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

FINDINGS AND RECOMMENDATIONS

Matter: **Contract Dispute of Concrete Modular Systems, Inc.**
Under Purchase Order No. DTFA07-02-P-06606

Docket No.: 03-ODRA-00286

Appearances:

For the Contractor, Concrete Modular Systems, Inc.: John S. Vento, Esq. and Charlotte D. Gage, Esq., Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A.

For the Federal Aviation Administration, Southwest Region: William K. Tolar, Esq.

I. Introduction

By facsimile letter to the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA") dated December 3, 2003, Concrete Modular Systems, Inc. ("CMS") provided notice of a contract dispute under Purchase Order No. DTFA07-02-P-06606 (the "Purchase Order" or "contract"). By a second facsimile letter of December 29, 2003, CMS provided a detailed statement of its contract dispute. The Purchase Order had been issued by the FAA Southwest Region ("Region") and called for the fabrication, delivery and installation of a precast concrete shelter for use at an FAA Remote Communications Facility (RCF) at the North Little Rock, Arkansas, Municipal Airport. The shelter was delivered to the FAA facility on July 9, 2003, but was admittedly defective at the time of delivery by reason of damage incurred while enroute to the facility. CMS was afforded the opportunity to attempt to repair the concrete structure. The building, however, was never accepted by the Region and, to the contrary, was formally rejected by letter dated November 3, 2003. The Region's letter notified

CMS that the Purchase Order had been terminated for default effective November 1, 2003. CMS' contract dispute contests the propriety of the default termination, asserts that the building, as repaired, satisfied the terms of the Purchase Order, and claims: (1) the amount of its invoice for the building, $58,014.28, plus interest and/or "late fees"; and (2) the cost it incurred to "off-load" the building at the North Little Rock site, $8,355.00, plus interest.

For the reasons explained below, the ODRA finds that the Region's default termination was justified and that CMS has failed satisfactorily to cure the defects in the precast concrete structure. Accordingly, the ODRA recommends that the contract dispute be denied in its entirety.

II. Findings of Fact

1. The Purchase Order was awarded to CMS on September 25, 2002. The Statement of Work for the Purchase Order called for the fabrication and delivery to the North Little Rock, Arkansas, Municipal Airport Remote Communications Facility of a precast concrete shelter having nominal dimensions of 15' in width, by 32' in length, by 9' in height. The shelter was to include certain electrical and Heating Ventilation and Air Conditioning (HVAC) equipment. Electrical work was to comply with the National Electrical Code (NEC) and with designated FAA electrical specifications and standards. Delivery was expressly to include offloading. Dispute File ("DF") Tab 1, Statement of Work.

2. The Region asserts (without contradiction by CMS) that the shelter was to house sensitive radio communications equipment to be used for air traffic control operations and thus needed to be structurally intact and not subject to the infiltration of water or moisture. DF, Tab 14, Region Letter of November 3, 2003, Rejection of Building, page 4.

3. On July 9, 2003, CMS delivered the concrete shelter to the North Little Rock site. The shelter was verbally rejected as not meeting the terms of the specifications. In this regard, CMS concedes that the shelter had been damaged in transit enroute to North Little Rock. DF, Chronology, pages 1-2; Concrete Modular Systems, Inc.'s Response to Federal Aviation Administration's Region's Dispute File ("CMS Response"), page 2. CMS, in explaining how the building was loaded and shipped, makes plain that the loading was initially done pursuant to instructions from CMS's own engineer and that CMS's shipper took an additional measure (adding a "stinger") that may have brought about the damage in question:

> The building was loaded per our [CMS'] design engineer's instruction and shipped on July 3, 2003. The building did receive some damage during shipping on July 7, 2003. The shipping company added a stinger (is an extra set of axles to [spread] the load out) to the loaded truck which caused the beam in the trailer to deflect during the trip. [T]his placed addition[al] stress on the building. The building was shored up during delivery and the building arrived and [was] offloaded without any additional damage.

CMS Letter of December 29, 2003, Detailed Statement of Claim, page 1. In addition to damage sustained during the shipment, the Region maintains (contrary to CMS' assertion) that further damage was caused when CMS offloaded the building from the tractor trailer to the concrete pad at the North Little Rock site. FAA Letter of November 3, 2003, Rejection of Building, page 3. There is no contention or evidence in the record that the Region played any part in causing damage to the structure, either during shipment or in the offloading process.

4. In terms of the nature of the damage, among other things, it appears from contemporaneous photos and a report issued by Mr. Don Head, FAA Project Engineer, that there were a number of cracks visible on the structure – in particular "two cracks running from the front of the building to the rear of

the building in the location of [certain] crane lifting holes" – as well as broken weld plates and a separation of the floor from the left wall. DF, Tab 5, Photographs on Compact Disk; and Tab 9, Concrete Shelter Report.

