FAR, nonetheless imposes comparable guidelines and principles with respect to price reasonableness, and calls for the Government to perform a cost and price analysis of an offeror's proposal in the absence of adequate price competition. *See* AMS T3.2.3.5. As the Government points out, no such extensive analysis was practicable in the circumstances, given the urgency of the requirement and the magnitude of the undertaking. Although Globe's proposal provided line item prices and labor rates, it did not include back-up documentation of any sort or provide any other basis by which the Government might reasonably have been expected to determine whether the prices in Globe's proposal were reasonable. Moreover, even if such information had been available or provided, given that the Government had very little time in which to award numerous contracts for these services, it would not have been reasonable for Globe, or any of the prospective screening service contractors, to have understood or assumed that the Government was in a position to undertake the requisite price reasonableness assessment to enable it to agree to binding rates in awarding the letter contracts. One of

the principal benefits to the Government of using a letter contract format is the ability to postpone time-consuming, but necessary, steps such as price reasonableness evaluations in order to proceed with an urgent procurement.

From this backdrop, we look to the terms of the letter contract to interpret the contractual rights and obligations of the parties to this dispute. Essentially, the letter contract initiated the contracting process -- it got the proverbial ball rolling. It permitted the Government to procure and pay for, and authorized the contractor, Globe, to supply, the necessary screening services on an interim basis. It incorporated the labor rates supplied by Globe as the basis for paying for those services initially.

It also contained a requirement that the parties would undertake in due course to definitize the arrangement and further stated that:

> The contract for these services will be definitized on an Indefinite Delivery/Indefinite Quantity ("IDIQ") basis with an incentive bonus.

TSA makes the point that the implication of this clause is that the contract for these services would be covered by a single definitized contract, presumably one that would replace the interim letter contract. We agree. Globe's proposed interpretation, if implemented, necessarily suggests that the definitized contract would be a separate vehicle that would be put into place following the letter contract, whose pricing would remain intact for the period in which the letter contract governed. The language of the letter contract does not suggest that a successor contract is what was envisioned, however. The Government makes a compelling argument, then, that Globe's proposed interpretation -- that definitization could apply only prospectively to prices -- renders this clause effectively meaningless.

The Government's position on this issue is also by far the more reasonable interpretation in light of well-settled Government procurement law. Ordinarily, the definitization of a letter contract is indeed considered to supersede and replace the previously existing letter contract. *See, e.g., Integrated Logistics Support Systems International, Inc.*, 46 Fed. Cl. at 248; *United Technologies Corp.*, ASBCA 46880, et al., 97-1 BCA ¶ 28,818, at 143,803; *Belleville Shoe Manufacturing Co.*, ASBCA 46036, 95-2 BCA ¶ 27,680, at 138,011; *TDC Management Corp.*, DOT BCA 1802, 91-2 BCA ¶ 23,815, at 119,309; *Lear Siegler, Inc.*, ASBCA 15250, 71-2 BCA ¶ 9,059, at 42,026. Thus, the usual expectation of parties agreeing to definitize a letter contract would be to negotiate a replacement contract to apply to the entirety of the undertaking. This makes particular sense here, where the period of expected performance was limited to, at best, approximately nine months.

Nor has Globe persuaded us that the parties' conduct through discussions and negotiations prior to award of the letter contract somehow altered the customary operation of the letter contract vehicle given the language of the contract awarded here, which, as noted above, established a schedule for definitizing "[t]he contract for these services." We find unconvincing Globe's hypothesis that the absence of the words "unpriced basis" in the letter contract that was ultimately awarded meant that its pricing was not to be replaced upon definitization. Although Globe makes much of the fact that this phrase was present in the preliminary model contract but was not used in later versions of the model contract, the subsequent absence of this phrase does not appear to be attributable to any effort of Globe's. Indeed, TSA argues strenuously that the Government, of its own volition, eliminated the use of the term "unpriced basis" in its draft letter contract, without prompting from Globe. On the basis of the contemporaneous written record, it is only evident that the phrase was edited out of subsequent versions of the model letter contract that were circulated a short two days later -- there is no explanation of why the language changed. Globe has not directed us to any written correspondence in which it expressly requested the deletion of this term, although there are numerous written communications in which it addressed other matters of concern, such as the need for indemnification language and its requests for modification of the clauses requiring submission of cost and pricing data and authorizing the Government to unilaterally establish a price for screening services if a mutually acceptable price was not negotiated. Given that the Government necessarily would have needed to fund and price the letter contracts in some manner as a mechanism for acquiring these services on an interim basis, the fact that this phrase dropped out of the letter contract does not, a priori, support Globe's contention that this phrase was removed due to the fact that the prices were intended to be binding until definitization occurred.[10]

