# *Office of Dispute Resolution for Acquisition*
## Federal Aviation Administration
## Washington, D.C.

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| Consolidated Contract Disputes of | ) | |
| | ) | |
| Huntleigh USA Corporation | ) | Docket No. 04-TSA-008 |
| Transportation Security Administration | ) | Docket No. 06-TSA-025 |
| | ) | |
| Under Contract DTFA01-02-C04025 | ) | |

**DECISION DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT**

Huntleigh USA Corporation ("Huntleigh") and the Transportation Security Administration ("TSA") have filed cross motions for summary judgment ("Cross Motions") with the Office of Dispute Resolution for Acquisition ("ODRA"). The Cross Motions concern the consolidated contract disputes brought by Huntleigh (Case No. 04-TSA-008) and by the TSA (Case No. 06-TSA-025) (collectively referred to herein as "Contract Disputes") related to letter contract DTFA01-02-C04025 between the parties dated February 12, 2002 ("Contract").[1]

The Contract, issued in the wake of the terrorist attacks of September 11, 2001, required Huntleigh to temporarily perform screening services for the TSA at 45 commercial airports until a newly created Federal security screener workforce assumed the work. Huntleigh claims that TSA breached the Contract by failing to provide 30 days notice in advance of transitioning work from Huntleigh to the new Federal screener workforce. *See Huntleigh's Amended Claim*, at 7-9. It also seeks the balance of unpaid invoices submitted to the TSA. *Id.* at 9. In contrast, the TSA claims reimbursement of $59,177,763.94 that TSA allegedly overpaid to Huntleigh. *See TSA's Claim*, at 4.

[1] **Short Citation Formats**. This Decision cites several motions, responses, replies, and prior ODRA decisions involving the present Contract Disputes. In the interest of clarity and ease of reference, Appendix A of this decision contains a table listing the short citations used in this Decision.

For the reasons discussed below, the ODRA denies the Cross Motions.

## I. Factual Background and Summary of Prior Decisions

The ODRA's prior decisions in these Contract Disputes provide the necessary factual background for the Cross Motions, and familiarity with those prior decisions, which are incorporated herein, is assumed. *See Dismissal Decision*, at 2-6; *Short Notice Decision*, at 2-8.

The rulings in the prior decisions are pertinent to the Cross Motions. In the first decision, following a full briefing on Huntleigh's First Motion for Partial Summary Judgment, the ODRA ruled, among other things, that:

> (1) In the situation presented here, the transition notification clause controlled over the general terms of the Termination for Convenience Clause; (2) in any event the TSA did not terminate the Letter Contract for convenience; and (3) the TSA's failure to provide written notice to Huntleigh at least 30 days before transitioning any of the pertinent screening service to Federal personnel materially breached its obligation under the Letter Contract.

*Short Notice Decision*, at 1-2.

The *Dismissal Decision* issued a few months later denied Huntleigh's Motion to Dismiss. In that Motion, Huntleigh argued that the TSA's Contract Dispute was untimely and legally insufficient. Following complete briefing, the ODRA denied Huntleigh's Motion to Dismiss and directed Huntleigh to submit a substantive answer in the matter. In so ordering, the ODRA stated:

> The ODRA concludes that the May 11, 2006, unilateral definitization constitutes the first objective event from which the accrual of the TSA Contract Dispute should be measured. Thus, the TSA Contract Dispute was filed timely at the ODRA, on June 9, 2006 – slightly less than one month after the 2006 unilateral definitization.

*Dismissal Decision*, at 13. The ODRA further determined that a complete record with full briefing is necessary regarding the price determination found in the TSA unilateral definitization. *Id.*, at 17.

## II. Discussion and Decision

Since 2002, both Huntleigh and TSA have remained in the limbo-like realm of an undefinitized letter contract valued at many millions of dollars. Unsuccessful in negotiating a final price, each has filed a motion for summary judgment in the apparent hope of favorably resolving the issues that keep them in their suspended state. The Cross Motions are considered separately in the following sections.

### Part A – The TSA's Cross Motion for Summary Judgment

TSA seeks summary judgment on all issues in these Contract Disputes. Specifically, it seeks judgment on its own claim of $59 million, which allegedly represents the overpayments TSA calculates by subtracting its unilaterally definitized contract price[2] from the total payments allegedly made. TSA also seeks summary judgment on Huntleigh's claims for unpaid invoices (allegedly totaling $11,871,794.51) and damages (allegedly valued at $5,303,992.37) for breaching the 30-day notice requirement found in clause F.2 of the Contract.