5. Before the building was offloaded, CMS sought an opportunity to cure the admitted defects in the building, and sent the Region a letter dated July 10, 2003, in which it undertook to offload the building at its own cost and risk and to perform certain specified repairs at the North Little Rock site. Enclosed with the letter was a repair plan formulated by CMS' structural engineer, Joseph W. Belt, P.E., which outlined the following elements of repair for the "slipped wall":

> FIELD CORRECTION OF BUILDING WITH SLIPPED WALL
>
> CONNECT CRANE TO BUILDING EIGHT POINTS TO FOUR POINTS.
> LOOSEN CHAIN BINDERS.
> CLEAN OUT OPEN JOINTS.
> REMOVE OLD CAULK.
> REMOVE BROKEN WELD PLATES AND SPALLED CONCRETE.
> LIFT UNTIL ROOF LINE IS STRAIGHT AND JOINT IS CLOSED.
> INSPECT JOINT AND MAKE SURE THEY ARE TIGHT.
> SET BUILDING ON SLAB SHIM AS REQUIRED LEVEL
> DRILL A/R 5/8" HOLES FOR PINS
> CLEAN HOLES AND EPOXY
> PIN ROOF AT 45 DEGREES CLEAN HOLES AND EPOXY [SIC]
> REPIN FLOOR TO LEFT WALL.
> KEEP CHECK TO VERIFY WALL HAS NOT SETTLED.
> PATCH, CAULK, PAINT AND RIVER ROCK AS REQUIRED
> REDO INTERIOR CORNERS
>
> MATERIALS NEEDED:
>
> 4 #5 18" TEE DRY PINS
> 12 #4 9" PINS
> 12 #4 16" PINS
> SLEDGE HAMMER

NEW DRILL
LONG 5/8" BIT AND 3/4" BIT
EPOXY AND GUN
PATCH
BUCKET AND SPOON
CHAMFER FOR PATCH
PIPE CLEANER TO CLEAN DRILLED HOLES.
CANNED AIR
RIVER ROCK

DF, Tab 6, CMS July 10, 2003 Letter, Concrete Modular Systems Plan entitled "Panel Fix" dated 07/10/03. In its July 10, letter, CMS agreed to take responsibility for the structure during the offloading, to "place the building on the prepared slab and complete the repair of the wall slipped during transport," and, once the work was complete and accepted by the Region, to "issue an extended ten-year warranty on the structural integrity of the building and any water leaks thru any precast concrete panel seam." *Id.*

6. Certain repair work appears to have been performed by CMS between July 10 and July 11, 2003 ("On July 11, 2003, you informed that the repairs to the shelter were complete."). DF, Tab 14, Region Letter of November 3, 2003, Rejection of Building, page 2. The Region conducted two separate inspections of the repaired structure, the first on July 14, 2003 by a group of eight FAA representatives from two FAA Systems Support Centers ("SSCs"), including Mr. Robert A. Edwards, Supervisor at the Little Rock/Jonesboro SSC and Mr. Glenn Stark, the Ralph M. Parsons Company Resident Engineer, and the second on July 23, 2003, by Mr. Don Head, who was identified as "Project Engineer, ANI-670." Messrs. Edwards and Head, respectively, prepared reports of those inspections. DF, Chronology and Tabs 8 and 9. Both reports indicate dissatisfaction on the part of the Region with the adequacy of the attempted repairs. More particularly, the July 14, 2003 report reads, in part:

> The condition of the building was found to be poor. The structural integrity of the building is questionable at best. Multiple defects were found and numerous attempts to cover up defects were also

> discovered. This building was found to be unacceptable for FAA use. The extent of damage require[s] the interior panels to be removed to facilitate a thorough inspection of the structure. * * * The building was damaged, still on the trailer, when it arrived and further damaged when it was unloaded in its weakened condition. Several stress fractures are evident and there is evidence that other stress fractures have attempted to be covered using silicone and quick-crete. The use of silicone and quick-crete will require increased maintenance, over time, on the part of the FAA and the local SSC to ensure the building remains waterproof. The FAA contracted for a concrete structure so that it would be a maintenance free or low maintenance building. The use of silicone and sack-crete to affix replacement rock to the exterior of the building will also require recurring maintenance on this building.
>
> The stress inflicted upon the damaged building during loading and unloading further damaged the building. The use of eyebolts, inserted into holes that were drilled in the side panels of the building has resulted in two large stress fractures across the entire width of the roof panel of the building. These stress fractures have compromised the integrity of the roof. Should the roof collapse it could cause bodily harm to anyone who was inside the building. The stress fractures have also compromised the watertightness of the building. This building will be used to house complex air-to-ground, radio-frequency (rf) communications equipment that will be used by air traffic controllers in all three career specialties: enroute (ARTCC), terminal (ATCT/TRACO) and flight advisory (AFSS). Should the electronic equipment inside this building become damaged, due [to] water or moisture, the result could be an adverse effect to the flying public and the FAA air traffic control system.
>
> Because of the multiple stress fractures, and the various materials used to "patch up" this building, and increased maintenance requirements, this building is not acceptable for use in the National Airspace System (NAS).

