UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 17, 2007

CBCA 609-C(AGBCA 97-203-1), 610-C(AGBCA 98-182-1)

OMNI DEVELOPMENT CORPORATION,

Applicant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

David S. Black of Holland & Knight LLP, McLean, VA, counsel for Applicant.

Elise Foster, Office of the General Counsel, Department of Agriculture, Ogden, UT, and Randall J. Bramer, Office of General Counsel, Department of Agriculture, Denver, CO, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **GOODMAN**.[1]

Opinion for the Board by Board Judge **GOODMAN**. Board Judge **POLLACK** concurs in part and dissents in part.

GOODMAN, Board Judge.

On January 16, 2007, Omni Development Corporation (Omni) filed a timely application under the Equal Access to Justice Act (EAJA) for attorney fees, costs, and expenses. Omni seeks to recover $712,990.73, associated with proceedings at the

[1] Judge Goodman was selected by random assignment as a panel member when the EAJA application was filed in January 2007, as Judge Westbrook, a member of the panel which resolved the underlying appeals, had retired earlier.

Department of Agriculture Board of Contract Appeals (AGBCA), and an additional $39,140.11, associated with proceedings at the United States Court of Appeals for the Federal Circuit. In its application, Omni breaks down the $712,990.73 claimed for the board actions to $392,245.50, which it says is applicable to its default challenge and breach claim (AGBCA 97-203-1), $306,970.65 for litigating quantum resulting from the breach (AGBCA 98-182-1), and $13,774.58 for preparing the application.

In the underlying appeals, Omni sought to overturn a termination for default by the Forest Service (FS) and further sought $2,193,066 for breach of the lease associated with that default. The damages claimed were composed of $162,883 for lost rental income and $2,030,183 for lost reversionary interest in the building that was to be constructed. The board overturned the default and awarded Omni $204,779 (plus applicable interest) for the breach. *Omni Development Corp.*, AGBCA 97-203-1, et al., 01-2 BCA ¶ 31,487. The $204,779 was entirely for loss of the reversionary interest.

Summarizing the procedural history, on September 10, 1997, Omni filed its notice of appeal with the AGBCA on the termination for default (AGBCA 97-203-1). On July 10, 1998, Omni filed a notice of appeal from a contracting officer (CO) decision denying its breach claim for damages attributable to the termination for default (AGBCA 98-182-1). The appeals were then combined for purposes of processing.

On June 18, 1999, the Government moved for summary judgment as to entitlement, asking the board to conclude that the termination for default was justified. On August 6, 1999, Omni filed its opposition and a cross-motion for summary judgment. On June 29, 2001, the board denied the parties' motions. The majority concluded that on the record before it and for purposes of summary judgment there were disputed material facts regarding the validity of the termination for default. One panel member issued a dissenting opinion; he would have upheld the termination for default at the summary judgment stage and denied the appeals.

Following the development of the evidentiary record and the submission of briefs, the record closed. The board issued its decision on May 25, 2005. A majority of the panel held that the termination for default was improper and that the Government had breached the contract. The majority awarded damages. The same panel member who issued the dissent in the decision on the parties' cross-motions issued a dissent that disagreed with the majority as to both entitlement and damages. *Omni Development Corp.*, AGBCA 97-203-1, et al., 05-2 BCA ¶ 32,982.

On June 18, 2005, the FS filed a notice of appeal with the Court of Appeals for the Federal Circuit and on September 23, 2005, Omni cross-appealed. The Court summarily

affirmed the board decision on September 19, 2006. *Johanns v. Omni Development Corp*., 197 F. App'x 941 (Fed. Cir. 2006).

Discussion

Omni timely filed an application[2] pursuant to the EAJA, as amended. 5 U.S.C. § 504 (2000). It is undisputed that Omni qualifies as a corporation to recover under the Act, given its size and net worth. *Id*. § 504(b)(1)(B). The Act directs that the Board shall award to Omni fees and other expenses it incurred in connection with the proceedings, unless the Board finds that the position of the agency was substantially justified or that special circumstances make an award unjust. *Id*. § 504(a)(1). The Government's position is substantially justified if it is justified in substance or in the main, or justified to a degree that would satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552 (1988). The burden of proof in establishing substantial justification falls upon the Government. *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143 (Fed. Cir. 1993); *Schuenemeyer v. United States*, 776 F.2d 329 (Fed. Cir. 1985).

In the underlying appeals, the majority held that the Government's decision to terminate for default did not comply with the applicable law and was a breach of contract. The fact that the Government did not prevail in the underlying appeals is not determinative, as a different standard applies in determining an applicant's entitlement to recover fees and expenses pursuant to EAJA. We must determine if the Government was substantially justified in its position throughout the proceedings. *Allen Ballew General Contractor, Inc. v. Department of Veterans Affairs*, CBCA 3-C(VABCA 6987E), et al. (Aug. 15, 2007).

In *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991), the Court provided direction regarding the required analysis:

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[2] On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the AGBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals (CBCA). The proceedings under this application were docketed as CBCA 609-C, relating to AGBCA 97-203-1, and CBCA 610-C, relating to AGBCA 98-182-1. The holdings of the AGBCA and other predecessor boards of the CBCA are binding on this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486.

> [T]o determine whether the overall position of the United States is substantially justified, trial courts are instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact.

Termination for default and government breach

As detailed above, the parties filed cross-motions for summary judgment on the issue of the validity of the default termination. While the majority denied the cross-motions, holding that issues of material fact remained in dispute, one panel member issued a dissenting opinion that contained extensive findings of fact and a reasoned discussion of applicable legal principles. The dissenting opinion concluded that the termination for default was properly issued and would have denied appellant's motion, granted respondent's motion, and denied the appeals.

Ultimately, a majority of the board held the termination for default to be a breach of contract and awarded damages. The same panel member who issued the dissent in the decision on the cross-motions issued another extensive dissenting opinion containing a discussion of the facts and applicable legal principles and concluded that the termination for default was proper, was not a breach of contract, and that appellant was not entitled to damages. The dissent went further, concluding that even if the termination for default was improper, appellant was not entitled to the damages awarded by the majority.