#### 1. The TSA's $59 Million Overpayment Claim

TSA argues that it had unilateral authority to definitize the Contract pursuant to the Contract Price Definitization Clause ("Definitization Clause"),[3] and, therefore, TSA further asserts that Huntleigh must provide proof that the unilateral definitization was erroneous. In the briefest of arguments, TSA explains its motion by stating:

> … the [TSA's] issuance of the modification [PZ0010] presented Huntleigh with two alternatives: accept the definitizated rates or challenge it [sic]. Clearly, Huntleigh has not adopted the former. Yet Huntleigh's apparent challenge consists of mere disagreement with the

[2] This definitized price is found in unilateral modification PZ0010, attached to TSA's Claim.

[3] The clause found in the Contract is substantially similar to AMS Clause 3.2.4-23 "Contract Price Definitization (April 1996)," but omits paragraph (d) of the AMS clause. That omitted paragraph ordinarily provides for a ceiling (price or otherwise) on the final definitized amount. *Compare* AMS clause 3.2.4-23 "Contract Price Definitization (April 1996)"; *TSA Agency Record*, Tab 4, at Bates stamp 000145.

> definitized rates. … In order to succeed in its dispute, Huntleigh must provide proof that its disagreement finds sufficient support in applicable law. Huntleigh's dissatisfaction and disagreement with the definitized rates have been understood and conceded; its support in applicable law for its dissatisfaction and disagreement with the rates are neither understood nor conceded by the Government.
>
> Accordingly, ODRA can only find the TSA definitized rates reasonable in the absence of any factual evidence having been presented by Huntleigh. Huntleigh's only defenses to TSA's Claim are legal arguments that have already been decided by the ODRA in TSA's favor as cited above ….

*TSA's Cross Motion*, at 14-15 (emphasis added). As the emphasized portions suggest, TSA presents the ODRA with a theory that Huntleigh, not TSA, has the burden of proof on TSA's affirmative claim. TSA's Cross Motion must fail because it erroneously interprets the Definitization Clause, resulting in a fundamental misallocation of the burden of proof.

**a. The Nature of the TSA's Affirmative Claim**

When rendering decisions on motions for summary judgment, the ODRA acknowledges the importance of understanding "the nature of the cause of action under which the Government may pursue the instant claim." *Coral Petroleum, Inc.*, ASBCA No. 27888, 86-1 BCA ¶ 18,533, at 93,104. "Although distinctions between forms of action have long been abolished in federal civil practice, the nature of the action remains important for determining what […] elements of the action [the claimant must prove] and what defenses are available to the party resisting the claim." *Id.*

TSA bases its recoupment action on the Definitization Clause.[4] The Definitization Clause includes a schedule to definitize the Contract before the end of the contemplated nine-month performance period, but it also gives the TSA the unilateral right to "determine a reasonable price or fee" if the parties cannot agree. The Definitization Clause tempers TSA's unilateral definitization right by giving Huntleigh the right to

[4] *See TSA's Claim*, at averment 2.g.

"appeal" from the decision under the Contract Disputes Clause. Although the Dispute File abounds with documents pertaining to audits and related materials that *might* have been used in the price definitization, TSA's Cross Motion does not discuss (much less assert) the reasonableness of the definitized price found in PZ0010. Instead, by implication, TSA invites the ODRA to rule that TSA's unilateral definitization is conclusive and binding unless Huntleigh proves otherwise.