DF, Tab 8.

7. The July 23, 2003 report of the FAA Project Engineer, in turn, reviews the repairs against the above-quoted "Panel Fix" plan of CMS' structural engineer and reads, in part, as follows:

> CMS's letter (dated July 10, 2003) of field corrections [*i.e.*, the "Panel Fix" plan] said that they would remove broken weld plates and spalled concrete. None of the weld plates were ever touched and the spalled concrete was only broomed clean prior to applying patchwork. American Concrete Institute (ACI) recommends chipping and removing material back to sound concrete and washing all debris out with water to help aid in the bond of the new concrete (see American Concrete Institute's recommended procedure for concrete repair). If the new patch material does not adequately bond to the existing concrete, then the structural integrity will be compromised. CMS did not fully chip out the loose material to sound concrete for these repairs. Concrete anchors probably should have been used to provide more of a mechanical connection to secure the walls, in lieu of rebar dowels.
>
> CMS's letter (dated July 10, 2003) of field corrections said that they would "pin the roof at 45 degrees clean holes and epoxy." [T]he pins were installed vertically per the FAA onsite representative [the Ralph M. Parsons Company Resident Engineer], Mr. Glen Stark. Compressed air was not used to clean out the holes. No compressed air was onsite per the FAA onsite representative, Mr. Glen Stark.
>
> CMS's letter (dated July 10, 2003) of field corrections said that they would "clean out open joints." This was vague, but CMS basically used a broom to sweep out the open joints. Compressed air was not onsite. Water was not used either. Concrete dust left in the cracks would cause the new concrete not to bond to the old concrete. Additionally epoxy should have been used to help bond the crack.
>
> CMS's letter (dated July 10, 2003) of field corrections said to re-pin [the] floor to [the] left wall. Pins were not installed at the floor slab and left wall per the FAA onsite representative, Mr. Glen Stark.
>
> CMS's letter (dated July 10, 2003) of field corrections said that they were going to use 4 #5-18" Tee Dry Pins, 12 #4 – 9" pins, and 12 #4 – 16" pins. All the pins used were about 9" long and made of #4 rebar steel per the FAA onsite representative, Mr. Glen Stark. Only a total number of 9 pins were used per the onsite representative, Mr. Glen Stark.
>
> * * *

DF, Tab 9, Concrete Shelter Report.

8. The Region advised CMS verbally on September 4, 2003 that the shelter was being rejected. On October 15, 2003, CMS requested a formal decision regarding the rejection, and, by the Region's letter to CMS dated November 3, 2003, the shelter was formally rejected. The rejection letter also advised CMS that the Purchase Order had been terminated for default as of November 1, 2003. DF, Chronology and Tab 14, Region Letter of November 3, 2003, Rejection of Building.

9. By facsimile letter of December 3, 2003, CMS notified the ODRA and the Region that it would be filing a contract dispute contesting the rejection and default termination. By second facsimile letter, dated December 29, 2003, CMS provided the ODRA and the Region with a detailed statement of its contract dispute.

10. Thereafter, the parties entered into an Alternative Dispute Resolution (ADR) Agreement and attempted to resolve the matter by means of ADR. That attempt proved unsuccessful. Accordingly, the contract dispute proceeded under the ODRA's Default Adjudicative Process. During a telephonic status conference on February 3, 2004, the ODRA Director advised the parties that the ODRA's Richard C. Walters would serve as Dispute Resolution Officer (DRO) for purposes of the adjudication.

11. The Region filed its Dispute File with the ODRA on March 3, 2004. CMS filed its Response thereto with the ODRA on April 1, 2004. The Dispute File includes, among other things, copies of the two inspection reports and a compact disk containing contemporaneous photographs of the status of the shelter structure, both before it was offloaded and after the repair work had been done by CMS.

12. By letter to the parties dated April 22, 2004, the ODRA directed that, by June 4, 2004, the parties file with the ODRA and serve on one another their

respective final written submissions with respect to the contract dispute in accordance with the ODRA Procedural Rules, 14 C.F.R. Section 17.39(f) and (g).