Even though the Government did not prevail, we find that its position was substantially justified throughout the claim process. It is clear from the board's ruling on the cross-motions for summary judgment that the Government had convinced one panel member that its position on the validity of the default termination was correct, while the panel members in the majority believed a trial was necessary to resolve issues of material fact that remained in dispute. After multiple days of hearing on the merits and after a record was fully developed and issues briefed, the panel member who dissented in the summary judgment proceedings remained convinced of the correctness of the Government's position. The dissenting panel member wrote detailed, reasoned opinions in both the summary judgment and merits hearing proceedings in support of his conclusions that the Government's position as to the propriety of the termination for default was correct and had a reasonable basis in both fact and law. For the reasons expressed in the dissents, the Government's position of continued support of the termination for default was justified based upon the record at its various stages. Accordingly, we find that the Government's position was substantially justified, i.e., justified in substance or in the main, or justified to a degree that would satisfy a reasonable person. In so holding, we do not do so simply because one panel member issued dissenting opinions. Rather, despite that panel member's disagreement with the majority

opinions, the detailed and reasoned factual and legal analysis of the dissenting opinions leads us to this conclusion.

Breach damages

During the proceedings of the underlying appeals, the information in the Government's possession did not support the amount Omni sought. The Government argued that if information in its possession was to be used as a basis for damages, if Omni were entitled to damages, the information would only support an award in an amount substantially lower than that sought by Omni.

The Government was substantially justified in defending against the quantum claim on two distinct bases. First, its position in support of the termination for default was substantially justified. A valid termination for default would mean no Government breach and no recovery of damages by Omni. Second, the excessive damages sought by Omni, particularly with a lack of support throughout the proceedings, fully support the Government's non-payment of the relief sought.

Expenses incurred on appeal

Further, given the conclusion that the Government's position was substantially justified throughout the litigation process, we deny the request to recover under EAJA the expenses applicant incurred in preparing its application for costs.

Decision

The application is **DENIED**.

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ALLAN H. GOODMAN
Board Judge

I concur:

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JOSEPH A. VERGILIO
Board Judge

POLLACK, Board Judge, concurring in part and dissenting in part.

The Department of Agriculture Board of Contract Appeals (AGBCA) majority decision in *Omni Development Corp.*, AGBCA 97-203-1, 05-2 BCA ¶ 32,982, overturned the Forest Service (FS) termination for default of Omni's lease contract. The AGBCA majority concluded that the FS could not meet the legal test required for a default based on the failure to make progress. The AGBCA majority further found no other basis justifying the default. The AGBCA majority concluded that at the time of the termination, the contracting officer (CO) could not meet the controlling legal test for default as set out in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). The *Lisbon* test requires that in order to terminate for failure to make progress, a CO must be able to reasonably conclude that at the time of termination, there was no reasonable likelihood that the contractor could complete by the contract due date.

On Omni's other appeal, AGBCA 98-182-1, also reported at 05-2 BCA ¶ 32,982, the AGBCA majority awarded appellant $204,779 on the breach claim of $2,049,653 arising out of the wrongful termination.

Appellant has claimed fees and expenses under EAJA for both.

I dissent as to the denial of EAJA fees and expenses on CBCA 609-C, where the majority addresses the default appeal issued by the AGBCA in AGBCA 97-203-1. The position of the CO and that of the FS on entitlement in the AGBCA case was not substantially justified either at the time of termination or at any other time during the ensuing litigation. I concur with the denial of EAJA fees and expenses on CBCA 610-C (AGBCA 98-182-1).

Background Facts

In November 1995, the FS issued a solicitation for offers (SFO) which involved two separate buildings to be leased to the FS. The smaller was the fire center and the larger, the supervisor's building. The SFO contemplated that the buildings could be constructed for those uses. The SFO called for space to be ready for occupancy by November 1, 1996. Paragraph 1.9, AWARD, provided that "15 days after award, the successful offeror/lessor shall provide to the CO a firm commitment of funds in an amount sufficient to perform the work required under the leasehold agreement." The SFO also contained a clause titled, "DEFAULT BY LESSOR DURING THE TERM." It stated failure to perform any requirement of the lease constitutes a default, provided any such failure shall remain uncured for a period of thirty days following notice thereof from the CO or CO's authorized representative. It defined notice to mean "written notice sent by certified or registered mail,

Express Mail or comparable service, or delivered by hand." The solicitation also contained a clause titled "NO WAIVER." The solicitation did not contain a Termination for Convenience clause.

The FS did not award Omni a contract on the solicitation until April 23, 1996, at which time the FS accepted Omni's first proposal on the lease. Omni's offer called for the larger building, the supervisor's building, to be ready for occupancy within 300 days of award. Accordingly, the parties were then looking at a late February 1997 completion. It was undisputed that Omni did not provide the CO with a firm commitment for financing within fifteen days of award, as was set out in Paragraph 1.9 of the original solicitation. It was also undisputed that the CO did not take any adverse action to enforce the specific time frame set out in Paragraph 1.9, either then or throughout the life of the contract. In fact, the cure notice of June 6, 1997 (the termination cure letter) was the first written "demand" by the FS giving Omni a mandatory time frame for producing a firm commitment or otherwise face default. The cure notice did not cite Paragraph 1.9 and compliance with the fifteen days set out in that clause was not a stated basis for the default.

Once the FS awarded the contract to lease space, Omni proceeded to design each of the buildings which the FS was to occupy. It provided those designs to the FS for review. It could not proceed with substantial construction on the larger, supervisor's building, however, until it had financing in place, had closed on the land, and had a building permit. While the purchase of the land for the supervisor's building had not been finalized, nor had any building permit been issued on the supervisor's building as of the date of the default termination, the AGBCA majority found from substantial evidence that the closing on the land and the securing of a building permit were not the issues driving the default. Those would have been completed without problem, once financing had been secured. The default was driven by the fact that Omni could not produce a financing commitment by the unilaterally-imposed due date set by the CO in the CO's June 6, 1997, cure notice. Prior to the expiration of the cure notice and at a point which would have allowed Omni ample time to complete, Omni and its lender informed the FS that the financing had been recommended to the anticipated lender's loan committee, that Omni had provided the lender with all the needed information, and financing approval was simply awaiting the committee's next meeting, which was anticipated to take place on June 25, 1997. Notwithstanding, the CO terminated the contract.

