

JAMCO CONSTRUCTORS, INC

CONTRACT NO. V501 C-339

VABCA 3271 & 3516T

VA MEDICAL CENTER  
ALBUQUERQUE, NEW MEXICO

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#### OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

In VABCA No. 3271, Jamco Constructors, Inc. (Jamco or Contractor) appeals the default termination of its contract with the Department of the Veterans Affairs (VA or Government) for an "OPERATING ROOM EXPANSION" at the VA Medical Center in Albuquerque, New Mexico. In a companion case, VABCA-3516T, the Contractor seeks convenience termination costs. Should the termination for default be converted to one of convenience, the parties have stipulated that the quantum is \$60,004. (Tr. 3)

Appellant argues that any failure to complete the work by the adjusted Contract completion date should be excused, primarily because of the Government's refusal to permit construction to begin prior to completion of the submittal process. Irrespective of excusable delay, Jamco also argues that the termination for default was an "abuse of discretion" because the VA was "relying on erroneous information" when it made its decision.

The record in these appeals consists of the Appeal file in VABCA- 3271 as supplemented (R4, tabs 1-49), the Appeal File in 3516T (3516T R4, tabs 1-18), and a transcript of a hearing held in Albuquerque (Tr. 1-408) together with exhibits introduced by the parties (Exhs. A-1 to A-13; G-1 to G-3; and B-1 to B-15). Both parties have filed post hearing briefs.

#### FINDINGS OF FACT

On June 30, 1989, the VA Medical Center in Albuquerque, New Mexico issued Solicitation No. IFB 501-50-89 requesting bids on or before August 1, for a project entitled "OPERATING ROOM EXPANSION," which was described in GENERAL REQUIREMENTS SECTION (01010) 1.2 as follows:

Work includes removal of flooring, ceilings, architectural specialties and selected other items. New Construction consists of new HVAC, plumbing and medical gas systems, including chiller and air cooled condenser, lights, surgical lights,

surgical facility boom(big reach) units, new power outlets, flooring, ceilings, painting, and other items identified within the construction documents.

(R4, tab 23)

The contract was estimated by the VA to cost between \$500,000 and \$1,000,000. GENERAL REQUIREMENTS Section 1.4, Operations and Storage Areas, provided for phasing requirements in paragraph G as follows:

Phasing: To insure such executions, Contractor shall furnish the Resident Engineer with a schedule of approximate phasing dates on which the Contractor intends to accomplish work in each specific area of the site, building or portion thereof. In addition, Contractor shall notify the Resident Engineer two weeks in advance of the proposed date of starting work in each specific area of site, building or portion thereof. The submittal process must be completed prior to the start of construction. Arrange such phasing dates to insure accomplishment of this work in successive phases mutually agreeable to Medical Center Director, Resident Engineer and Contractor as follows:

PHASE I SUBMITTALS

PHASE II----PHASE I CONSTRUCTION

PHASE III----PHASE II CONSTRUCTION

(emphasis added)

On July 26, 1989, the VA issued Amendment #1 to the IFB which extended the bid date to August 11, added certain new provisions, and provided copies of answers to questions posed by a prospective bidder. (3516T R4, tab 1) This amendment, which was received by the Contractor prior to bid, added provisions at the end of GENERAL REQUIREMENTS Section 1.4.G., quoted above, which defined Phase II construction as that shown on the drawings as "Area A" and Phase III construction as that listed on the drawings as "Areas B C & D." It further provided that the installation of the Chiller and Condenser "outside of the immediate area" of the above listed Areas, was to be "independent of all Phasing except . . . 'Phase I----Submittals' shall be completed before any work on the following phases starts." The amendment further provided that all work in phase II "shall be completed including final inspection and punch list items before the next phase [III] will be allowed to start."

Attached to the Amendment were the questions submitted by a prospective bidder and VA's responses thereto. Question 2.A. asked the VA to define the areas of work for the various phases which prompted the amendment outlined above. Question 2.B. asked if Phase I could "be accomplished while Phase II and III are in Progress?"

The VA's written response was: No, Phase I must be completed before Phase II can start and Phase II must be completed before Phase III can start.

(3516T R4, tab 1)

The IFB provided that the contract was to be completed within 180 days of the Notice to Proceed. Amendment #1 also added a liquidated damages provision of "\$700 for each day of delay" beyond the contract completion date, utilizing standard language found in Federal Acquisition Regulation (FAR) section 52.215-5.