13. The Final Submission of the Region ("Region's Final Submission") was filed with the ODRA on June 4, 2004. The Region's Final Submission included: a joint statement of the issues (Tab A); a joint statement of undisputed facts (Tab B); the Region's statement of disputed facts (Tab C); the Region's legal analysis in support of its position (Tab D); and the declaration of the Region's Project Engineer, Donald A. Head (Tab E).

14. The Final Submission of CMS ("CMS Final Submission") was received by the ODRA via regular mail on April 7, 2004. The Director of the ODRA subsequently clarified, in a telephone conference involving counsel for the Region and for CMS, that counsel for CMS had inadvertently mailed the CMS Final Submission on June 3, 2004, rather than forwarding it via an overnight service. Inasmuch as the late submission involved an inadvertent error, and was not to the prejudice or advantage of any party, the ODRA accepted the late filing. Thereafter, the record was closed.

15. The parties' joint statement of undisputed facts ("Region's Final Submission, Tab B") was executed by counsel for the parties and states as follows:

> 1. On August 6, 2002, the Federal Aviation Administration, Southwest Region, (FAA) issues a request for quote (RFQ) for Purchase Order DTFA07-02-Q-06165. The RFQ states that the work required is for a concrete shelter (shelter) for the Remote Communications Facility (RCF), North Little Rock Municipal Airport, North Little Rock, Arkansas.
>
> 2. Concrete Modular System, Inc., (CMS) submits an offer pursuant to RFQ DTAF07-02-Q-06165 on August 17, 2002.

3. On September 25, 2002, CMS is awarded Purchase Order DTFA07-02-P-06606 for a shelter for the RCF, North Little Rock Municipal Airport, North Little Rock, Arkansas.

4. In December 2002, with the exception of the five noted items, the FAA approves CMS's submittals for the shelter.

5. In January 2003 CMS begins production of the shelter. Discussions between the FAA and CMS establish a delivery date for the end of March 2003.

6. During production of the shelter CMS encounters various problems with its suppliers delaying completion of the project. The FAA issues a "deficiency to deliver" letter to CMS on March 27, 2003. On June 9, 2003, the FAA issues a "show cause" letter to CMS for its failure to provide the shelter in a timely manner. The FAA approves a new delivery date.

7. During the weeks of May 26, an June 9, 2003, the FAA project engineer travels to CMS's facility in St. Petersburg, Florida, to inspect the shelter prior to shipment to North Little Rock Municipal Airport. During the visits the project engineer discusses the progress and deficiencies of the shelter's construction with CMS. No formal FAA reports are generated for either visit.

8. On July 3, 2003, the shelter is loaded and shipped per CMS's design engineer's instructions.

9. The shelter is damaged on July 7, 2003, during transit to North Little Rock, Arkansas.

10. On July 9, 2003, the shelter is delivered to the RCF site. The FAA verbally rejects the shelter as not meeting the plans and specifications of Purchase Order DTFA07-02-P-06606.

11. Without accepting the shelter, on July 10, 2003, the FAA, in an effort to allow CMS to mitigate its damages and to prevent further delay to the overall FAA communications project, agrees to allow CMS to unload the shelter at the RCF site in North Little Rock, Arkansas, in an attempt to repair it.

12. On July 14, 2003 without CMS being present or having been given prior notice, FAA personnel from the Little

Rock/Jonesboro Systems Support Center inspect the shelter. The shelter's deficiencies are noted in an inspection report.

13. The FAA project engineer inspects the shelter on July 23, 2003, without notice to CMS. The shelter's deficiencies are noted in an inspection report.

14. CMS was not notified that the inspections were taking place and was not afforded the opportunity to be present during either inspection.

15. In early September 2003 during a series of telephone conversations initiated by CMS regarding the status of Purchase Order DTFA07-02-P-06606 the FAA contracting officer verbally notified CMS that a formal letter explaining the FAA's decision rejecting the shelter will be issued.

16. On October 15, 2003, CMS requested a formal decision on Purchase Order DTFA07-02-P-06606 from the FAA contracting officer. The FAA contracting officer acknowledges CMS's request for a formal decision on October 20, 2003, reiterating the prior verbal feedback given to CMS regarding the status of the purchase order in September 2003.

17. The FAA contracting officer on November 3, 2003, issues a formal letter to CMS rejecting the shelter and finding CMS in default of Purchase Order DTFA07-02-P-06606. CMS receives the FAA contracting officer's formal letter on November 7, 2003.

18. On December 29, 2004, CMS formally appeals the FAA contracting officer's decision to terminate Purchase Order DTFA07-02-P-06606 for default to the FAA Office of Dispute Resolution for Acquisition.