The ODRA declines the invitation. TSA's effort to collect alleged overpayments after definitization is fundamentally indistinguishable from other recoupment claims, and it is well established that when "the Government recoups an erroneous payment, it is pressing a Government claim and, thus, under the normal rules regarding burdens of proof, the Government must prove its entitlement to the refund by a preponderance of the evidence." *In re Thomas*, AGBCA No. 2001-138-1, 03-1 BCA ¶ 32,219, *citing W. B. & A., Inc.*, ASBCA No. 32524, 89-2 BCA ¶ 21,736. It makes no difference that TSA bases its action on the Agency's rights under the Definitization Clause, since that clause is like other standard clauses in government contracting that give the Government a right to assert and prove claims. Under standard termination for default clauses, for example, the notice of termination is not deemed conclusive. Rather, if the determination is challenged, the Government bears the burden to justify the default determination. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed.Cir.1987). Similarly, the Government bears the burden to prove assessments claimed under liquidated damages clauses. *See e.g., Whitesell-Green, Inc.*, ASBCA Nos. 54135, et. al., 06-2 BCA ¶ 33,323. None of these clauses – including the Definitization Clause – give the Government the right to issue unilateral adjustments that are conclusive or presumptively binding on a contractor. As in other types of Government claims, the Acquisition Management System's Definitization Clause does not accord conclusive finality to the Contracting Officer's position, and when challenged,[5] TSA has the burden to prove by the preponderance of the evidence that its unilaterally definitized price of $123 million

[5] Huntleigh has challenged the determination. *Huntleigh's Answer*, at ¶ 14, states with regard to PZ0010, "… Huntleigh disputes that there is any legal or factual basis for such a discount [from a prior offer that Huntleigh calls the "first definitization"]. Strict proof of the TSA's factual and legal bases for the Second Definitization [Huntleigh's rhetorical term for PZ0010] is demanded at time of trial."

*actually is* "a reasonable price or fee," as stated in the Definitization Clause. If recoupment is sought, TSA must also must prove other fundamental supporting facts, including the sums it actually paid to Huntleigh in excess of the determined price.

### b. TSA Has Not Met Its Burden for Summary Judgment on Its Affirmative Claim

The ODRA's Procedural Regulations at 14 C.F.R. § 17.29, contemplate the issuance of summary judgment decisions in contract disputes. Summary judgment is proper under the Federal Rules of Civil Procedure[6] when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), *citing* Fed. R. Civ. P. 56(c); *see also, Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed.Cir.1987). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986).

Given the nature of its cause of action in its $59 million contract dispute, the TSA has not addressed the *material* facts in its motion. Specifically, TSA does not point to undisputed facts showing the amount paid to Huntleigh, or that its definitized price was reasonable. TSA admits that it does not address the reasonableness of its unilateral, $123 million definitization, but charges that it is immaterial based on the ODRA's prior decisions. *See TSA's Reply*, at 3. TSA cites page 12 of the *Dismissal Decision* for the proposition that "[t]he May 11, 2006 Unilateral Definitization by TSA was a proper and timely exercise of the Government's rights under the contract." *TSA's Cross Motion*, at *Statement of Facts* 19 and 20. To the contrary, nothing in the ODRA's *Dismissal Decision* addressed

[6] Summary decisions before the ODRA are governed by 14 C.F.R. § 17.29 rather than the Federal Rules of Civil Procedure. The ODRA may consider the Federal Rules of Civil Procedure and related decisions as useful guidance when rendering decisions.

or concluded that the definitized price was "proper," reasonable or conclusively binding. Instead, the cited portions of the *Dismissal Decision* strictly address the issue of timeliness of the TSA definitization.

TSA does not provide evidence of the amount actually paid to Huntleigh. *TSA's Cross Motion*, at 4, states, "TSA made payments in the amount of $208,858,681.01 (this sum includes the $26,000,000 partial payment) to Huntleigh under the Letter Contract." The TSA did not provide a supporting citation. Standing alone, this statement constitutes only argument of counsel, not a supported statement of fact. Even if the Dispute File contains reams of evidence, an affidavit from the disbursing officer, and pages of accounting figures kept in the ordinary course of business, the ODRA would not be bound to consider that evidence unless TSA referred to it in its brief. *See Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003). Nevertheless, the ODRA has searched the record, and has found one reference to the figure in Tab 306 of Huntleigh's Supplemental Submission to the Dispute File. The document, however, is simply correspondence from the Defense Contract Management Agency's contracting officer, and the figure stands alone without discussion or support. TSA has not provided the ODRA with any helpful reference establishing that Huntleigh agrees with the figure.

Rather than discussing the necessary factual elements of the its Contract Dispute, the TSA has based its entire Cross Motion on the legal argument that the unilateral definitization is binding and conclusive as a matter of law. That theory, as already discussed, is untenable. Accordingly, TSA has not met its initial burden for summary judgment regarding the facts and the law, and its Cross Motion regarding the $59 million recoupment contract dispute therefore is denied.

