IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
2002 SEP -5 PM 3:31
NANCY M.
MAYER-WHITTINGTON
CLERK

ELOUISE PEPION COBELL et al.,	)
	)
	) No. 1:96CV01285
Plaintiffs,	) (Judge Lamberth)
v.	)
	)
GALE A. NORTON, Secretary of the Interior, et al.,	)
	)
Defendants.	)
	)

INTERIOR DEFENDANTS' OPPOSITION TO THIRD-PARTY NATIVE AMERICAN INDUSTRIAL DISTRIBUTORS, INC.'S (1) MOTION FOR PERMISSIVE INTERVENTION AND (2) MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following opposition to Native American Industrial Distributors, Inc's ("NAID") Motion for Intervention ("Intervention Motion") and NAID's concurrently filed Motion for a Temporary Restraining Order ("TRO Motion"). NAID has filed one memorandum ("NAID's Memorandum") in support of both motions and consequently Interior's opposition to both motions will be included in this single pleading. It appears that the Intervention Motion should be decided first because, if the Intervention Motion is denied, then NAID is not a party to this case and its TRO Motion must also be denied.

INTRODUCTION

NAID, a government contractor, had two contracts to perform services for Interior, one with the Bureau of Indian Affairs ("BIA") and one with the Office of Special Trustee ("OST"). See TRO Motion at ¶¶ 10, 12. The OST contract has been terminated for convenience. Id. at ¶¶ 51-52. The BIA contract has not been terminated. Id. at ¶ 53.

NAID alleges that the OST contract was terminated for improper purposes and that the BIA contract will also be terminated, or allowed to expire without renewal, for similar improper purposes. TRO Motion at ¶ 45. NAID has filed its TRO Motion to ask the Court to reinstate the OST contract and enjoin Interior from terminating, or not renewing, the BIA contract. Id. at ¶ 60A-C. NAID has also moved to intervene in this action solely for the purpose of having its TRO Motion heard by this Court. Intervention Motion at 1. This Court should deny both motions.

I. NAID'S MOTION FOR PERMISSIVE INTERVENTION MUST BE DENIED FOR LACK OF JURISDICTION AND COMMONALITY WITH THE MAIN ACTION

NAID has not moved for intervention as of right under Federal Rules of Civil Procedure ("Rule") 24(a), but rather seeks permissive intervention under Rule 24(b)(2). To succeed in a request for permissive intervention, the putative intervenor must demonstrate (1) an independent ground for subject matter jurisdiction, (2) a timely motion, and (3) a claim or defense that has a question of law or fact in common with the main action. See EEOC v. National Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998). NAID has not demonstrated the existence of jurisdiction over its claims or the requisite commonality with issues in the main action, and thus its Intervention Motion must be denied.

A. No Subject Matter Jurisdiction Over NAID's Claims Exists

Distilled to their essence, the allegations in NAID's Memorandum and TRO Motion reveal a mere contract dispute between Interior and one of its contractors. NAID is asking this Court to step in and solve this dispute by forcing Interior to continue to do business with NAID. What NAID overlooks in its attempt to obtain this extra-contractual remedy is that both of its

contracts with Interior are subject to the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. §§ 601 et seq. The CDA applies to "any express or implied contract . . . entered into by an executive agency" for the procurement of property, services, or construction. 41 U.S.C. § 602(a). Where it applies, as it does here, the CDA is the exclusive remedy for a dispute with a federal agency. A&S Council Oil Co. v. Lader, 56 F.3d 234, 241 (D.C. Cir. 1995); 1-10 Indus. Assocs. v. United States Postal Serv., 133 F. Supp. 2d 194, 195 (E.D.N.Y. 2001).