The AGBCA majority recognized that getting Omni to confirm financing was a continuing problem throughout the life of the project. That was evident in the fact that financing was still not in place as of April 27, 1997, almost a year after award. However, during the time frame from award to April 1997, Omni had identified the land to be used for the supervisor's building (although it had not yet purchased the land), had substantially

constructed the fire center (with the FS taking occupancy), had made design submissions to the FS on the supervisor's building (which the FS responded to), had performed site work on the supervisor's building, and was pursuing financing. Furthermore, during the time frame of September 1996 into the end of January 1997, much of the activity as to the supervisor's building was put on hold. That was because Omni (with knowledge and agreement of the FS) discussed the possibility of adding the Bureau of Land Management (BLM) as an co-tenant with the FS. A positive decision by the BLM would have required modifications to the design. The BLM ultimately declined to join as a tenant and so informed Omni in late January 1997. The project then resumed with the FS as the tenant.

The date of April 27, 1997, was particularly significant. On April 27, Omni and the FS entered into a new lease agreement which replaced the original agreement that had been awarded pursuant to the solicitation. The new lease agreement stated that it incorporated by reference solicitation terms and provisions. The new lease had no specified start date for construction and no specific date or time frame for Omni to provide a commitment on financing. The new lease did specify a new completion date for the building of December 13, 1997, which for some unexplained reason was stated as tentative. As of the date of the new lease, the FS knew that Omni did not have a firm financing commitment and was continuing efforts to finalize the matter. Furthermore, any attempt to suggest that the new lease resurrected the fifteen-day time frame in the original SFO is nonsensical, since the fifteen days referenced in the SFO were to be counted from the date of original award (a date which had occurred a year earlier). The April 27 lease was not an award. Rather, it was a new agreement between Omni and the FS. Finally, even after the parties entered into the April 27 agreement, it is noteworthy that at no time did the FS claim the fifteen days were applicable, and even in the cure notice, the FS did not use fifteen days or cite the SFO paragraph on financing. The FS terminated because it demanded a particular assurance from Omni (one not required by the contract), and Omni could not provide that exact assurance.

The AGBCA majority considered it significant that during April and May 1997, beginning even prior to the new lease agreement, the FS had several contacts with Mr. John Pitcher, the loan officer for Equitable, as to the status and progress of Omni in securing the financing commitment from his firm. In a letter of April 7, 1997, Mr Pitcher advised the CO that even though he did not yet have an appraisal or loan application, Equitable had every expectation of funding a combination construction/permanent loan for the borrower, subject to finalization of the lease which Mr. Pitcher understood would occur on April 25. The lease he was referring to was the new lease agreement referenced above, carrying the date of April 27, 1997. Later, in May, Mr. Pitcher had conversations with FS officials, as the FS was attempting to understand the delay in securing financing. In the conversation of May 27, 1997, Mr. Pitcher told the FS that Omni's appraiser had still not yet provided the material necessary for Equitable to go forward with the loan approval and that he was awaiting that

information. He said that with that information, the approval would take at least two weeks. The fact that Mr. Pitcher acknowledged to the FS on May 27 that he was still lacking data was considered significant by the AGBCA majority. That is because, about two weeks later, on June 10, he reported to the FS a considerable change. On June 10 he told the FS that the loan was then ready to go and was only awaiting the meeting of Equitable's loan committee. Given Mr. Pitcher's earlier candor as to Omni not yet providing needed data, his positive statements of June 10, logically gave the FS reason to believe that Mr. Pitcher finally had the needed information and that approval was simply awaiting a formal meeting of the committee.

The AGBCA majority concluded that on or about June 2, 1997, the FS had come to a decision to terminate the lease. By letter of June 6, the FS issued a cure notice. The cure notice specified that Omni had to provide a firm written commitment for financing within ten days of Omni's receipt of the notice. There were issues as to when the cure notice was actually received by Omni; however, the fate of the default did not turn on that issue. It appears the notice was received on either June 9 or 10. What is relevant is that on June 10, Mr. Pitcher of Equitable again spoke with the FS. He reported that he had received the appraisal from Omni's appraiser on June 9. He told the FS he was preparing the loan documents for the loan committee approval at the next meeting. He provided the FS with tentative dates for that meeting, and then said if the loan was approved, he would be able to issue a firm commitment for financing within two to three days and the loan could close within two weeks thereafter. On June 17, still prior to the termination, Omni, through its principal, Mr. Quayle, informed the CO that Omni would receive a loan commitment on June 25, and the other matters as to the drawings and building permit would also be completed by that point. On June 17 or 18, Mr. Quayle provided the FS with a letter from Mr. Pitcher to Omni, dated June 17. In that letter Mr. Pitcher said that he had completed his write-up and recommendation for the loan and distributed it to some committee members. He said that the loan committee was scheduled for Friday of that week and that it would likely be Wednesday of the following week (June 25) before he could have the loan commitment to Mr. Quayle. The letter to Omni was consistent with what Mr. Pitcher told the FS on June 10. As confirmed by Mr. Pitcher, the committee did ultimately meet and the loan was approved. By that point, the FS had already terminated the contract.