**2. TSA's Cross Motion On Huntleigh's Contract Dispute**

TSA also seeks summary judgment on Huntleigh's Contract Dispute. As indicated in Exhibit J of Huntleigh's Amended Claim, Huntleigh alleged:

$ 5,303,992.37 (damages for short notice)[2]
$11,871,794.51 (damages for unpaid invoices)
+ $ 7,300,000.00 (DOL wage adjustment)
= $25,475,786.88 (subtotal of all damages)

$25,475,786.88 (subtotal from above)
- $14,300,000.00 (less balance of Government's advance payment)

Total Damages Due to Huntleigh = $11,175,786.88[3]
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*2* This amount reflects Huntleigh's payroll savings, but it does not include its early shutdown expenses and costs. See Exhibit E (summary of damages for short notice).
*3* This amount will be increased by related early shutdown expenses and such other applicable costs.

*Huntleigh's Amended Claim*, at Exh. J. Huntleigh bears the burden to prove liability, causation, and injury for these claims. Claims for unpaid invoices are straightforward contract actions:

> [The contractor] seeking entitlement for unpaid services has the burden of proving that it delivered the equipment [services, etc.] in accordance with the contract requirements, that it properly and timely submitted invoices for those services, and that such invoices were unpaid by the Government.

*Ahmed S. Al-Zhickrulla Est.,* ASBCA No. 52137, 03-2 BCA ¶ 32409. The propriety of an invoice depends in part on the whether it correctly charges the prices in the contract. For Huntleigh's short notice claim, which the ODRA's *Short Notice Decision* partially granted in Huntleigh's favor on entitlement, only the question of damages caused by the breach remains to be decided. Both claims depend on the crucial – and obvious – need to determine the final, reasonable definitized price of the Contract. As the ODRA stated in regards to Huntleigh's Motion to Dismiss, the price definitization depends on interpreting the underlying Contract in light of the parties' intent at the time they entered into it. *Dismissal Decision*, at 15. Determining a price that is consistent with the intent of the parties poses a mixed question of law and fact in this case. *Id.*, at 17; *see also, e.g., NRM Corp. v. Hercules, Inc.*, 758 F.2d 676 (DC Cir. 1985) (questions of intent regarding pricing elements precluded summary judgment in a subcontract action subject to the "Federal Government contract law").

TSA, as the moving party, has the burden on summary judgment to demonstrate the absence of genuine issues of material fact. *Celotex*, 477 U.S., at 323, 106 S.Ct., at 2553

(1986). In the instant case that means demonstrating an absence of issues regarding the intended contract price. But as the party that does not bear the burden of proof on the invoice claim or the short notice claim, TSA need not produce evidence to negate Huntleigh's claim. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. It is sufficient for TSA to demonstrate[7] "that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554.

Even under this relaxed requirement, however, TSA has not met its initial burden to demonstrate an absence of issues of material fact regarding the contract price. In lieu of alleging undisputed material facts, TSA erroneously relies solely on its legal argument under the Definitization clause. TSA's flawed legal argument, however, cannot serve as a substitute for establishing the absence of genuine issues of material fact. Without an undisputed definitized price consistent with the intent of the parties, the ODRA cannot determine if the invoices were legally improper such that TSA should prevail as a matter of law. TSA's Cross Motion on the invoice claim, therefore, must be denied.

TSA's Cross Motion similarly fails in regards to Huntleigh's short notice breach claim. TSA concedes in its Cross Motion that lost profits on the short notice claim should be measured by the five percent profit rate found in the unilaterally definitized price. *TSA's Cross Motion*, at 10-11. This concession alone raises questions of fact that preclude summary judgment. As discussed already, TSA has made no effort to demonstrate the reasonableness of its figure or that the five percent rate reflects the uncontroverted intent of the parties. Moreover, TSA concedes only the *rate* of profit, but makes no effort to demonstrate an undisputed *base figure* to which the lost profit rate should be applied. Monetary judgments on damages are rendered in dollars, not percentages. No ruling granting summary judgment is possible without clear, uncontested facts on these points.