16. The Region's Final Submission also included a "joint statement of the issues" executed by both parties. The issues identified included the following:

1. Did the concrete equipment shelter manufactured and delivered by Concrete Modular Systems, Inc., (CMS) to North Little Rock, Arkansas, on July 9, 2003, meet the plans and specifications of Purchase Order DTFA07-02-P-06606?

2. If the concrete equipment shelter manufactured by CMS did not meet the plans and specifications of Purchase Order DTFA07-02-P-06606:

   (a) Would the repairs proposed by CMS in its letter to the Federal Aviation Administration (FAA), Southwest Region, dated July 10, 2003, have brought the concrete equipment shelter into substantial compliance with the plans and specifications?
   (b) When CMS made the repairs on July 10-11, 2003, was the concrete equipment shelter substantially completed?
   (c) Was CMS given adequate opportunity to complete final repairs to the concrete equipment shelter prior to termination?
   (d) Was CMS notified that the FAA was going to conduct what it considered to be "final" inspections on July 14 and 23, 2003?
   (e) At the time of the visual inspections on July 14 and 23, 2003, and at the time of the FAA's termination for default letter dated November 3, 2003, did the FAA have sufficient evidence that the concrete equipment shelter was structurally unsound and thereby otherwise did not substantially comply with the plans and specifications of purchase order DTFA07-02-P-6606?

3. Did the FAA, Southwest Region, properly terminate Purchase Order DFTA07-02-P-06606 for default?

4. Depending on the outcome of Issue No. 3 above, what are the liabilities of CMS to the FAA, or of the FAA to CMS?

17. The "Legal Analysis" portion of the Region's Final Submission (Tab D) essentially argues that:

> In the case at bar, Concrete Modular Systems, Inc., (CMS) failed to construct and deliver a concrete equipment shelter (shelter) to the FAA that complied with the plans and specifications of Purchase Order DTFA07-02-P-06606. Additionally, CMS failed to cure the defects in the shelter it delivered to the FAA, when it was provided an opportunity. CMS's failure to construct a shelter in accordance with the plans and specifications of the Purchase Order has

> compromised the structural integrity and water tightness of the shelter rendering it useless for intended purpose of housing sensitive, complex air-to-ground radio communications equipment.

Region Final Submission, Tab D, Page 1. The Region goes on to argue that:

> The FAA is also justified in seeking from CMS excess costs regarding this procurement attributable to it pursuant to FAA Acquisition Management Clause 3.10.6-4, Default (Fixed-Price Supply and Service).

Id.

18. In support of its position that the shelter in question was defective as delivered and that the damage to the shelter was not adequately repaired, the Region asserts, among other things:

> CMS also recognized visual evidence of structural damage to the shelter in its letter to the Office of Dispute Resolution Acquisition ("ODRA"), when it acknowledged that the shelter suffered 'stress cracks and fractures' due to excessive stress during shipping.

Region Final Submission, Tab E, Page 4, citing to Dispute File, Tab 15, Pages 4 and 8.

19. The Region further asserts that FAA employees conducted a visual inspection of the shelter on July 14, 2003, after being informed by CMS that its repairs were complete, *see* Region's Final Submission, Tab D, Page 3; and that the FAA employees "observed numerous problems" with the shelter during their inspection. Citing to Dispute File, Tab 8, the Region notes that, thereafter:

> As a result of this inspection, the project engineer, a resident engineer, and the manager of the local FAA Support Center, traveled to the RCF site in North Little Rock, Arkansas. On July 23, 2003, the shelter and CMS' repairs were again inspected, as much as possible, without removing the floor tile, wall panels, or ceiling panels.

Region's Final Submission, Tab D, Page 3, citing to Dispute File Tab 9.

20. In response to the CMS' arguments that the FAA inspections and subsequent termination action were not based on an "engineering report" the Region states:

> The FAA respectfully submits that an engineering report or evaluation can be based upon visual inspections such as were conducted by the FAA herein.

Region's Final Submission, Tab D, Page 3. The Region goes on to note that:

> CMS itself acknowledged that the shelter had undergone some sort of structural damage when based solely a visual inspection of the shelter, it proposed to address a variety of visual and non-visual structural problems, including removing broken weld plates and spalled concrete.

Id. at 4, citing to Dispute File, Tab 6, Page 2. The Region also states:

> It is important to note at this point that the broken weld plates identified by CMS, during its visual inspection of the shelter, as needing replacing are located behind the wall panels and not visible unless the wall panels are removed. … It is important to note that at no time since its arrival in North Little Rock, Arkansas, have the wall panels of the shelter been removed for inspection or repair.