Here, it is not even necessary to "read" the CDA into the BIA and OST contracts. Those contracts expressly incorporate the Federal Acquisition Regulation "Disputes" clause (FAR 52.233-1), which applies the CDA to any contract in which it appears. See TRO Motion Exhibit B at 5 (Section A, Clauses Incorporated by Reference); Interior's Attachment A at 3.[1] The Disputes Clause sets forth the steps that a contractor must follow in order to perfect its claim under the CDA. The first step of the process is to submit "[a]ll claims by a contractor against the government relating to a contract . . . to the contracting officer for a decision." 41 U.S.C. § 605(a). After receiving a proper "claim," the contracting officer then renders a decision which becomes final and conclusive ("final decision") unless the contractor timely appeals. 41 U.S.C. § 605(b). There are only two routes of appeal from a contracting officer's final decision under the CDA. One is to an agency's contract appeals board (here, the Interior Board of Contract Appeals) within 90 days of the decision and the other is to the U.S. Court of Federal Claims within one year. 41 U.S.C. §§ 606, 609(a)(1).

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[1] NAID has placed both contracts before this Court as Exhibits A and B to its TRO Motion, but misidentified them: the BIA Contract is Exhibit A and the OST contract is Exhibit B. In addition, NAID has omitted the portion of the BIA contract which incorporates FAR 52.233-1. Interior has attached the relevant portions of the GSA supply schedule for the BIA contract as Attachment A.

NAID has not presented a CDA claim to either BIA or OST. It has never obtained a contracting officer's final decision from BIA or OST. Although NAID refers to a "protest" that it filed concerning a modification to the BIA contract, the contracting officer withdrew the modification. See TRO Motion at ¶ 39. Furthermore, even if there had been a contracting officer's final decision on a NAID claim – something that NAID has not alleged – it would still be necessary for NAID to appeal the final decision to the Interior Board of Contract Appeals or to the Court of Federal Claims. 41 U.S.C. §§ 606, 609(a)(1). Thus, it does not matter whether NAID has asserted its claims or whether a contracting officer has finally decided them. While those questions might be relevant to the Interior Board of Contract Appeals or Court of Federal Claims, this Court simply lacks jurisdiction to hear a CDA claim – any claim "relating to" the BIA and OST contracts. B&B Indus., Inc. v. United States Postal Serv., 185 F. Supp. 2d 760, 765-66 (E.D. Mich. 2002).

A claim falls under the CDA if it is "essentially contractual." RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1136 (6th Cir. 1996). What matters is the "source of the right that is at stake." Mutual of Omaha v. National Assoc. of Gov't Employees, 145 F.3d 389, 394 (D.C. Cir. 1998) (citing Ingersoll-Rand Co. v. United States, 780 F.2d 74, 76 (D.C. Cir. 1985)). Here, the BIA and OST contracts are the "source" of NAID's rights because NAID's concern is about the "termination, non-renewal or curtailment" of those contracts. Those contingencies are addressed by the contracts themselves. See, e.g., Interior Attachment A at 4 (Termination for convenience and cause); TRO Motion Exhibit B at 5 (Termination for convenience and default).

A significant body of precedent pertaining to terminations has developed squarely within CDA jurisprudence before the former Claims Court, which is today's U.S. Court of Federal Claims, the contract appeals boards, and the U.S. Court of Appeals for the Federal Circuit. See, e.g., John Reiner & Co. v. United States, 163 Ct. Cl. 381 (1963) (addresses "constructive termination"); Kalvar Corp. v. United States, 211 Ct. Cl. 192, 543 F.2d 1298 (1976) (proof of intent to injure contractor or "malice" is required); Torncello v. United States, 231 Ct. Cl. 20 (1982)(illusory contract or "bad faith" required for convenience termination to be tantamount to breach); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed.Cir. 1995); Rowe, Inc. v. GSA, GSBCA No. 15,217, 00-2 BCA ¶ 31,125 (Sept. 7, 2000) (in absence of bad faith or abuse of discretion, constructive termination for convenience moots all breach claims). Citing Torncello, the D.C. Circuit has recognized that "it is possible to conceive of [a termination-for-convenience] dispute as entirely contained within the terms of the contract." Ingersoll-Rand, 780 F.2d at 78. Such determinations are "within the unique expertise of the Court of Claims." Id. That court is "a single, uniquely qualified forum for the resolution of contractual disputes." B&B Indus., 185 F. Supp. 2d at 765.