There is another subtle argument in TSA's challenge to Huntleigh's pricing theory that must be addressed. Specifically, regardless of TSA's burden on summary judgment, TSA seemingly asserts that if Huntleigh cannot prove the theory of recovery it has

[7] The demonstration can rely upon "whatever is before the district court," or in this case, the ODRA. *See Celotex*, 477 U.S., at 323.

articulated to date, then the ODRA must grant summary judgment denying Huntleigh's contract dispute. The ODRA rejects this notion, and will not be confined or restricted to considering only the TSA's and Huntleigh's theories of contract interpretation. Instead, the ODRA has the independent authority to identify and apply the proper construction of governing law. *Long Island Savings Bank, FSB v. U.S.*, 503 F.3d 1234, 1244-45 (Fed. Cir. 2007), *citing Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). Accordingly, if this matter proceeds to a hearing and decision on the merits, then consistent with its decision in *Globe Aviation Services Corporation v. TSA*, 04-TSA-007, and other applicable precedent, the ODRA will not leave the parties where it found them, but will consider all relevant evidence to determine the reasonable definitized price.

Huntleigh has called attention[8] to evidence that raises questions of fact that could justify an ultimate price above the TSA's unilaterally definitized price. Specifically, Huntleigh cited DCAA documents reflecting higher potential negotiation ranges for the Government's definitization negotiation position (see document stamped DCAA003167), and a contracting officer's letter discussing an earlier definitization offer for a higher amount (Letter of June 16, 2003).[9] Huntleigh also points out that the significantly higher payments paid during performance – readily apparent considering the TSA's recoupment demand of $59 million - reflects an intent to definitize the prices higher than those stated in the TSA's unilateral definitization. While these items raise questions of fact sufficient to avoid summary judgment, the ODRA need not and does not, for the purposes of the TSA's Cross Motion, accept as proven any prices that Huntleigh alleges. Instead, the issue of determining a reasonable, definitized price remains an open, unanswered, and controverted mixed question of fact and law that precludes summary judgment in favor of TSA. If the parties cannot resolve the issue, a hearing on this matter will be necessary. Therefore, the ODRA will not entertain further dispositive motions on this point by either party prior to a hearing.

[8] *Huntleigh's Response*, at p. 3, references Huntleigh's prior *Motion to Dismiss*. That earlier motion has attachments pertinent to the TSA's Cross Motion.

[9] The DCAA document and the June 16, 2003 letter are contained in tabs A and C, respectively, of Huntleigh's *Motion to Dismiss*.

## Part B – Huntleigh's Motion On Its Affirmative Defense

Huntleigh asserts that its Cross Motion is "based on the additional information obtained in discovery that establishes conclusively that the TSA Contract Dispute is untimely, filed three years after the accrual of the claim – more than a year after the statute of limitations expired." *Huntleigh's Cross Motion*, at 1-2. Huntleigh asserts that "the [TSA's] Contract Dispute was capable of 'reasonable estimation' in June 2003, and thus, the contract claim ripened and accrued at that point." *Id*. at 2.

TSA responds by relying exclusively on the ODRA's *Dismissal Decision*. TSA does not provide additional citations or materials gained in discovery that arguably show conflicts in the record to establish material facts genuinely in dispute.[10] TSA summarizes its six-page response by stating, "Nothing of legal significance has been added by Huntleigh, nor has changed to alter the clear rulings of the ODRA in its October 2006 Decision Denying Huntleigh Motion to Dismiss." *TSA's Response*, p. 6.

### 1. Law of the Case Doctrine

The ODRA views the TSA's Response as relying exclusively on the law of the case doctrine ("Doctrine") even though TSA has not used the term nor cited related legal authorities. As the Court of Appeals for the Federal Circuit explained,

> Law of the case is a judicially created doctrine, the purpose of which is to prevent relitigation of issues that have been decided. *See Gould, Inc. v. United States*, 67 F.3d 925, 927-28 (Fed.Cir.1995). The doctrine operates to protect the settled expectations of the parties and promote orderly development of the case. *See Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1582 (Fed.Cir.1994); *Little Earth of the United Tribes v. Department of HUD*, 807 F.2d 1433, 1441 (8th Cir.1986). It "ensures judicial efficiency and prevents endless litigation. Its elementary logic is matched by elementary fairness - a litigant given one good bite at the apple should not have a second." *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 890 (Fed.Cir.1984). Under law of the case, then, a court will generally refuse to reopen or reconsider what has already been decided at an earlier stage of the litigation. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*,

[10] It is permissible to respond in this way. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2727 (3d ed. 1998 & Supp. 2008).