As to the issue of whether Omni at the time of the termination had sufficient time to complete by December 31, 1997, the CO used July 5, 1997, as the latest date that appellant could begin construction so as to complete on time. The CO based that on a rudimentary schedule that appellant had provided to the FS on May 12, 1997, in response to a request from the CO for a schedule. That schedule showed 180 days for construction but also stated that it was subject to acceleration "if the recorded date of the loan shifted." The 180 days compared to prior representations from Omni to the FS, representations starting as early as

May 1996, when Omni had provided the FS with an estimated construction time of 150 to 180 days to complete the supervisor's building. In arguing in support of the default that Omni needed 180 days to complete construction, the FS did not give weight to Omni's statement as to Omni's willingness to accelerate, if needed. Additionally, the evidence showed that neither the CO in issuing the default nor the FS in defending the appeal took into account that substantial site work (shown on the schedule) had already been completed as of the cure notice. Undisputed evidence showed that by late November 1996, although Omni still had not closed on the land where the supervisor's building was to be sited, the site work for the supervisor's building was close to completion and Omni needed but a day or two before it could start pouring the foundation. The CO acknowledged that she knew that some site work had been conducted. Moreover, the evidence further showed that the FS did not appear to make any detailed analysis as to whether Omni had adequate time to finish, if the financing was provided at a date later than that demanded in the cure notice. Further, at the hearing, it became clear that the FS reading of the schedule it had from Omni was unduly restrictive. The evidence showed that the FS read the schedule to have each prior activity as a full constraint on the next, as opposed to having activities overlap. However, there was no reason why once Omni completed framing in an area, it could not move on to the next activity in that space and continue framing in other areas. Overlap of many activities is the norm in construction, particularly on a building with more than one floor and with multiple rooms or areas. Reading the schedule without overlap was neither warranted or logical. Finally, in the face of the termination, Mr. Stedman, then Omni's counsel, attempted to stem the default action. In his telephone call to the CO of June 17, just prior to the termination, he told the CO that Omni had built a cushion of thirty days into the submitted schedule. Mr. Stedman offered to provide the CO with additional information showing how Omni had ample time to complete. That offer further opened the door for a discussion and for a greater analysis of whether Omni could complete with later financing. The CO indicated she was not interested. She instead terminated the contract.

In issuing its decision the AGBCA majority reviewed the various information as to what date was the outside date for Omni to begin. The AGBCA majority concluded that work could have begun as late as August 4, 1997, taking into account various factors, including Omni's original estimate of 150 to 180 days, Omni's expressed intention to accelerate if needed, and the fact that most of the site work on the supervisor's building was already completed.

Omni appealed the default, which was docketed as AGBCA 97-203-1, and later filed a separate claim for damages, which also was denied by the FS. Omni then appealed that claim, which was docketed as AGBCA 98-182-1. The separate claims were then consolidated for processing purposes.

In September 1999, the FS filed a motion for summary judgment, which was followed by a cross-motion from Omni. On June 29, 2001, the board issued a majority ruling (with a dissent) denying each party's motion. *Omni Development Corp.*, AGBCA 97-203-1, et al., 01-2 BCA ¶ 31,487.

On July 17, 2002, the parties engaged in unsuccessful mediation. By letter of September 2, 2002, the FS made what it identified as an offer of judgment to Omni in the amount of $300,000. Omni rejected it. Thereafter, a hearing was held in Ogden, Utah, in July 2003, with the evidentiary record closing with final cross-examination in September 2003.

The AGBCA issued its decision on May 25, 2005, with the majority of the panel finding that the termination for default was not sustainable. A dissent was filed. *Omni Development Corp.*, 97- 203-1, et. al., 05-2 BCA ¶ 32,982. On June 18, 2005, the FS filed a notice of appeal with the Court of Appeals for the Federal Circuit, and on September 23, 2005, Omni cross-appealed. The Court affirmed the board decision on September 19, 2006, without opinion.

In the EAJA application filed in this case, there are no issues as to prevailing party, size, or other eligibility criteria. Additionally, the FS has not challenged specific dollars claimed by appellant as to attorney fees and other expenses. The attorney fees being claimed are priced at the EAJA rate. Accordingly, the issue in dispute is whether the Government's position as to entitlement and damages was substantially justified.

Basis of majority denial of EAJA fees and costs

My colleagues set out in their majority opinion on EAJA the basis of their denial. They acknowledge that breach was found by two of the three judges in the underlying decision, with the remaining judge dissenting. I was part of the majority. Judge Vergilio, who joins in the denial of EAJA fees and expenses, wrote a dissent on both entitlement and quantum. In explaining the basis for denying EAJA fees and expenses in the matter now before the CBCA, my colleagues say as follows:

> For the reasons expressed in the dissents, the Government's position of continued support of the termination for default was justified based on the record at various stages. Accordingly, we find that the Government's position was substantially justified, i.e., justified in substance or in the main, or justified to a degree that would satisfy a reasonable person. In so holding, we do not do so simply because one panel member issued dissenting opinions. Rather, despite that panel member's disagreements with the majority opinions, the

> detailed and reasoned factual and legal analysis of the dissenting opinion leads us to this conclusion.

The majority decision to deny EAJA fees and expenses is based on conclusions drawn from what my colleagues describe as the "reasoned factual and legal analysis of the dissenting opinions," there referring to the dissenting opinions of Judge Vergilio on both the merits and on summary judgment. Because they state that as the basis for finding the FS to have been substantially justified as to both entitlement and quantum, I find it necessary to respond to the rationale set out in those dissents, as well as explain my and the AGBCA majority position which resulted in denying the FS motion for summary judgment and granting judgment in favor of Omni on the merits. To do that, I will have to revisit, to some extent, the merits of the Omni case and significant factual and legal differences reflected in the AGBCA majority and dissenting opinions. Furthermore, an EAJA analysis must look at matters through a different lens than does a decision on the merits or on summary judgment. My conclusions on EAJA in both cases center on assessing substantial justification and are not reached solely because the AGBCA majority found the actions of the CO and FS to be wrong.

AGBCA 97-203-1, entitlement

Summary judgment

The FS motion for summary judgment did not focus on establishing whether the CO complied with *Lisbon*. While the FS contended that appellant did not have time to finish, the FS based the default and its arguments for summary relief on the contention that appellant did not comply with the demands of the cure notice. Neither at the time it terminated, nor at the time the FS pursued summary judgment relief did the FS conduct or rely on a *Lisbon* analysis. Moreover, the FS did not make a determination as to whether Omni would have had adequate time to complete, had the FS allowed Omni to meet the cure notice demands at a later date than the date demanded by the FS. As the AGBCA majority pointed out in its summary judgment decision, *Omni Development*, 01-2 BCA ¶ 31,487, the FS rationale for default was set out by FS counsel in the FS opening brief. In that brief, FS counsel said:

> Propriety of the termination does not turn on whether it was possible for Omni to perform but rather whether the Government received adequate assurances that timely completion would occur.

