

INCORE, INC.

CONTRACT NO. V101DC0149

DALLAS-FORT WORTH NATIONAL
CEMETERY
DALLAS, TEXAS

VABCA-6305, 6345,
6918, 6944-6949,
6954

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**PREHEARING ORDER
AND
ORDER OF DISMISSAL**

In a telephonic PREHEARING CONFERENCE convened by the Board on March 6, 2003 and attended by counsel for both parties, the date for the hearing in these appeals was established and other matters pertaining to these proceedings resolved. In the PREHEARING CONFERENCE, the Board explained that it would issue a comprehensive PREHEARING ORDER to schedule events leading to the commencement of the hearing on September 9, 2003. The instructions in this ORDER are designed to insure that necessary prehearing actions are accomplished in a timely fashion and this ORDER supersedes any previous PREHEARING ORDER. Except as provided otherwise in this ORDER, the Board's SCHEDULING ORDER remains in effect.

The appeal in VABCA-6345 involves additional contract performance time and delay costs relating to FCO 1B/Koch Gas Line. In its COMPLAINT in the appeals in VABCA-6948 and 6949, Appellant represents that the appeals in VABCA-6948 and 6949, involving comprehensive delay and delay cost claims, "supersedes and revises" delay claims relating to FCO-1B as presented in VABCA 6345. Consequently, the Appeal of Incore, Inc., under Contract No. V101DC0149, VABCA-6345, is hereby **DISMISSED** as moot.

The appeal in VABCA-6918 is from a Contracting Officer's final decision denying Appellant's claims for overtime costs and the appeals in VABCA-6944, 6945,

6946, and 6947 are from the deemed denial of claims for the direct costs of alleged contract changes. Since the disposition of the appeals in VABCA-6305, VABCA-6948, VABCA-6949, and VABCA-6954 relating to claims for Delay and Delay Costs may be determinative of the appeals in VABCA-6918, (Overtime), VABCA-6944 (Loop Bridge), VABCA-6945 (Concrete Grade Beam), VABCA-6946 (Extra Drilling Costs) and VABCA-6947 (Additional Water Injection). Since the disposition of the appeals in VABCA 6305, 6948, 6949 and 6954 will not be reached for an inordinate length of time, the Board and the parties are in agreement that no purpose is served by keeping the appeals in VABCA-6918, 6944, 6945, 6946, and 6947 on the active docket. Accordingly, pursuant to Rule 30, the appeals of Incore, Inc. in VABCA-6918, VABCA-6944, VABCA-6945, VABCA-6946, and VABCA-6947 under Contract No. V101DC0149 are hereby **DISMISSED WITHOUT PREJUDICE**. Unless the Board or either party takes action within three years to reinstate these appeals, the dismissal shall be deemed to be with prejudice without further notice from the Board.

With the above actions, the scope of the hearing will encompass VABCA-6305 (Termination for Default), VABCA-6948, 6949 (Equitable Adjustment Claims for Delay and Delay Costs) and VABCA-6954 (Zachary Equitable Adjustment Claims for Delay and Delay Costs).

The Government has not yet filed its ANSWERS in the Appeals in VABCA-6948, 6949 and 6954. The ANSWERS in these appeals shall be filed on or before, *Friday, March 28, 2003*.

INSTRUCTIONS FOR PREHEARING ACTIONS

A. *Discovery*

- (1) The last day for submission of discovery requests in these appeals shall be *Friday, April 25, 2003*.
- (2) No extension to the discovery cut-off date set forth above will be granted except for good cause shown. If such extension is desired, the party desiring the extension should make application to the Board after notice to the other party stating the extent of the discovery requested and a schedule for accomplishing such discovery.
- (3) The Board refers the parties to the Board's Rules 14 and 15 and the SCHEDULING ORDER with respect to the parties' conduct of discovery.
- (4) If a subpoena will be necessary for discovery, any request for subpoena must be filed with the Board on or before *Friday, March 21, 2003*. The Board directs the parties' attention to Rule 21 (C) with regard to requests for subpoenas.