Id., citing to Dispute File, Tabs 9 and 11. Finally, the Region notes:

> [T]he shelter, however, is not the FAAs to dismantle inasmuch as it was never accepted by the FAA. It remains the property of CMS. Therefore, all of the inspections performed by the FAA, while as thorough as possible, have been non-evasive (sic) to avoid damaging private property.

Id.

21. The Region contends that the contracting officer acted correctly and within her discretion in initially rejecting the shelter and in finally rejecting it after permitting CMS an opportunity to repair the structure. Region Final Submission, Tab D, Pages 5 and 6.

22. The Region's Final Submission also included an affidavit of Donald A. Head. Final Submission, Tab E. Mr. Head identifies himself as the "Project Engineer" on the RCF site at North Little Rock Municipal Airport." *See* Head Affidavit at Paragraph 5. The Head Affidavit relates that Mr. Head was advised that the structure was damaged in transit and repaired prior to arrival at the site. Head Affidavit at 6. The Head Affidavit goes on to detail the damage to the shelter observed by Mr. Head at the site. *Id.* at Paragraph 7. The Affidavit recounts the events surrounding the repairs and Mr. Head's inspection of the repairs of the shelter as well as his recommendation that the shelter not be accepted by the FAA following those repairs. *Id*. at Paragraphs 13 and 14.

23. The CMS Final Submission consists of: its Memorandum of Law; affidavits of Mr. Fred Kennedy, Mr. Bruce Brewer and Mr. William Garrett; and copies of cases cited in the CMS response to the Region's Dispute File.

24. In the Memorandum of Law portion of the CMS Final Submission, CMS asserts:

> Most of the FAA objections to the shelter dealt with aesthetics. The Purchase Order itself did not contain any aesthetics specifications. The FAA was prejudiced by the shelter's aesthetic appearance pursuant to visual inspections and presumed, without any engineering evaluation, that the building was unsound, rejected the building and terminated the contract solely on its appearance.

CMS Final Submissions at Pages 1, 2. CMS further asserts that it:

> was not given adequate opportunity to cure the in-transit damage to the building. After unloading the building at its own expense, CMS was in the process of **preliminary** repairs to the shelter so that it could be re-inspected.

Id. at 2. CMS argues that:

> had the FAA acted properly, it would have engaged a structural engineer to inspect the building for soundness and to suggest or to approve repair methods. They did neither and 'rushed to judgment' improperly terminating the contract for 'default'.

Id.

25. CMS asserts that it "was led to believe that the building would be re-inspected to approve the repair methods and that CMS would be allowed to be present for the re-inspection." *Id.* CMS further alleges that "the Region never notified CMS despite repeated requests, that it was doing inspections, and that CMS was not given the opportunity to be present at the inspections." *Id.* at 3, *citing* Kennedy Affidavit, Paragraph 8.

26. The CMS Final Submission cites again to the report of its consulting engineer, Mr. Joseph Belt, which CMS contends "resolved and responded to Mr. Head's criticisms."

27. The Belt Letter, Tab 18 to the CMS Response to the Region's Response, indicates clearly that Mr. Belt did not personally inspect the repairs that CMS made to the shelter. Rather, he relied on information supplied to him by others.

28. The CMS Final Submission includes the affidavits of Mr. Bruce Brewer, the CMS employee who was personally involved in repairing the shelter at the site; as well as the affidavit of Mr. William Garrett, who also was involved in the repair process. Neither Mr. Brewer nor Mr. Garrett is identified as being an engineer. CMS further refutes the contention that it used an

uncertified welder on the building. *See* Affidavits of Mr. Fred Kennedy and Mr. William Garrett.

29. CMS relies on the fact that the termination for default was based "solely on the visual inspections" of the FAA:

> The FAA has not and cannot (because it did not perform an engineering analysis) dispute that CMS preliminarily repaired all structural issues, in coordination with CMS' design engineer and in accordance with industry standards. (Kennedy Affidavit, Paragraph 2; Brewer Affidavit, Paragraphs 6-7; Garret Affidavit, Paragraph 7). It therefore is beyond dispute that the structural integrity and the watertightness of the building after repair is the same as it was before any damage occurred.

CMS Final Submission at 4, 5.

30. Finally, CMS contends that:

> The FAA terminated the CMS contract based on two visual inspections, neither of which was performed by a structural engineer. The FAA's inspection of shelter was not reasonable as is required under applicable law.

Id. at 6.