Id. at 155,460.

The AGBCA majority later summarized its understanding of the FS position on the motion and said:

> The FS has asserted that the Board should grant summary judgment because (1) Omni committed anticipatory repudiation by stating that it could not secure financing by the end of the FS imposed cure period, and (2) that Omni did not provide realistic and reasonable enough assurances to the CO that it could complete on time. The FS relies on *Danzig v. AEC Corp*., [224 F. 3d 1333 (Fed. Cir. 2000)]. We disagree with how the FS understands the law and *Danzig*.

01-2 BCA at 155,460. In supporting the conclusion that *Danzig* was not applicable, the AGBCA majority pointed out that *Danzig* dealt with a much different factual situation than that in Omni and further said, "[T]o attempt to apply it here is not appropriate or warranted." The AGBCA majority continued,

> While *Danzig* involved a termination by the Navy of a contractor who was failing to make progress so as to endanger performance, the thrust of the court decision dealt with the legal effect of contractor statements and contractor actions which even taken in their best light for the contractor would not give the Government an assurance that it would complete in a timely manner. Further, the evidence in *Danzig* showed that the contractor was shutting down its operation as opposed to taking steps aimed at completion.

Id. at 155,461.

In *Danzig*, the contractor's response included a statement that financial strangulation by the surety not only had progressed to the point of preventing the contractor from meeting the completion date, but also had made it impossible for the contractor to predict an ultimate completion date at that time. The contractor continued that unless the surety and its affiliates restrained themselves from the then-present conduct and released the funds currently sitting in the project's bank account, the contractor doubted that it would ever be able to complete the project. The AGBCA majority had no difficulty seeing the above as justifying a termination. However, the AGBCA majority also had no difficulty concluding that Omni's actions did not even approach the situation set out in *Danzig*.

That view of the majority was further buttressed by the fact that Omni, unlike the contractor in *Danzig*, never indicated that it could not or would not finish. Instead, Omni made multiple assertions that it could and would complete on time and further offered,

through Mr. Stedman, to provide whatever additional data the FS needed to show Omni had adequate time to finish.

The AGBCA majority concluded, in assessing the FS motion, that the FS did not have confidence in Omni's ability to deliver and terminated on that basis. That said, however, the AGBCA majority found that the lack of confidence was not sufficient to justify a default, particularly, whereas in *Omni*, specific evidence showed that Omni could start well after the date set in the cure notice and still have ample time to complete by the finish date. In coming to that conclusion, the AGBCA majority relied on the facts that Omni unequivocally stated to the FS that it could finish by the completion date, that the FS had corroboration through Equitable (the lender) that financing was only awaiting a meeting to be held the next week, and that Omni had provided the FS with a schedule (specifically highlighting acceleration if needed) which on its face indicated that Omni had adequate time to finish, if the financing came through as expected and as appeared likely. Under these circumstances, reliance on anticipatory repudiation, "inadequate assurances," or lack of confidence was found by the AGBCA majority not to be a reasonable or legally sustainable basis for a default termination. Under the controlling law in *Lisbon*, Omni did not have to prove the financing approval was absolute. Rather, the legal test was whether the CO was reasonable in concluding that there was no reasonable likelihood that Omni could complete on time. Given Mr. Pitcher's statement as to an expected approval for the loan and as discussed below given the clear evidence of ample time for construction, the FS position in defaulting and defending on summary judgment cannot be seen as reasonable, nor can its position on these same matters be classified as substantially justified.

As I noted at the outset of this dissent, the majority states that it bases its determination to deny EAJA fees and costs on what it describes as the "reasoned legal and factual analysis of the dissent" in both the summary judgment and merits decisions. With all due respect to my colleague who authored the dissent, I disagree with that characterization of his legal and factual analysis. I conclude that the dissent applied the wrong legal principles and relied on factual conclusions not supported by the record. Accordingly, the dissents in both AGBCA cases do not support a finding of substantial justification.

In the AGBCA dissent on summary judgment, the dissent described the legal issue as follows:

> The question before this Board is not whether the lessor could have provided the space on time. Rather, the question is whether the contracting officer reasonably concluded that the contractor, in response to the cure notice, failed to provide **sufficient assurances** that it would complete on time.

01-2 BCA at 155,468 (emphasis added). In that same vein the dissent said:

> During the cure period and prior to the contracting officer issuing the disputed termination for default, the lessor informed the Contracting Officer that a loan commitment would be obtained, after, not within, the cure period. Without financing, there was **no assurance** that the project would begin so as to enable the lease space to be competed on time. The lessor's failure to satisfy the contract requirement for financing, particularly given the unfulfilled earlier assurance by the lessor that financing was forthcoming, did not provide the contracting officer with the **requisite assurance** that the lease would be satisfied. The contracting officer's decision to terminate for default was reasonable and justified.

Id. at 155,468 (emphasis added).

The common theme in the dissent was the lack of "adequate assurance" or "inadequate assurances." Meeting that standard and not the *Lisbon* test was identified as the standard under which to judge the appropriateness of the termination. The problem with using an "adequate assurances" test is that such a test is not the controlling law when the FS wishes to terminate a contractor for default due to failure to make progress. This termination demanded and required that the FS conduct an analysis and make a decision following the criteria in *Lisbon*. Because the dissent relied upon the wrong legal standard, I cannot find that it qualifies as a sufficient legal and factual analysis so as to bootstrap the FS position into one that can be described as substantially justified.