Like NAID, the plaintiff in Ingersoll-Rand challenged the Government's decision to terminate its contract, relying on two federal regulations to argue that the termination was wrongful. Ingersoll-Rand, 780 F.2d at 77. Finding that the "essential rights at stake [were] contractual," the court cautioned that a plaintiff may not "avoid the jurisdictional bar of the CDA merely by alleging violations of regulatory or statutory provisions rather than breach of contract." Id. Neither was the court swayed by that fact that plaintiff sought only nonmonetary, injunctive relief. Id. at 79. Plaintiff's labeling is of little importance. This is true even if the harm

complained of purportedly flows from "unlawful agency action." A&S Council, 56 F.3d at 241. This is also true even if plaintiff alleges constitutional violations or arbitrary or capricious action. See B&B Indus., 185 F. Supp. 2d at 765-66 (claim that incorporation of unfavorable terms into new contracts violated Fifth Amendment and was arbitrary, without legal authority, and a restraint of trade not sufficient to overcome CDA's jurisdictional bar; resolution depended on contract interpretation); see also Mutual of Omaha, 145 F.3d at 394 ("Nor would the Health Benefits Act confer jurisdiction on the court if the complaints indeed turn on contract"). Thus, NAID's hypothesized wrongful agency motivation for Interior's contract actions cannot remove these contract disputes from CDA jurisdiction.

To the extent NAID casts its challenge as a "bid protest," this is also not a matter for this Court. First, NAID is not a proper protester because it is not a "disappointed bidder" seeking to void the award of a contract to another. Instead, NAID challenges the termination or non-renewal of its own contracts. Quite unlike NAID, which has two government contracts, "frustrated bidder[s]" have no express contract on which to sue the Government. Ingersoll-Rand, 780 F.2d at 78-79 (citing Megapulse, Inc. v. Lewis, 672 F.2d 959, 968 (D.C. Cir. 1982)). Moreover, even if NAID were properly bringing a bid protest, this Court would not be the proper forum in which to bring it.

The Comptroller General (General Accounting Office) and the Court of Federal Claims are the only fora in which to bring bid protests. Under procedures set forth at 31 U.S.C. §§ 3551 et seq., "interested part[ies]" may file a "protest concerning an alleged violation of a procurement statute or regulation" with the Comptroller General. 31 U.S.C. §§ 3552, 3553(a). Alternatively, under the Alternative Dispute Resolution Act of 1996 ("ADRA"), an "interested party" may

challenge in the Court of Federal Claims "a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The concurrent protest jurisdiction once enjoyed by the federal district courts expired on January 1, 2001. The Court of Federal Claims now has exclusive jurisdiction over any bid protests filed after that date. See Pub.L. No. 104-320, § 12(d), 110 Stat. at 3875. The protest jurisdiction of the federal district courts under Scanwell Labs, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), which predated the ADRA, was "subsumed" into the ADRA upon its passage. Emery Worldwide Airlines, Inc., 264 F.3d 1071, 1079-80 (Fed. Cir. 2001); Novell, Inc. v. United States, 109 F. Supp. 2d 22, 24-25 (D.D.C. 2000). After "sunsetting" of the concurrent jurisdiction portion of the ADRA, no protest jurisdiction remains in the U.S. district courts. Id.

NAID does not point to any federal law that would give this Court jurisdiction over its contract dispute with Interior. NAID provides citations for the unremarkable proposition that the availability of another forum should not prevent permissive intervention (see NAID's Memorandum at 6), but that principle has no relevance where it is plain that exclusive jurisdiction is vested in another forum.

In short, this Court does not have jurisdiction to hear NAID's request for injunctive relief. Because resolution of NAID's TRO Motion is the only issue for which NAID seeks to intervene, the Intervention Motion must be denied.