> 761 F.2d 649, 657 (Fed.Cir.1985); *see also In re Resyn Corp*., 945 F.2d 1279, 1281 (3d Cir.1991).

*Suel v. Sec. of HHS, 192 F.3d 981, 984-85 (Fed. Cir. 2000).* Although the law of the case doctrine generally precludes reopening prior determinations, it is not absolute.

> Tribunals have the power to revisit their own prior decisions in the same case, but should do so sparingly and only when extraordinary circumstances are present, such as (1) the evidence on a subsequent trial is substantially different; (2) controlling authority has since made a contrary decision on applicable law; or (3) the prior decision was clearly erroneous and would work a manifest injustice.

*Marshall Associated Contractors, Inc., and Columbia Excavating, Inc. (J.V.),* IBCA Nos. 1901, 3433 to 3435, 98-1 BCA ¶ 29,565, at 146,561-8, *citing, Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 1576 (Fed. Cir. 1996); *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 521 (Ct. Cl. 1979). In *Suel*, the court advised that to reopen a decision based on new evidence, that evidence must be "substantial, even conclusive," and "new and compelling." *Suel, 192 F.3d, at 986.*

The ODRA has no hesitation to apply these principles to its own decisions on prior motions in contract disputes. In fact, the standards articulated above are similar to the ODRA's own rulings in the context of motions for reconsideration. *See Protest of HyperNet Solutions, Incorporated*, Docket No. 07-ODRA-00416 (February 11, 2008), at 2, and the cases cited therein. The usefulness of these standards applies equally to contract disputes before the ODRA because the Doctrine enables forums to efficiently manage cases while still retaining authority to revise rulings if necessary. This means that the Doctrine is not limited only to respect for prior appellate rulings in the specific case before the trial court or forum. As the authors of one leading treatise observed:

> Occasionally the undoubted power to revise is reflected in statements that law-of-the-case principles do not apply to trial-court rulings. That view, baldly expressed, may generate some confusion. Only if law-of-the-case rules are seen as constraints on authority is it helpful to say that the rules do not apply to reconsideration by a trial court. The policies that support adherence to earlier rulings without perpetual reexamination surely do apply, whatever label is used. These policies regulate exercise of the undoubted power to reconsider. The "law-of-the-case" label is a convenient way of invoking these policies and is often used.

18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4478.1 (2d ed. 2002 & Supp. 2008).

**2. The ODRA Will Not Revisit the Issue at this Time**

The ODRA will not revisit the timeliness issue at this time, in the context of a motion for summary judgment.

Looking to the standard provided in *Suel*, the ODRA notes as a preliminary matter that 7 of the 17 exhibits attached to Huntleigh's Cross Motion are letters between the parties that are not new evidence gained in discovery. *See Huntleigh's Cross Motion*, Exhibits 5, 6, 7, 8, 9, 12 and 13. Next, the ODRA recognizes that Huntleigh has cited to deposition testimony gained in discovery, but in the ODRA's view the testimony is not substantial, compelling or conclusive. For example, Exhibit 16 contains a portion of testimony from the contracting officer who issued the unilateral definitization. The transcript shows in part:

> [Huntleigh's counsel] Q: How is it you in May of 2006 get the blessing to do unilateral definitization?
>
> A: The contract always provided the opportunity for the contracting officer to issue an unilateral determination. Our goal was to be able to negotiate a mutually agreeable settlement. It appeared *in the spring of 2006* that that was not going to be a realistic possibility.

*Huntleigh's Motion*, Exh. 16 (emphasis added). Further, the same contracting officer's "Pre-Negotiation Business Clearance" cites to information gained later in the proceedings relating to Huntleigh's claims under ODRA Docket No. 04-TSA-008. To his credit, Huntleigh's counsel called the ODRA's attention to this point and sought to mitigate its impact. But the quoted testimony and the business clearance, construed in a manner most favorable to the TSA (as they must be under 14 C.F.R. § 17.29(b)), contradicts

Huntleigh's necessary showing for its affirmative defense[11] asserting that the two-year limitation had run.