The preliminary and limited dickering over labor rates that took place prior to the award of the letter contract simply does not compel the conclusion that the parties mutually intended that these rates could not and would not be modified retroactively upon contract definitization. Regardless of whether Globe believed that it negotiated a firm price for some or part of the contract term, on the face of the written record this belief was not unequivocally communicated to the Government's negotiation team, although it certainly could have been. It also should have been, given the fact that the contract vehicle remained a letter contract and the Government, by the terms of the letter contract, manifestly expected Globe to work with it to achieve a definitized contract, first

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[10] Moreover, we are not entirely persuaded that the technical distinction between an award on a "priced" or an "unpriced" basis would necessarily be dispositive of the issue of whether the prices so established were binding for some particular period of time or entirely temporary, given the requirement for definitization.

by submitting a proposal and then by negotiating a firm fixed-price IDIQ contract with a provision for an incentive bonus. Globe was patently clear that it did not want to be required to provide formal cost or pricing data, as that term is commonly used in federal government contracting, and communicated its position on this point very effectively. It also effectively negotiated substitute language for the contracting officer's ability to establish a definitized price unilaterally. Globe was also forthright and explicit about its need for indemnification and its preferred billing procedures, which differed from those proposed in the model contract. Nowhere do the contemporaneous documents suggest, however, that Globe just as forthrightly and explicitly communicated its understanding and expectation that the quoted prices would be binding and could not be renegotiated on a retroactive basis during the definitization process.

Ultimately, Globe's position that its rates were binding for at least the first three months of the contract period negates the entire concept of this contract vehicle. In essence, the letter contract, as used in the current Government procurement environment, envisions that the contractor will undertake performance immediately and the parties will at a later date undertake to hammer out a replacement contract to supersede the temporary agreement that enabled the Government's pressing need to be met until the details of the full contract were worked out. After considering the contract documents themselves, the dealings of the parties before and after the contract award, and the nature of the letter contract vehicle as used in Government procurements generally, as well as the specific exigencies of this particular procurement transaction, we conclude that the most reasonable interpretation of the letter contract was that firm labor rates were to be negotiated to replace the temporary ones used to get the process in place. While Globe may have intended otherwise, its unexpressed expectation cannot control in these circumstances.

Pricing the Definitized Contract

This does not end the matter, however. It brings us to the second issue raised for consideration -- how, given that the parties did not undertake on their own to definitize the contract and agree to fixed labor rates prior to completion of performance, the contract should now be priced.

We concluded above that the letter contract obligated the parties to negotiate labor rates to apply to the screening services for the full contract term. Certainly, we are not prepared to say that this failure results in leaving the parties where they were at the conclusion of the contract, which in this case would leave Globe arguably underpaid (from its point of view) or possibly overpaid (from the Government's point of view). The mere fact that the parties did not undertake to definitize their contractual arrangement at a particular designated time does not altogether invalidate the underlying agreement to

make the attempt to definitize, thereby entitling Globe to retain the price it asked for initially. *See Folk Construction Co.*, ENG BCA 5839, et al., 93-3 BCA ¶ 26,094 ("The failure of the parties to reach an agreement with respect to repricing of the completed work by some magic date does not invalidate the entire agreement per se."). Thus, one possibility would be to return this matter to the parties to negotiate at this point.

Globe has further suggested, however, that the Government has breached its obligations to negotiate with it in good faith in the definitization process, thus entitling it to concessions in pricing even if it should not prevail in its proposed interpretation of the letter contract. There are several prongs to this argument. First, the definitization instructions were not issued until June 2002, which Globe maintains greatly delayed the entire process. Second, when the generic instructions were issued, the requirements placed on contractors thoroughly breached the terms of Globe's letter contract by demanding that Globe produce cost and pricing data in support of its definitization proposal and by asserting an entitlement to unilaterally establish the contract price if negotiations did not succeed. Globe points out that the Government had no right to make these demands under its contract and suggests that since the Government thus breached the terms of the letter agreement, this could also provide a basis for permitting Globe to retain the benefit of its bargained-for rates. Finally, in Globe's view, DCMA never reciprocated Globe's good faith efforts to meet to negotiate a definitized contract, thus forcing Globe to resort to litigation.