At bid opening conducted on August 11, 1989, Jamco was determined to be the low bidder. On September 27, 1989, Bruce Johnson, who had just arrived at Albuquerque to begin his first assignment following completion of the contracting officer training program, notified Jamco that the VA had awarded the firm the Contract in the amount of \$598,700. (R4, tab 3; tr. 353) At the time of Contract award, Jamco was performing two other contracts at the Albuquerque VAMC. One contract for approximately \$500,000 involved the installation of a Magnetoencephalography (MEG) unit in the radiology area of the hospital. (Tr. 77) The other involved the installation of a new emergency generator exhaust. Neither contract involved working in areas where there were surgical procedures or critical patients. (Tr. 183-84; 238-40)

The Contract specifications for the Operating Room Expansion contained the usual provisions found in VA construction contracts, as provided by Federal Acquisition Regulation (FAR), 48 CFR Part 52, and as supplemented by VA Acquisition Regulation (VAAR) in Part 852. Included in the GENERAL CONDITIONS Section (01001) is clause 1.43, MATERIAL AND WORKMANSHIP (F[AR] 52.236-5) (APR 1984) which provides, in pertinent part:

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work . . . When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work . . . Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection. (emphasis added)

Also included in the GENERAL CONDITIONS is clause 1.51, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FAR 52.236-21 (APR 1984)) which provides in paragraph (e), with respect to shop drawings that are required to be submitted by a Contractor, that:

The Contracting Officer will indicate an approval of [sic, or] disapproval of the shop drawings and if not approved as submitted shall indicate the Government's reasons therefor. *Any work done before such approval shall be at the Contractor's*

*risk. (emphasis added)*

A preconstruction conference was held on October 11, at which the Notice to Proceed was issued and received by the Contractor, thus establishing the Contract completion date as April 9, 1990. (R4, tab 6) VA representatives at the meeting included Contracting Officer (CO) Bruce Johnson, Michael McQuade, the Contracting Officer's Technical Representative (COTR), and Dr. Fred Bold, anesthesiologist who attended as a representative of the VA surgical team.(3516T R4, tab 4; tr. 260) Jamco's Project Manager, Joe Mullins, attended for the Contractor, as did two representatives from Gardner-Zemke, the mechanical subcontractor. (3516T R4, tab 4)

Mullins had worked in construction since 1964, although the MEG contract and the Operating Room Expansion were his "first federal" government contract projects as a prime contractor. (Tr. 15) He testified that he had worked as a subcontractor on VA contracts on about 5 or 6 previous occasions. (Tr. 76) Asked if his experience was "consistent on those contracts with regard to phasing submittals and demolition," Mullins said it was, explaining:

[D]ue to the Government's lengthy and very detailed submittals, it is not uncommon for us to order materials, and if we feel like those materials meet the specifications/requirements, to release them for shipment *prior to their approval . . .*" (emphasis added)

(Tr. 82)

The Contracting Officer conducted the preconstruction meeting by proceeding through items set forth in a standard form letter prepared several days prior to the conference. (Tr. 355, 370-71) The letter which was then formally transmitted to Jamco by certified mail outlines the "items . . . discussed at the preconstruction meeting." Under "*Responsibilities of the Contractor*," paragraph 3.c. notes that a "cost breakdown was to be submitted . . . within thirty (30) days of receipt of the Acceptance letter," while "detailed and realistic" progress charts were due "within ten (10) calendar days of the Notice to Proceed." Paragraph 3.g. further notes that submittals are to be furnished "timely and in a manner as to not delay timely completion of the project."

Although he made no notes of the meeting, CO Johnson testified that here called it was "stressed very strenuously that we need the submittals . . . before the construction started." Johnson said he knew it "was a very tight schedule" and, that it would take an "extreme amount of coordination to accomplish disposition" of a contract involving an operating suite. He asked Project Manager Mullins at the preconstruction conference "if this was going to be a problem with the contract and his reply was 'no.'" (Tr. 360)

In advance of the preconstruction meeting, COTR Michael McQuade had also prepared a letter to Jamco which dealt with many of the areas covered by the Contracting Officer's letter. (Tr. 269) McQuade, who has a degree in fire protection and safety engineering, was originally employed by the VA in areas unrelated to construction. For only about two years immediately preceding this Contract had he been employed as a VA engineering technician. (Tr. 177-78, 234) During that time he served as a COTR on about 10 projects, although this Contract was the first in which he encountered any

"performance problems." (Tr.235) McQuade also served as COTR on Jamco's generator exhaust project but not on the MEG contract. (Tr. 183-84) During the administration of this Contract McQuade generally prepared Engineering Service's correspondence concerning this Contract for the signature of Ronald Richter, the Chief Engineer.