B. NAID Has No Claims in Common with the Main Action

Another prerequisite for permissive intervention is a claim that shares a common question of law or fact with the main action. National Children's Ctr., 146 F.3d at 1047. NAID has asked

to intervene in this action solely for the purpose of having its TRO Motion heard. The TRO Motion relates exclusively to NAID's contracts with Interior. NAID's disputes under these contracts have nothing in common with any of the issues in the main action.

NAID vaguely references the Court's prior orders that Interior submit quarterly reports on the progress of trust reform and the general government obligation to provide accurate information to the Court. See NAID's Memorandum at 7. NAID does not, and cannot, explain how the continued operation of its contracts with Interior is required for Interior to fulfill its obligations. Surely NAID cannot be arguing that NAID, only NAID, and no other potential contractor, has the ability to provide accurate information, and that EDS or whatever other contractor Interior engages would not be able to assist Interior in providing reports to the Court. At most, if everything NAID has alleged is presumed true, NAID or its employees may possess information relevant to an issue in the main action. But that information can still be provided to the Court in the absence of NAID's presence as a party to the suit and regardless of whether NAID continues as an Interior contractor. NAID's TRO Motion thus has nothing in common with the issues in the main action, and NAID's Intervention Motion must be denied.[2]

II. NAID'S MOTION FOR TRO AND INJUNCTIVE RELIEF MUST BE DENIED

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1, Interior Defendants also oppose NAID's TRO Motion. If the Intervention Motion is denied, NAID is not a party to this case, and its TRO Motion must also be denied. If NAID is permitted to intervene, the Court should still deny NAID's request for injunctive relief.

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[2] The remaining requirement for permissive intervention is that a "timely motion" has been filed. See National Children's Ctr., 146 F.3d at 1046. Interior does not dispute the timeliness of NAID's Intervention Motion.

As a preliminary matter, and as discussed above, the Court lacks jurisdiction to entertain NAID's TRO Motion. However, even if jurisdiction existed, injunctive relief would not be appropriate or warranted here.

In considering whether to grant an application for a TRO or a preliminary injunction, this Court must examine (1) whether there is a substantial likelihood that the applicant would succeed on the merits, (2) whether the applicant would suffer irreparable injury if the injunctive relief is denied, (3) whether the granting of injunctive relief would substantially injure the other party, and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. International Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 n.2 (D.D.C. 2001) (application for temporary restraining order would be denied when plaintiffs failed to show substantial likelihood of prevailing on merits or irreparable harm). As we explain below, the TRO Motion does not satisfy any of the four elements required for the issuance of a TRO or a preliminary injunction and must therefore be denied.

A. No Substantial Likelihood of Success on the Merits

NAID cannot show that any action by Interior warrants the injunctive relief of the type asked for by NAID in its TRO Motion or that the Court has the authority to grant the extraordinary relief requested by NAID. NAID not only demands that Interior must forgo its rights to terminate any contracts with NAID, including one that has already been terminated, but also demands that Interior must renew all contracts with NAID when they would ordinarily expire.

NAID provides no citation to any law, and the government has not found any, that would authorize the Court to reinstate a contract that has already been terminated. Any damages or other claims related to this termination must be resolved by the contracting officer and then by the Board of Contract Appeals or the Court of Federal Claims. Similarly, NAID cites to no law that would provide the Court authority to modify the terms of the ongoing contract between NAID and Interior in the manner that NAID demands. The ongoing NAID contract gives Interior the right to terminate under certain circumstances and does not require Interior to renew the contract when it expires. Again, if NAID has any claim whatsoever regarding the operation of this contract it must first pursue a claim with the contracting officer and then proceed to the Board of Contract Appeals or the Court of Federal Claims. There simply is no relief that this Court can give to NAID related to these contracts, and thus, NAID cannot conceivably succeed on the merits.