Although we recognize Globe's concerns about being asked to provide cost or pricing data, and its natural offense at receiving a letter that contradicted the carefully negotiated provision in its customized letter contract that did not permit the Government to unilaterally establish fixed labor rates, we are nonetheless not inclined to assign all blame for delays in the definitization process to the Government. Although Globe contends that the burden was on TSA to issue definitization instructions in order to trigger Globe's burden to submit a proposal, in fact, the contract language on its face contained no mention of definitization instructions, but simply stated that Globe should prepare and submit its proposal within thirty days. The relevant AMS regulations governing letter contracts also make no mention of a need for the agency to issue or provide definitization instructions to the contractor. It appears that in this case, issuance of definitization instructions occurred when contractors failed to undertake to submit proposals and the Government focused on the need to get the process underway. Neither the contract nor the AMS provided that issuance of formal instructions was a prerequisite to definitization.

We are not, therefore, prepared to fault the agency alone for the preliminary delay in the definitization process. Globe's implication that the Government somehow breached its obligations in this regard, and further breached the contract by improperly

asking for cost or pricing data in support of pricing and then by asserting a right to unilaterally establish rates in the absence of agreement is simply not well taken. Either party could have taken the initiative to begin the definitization process, but the language of the letter contract itself places at least as much, if not more, responsibility for doing so on the contractor. Having allowed the date established in the letter contract for submitting a definitization proposal to come and go without proffering a proposal, Globe shares the responsibility for the fact that it was included with the other contractors who received a common set of generic definitization instructions in June 2002.

Moreover, as the agency points out, Globe could also have responded to these instructions more firmly by asserting at the time that it could not or would not provide the cost and pricing data as requested, and seeking then to work out a compromise more in keeping with what it had negotiated to do, which was to provide information reasonably requested to permit the Government to assess the reasonableness of its prices.[11] At least some part of the delay in preparing a proposal and in getting the audit process completed by the Government was caused by Globe's efforts to meet the requirements set forth in the definitization instructions which it now complains about, but surely could have been more assertive about at the time.

Our assessment of the facts and circumstances persuades us that both parties have contributed to the circumstances in which they find themselves today -- having completed contract performance without having begun negotiations on the contract price. Although Globe complains that definitization was unduly hindered by DCMA's intractable positions with respect to the unique provisions of Globe's letter contract, Globe's definitization proposal was not submitted for consideration until November 1, 2002. By that time the contract had nearly been completely performed. All things considered, then, it is our assessment that both parties contributed, to some degree, to the failure to definitize the contract in a timely manner.

To summarize, we have concluded that the contract and pre-award dealings of the parties do not establish a mutual intent to accord any level of permanency to the interim rates proposed by Globe. The obvious next step, had the parties acted pursuant to the letter contract, was for them to have promptly negotiated fixed labor rates to have applied for the entire duration of contract performance. Globe's efforts to retain its interim rates

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[11] Although Globe did not necessarily have to supply cost information in strict conformance with FAA cost standards and regulations, it certainly did have an obligation to support its proposal with cost information reasonably required by the contracting officer in order to analyze that proposal. According to TSA, Globe has provided very little in the way of back-up information to support its proposed labor rates, although presumably it could produce copies of prior commercial contracts at the very least.

until it voluntarily lowered them in June, to use the second set of rates until September 19, 2002, and then to use a third set based on its proposal, is not grounded in any right bestowed by the contract, but mainly derives from wishful thinking. The letter contract process did not envision such an approach, nor did any subsequent inappropriate conduct of the Government create a de facto entitlement of this nature.

Globe cites us to *Saul Bass & Associates v. United States*, 505 F.2d 1386 (Ct. Cl. 1974), as support for its position that when the parties to a letter contract fail to definitize their arrangement, they are bound to their original price agreement. Because Globe maintains that this case strongly supports its position in this matter, we address it in detail.