At the preconstruction conference the COTR went over the points set forth in the letter. Paragraph 6 of the letter concerning submittals "requested that all submittals be assembled into a single package and delivered within 30 days of the notice to proceed." (3516T R4, tab 8) McQuade testified that he informed the Contractor that the VA "would require submittals to be complete before construction could begin," and that Mullins voiced no objection at the meeting to furnishing the submittals within 30 days. (Tr. 181,184)

McQuade also testified that Dr. Bold was concerned that the Contractor understood the necessity of working around medical gas bottles and wanted to "stress the importance of the dust barrier and what procedures would be used in changing out med gas bottles." (Tr. 261) Project Manager Mullins was apprised that because this was a "most sensitive project" in which the Contractor would be "invading the clean areas of a surgical complex . . . [d]ust control was a paramount issue," as were "[n]oise, vibrations, anything that would affect an operation and the performance of surgery." (Tr. 182)

Finally, COTR McQuade's preconstruction conference letter to Jamco provided in paragraph 15 that:

Request for final inspection shall be submitted at least 15 days in advance of the requested date. The 180 day period of construction will include time for correction of final inspection punch list items. (R4, tab 8)

Jamco's proposed Contract Progress Schedule dated October 1, was received by the VA on October 16, 1989. (3516T R4, tab 16) It listed work activities in biweekly intervals. It showed work commencing on October 6, 1989, and completion on April 6, 1990. Under the proposed schedule submittals were to be completed in four weeks, half of them in the first biweekly period ending October 20, and the remainder in the next two week segment ending November 3, 1989. Under the proposed schedule about 20% of the demolition work was also planned to be accomplished in the second biweekly segment ending November 3.

This schedule was rejected by the VA on October 17, with directions to resubmit the plan in weekly rather than biweekly segments and to insert a "15 day time frame . . . at the end of Phase II construction to allow for the punch list." (3516T R4, tab 17) The Contractor was informed that it could not commence work on Phase III until all Phase II construction "including the punch list is 100% complete." Additionally, McQuade directed that Jamco's Progress Schedule be adjusted to reflect another 15 days and the end of the Contract for the "final punch list" of Phase III, erroneously believing that the Contract provisions gave him authority to require such a reserved time period.

At some point a revised schedule was submitted which listed work progress in weekly segments. (3516T R4, tab 18) In dollar value terms, about 44% of the work was assigned

to Phases I and II and 55% to Phase III. Phase I processing time for submittals still showed a four week period, the final 25% of which was scheduled to be completed in the fourth week (October 30-November 3). Week 4 was also shown as the commencement of Phase II (also known as "Phase I Construction"), for which completion was scheduled at the end of Week 14, January 14, 1990). Weeks 15 and 16 were reserved for Phase II punch list work. Phase III work was shown as commencing in Week 17 with completion occurring in week 27 January 29- April 13).

Approximately 10% of the scheduled demolition (a 6 week activity which represented 3.26% of the total project cost) was also shown being accomplished in the same week as the final 25% of the submittals were furnished. Mullins said he planned to begin demolition on Monday, October 30. (Tr.17) But the VA did not permit him to begin the Phase II work on that date because the Phase I submittal process had not been completed. (Tr.119) Jamco's first few submittals had been furnished only days before on October 25 and 26. (3516T R4, tab 5)

On November 14, CO Johnson wrote to Jamco that submittals were not being furnished in a "timely manner." He wrote that of "sixty-six (66) required submittals only eighteen (18) have been submitted with seven (7) of them being rejected." (R4, tab 9) Asserting that if the slow rate of submittals continued the Contractor would be "hard pressed to complete the project on time," he said "no work shall begin until all submittals are approved," and reminded Jamco that the Contract contained a \$700 per day liquidated damages provision. The CO asked Jamco for a "schedule for finishing your submittals and when you plan to start construction." The Contractor made no written response and the Contracting Officer does not recall any verbal response. (Tr. 355-56)

COTR McQuade kept detailed, if not always accurate, records concerning when submittals were made and what actions were taken thereon. As of December 22, his records indicated that approximately half of the required submittals had not been furnished and approved. (3516T R4, tab 5) Notwithstanding that the Phase I submittal process had not been completed, the Contractor was allowed to begin demolition work on December 11, after McQuade, prompted by concerns that the completion date would not be met, recommended that the CO permit Phase II work to commence. (Tr. 22, 188) Demolition thus began 61 days after Notice to Proceed and 42 days after the planned starting date in the Contractor's Construction Schedule.