B. No Irreparable Injury if Injunctive Relief is Denied

If NAID does not get the injunctive relief that it has requested, it can pursue the same remedies that any government contractor has and bring a claim for damages in the appropriate forum. The risk of termination of a government contract and the consequent disruption of the business of the contractor is the risk that any government contractor bears when it enters into its contract. This Court is not the appropriate forum for this contract dispute, and NAID cannot show how it will suffer any irreparable injury if the Court denies its TRO Motion.

C. Granting the Injunctive Relief Would Substantially Harm the Government

If the Court were to order Interior to reinstate the contract that was terminated and somehow modify the terms of the ongoing contract to prevent it from ever expiring, it would

alter the law of government contracts and interfere with the government's ability to enter into contracts in the future. In addition, if Interior is enjoined in the manner requested by NAID, the government will incur costs from any replacement contracts that it will be unable to recoup.

D. Public Interest Is Not Served by Granting Emergency Injunctive Relief

The public interest in predictable government contract rules, including those involving the termination of contracts and the hiring of other contractors to perform the needed work is severely harmed if the draconian injunctive relief requested by NAID were granted here. No public interest is served by forcing the government to enter into contracts that can never expire.

Any public interest in hearing NAID's complaints of government wrongdoing can be served by a proceeding in the appropriate forum provided by the CDA. Also, if any NAID employee has evidence that is relevant to any issue in this case, the parties can bring the evidence to the Court.

CONCLUSION

For these reasons, NAID's Intervention Motion and TRO Motion should be denied.

Dated: September 5, 2002

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter coming before the Court on third-party Native American Industrial Distributors, Inc.'s ("NAID") (1) Motion for Permissive Intervention and (2) Motion for Temporary Restraining Order, Preliminary and Permanent Injunction, the Court finds that the Motions should be DENIED.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 5, 2002 I served the foregoing *Interior Defendants' Opposition to Third-Party Native American Industrial Distributors, Inc.'s Motion for Permissive Intervention and Motion for Temporary Restraining Order, Preliminary and Permanent Injunction* by facsimile upon:

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Court Monitor
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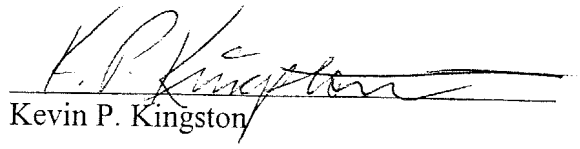

Kevin P. Kingston

Vendor Information

Contract: GS-35F-0264L: Status:.....AWARDED....2001/02

GSA Buyer.....(To be contacted for incorrect information)

Buyer Name:	ANNIEBELL L. PARKER
Buyer Phone:	703/305-5501
Buyer E-Mail:	ANNIEBELL.PARKER@GSA.GOV

Vendor

Name and Address:	NATIVE AMERICAN INDUSTRIAL DISTRIBUTORS, INC.
.	9706 PENNSYLVANIA AVE
.	UPPER MARLBORO, MD 20772-
Business Size:	8A(SBA)
Woman Owned:	No
eMail:	jmeyers@naid.com
Web Site:	http://www.naid.com/
Price List	

Products or Services

- IT Systems Development Services
- IT Systems Analysis Services
- Auto. Info. System Design & Integration
- Other IT Services

Attachment A
Interior Defendants' Opposition to 3rd Party NAID Intervention and Motion for TRO, Restraining Order and Injunction

Solicitation No. FCIS-JB-980001B - Refresh #45

FEDERAL SUPPLY SCHEDULE FOR INFORMATION TECHNOLOGY (IT) HARDWARE, COMMERCIAL INFORMATION TECHNOLOGY (COTS) BUSINESS SOFTWARE AND SERVICES, AND IT CROSS-TO

NOTE 1: THIS IS **REFRESH NUMBER** 34 OF SOLICITATION NUMBER FCIS-JB-980001B. IT IS STILL THE SAME SOLICITATION.

NOTE 2: HARDCOPY RESPONSES TO THIS ELECTRONICALLY AVAILIABLE SOLICITATION, AT A MINIMUM, MUST BE IN A FONT NO SMALLER THAN 10 CPI (characters per inch). REFER TO PARAGRAPH E.4 FOR MORE INFORMATION.