Saul Bass & Associates concerned a dispute that arose from a letter of intent that was awarded for the design and construction of an exhibit to be displayed in the U.S. Pavilion at the 1964 New York World Fair. The responsibility for the overall U.S. Pavilion and exhibits therein was vested in a constituent agency of the Commerce Department. That agency selected Saul Bass & Associates to design, and eventually construct, a multimedia exhibit for the upper level of the Pavilion. Since time was short, the parties signed a letter of intent in December 1962 with the expectation that they would soon agree upon and execute a formal contract. The letter of intent enabled the contractor to get started promptly with the design effort. Although the parties negotiated steadily for about six months, and extended the letter of intent several times, until their relationship ended in May 1963, no formal contract was ever signed. At the end of this period, while the contractor had completed a satisfactory design, it did not pursue a production contract because the Government's budget for the exhibit had been substantially reduced. Although Bass made a conscientious effort to reduce the projected cost of producing its design to accommodate the Government's revised budget, it ultimately became clear that the contractor would not be able to implement its design with the limited funds the Government had available and the company withdrew from the project.

The agency thereafter contracted with another company for a completely different exhibit that could be produced for the available funds. Litigation ensued between Bass and the Government, in which Bass maintained it was entitled to be paid its out-of-pocket and travel expenses, and its fee of $85,000, for the design work under the letter of intent. Although it had received advances under the letter contract, Bass was still owed a net balance. The Government countered that Bass had never turned over all the tangible products of its design efforts as required under the contract and that since the Government had been forced to contract elsewhere for the final exhibit, Bass should in fact refund the monies it had already received.

The Court, upon a review of the letter of intent that was entered into and the extensions of that letter of intent, and in consideration of the prolonged pattern of

negotiations between the parties, noted that, as a practical matter, the letter of intent had bound the parties sufficiently to function as an enforceable contract despite the fact that a formal definitized contract was never executed with respect to the full undertaking, largely because the contractor was unwilling to redo its work to make the cost of the exhibit substantially less expensive, at the risk of damaging the contractor's reputation. The Court found that the letter contract and extensions had bound the parties to commence work and undertake to negotiate a detailed contract. Bass had completed the design and, although a formal contract was never negotiated, the parties had in fact negotiated its fee for the design portion of the work, with the Government coming up from its proffer of $52,500 and Bass coming down from $115,000, to agreement on the sum of $85,000. This agreement was memorialized in one of the letters extending the term of the letter contract.

Based on these considerations, the Court ruled that the letter of intent, or letter contract, was enforceable according to its terms as extended. It reasoned that the contractor, Bass, was entitled to the unpaid balance of its fee and expenses incurred in performing the design portion of the project. It also held that Bass was required under the contract to turn over the tangible products of its design effort.

Although Globe cites *Saul Bass & Associates* as support for its proposition that since the letter contract was never definitized in a formal agreement, it should be paid the labor rates that were agreed to initially -- the only rates that were ever agreed upon -- that is not the guidance that we derive from this decision. The Court examined the contract documents and the negotiations and conduct of the parties to determine their intent and enforced it. The $85,000 fee that Bass was awarded was an amount that was determined through the arm's length bargaining efforts of the parties after the award of the letter contract and before the dispute arose. It was not the original amount proposed by the designer, but the final amount negotiated for those services. The real issue in *Saul Bass & Associates* was that the Government no longer wanted the design and preferred not to pay for it if it could avoid doing so; the Court was not going to allow that. The principle established by *Bass* is that the tribunal should do its best to ascertain the intent of the parties and enforce it.

No provision of the letter contract now before us supports either the tiered approach Globe has proposed to resolve the dilemma inherent in pricing labor rates after completion of performance or the notion that the initial rates should apply across the board. Allowing Globe to be paid in such a fashion, then, would not effectuate the intent of the contract. Here, we have found that that intent was to negotiate fixed hourly labor rates after performance began and, ideally, before the contracts expired through federalization of the airport screening services workforce. Inherent in the use of the letter contract -- a temporary instrument used to get the process rolling (even the customized

one that Globe negotiated) -- was the concept that the agency would have the opportunity to assess the overall reasonableness of the rates it ultimately paid, once the contractor provided its definitization proposal and supporting data for the rates it sought. Since Globe agreed to provide information reasonably requested by the contracting officer, it assented to give the Government that opportunity.

At the same time, the uncertainties which would have made the negotiation process more meaningful prior to contract completion no longer exist. The contract's most reasonable interpretation is that the parties, had they negotiated according to the stated terms, would have agreed to a single set of rates to apply to the entire period of performance, not separate sets of rates as now proposed. This would have satisfied the Government's preference for a fixed-price contract, with nonetheless reasonable rates, while permitting Globe to earn perhaps a higher than average rate of return or profit because of the higher perceived risks, and short term revenue stream, attendant to the provision of these services at the time in question.