Turning to the FS position, during the summary judgment stage, the FS argued that the termination was justified under *Danzig*. Given the stark contrast in facts between what happened in *Danzig,* where the contractor made clear statements that completion was unlikely and in jeopardy, and what happened in Omni, where the contractor made multiple positive representations that it expected financing, but simply had to wait for the loan committee meeting, there is no basis to equate *the Danzig* decision to the Omni termination action. Further, the FS failed to conduct a *Lisbon* analysis. Accordingly, I cannot conclude that one could sustain a finding of substantial justification on either the FS's or the dissent's reasoning and actions. Finally, while not conclusive as to establishing a lack of substantial justification, I do point out that the Federal Circuit sustained the decision of the AGBCA majority.

Before leaving the motion, one other point needs to be made. The AGBCA majority decision on the motion included a clear statement by the majority that *Danzig* and a defense based on reasonable assurances was not going to prevail. The AGBCA majority noted that

on the record before it and for purposes of summary judgment, it had questions as to whether the CO had a reasonable basis to conclude that there was no reasonable likelihood that Omni could not complete by the completion date of December 31, 1997. The majority concluded that the date used in the cure notice was not contractually specified, but rather unilaterally set by the CO and that *Danzig* did not apply to this situation. The AGBCA majority said:

> But for the FS argument of anticipatory repudiation (failure to provide adequate assurances) and Appellant's contentions that the FS used defective default procedures, this appeal presents the classic default dispute over failure to make progress (failure to show due diligence), so as to endanger performance. The law on failure to make progress is well settled. The validity of a termination action essentially turns on whether the CO at the time of the termination had a reasonable basis to conclude that there was no likelihood that the contractor could complete on time.

01-2 BCA at 155,459 (citing *Lisbon*, 828 F.2d at 765). With the above said, following the issuance of the board's decision on summary judgment, the FS was on notice that to justify the termination, it had to meet the *Lisbon* test.

The AGBCA majority decision to deny appellant's cross-motion reflected the need to take all factual inferences in favor of the non-moving party. Under that standard, the denial of Omni's motion does not suggest that the AGBCA majority thought that the FS position on various facts would ultimately prevail. All the denial established was that a trier of fact, on the record as then developed and taking all inferences in favor of the FS, could find in the FS's favor. Being able to prevail, when one has all inferences taken in one's favor, is not a basis for finding substantial justification.

Merits

In defending on the merits, the FS still pursued the *Danzig* argument of inadequate assurances. The FS also presented several other challenges, among which were whether the Equitable loan would have actually come through, whether Omni could secure the land and building permits, and whether Omni could complete if it started by July 5, 1997 (which the FS determined was the late start date). Simply put, on all of those matters, the AGBCA majority found the FS evidence to be weak and not sufficient to prove the intended point.

At the time of the termination all indications were that the loan would be approved, albeit a few days after the cure date created by the FS. The likelihood of the approval of financing was corroborated by Equitable. Other witnesses, particularly from Sevier County, as well as a local realtor, confirmed that the land transfer and the building permit were not

serious problems and would be resolved in plenty of time, upon the approval of financing. Had the CO not insisted on terminating because Omni did not meet the ten-day deadline she set, Omni would have likely had the financing and, with that in hand, adequate time to complete.

The FS contended that even if Omni secured the financing, it would still have not had enough time to complete by the due date. The AGBCA majority again found the FS evidence weak in attempting to establish a lack of sufficient time to finish. To support its position the FS relied on a statement by one of its engineers who challenged Omni's assessment as to time needed. However, this same engineer also acknowledged that a good contractor would have time to finish a building such as the supervisor's building within six months. That same engineer was also involved on the project when Omni made its initial submission of a schedule and that showed 150 to 180 days as the time needed to complete. That estimate of 150 to 180 days was without acceleration. There was no evidence that the engineer had ever challenged that time estimate, and accordingly, the challenge at trial was found not to be convincing.

Moreover, the engineer in his assessment did not include acceleration or take into account the fact that site work had essentially been completed. The FS chose not to give credence to a clear statement in the last schedule provided by Omni which stated that the work could be accelerated if the closing date slipped. The FS did not give credence or effect to Mr. Stedman, who reiterated that Omni would accelerate and that the time on the schedule could be shortened. The FS told Mr. Stedman that it did not need or want more information, even though he offered it in an attempt to thwart the default. Further, the FS appeared not to understand the operation of stacking of trades and how many construction activities overlap and do not have to be fully completed before a subsequent activity could begin. Once again under *Lisbon*, Omni did not have to prove that it was a certainty that the contractor could finish on time if it received the financing when expected. Instead, the FS had to show that even if Omni secured financing, Omni could not finish. The fact is that the evidence was overwhelming that Omni could have started as late as August 4, the late start date found by the majority, and still finished before December 31. Had the financing been approved as expected (certainly not unlikely), the August 4 date could have been met. Accordingly, the AGBCA majority decided that the default could not reasonably stand. *Omni Development*, 05-2 BCA ¶ 32,982.

Because the majority in this EAJA matter bases the denial on reasoning in the dissent, I now address the dissent on the merits. The dissent in the merits case was not in lockstep with the dissent discussion on summary judgment, and in that regard did address *Lisbon.* The dissent stated that in deciding compliance with *Lisbon*, the board could consider "the lessor's failure to meet progress milestones and financial situation, and other pertinent circumstances

surrounding the decision in order to determine whether the contracting officer had a valid basis for the conclusion." 05-2 BCA at 163,462.

I do not disagree with the AGBCA dissent on the above statement. A contractor's past track record and performance are relevant elements to consider under *Lisbon*. I agree that a CO is tasked with weighing information as to whether the contractor can complete within the needed time frame and a past track record would be a factor. However, where I diverge from the dissent is that I find that a past track record and past performance cannot reasonably justify a termination for failure to make progress when the material blocks necessary to perform by the completion date are in place. Thus, since here (1) financing was expected within several days (corroborated by the lender, not just appellant), and (2) adequate time was left on the schedule to finish, the FS had to let the financing issue play out (for at least a few more days) before the FS could properly justify a termination. As I see it, by emphasizing the need for adequate assurances so that the FS could be confident of completion, the dissent and the FS radically changed the test established by the court in *Lisbon*.