NOTE 3: SALES AND MAINTENANCE SERVICE MUST BE PROVIDED TO, AT A MINIMUM, THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA

CONTRACT PERIOD: Contracts awarded under this standing solicitation will commence on the DATE OF AWARD and end five years from that date (unless contract is canceled/terminated or extended).

ANY INFORMATION THAT MAY BE DESIRED ON THIS PARTICULAR SOLICITATION CAN BE OBTAINED FROM THE ISSUING OFFICE ADDRESS SHOWN HEREIN. THE OFFER SHOULD BE SUBMITTED, IN DUPLICATE, TO THE FOLLOWING ADDRESS:

GSA/FSS
IT ACQUISITION CENTER
SOLICITATION NO. FCIS-JB-980001B
ATTN.: BOOCO, ROOM 1017
1941 JEFFERSON DAVIS HIGHWAY
ARLINGTON, VA 22202

OFFERS MUST BE SIGNED IN BLOCK 30a OF THE STANDARD FORM 1449

Many of the provisions and clauses cited in this solicitation are incorporated by reference to the appropriate section of the Federal Acquisition Regulation (FAR) or the General Services Administration Acquisition Manual (GSAM). A review of these clauses and provisions will be necessary for you to understand all aspects of the solicitation. The full text of any FAR and GSAM clauses which are incorporated by reference in this solicitation may be found in the electronic file titled IBR.DOC or they can be accessed at the following URLs:

FAR: http://www.arnet.gov/far
GSAM: http://www.arnet.gov/GSAM/gsam.html

Copies of FAR may be purchased from: Superintendent of Documents
Government Printing Office (GPO)
Washington, DC 20402

PREPARATION, SUBMISSION, AND NEGOTIATION OF SUBCONTRACTING PLANS (GSAR 552.219-72) (SEP 1999)

(a) An offeror, other than a small business concern, submitting an offer that exceeds $500,000 ($1,000,000 for construction) shall submit a subcontracting plan with its initial offer. The subcontracting plan will be negotiated concurrently with price and any required technical and management proposals, unless the offeror submits a previously-approved commercial products plan.

C.1 CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FAR 52.212-4) (MAY 2001) (TAILORED)

(a) **Inspection/Acceptance.** The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its post acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) **Assignment.** The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (e.g., use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(c) **Changes.** Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) **Disputes.** This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes [DEC 1998], which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) **Definitions.** The clause at FAR 52.202-1, Definitions [MAY 2001], is incorporated herein by reference.

(f) **Excusable delays.** The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) **Invoice.** The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include-

(1) Name and address of the Contractor;
(2) Invoice date;
(3) Contract number, contract line item number and, if applicable, the order number;
(4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
(5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
(6) Terms of any prompt payment discount offered;
(7) Name and address of official to whom payment is to be sent; and
(8) Name, title, and phone number of person to be notified in event of defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) [SEE C.2] and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Contractors are encouraged to assign an identification number to each invoice.

(h) **Patent indemnity.** The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) **Payment.** Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. If the Government makes payment by Electronic Funds Transfer (EFT), see 52.212-5(b) [SEE D.1] for the appropriate EFT clause. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(j) **Risk of loss.** Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) **Taxes.** The contract price excludes all State and local taxes levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract. The Contractor shall state separately on its invoices taxes excluded from the contract price, and the Government agrees either to pay the amount of the taxes to the Contractor or provide evidence necessary to sustain an exemption. See FAR clauses 52.229-1 State and Local Taxes [SEE C.2]; 52.229-3 Federal, State, and Local Taxes [SEE C.2]; and 52.229-5 Taxes—Contracts Performed in U.S. Possessions or Puerto Rico [SEE C.2] which are incorporated by reference.

(l) **Termination for the Government's convenience.** The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) **Termination for cause.** The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) **Title.** Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) **Warranty.** The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.