Having concluded that the letter contract, construed in its proper context and with due regard to the circumstances in which it came about, required the parties to agree to rates that would cover the entire period of performance, the next question is whether or how this can still be done given that the contract was fully performed without the definitization process taking place. The answer is that while it is never possible to unscramble the egg, in this case, it is also not appropriate to leave the parties where we find them. Some effort must now be undertaken to restructure the pricing of the letter contract and determine what the proper overall payment to this contractor should be.

The main problem faced in trying to determine how to price the work now that performance has been completed is that the opportunity to negotiate a fixed price for these services prior to the completion of performance is forever lost. We now know what it actually cost Globe to supply these services. Globe not unsurprisingly desires to retain the benefit of its "bargain" under the theory that the rates it quoted in February 2002 were binding at least until the target date for definitization (May 2002), if not longer, given the difficulties of pressing for the reasonableness of these rates now that the true costs are known. It is not likely, however, that the agency would have agreed to these rates in May 2002, by which time the parties all had experience under the contracts, the logistics of providing screening services for the Government were becoming less uncertain, and it was easier to assess the likely actual costs that would be incurred to continue to provide the requisite services.

The obvious starting point for pricing goods and services after they have already been provided is the default adopted for compensating a contractor for changed work under a fixed price contract -- the actual reasonable costs incurred to perform the work plus a reasonable profit. *See Bruce Construction Corp. v. United States*, 324 F.2d 516

(Ct. Cl. 1963).[12] This formula would not necessarily produce a fair or appropriate result here, however, if "reasonable" and "fair" are considered in today's context. Had the parties been able to negotiate a fixed-rate IDIQ contract by the target date, or at least prior to contract completion, Globe's rates might very well and appropriately have included contingencies for various (at the time) potential (and now unrealized) risks and costs of performance, given the fact that under a fixed-price contract the contractor bears the risk that its price is too low. Thus, the profits it might have realized under a timely negotiated contract could well have exceeded what would be deemed "reasonable" by DCMA in its apparent quest to limit prices to what it considers to be strictly allowable costs plus a ten percent profit.

Both parties recognize that they have never undertaken to negotiate a definitized price -- largely because there was never any agreement on what that process should cover and how it should proceed. TSA, in particular, continues to urge that the parties should make the attempt to definitize this contract as a means of resolving this dispute, particularly since they have never taken the opportunity to negotiate costs. It states that it has stood ready to do this since the completion of the auditing process. TSA also recognizes that these circumstances require a willingness to exercise flexibility and that some costs that DCMA has regarded as unallowable may be permitted in the rates depending on the circumstances and supporting information and documentation that is available to justify a negotiated settlement of this dispute. TSA thus believes that ODRA should, at this juncture, return the matter to the parties to explore the possibility of negotiating a settlement.

At this point, ODRA can provide some guidance to assist that process. Any negotiation effort that the parties undertake at this time should endeavor to agree upon fixed-price rates that would have covered the entire contract performance period and that would have reimbursed the contractor for its costs plus a reasonable profit level, taking into account the elevated risks, concerns, and contingencies that would have been factored into quoted rates had the negotiation process taken place shortly after the contract was signed, as was originally contemplated. In addition to the elevated risks and uncertainties associated with the provision of the services at the time in question, the effort to approximate reasonable fixed-price labor rates should take into account Globe's status as a commercial contractor.

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[12] Although a court or tribunal cannot necessarily duplicate the negotiation process that would have been adopted by the parties, it is generally possible to review all the factors that go into determining a contract price and approximate what a reasonable contract price would be. *See Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1573 (Fed. Cir.1991).

Recommendation

If further discovery or an additional exchange of documents is needed to enable the parties to proceed with negotiations as recommended above, the parties should endeavor to notify ODRA as soon as possible. If not, it is our recommendation that they explore the possibility that an amicable resolution of this matter could still be achieved, using the recommendations of the DCAA audit report as a starting point. If the parties, after exploring the possibility of arriving at a negotiated settlement, conclude that such efforts would not be fruitful, they should contact ODRA to discuss the possibility of a more structured negotiation or mediation process under the auspices of ODRA, or to suggest other approaches as they deem appropriate.

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CATHERINE B. HYATT
Board Judge