In declining to revisit its earlier decision, the ODRA relies on the law of the case doctrine, but also is mindful of the Supreme Court's guidance that trial courts "should act … with caution in granting summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). The ODRA's prior opinion denying the Motion to Dismiss did not invite Huntleigh to file a new motion after discovery, but instead concluded (albeit on other matters) that a complete record with full briefing is necessary. To use the same analogy as the Court of Appeals for the Federal Circuit, Huntleigh already has taken a bite from the apple, and it is not entitled to a second bite in another motion. *See Perkin-Elmer Corp.*, 732 F.2d at 890. The ODRA cautions the TSA, however, that after a hearing the ODRA still has the authority to revisit its *Dismissal Decision*.

**CONCLUSION**

For the reasons stated above, TSA's Cross Motion is denied. Huntleigh's Cross Motion also is denied. The ODRA encourages the parties to renew their efforts under 14 C.F.R. § 17.33(a) (ODRA's alternative dispute resolution process) to negotiate a resolution of this case.[12]

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John A. Dietrich
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

March 30, 2009

[11] Huntleigh has properly characterized the timeliness issue as an affirmative defense. *Huntleigh's Answer*, at p. 8, ¶ 3. Huntleigh, therefore, bears the burden of proof on this defense. *See Bridgestone/Firestone Research Inc. v. Automobile Club de L'Ouest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001) (party raising affirmative defense bears the burden of proof).

[12] This is an interlocutory decision. It will become final and appealable once incorporated into a final agency decision and order at the conclusion of this case.

**APPENDIX A**
**TABLE OF SHORT CITATIONS**

In the interest of clarity and easy reference, the following below lists relevant documents by formal title, and provides the short citation used in this decision.

| General Subject or Category | Formal Title and Date | Short Citation |
|---|---|---|
| Prior ODRA Decisions in these Consolidated Contract Disputes | *Decision Denying Huntleigh's Motion to Dismiss*, dated October 17, 2006. | *Dismissal Decision* |
| | *Decision on Claimant's Motion for Partial Summary Judgment*, dated May 30, 2006 | *Short Notice Decision* |
| TSA's Present Motion for Summary Judgment | *The Transportation Security Administration's Motion for Summary Judgment*, dated March 14, 2008 | *TSA's Cross Motion* |
| | *Response of Huntleigh USA Corporation to the Transportation Security Administration's Motion for Summary Judgment*, dated April 4, 2008 | *Huntleigh's Response* |
| | *The Transportation Security Administration's Reply to the Response of Huntleigh USA Corporation to the Transportation Security Administration's Motion for Summary Judgment*, dated April 11, 2008 | *TSA's Reply* |
| Huntleigh's Present Motion for Summary Judgment | *Motion of Huntleigh USA Corporation for Summary Judgment on the Contract Dispute of the Transportation Security Administration*, dated March 14, 2008 | *Huntleigh's Cross Motion* |
| | *The Transportation Security Administration's Response to the Motion of Huntleigh USA Corporation for Summary Judgment on the Contract Dispute of the Transportation Security Administration*, dated April 4, 2008 | *TSA's Response* |
| | *Reply to the Transportation Security Administration's Response to the Motion of Huntleigh USA Corporation for Summary Judgment on the Contract Dispute of the Transportation Security Administration*, April 11, 2008 | *Huntleigh's Reply* |
| Huntleigh's Prior Motion to Dismiss | *Motion of Huntleigh USA Corporation to Dismiss the Contract Dispute of the Transportation Security Administration*, dated August 11, 2006 | *Motion to Dismiss* |
| Pleadings Relating to Huntleigh's Contract Dispute | *Amended Contract Dispute Claim*, dated April 14, 2005 | *Huntleigh's Amended Claim* |
| | *Response of Transportation Security Administration*, dated June 30, 2005 | *TSA's Answer* |
| Pleadings Relating to TSA's Contract Dispute | *Contract Dispute of the Transportation Security Administration*, dated June 9, 2006 | *TSA's Claim* |
| | *Answer of Huntleigh USA Corporation to Contract Dispute of the Transportation Security Administration*, dated November 6, 2006. | *Huntleigh's Answer* |

Note that TSA's Cross Motion and Huntleigh's Cross Motion are collectively cited as the "Cross Motions."

Consistent with the definitions in the Acquisition Management System, the word "claim" has the same meaning as the phrase "contract dispute," and the terms are used interchangeably in the short citations and the text of this opinion. *See* AMS Appendix C, "Claim" definition (Oct. 2008).