CO Johnson again wrote to Jamco on December 26, asserting that the Contractor was only 10% complete when it was scheduled to have completed 40.5% of the Contract. The source of these percentage figures is unknown and appears inaccurate. According to information inserted by COTR McQuade onto Jamco's Contract Progress Schedule, the Contractor had, on a dollar value basis, completed 4.2 % of the Contract against a scheduled completion rate of 35% for the week ending December 29, 1989. (3516T R4, tab 18) By comparison, the Contract Progress Report for the period ending December 31, which is based on information supplied by Jamco, shows actual and scheduled completion rates of 6.3% and 35%, respectively. Whatever the correct percentages, the disparity between actual and planned was sufficient to cause the Contracting Officer to direct the Contractor to "accelerate your work force to assure completion as scheduled." (R4, tab 10)

Jamco made no written response to CO Johnson's direction to accelerate, although Project Manager Mullins recalled talking to the Contracting Officer and explaining that "we had all the people on the job that could safely work in that small area during demolition." The CO responded that he needed to "get a new schedule." Mullins, noting that Phase II work commenced on December 11, instead of October 30, asked if he could "revise our schedule and show this as lost time and push it out." (Tr. 26) When told no, he responded that without a time adjustment anything he prepared would be "an unrealistic schedule and I don't know how to do it." (Tr. 400-01) The actual time for demolition took 6 weeks which was what Jamco had scheduled in its Contract Progress Schedule. (3516T R4, tab 18)

In a January 10, 1980 memorandum to the Contracting Officer, Chief Engineer Ronald Richter expressed his concern that the Contract would not be completed on time. He said that a number of submittals had not been received and that of those 63 submittals that had been received, there was a "19~ rejection ratio." Although observing that the Contractor had been permitted to begin Phase II demolition prior to completion of the Phase I submittal process, he said it did "not seem likely that the Contract will be completed on time." Instead of the originally scheduled April 9, 1990 completion date, he believed that the Contract would not be finished until September 12, 1990, 156 days late. The Board is unable to determine the method by which this estimate was made or its reasonableness. If such an estimate were correct, it would mean that Jamco would be facing liquidated damages in the amount of \$109,200. (R4, tab 11)

On January 26, CO Johnson wrote to Jamco noting that there had been no response to his letter directing acceleration of work. He said he was "enclosing a list of submittals . . . that have not been submitted or need to be resubmitted." He concluded his letter by stating:

Since you are about 2696 behind schedule and the contract completion date is still April 9, 1990 please prepare a updated progress schedule on how you intend to meet this deadline and submit it to me for approval.

(R4, tab 12)

No revised progress schedule was furnished. (Tr. 382) However, Jamco did respond on February 6, the day actual new construction under Phase II began, concerning VA's list of items that had not yet been submitted for approval. The Contractor listed 12 of the Contract's boiler plate specification sections for which, contrary to the Contracting Officer's assertion, it claimed no submittals were required under the VA's construction plan. (R4, tab 13) This list was reviewed by the VA's Architect-Engineer who concurred with the Contractor's position with respect to 8 of those 12 items. (R4, tab 14)

As work progressed during January and February, a number of changes were ordered by the VA. Supplemental Agreement (SA) #1, resulting from a proposal submitted by Jamco on January 5, deleted the requirement for new fixed windows and allowed the reuse of existing windows. The Government accepted the Contractor's credit proposal of \$2,810.31 with no change in time. (3516T R4, tab 6) SA # 2, involving extra concrete work and the construction of a new stud wall increased the Contract price by \$1,376.33

and granted a 7 day extension as requested by the Contractor's January 24, 1990 proposal. The Supplemental Agreement was signed by both parties in early February and contains the following clause:

RELEASE OF CLAIMS: This change [which] represents full and final compensation for money and time hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to such facts or circumstances giving rise to the "Proposal for Adjustment" for this change in work.