31. Following receipt of the Region's Final Submission and the CMS Final Submission, the record herein was closed.

III. Discussion

It is recognized that a termination for default is a drastic remedy and is only to be imposed based on "good grounds or solid evidence." *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1968). Nevertheless, it is also axiomatic that the Government is entitled to receive from a contractor precisely what it specified and that it need not permit deviations from its contract specifications. In this regard, the Armed Services Board of Contract Appeals has observed:

> Absent a showing of impossibility or commercial impracticability . . . the Government is entitled to strict conformance with its contract requirements.

Appeal of Kurz-Kasch, Inc., ASBCA No. 32,486, 88-3 BCA ¶21,053; *see also Appeal of Sauer, Inc.,* ASBCA No. 43,680, 94-3 BCA ¶27,199; *Appeal of Munck Systems, Inc.,* ASBCA No. 25,600, 83-1 BCA ¶16,210. By the same token, the Government has a duty to cooperate with its contractors and should not automatically reject a contractor's work, if there has been "substantial compliance" with the terms of the contract specifications and if insistence on strict compliance would result in "economic waste." *Appeal of George Ledford Construction, Inc.,* EngBCA No. 6268, 98-2 BCA ¶30,016.[1]

Here, the evidence in the record is clear that, as delivered on July 10, 2003, the shelter in question neither was in strict compliance with the terms of the specifications nor in "substantial compliance" with those terms. The Region had every right to reject the shelter on July 10, in light of the extensive damage sustained by the shelter during shipment, including an acknowledged "slipped wall." *See* Finding of Fact ("FF") 5. As the parties have stipulated, among the issues to be resolved by the ODRA are:

> 5. If the concrete equipment shelter manufactured by CMS did not meet the plans and specifications of Purchase Order DTFA07-02-P-06606:
>
> (a) Would the repairs proposed by CMS in its letter to the Federal Aviation Administration (FAA), Southwest Region, dated July 10, 2003, have brought the concrete equipment shelter into substantial compliance with the plans and specifications?
> (b) When CMS made the repairs on July 10-11, 2003, was the concrete equipment shelter substantially completed?
> (c) Was CMS given adequate opportunity to complete final repairs to the concrete equipment shelter prior to termination?

[1] In such circumstances, the Government prior to rejecting the work, should consider the possibility of a downward equitable price adjustment. *Id.*

(d) Was CMS notified that the FAA was going to conduct what it considered to be "final" inspections on July 14 and 23, 2003?

(e) At the time of the visual inspections on July 14 and 23, 2003, and at the time of the FAA's termination for default letter dated November 3, 2003, did the FAA have sufficient evidence that the concrete equipment shelter was structurally unsound and thereby otherwise did not substantially comply with the plans and specifications of purchase order DTFA07-02-P-6606?

FF16.

It appears that both parties are in agreement that, had CMS performed the steps called for by its structural engineer, Mr. Belt, in his "Panel Fix" plan, the shelter could have been brought into "substantial compliance" with the contract specifications, albeit not into "strict compliance" and that, had the plan been implemented fully, the Region, pursuant to its duty of cooperation, had every intention of accepting the building, even without a downward price adjustment. *Cf. Appeal of George Ledford Construction, Inc.*, *supra.* It is also clear from the record that the repair work performed by CMS on July 10 and 11, 2003 did not conform to Mr. Belt's plan. More specifically, there is unrebutted evidence that CMS failed to remove the broken weld plates. Also, even in terms of the numbers and types of pins specified by Mr. Belt within the "Panel Fix" plan, the evidence in the record makes plain that CMS did not follow the plan:

Per Panel Fix Plan	**Per Region**	**Per CMS**
"4 #5 18" Tee dry pins 12 #4 9" pins 12 #4 16" pins" FF5	"All the pins used were about 9" long and made of #4 rebar steel per the FAA onsite representative, Mr. Glen Stark. Only a total number of 9 pins were used per the onsite representative, Mr. Glen Stark." FF7	"During my repair, I used four number 5 18-inch rebar dry (temps) pins, and removed them. Four to five (as required) number 4 9-inch rebar pins in the roof and five to six number 4 16-inch pins in the vertical joint repair." CMS Final Written Submission, Affidavit of Bruce Brewer, ¶5.

In terms of numbers of pins, the assertion that CMS was placing pins "as required" is not explained. Mr. Belt was not supervising the repairs as they were being performed, and there is no evidence that he had any awareness of how many pins were actually used by CMS' Mr. Brewer. The single page letter from Mr. Belt to CMS' Mr. Kennedy dated August 11, 2003 that accompanied CMS' October 15, 2003 letter to the FAA Contracting Officer requesting a "Formal Decision" on the contract merely indicates a general "understanding" on Mr. Belt's part (based on some undisclosed source of information) that his "proposed fixes" had been "implemented" by CMS. *See* Dispute File, Tab 12, Letter of Joseph W. Belt, P.E. dated August 11, 2003. Moreover, in terms of ***how*** the pins were used, it is unrebutted that CMS failed to pin the roof by setting pins at a 45 degree angle as Mr. Belt had recommended, but instead set those pins vertically. FF7.