Lisbon does not set as the test that the CO has to have a reasonable belief that the work will likely be completed. *Lisbon* does not turn on the CO having to be confident that the work will be done. Instead, it sets the test that the CO has to have a reasonable belief that there is no reasonable likelihood that the work can be completed. That analysis is the one that needs to be made before a CO can exercise the drastic sanction of termination in a case such as this.

Because the FS and dissent applied what I find to be the wrong standard, I conclude that there can be no finding of substantial justification. While the dissent recognized *Lisbon*, it tied that decision to "adequate assurances." That means that under the dissent, the CO can default a contract when he/she is not certain enough that the contract will be completed on time. That is simply not the legal standard.

Any fair reading of the record shows that the termination did not occur because the FS assessed and concluded that the contractor did not have enough time to finish. Omni's contract was terminated because the CO concluded that once she set a date for the financing, she had no obligation to extend that date, even if there was adequate time with an extension of the cure period for the work to be completed. The CO had reached a level of frustration. That is reflected from the dissent on the merits, where my colleague stated,

> In short this termination for default must be upheld if the Government was **justifiably insecure** about the lessor's ability to provide timely occupancy--unfulfilled promises, silence and failures to meet deadlines of the contract and

> schedule are relevant to the analysis, which need not focus on the remaining time to complete.

05-2 BCA at 163,463 (emphasis added).

Similarly, he stated,

> Without funding, this project would not be completed; performance was endangered. The failure to obtain funding establishes a reasonable basis for concluding that there was **inadequate assurance** that this lessor could perform.

Id. at 163,453 (emphasis added). This theme continued and the dissenter defined what he believed was needed to comply with a "no reasonable likelihood test." The dissent stated:

> This contracting officer was not required to engage in discovery, depositions, or subject individuals to examination and cross-examination under oath. The lessor had failed to satisfy promised dates for completion of given tasks, the contracting officer **sought assurances, did not obtain those assurances**, and reached a reasonable conclusion accordingly.

Id. at 163,453 (emphasis added). Under the dissent's reading, because Omni did not provide the assurances set out in the cure notice, that was sufficient to justify termination. That is incorrect law in this case.

As to the amount to be recovered, the applicant has stated in an affidavit that $392,245.50 of its litigation costs are attributable to the entitlement issues. The Government has not challenged that allocation or the specific costs or expenses from which that total is derived. Applicant's claim is at the statutory rate for attorney fees. Accordingly, I would award $392,245.50.

Damages

Omni stated in its application that $306,970.65 of its costs are for quantum litigation. That was approximately half of the total amount sought and according to applicant represented about half of its EAJA effort. Applicant sought over $2 million for both lost income and reversionary value of the property. It was awarded $204,000, all of that for reversionary value. It received no recovery for lost income.

The Government urges that we deny relief for attorney fees related to quantum. First, it argues its position on quantum was substantially justified. Second, it contends that even if some relief is warranted, that sum should be significantly reduced to reflect the disparity between what was recovered and what was sought and if some recovery is allowed, we should not award more than ten percent of the claimed quantum costs and fees. Omni argues that it should get the full costs and fees because it received damages. It argues that if an adjustment is to be made, that adjustment should be on a page allocation basis.

The legal test for substantial justification is that the Government needs to show that in the main it was justified in denying and defending the quantum issues. *Pierce v. Underwood*, 487 U.S. 552 (1988). I understand "in the main" to mean that we look at the totality of the issues and respective positions of the parties and determine if the Government was reasonable in defending in this case. To be reasonable does not require a high degree of probability of success. The decision as to what is reasonable and substantial justification is one that is left to the discretion of the tribunal and allows the tribunal to consider all that was before it and assess matters on that basis.

As a threshold matter, the quantum analysis involved in this case was complex and required significant clarification and explanation at the hearing. While there was some legal authority as to the operation of reversionary value as a damage in breach of a lease, the authority was not extensive and consisted of state court decisions (not Utah) and federal court decisions relying on state laws. The matter of using and calculating reversionary interest in a breach of lease situation was novel in this government contract setting. Accordingly, the FS had substantial justification in making its arguments as to a lack of forseeability for the reversionary interest damages.

With the above as a backdrop, but for deciding in favor of Omni as to the forseeability of the loss of reversionary interest, the remainder of the AGBCA majority decision on quantum was generally based on and reflected the position of the Government and not that of Omni. A substantial segment of the case on quantum focused on determining how to calculate the loss of the reversionary interest rather than on whether a reversionary interest was recoverable at all. In fact, much of the Government's presentation, and particularly that of Mr. Johnson and the Rigbys, centered on how one correctly calculates reversionary interest in a lease situation such as that here. Much of Omni's quantum claim was not clear or relied on erroneous principles as to cost and calculation. Various formulas were not clear until explained at the hearing by government witnesses or witnesses being challenged by Omni's expert. The AGBCA majority's ability to fashion a remedy and to come to a comfort level as to the fairness of the award was primarily due to testimony of the Rigbys and Mr. Johnson and rejected much of what was offered by appellant's expert. The Government's evidence and presentation focused on real estate valuations, while Omni's

expert and its claim generally relied on concepts which were neither applicable nor convincing in the real estate context.

On a number of matters, such as the inclusion and valuation of sweat equity, the operation and amount of discount rates, the calculation of net operating income, the issue of present day value, and the use of an income approach rather than a cost approach, the AGBCA majority came down on the side of the Government and relied on the Government's witnesses and explanations for conclusions. Of course, there were some limited areas and individual matters where the AGBCA majority relied on appellant and found its evidence convincing. However, "in the main," the AGBCA majority rejected Omni's approach at valuing the reversionary value, rejected its position on income, and in general concluded as it did on the basis of the alternatives presented by the Government.