(3516T R4, tab 7)

Efforts to level the existing floor of the new anesthesia area encountered difficulties requiring "removal of the areas of concrete which are too high." (3516T R4, tab 8) Jamco, in a January 29 proposal, requested \$6,116.36 to do the work and noted that "three (3) days time for this is probably the minimum required." The Contractor sought a Contract extension of 10 days "[d]ue to the time already passed to determine the method and cost to accomplish this change." The Chief Engineer recommended \$4,633.50 which the Contracting Officer adopted together with a 10 day Contract extension. SA # 3, which was executed by the parties on February 23, contained the RELEASE clause quoted above. Subsequently, SA # 6 increased the compensation for the SA # 3 change work by another \$420.49. (3516T R4, tab 11)

The Contract called for the relocation of existing duct boxes which would have required shutting down the operating room. To avoid this shutdown, the VA requested on January 3, a proposal for installation of three new duct boxes in the Anesthesia Workroom. On January 30, Jamco requested \$4,782.42 for this changed work which represented its mechanical subcontractor's proposal with general contractor markup. (3516T R4, tab 9) Gardner-Zemke's proposal only equipment cost and no additional labor costs or time required to accomplish the change. It did inform Jamco that delivery of the units would occur three weeks after the subcontractor was told to order the units. In its proposal to the VA, Jamco had said that the change would "require a 28 day time extension to accomplish the work." The Chief Engineer in a memorandum to the Contracting Officer recommended approval of the requested cost increase but advised that no additional days be given because "there is no additional work involved, only are scheduling of work that would have to be performed." SA #4, signed by the parties on February 20 increased the Contract by the requested \$4,782.42 and provided that "[t]here is no time extension warranted for this change." The standard RELEASE clause language was also included. Questioned at the hearing, COTR McQuade conceded that this change involved "more labor than what was originally planned." (Tr. 214) He was unable to recall why he had not recommended a time extension. (Tr. 306-07)

SA # 5 covered additional valves and zone valves desired by the VA and contained the standard RELEASE clause language. On February 5, 1990, Jamco had forwarded the proposal of Gardner-Zemke, to which it had added a standard markup, requesting \$2,989.44. The mechanical subcontractor had indicated in its proposal to Jamco that the work would require 5.3 man-hours for which it was seeking "zero days for performing

the additional work." In submitting the proposal to the VA, however, Jamco stated that it would "require ten additional days to the contract time to accomplish this work." (3516T R4, tab10) In a February 7 internal memorandum to the Contracting Officer recommending acceptance of the proposal, the Chief Engineer stated that "[t]en(10) additional days will be required for the completion of this work. This time will cover ALL TIME LOST TO DATE through the request of the VA." SA # 5, itself, however, makes no reference to VA work stoppages, and simply states that there will be a "time extension of ten (10) days to accomplish this work."

COTR McQuade testified that he had requested the Contractor to include in its proposal the time lost to date due to various occasions when the VA would not permit Jamco to work. (Tr. 215) Early in the Contract he had asked Jamco to keep a daily log of when it "was shutdown at the request of the hospital" so that when there were "an appropriate number of days, we would make an adjustment by supplemental agreement or time extension, which we did." (Tr. 204) In this connection, the daily logs indicate that on December 18, 1989, demolition work was shut down at 2:30 p.m. because of excessive dust arising from the Contractor's trash chute. (3516T R4, tab 15) Shifting winds which operated in a "vortex fashion" lead the VA to "shut him down until we could wet down this pile of dirt." (Tr. 203) Eight hours were lost on January 2, 1990, and 5 hours on January 5, due to heart surgery. Another 8 hours were lost on January 20, because of eye surgery. Surgery again resulted in approximately 6 hours lost on January 22, 8 hours on January 24, and approximately 2 hours on February 3.(3516T R4, tab 15)

Additional time was granted for "work stoppage" in SA # 7 which was issued in early May. Previously, on March 27, the VA had requested a proposal from Jamco to substitute a gypsum wall board system for the specified lathing and plastering. Jamco's proposal was for a net credit of \$295.40with no reference to time. The Contracting Officer accepted Jamco's credit proposal and additionally granted an 8 day time extension "for work stoppage caused by Government requests . . . for delays from February 7, 1990 to May 2, 1990."(3516T R4, tab 12) How these delays were calculated is not known with precision, although the daily logs do show work stoppages of approximately 7hours on March 5, 2 hours on March 16, and nearly 7 hours on March 26, 1990 (3516T R4, tab 15) The time extension granted by SA # 7 adjusted the Contract completion date to May 14, 1990.