In addition, contrary to CMS' contention that "all repairs done to the shelter were done correctly and pursuant to industry standards," CMS Final Written Submission, page 3, it is uncontested that CMS failed to adhere to American Concrete Institute standards[2] regarding concrete repair, in that, rather than chipping and removing damaged concrete back to sound concrete and washing out spalled concrete or at least using compressed air to remove such broken material, CMS only managed to broom clean the damaged areas of concrete. FF7. Mr. Head's report explains convincingly how this alone could jeopardize the efficacy of the concrete repairs and the shelter's structural integrity. *Id.* Accordingly, the ODRA finds that, as of the July 14 and 23 inspections, CMS had not cured the defects in the shelter, either in the manner contemplated by Mr. Belt or in a manner that conformed to industry standards.

As to CMS' argument that it had not been given notice that the July 14 and 23 inspections were to be "final inspections" and its assertion that it had not been afforded an adequate opportunity to effect the repairs, even if there were confusion about whether CMS would be allowed an opportunity to make further repairs after the July inspections, it is undisputed that, on September 4, 2003, the Contracting Officer gave CMS verbal

[2] Dispute File, Tab 7, American Concrete Institute International Field Guide to Concrete Repair Application Procedures, "Surface Repair Using Form-and-Pour Techniques," ACI RAP-4 at page 2.

notice that the shelter was being rejected. Dispute File, Chronology of Significant Events. It would seem that, if the July inspections were, in CMS' mind, to have been "preliminary" only, there should have been some contemporaneous record indicating CMS' surprise about the Region reneging on its purported understanding regarding those inspections. Further, it is unclear why, after receiving this verbal notice in September, CMS did not attempt to arrange for Mr. Belt to go to the site with CMS' forces to see what further could be done to remedy the situation, make further repairs and reverse the Region's position. Nearly six weeks later, CMS, by its October 15, 2003 letter to the Contracting Officer, made no mention whatsoever about its understanding regarding the July inspections and simply sought a Formal Decision regarding the contract, forwarding the short letter from Mr. Belt that presumed that his repair plan had been fully implemented. Under these circumstances, the ODRA does not accept CMS' arguments about the July inspections and its understanding concerning being permitted an opportunity to effect additional repairs.

Finally, as to whether the Region had sufficient evidence regarding lack of structural integrity to justify its default termination of the contract, it appears that CMS' sole argument is that the Region ought not be allowed to base its actions on "visual inspections" of non-structural engineers. The contract did not contemplate that the Government would engage a structural engineer to inspect this rather simple pre-fabricated building upon delivery or that it would conduct more than a visual inspection of the shelter. Indeed, CMS' structural engineer did not perform ***any*** on-site inspection of the shelter, visual or otherwise, and, from viewing the photographs provided to him, could only say that he was unable to "tell by looking at the photos of the roof that the crack was a stress fracture." FAA Written Submission, Tab 18, Letter of Joseph W. Belt, P.E. dated March 31, 2004. It is clear that, without a site visit, Mr. Belt was not in a position to refute the personal observations of Region's engineers, who had concluded that what they saw were stress fractures that appeared to compromise the building's structural integrity. FF6 and 7. [3] Further, Mr. Belt was totally silent as to Mr. Head's

[3] As noted in the Findings, the shelter was personally inspected not only by Mr. Glenn Stark, the Ralph M. Parsons Company Resident Engineer, but by Mr. Don Head, the Region's Project Engineer. The Region

observations about CMS' failure to adhere to American Concrete Institute standards for concrete repair and the implications of that failure in terms of structural integrity. *See* FAA Written Submission, Tab 18. There were, in short, sufficient "good grounds or solid evidence" for the Region in this case to reject the shelter and to effect the instant default termination. *See J.D. Hedin Construction Co. v. United States, supra*.

IV. Conclusion and Recommendation

For the foregoing reasons, the ODRA finds that CMS failed to cure the defects within the concrete structure in question so as to bring it into conformance with the terms of the Purchase Order and that, accordingly, the default termination of CMS' Purchase Order was justified under the circumstances. Thus, the ODRA recommends that the contract dispute be denied in its entirety.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

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has represented that Mr. Head is a licensed civil engineer with 18 years of civil engineering experience and has been a registered civil engineer in the State of Texas since 1991. FAA Written Submission, Legal Analysis, Footnote 8.