In appropriate instances, boards have denied recovery of EAJA costs and fees in instances analogous but not in lockstep to the situation here. In *Keno & Sons Construction Co.*, ENG BCA 5837-F, 99-1 BCA ¶ 30,273, the board pointed out that its decision reflected the complexity of applying the quantum calculations offered by each party regarding the appropriate equitable adjustment. The board said that the resolution of quantum required a detailed weighing of considerable financial and operations data and decisions concerning opposing proof and calculation theories. In explaining its denial of applicant's EAJA claim, the board noted that "[T]he complexity of the numerous issues concerning quantum leads us to the conclusion that the Corps was reasonably justified in not accepting at face value Keno's financial and accounting data regarding Keno's actual costs or Keno's estimate of the 'should cost' amount offered in support of its equitable adjustment request." *Id.* at 149,708.

In *Overflo Public Warehouse, Inc.*, PSBCA 4531, et. al., 06-1 BCA ¶ 33,160 (2005), the board found that it was reasonable for the Government to have resisted appellant's adjustment claim, noting that appellant's entitlement to an economic adjustment only became clear through evidence presented at the hearing. Accordingly, even though the board allowed the contractor's claim, it found the position of the Government to be substantially justified.

In *C.H. Hyperbarics, Inc.*, ASBCA 49375, et. al., 05-2 BCA ¶ 32,989, the board said that where a contractor's effort to prove quantum is seriously lacking, the Government is not obligated to attempt to assemble the appropriate figures and the Government's position requiring proof as to entitlement on specific claimed problems, on causation, and on reasonableness of the amount claimed has been held to be substantially justified. Additionally, the board took the position that EAJA recovery was not allowable on some

entitlement issues, citing as the basis the fact that the recovery was awarded on an independent basis, rather than on the basis presented by the contractor.

Keno and *Overflo* both present situations where EAJA recovery was denied because the dollar presentations by the appellants were found to lack sufficient detail and support. Both boards found that the absence of sufficient detail and support justified a finding that the Government's position in defending was substantially justified. *Hyperbarics* differs from those cases in that it deals with entitlement. However, the case reiterates the principle that when a contractor achieves its desired results, but does not do so based on or through the theories it presented, the tribunal can conclude that the Government was substantially justified in defending. Here, given the dollars being sought by Omni and the weakness of its calculations and theories, the Government was substantially justified in defending as to the reversionary interest claim being asserted by Omni.

A portion of the Omni appeal involved issues surrounding the cost to construct the building. In the majority decision, value was ultimately based on the projected loan from Mr. Hancey, as we found that a better measure than the cost projections and subcontractor estimates presented by Omni. As to the evidence presented on anticipated costs, Omni's number changed as to many items. Moreover, what was being submitted was estimates of projected costs or future subcontracts. This was not a matter where the Government could simply go through the cost records and verify expenditures or values. Although many of the differences in work item values were explained at the hearing, it was not until those explanations were made that some of the numbers made sense. Accordingly, what the Government had before it was of such a nature that there was not sufficient information or support to allow it to make a reasoned determination, with any certainty, as to what it would have cost Omni to construct the building. Accordingly on issues surrounding the value of the building, the Government was substantially justified.

While the Government may well have not expected to pay zero, the fact is that it was reasonable in defending the quantum because appellant was seeking in excess of two million dollars and the information before the Government did not support that figure or anything close. Further, the quantum case is not one containing multiple cost centers or separate claims that I could comfortably parse out. There were two quantum issues, lost income and reversionary interest. I am certain that the applicant can point out instances where it prevailed on a specific cost item or quantum issue; however, to the extent that is the case, those instances are dwarfed by other issues and particularly the issues surrounding how one calculates reversionary interest and lost income.

In arriving at my conclusion as to substantial justification in defending quantum, I am directed by the wording in *Pierce* that we are to look at the Government's position in the main. When I do that on damages, I find the FS met the substantial justification standard.

Special circumstances

The Government has contended that award of EAJA fees should be denied due to special circumstances, citing 5 U.S.C. § 504(a)(2). It states that the amount expended by Omni far exceeds what it recovered in the judgment and that Omni refused to accept an offer of judgment of $300,000, which represented more than that to which Omni was entitled. The Government presents a September 2, 2002, letter to Omni where it offered $300,000. The Government points out that after the date of the offer, Omni expended $329,079.87 in potential EAJA fees and costs, not including preparation of the EAJA application.

The Government is urging the Board to deny relief using the rationale expressed in Federal Rule of Civil Procedure 68. That rule in pertinent part basically provides that if an offer is made and the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred after the offer.

As appropriately cited by the Government, the Federal Rules of Civil Procedure are not binding upon a board of contract appeals. However, boards do look to the rules for guidance. Moreover, a number of boards have considered settlement offers in assessing EAJA applications. *See McTeague Construction Co. v. General Services Administration*, GSBCA 15479-C(14765)-R, 01-2 BCA 31,462, *aff'd on reconsideration*, 01-2 BCA ¶ 31,526.

As set forth in the Federal Rules, a critical element in denying relief because of an offer of judgment is that the offer made is more favorable than the relief recovered. Here there are two problems with meeting that threshold. First, the letter offers a dollar figure but does not offer to withdraw the termination for default. That may have been the intent, but it is not reflected in the letter. Second, while a tribunal will look at the amount awarded and that offered, we also need to take into account the absence of fees in the offer. Using the Government's own number, by the time of the settlement offer, Omni had already incurred over $300,000 in legal fees. Thus, had Omni taken the offer, Omni would have at best covered its legal fees, with nothing left for the recovery itself. When faced with a similar situation in *Prowest Diversified, Inc. v. United States*, 39 Fed. Cl. 276 (1997), the court denied the Government's motion for costs. In justifying its claim for recovery of fees against Prowest, the Government stressed that it had made an offer of judgment of $58,000 and the court awarded $46,476. In explaining its denial of the Government's motion, the court added to the judgment, secured by Prowest, the amount of pre-offer attorney fees

Prowest had already incurred. When those fees were combined with the offer of judgment submitted by the Government, the combined total exceeded the Government's offer. As such, the court ruled against the Government.

Accordingly, in order to consider an offer of judgment defense, the Board needs not only to consider whether the judgment awarded is commensurate with the potential liability, but also to take into account what has been incurred in pursuing the case to that point. Here, given the above, I do not find the offer of judgment approach valid in this application.

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HOWARD A. POLLACK
Board Judge