SA # 8, increasing the Contract by \$945.96 and extending the Contract performance period by seven days to May 21, was proposed by the Government in mid-May but returned by Jamco unsigned on May 31. This change originated in a March 30 proposal from the Chief, Anesthesia Section to remove counters and cabinets in the Anesthesia Workroom and replace them with shelving and C-lockers. Jamco responded on April 9, with a \$568.79 proposal principally composed of material costs together with 6 hours of labor costs. In its proposal Jamco said that it would need an "additional 14 days to the Contract time to complete this change." (3516T R4, tab 13) In its recommendation to the Contracting Officer dated April 11, the Engineering Service approved the proposed costs but said that only 7 days would be required to complete the work. (Tr. 219) The daily logs indicate that work on the change order encompassed by SA #7 occurred on April 11, 12, 13, and 14. The change order was completed when the C rails were installed April 25.

In Jamco's May 31 letter refusing to sign the Supplemental Agreement, the Contractor

claimed--apparently for the first time--that it was entitled to "extended overhead" in the daily amount of \$266.95. It noted "[i]n addition . . . our change proposal requested 14 additional days and the Modification has only 7 days." At the hearing, Guy Hankins, vice president of Jamco testified that he had requested 14 days because it was "going to take us ten days to get this rail locker and . . . [i]t's going to take 14 days to get it all done." (Tr. 153) He claimed VA officials had verbally agreed to give him the 14 days he sought. (Tr. 90) Asked if it was his current position that Contract performance as a whole was extended by 14 days as a result of the change, Hankins was less positive, stating " I don't know without sitting down and doing a critical path." (Tr. 152) He added:

[W]e don't have a job on critical path. If I could do a critical path I could see if it would fit in and it would push it out or wouldn't push it out. If it's not critical then it wouldn't push it out.

(Tr. 154)

As Contract performance proceeded, VA officials continued to be concerned about the lack of progress. Each VA Contract Progress Report for the months ending October 1989 through April 1990 listed the work progress as "Unsatisfactory." (Exh. A-3 through A-9) The Progress Report for the month of February 1990 which followed the Contracting Officer's January 26 direction to "accelerate," listed a completion rate 36% against a scheduled rate of 60.3% . While the report noted that "[w]ork has picked up over the past month" it predicted that the Contract would not be completed prior to August 3. (Exh. A-7) The Progress Report for the month of March showed actual/scheduled completion rates of 51.4%/90% and estimated final completion in "mid September." (Exh. A-8)

The Progress Report for the month of April showed an adjusted Contract completion date of May 1 and a September 15 estimated Contract completion date. (Exh. A-9) The VA report stated that the Contractor had earned \$432,990 of an adjusted Contract price of \$610,064. Jamco was thus 71% complete at a time when it should have finished the job. Notwithstanding the 71% figure listed under "Actual Percent Completion," the COTR under the remarks section asserted that the Contract was "only 51% complete." This figure was apparently arrived at by deleting costs for "Unused Materials Previously Paid For" from the calculations. It should be noted that a comparison of "Work in Place" (\$333,800) with the "Current Contract Amount" (\$610,065), which excludes material paid for but not installed, actually produces a 54.8% completion rate.

As part of the Progress Report, the Chief Engineer asserted that material was "slow in getting to the job site," that "labor is insufficient to perform this job," and that the job was "poorly organized and managed." McQuade testified that "he would inform Jamco's job superintendent on a regular basis" that there was insufficient manpower devoted to the project.

CO Bruce Johnson said he had "intensive extensive" discussions with VA attorneys and engineering personnel over what course of action to take. (Tr. 362) Among the options considered were "assessing liquidated damages . . . terminating for convenience at the time the Contractor completed . . . Phase I construction [Phase II] and/or termination for default." (Tr. 358) He said he was concerned that:

if we assessed liquidated damages against the Contractor that by the time he ran out of money which would have been probably, been half through the period of time into the project that he would simply walk off.

(Tr. 358)

He informed Jamco's surety that he was considering default and that he had "written several letters . . . that there had not been any response." (Tr. 362)

The FAR provisions found in 48 C.F.R. Part 49.402-3, PROCEDURE FOR DEFAULT provide in subsection (f) that:

The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

- (1) The terms of the contract and applicable laws and regulations.
- (2) The specific failure of the contractor and the excuses for the failure.
- (3) The availability of the supplies or services from other sources.
- (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
- (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
- (6) The eff