B. *Appeal File Documents*

- (1) Supplements to the Consolidated Appeal File by either party may be submitted to the Board and to the other party until *Friday, June 27, 2003*. Any objections, pursuant to Rule 4, to such supplements must be received by the Board and the other party by *Friday, July 11, 2003*. The Board notes that the Government has not yet filed its submission to the Consolidated Appeal File in the Appeals in VABCA-6948, VABCA-6949, and 6954; those submissions shall be filed on or before *Friday, March 28, 2003*.
- (2) The Appeal File, as indicated in the attached, revised Appeal File Index currently consists of 981 tabbed exhibits any additions to the Consolidated Appeal File shall begin with Exhibit Number 982 and the parties shall coordinate their Appeal File supplements to insure proper consecutive numbering of exhibits. Appeal File submissions should include a disc capable of being read by Microsoft Word containing the index of the additional submissions.

(3) As provided by Rule 4, Appeal File documents objected to will be removed from the Appeal File subject to reintroduction as hearing exhibits. Appeal File documents not objected to will be considered part of the formal record.

(4) The Board does not expect trivial or merely technical objections with respect to the admissibility of Appeal File documents.

C. *Joint Comprehensive Prehearing Statement of Facts*

(1) The Parties shall confer for the purpose of preparing a JOINT COMPREHENSIVE PREHEARING STATEMENT OF FACTS.

(2) The JOINT COMPREHENSIVE PREHEARING STATEMENT OF FACTS shall set forth, in separately numbered paragraphs, all facts that the parties believe are necessary to the resolution of these appeals. The statement shall include both the controverted and uncontroverted facts; paragraphs consisting of uncontroverted facts shall be identified by an asterisk. Paragraphs containing a controverted or denied fact shall be annotated with a parenthetical reference to the Appeal File, proposed witnesses, and/or exhibits to be offered in support of the controverted facts.

(3) The Board will consider the uncontroverted facts as STIPULATIONS OF FACT and will enter such stipulations into the record as a JOINT EXHIBIT at the beginning of the hearing.

(4) The JOINT COMPREHENSIVE PREHEARING STATEMENT OF FACTS shall be submitted to the Board on or before *Friday, August 1, 2003*.

(5) It is the expectation of the Board that only evidence directed toward a controverted or denied fact may be admitted at the hearing. Evidence concerning uncontroverted facts will not be heard unless the Board, at its discretion, calls for such information. In addition, the Board, except for good cause shown, will not hear evidence on any fact or issue not contained in the JOINT COMPREHENSIVE PREHEARING STATEMENT OF FACTS.

(6) As discussed in the PREHEARING CONFERENCE, the Board expects the parties to confer for the purposes of having their respective scheduling consultants meet for the purpose of attempting to reach agreement on the

date of inception of a change or delaying event, fragnets relating to those events or changes and activity time on those events for insertion into the approved Day-1 schedule and the schedule resulting from the NAS computerized run utilizing the agreed upon fragnets. The Board's intent in this regard is to attempt to have stipulated NAS Schedule to be used in the disposition of the appeals within the scope of the hearing.

D. *Quantum*

(1) The Board will decide issues of both entitlement and quantum in these appeals. The parties are directed to confer for the purposes of attempting to reach an agreement to permit the parties to stipulate to the quantum amount.

(2) These appeals involve claims by the Appellant. Therefore, the instructions pertaining to submission of schedules of costs pertain to Appellant's claim.

(3) In the absence of an agreement stipulating quantum, it is necessary that each Appellant's quantum claim and the Government's response thereto and the bases for each be set forth in an easily understandable format. The instructions below apply only if the parties are unable to stipulate to the quantum amount.

(4) On or before *Friday, July 18, 2003*, Appellant shall furnish the Board and the Government a detailed breakdown of its claimed costs in schedule form ("SCHEDULE OF COSTS") and the identification of the particular books, records, accounting data, accounting or cost principles, or other documents relied upon to establish the amount of its claim.

(5) On or before *Friday, August 1, 2003*, the Government shall furnish the Board and the Appellant its response to Appellant's SCHEDULE OF COSTS. If the Government verifies any items or figures in the SCHEDULE OF COSTS, it shall so report in its response. Such a report, unless otherwise admitted or stipulated to, shall not be deemed an admission by the party of anything more than the accuracy of the SCHEDULE OF COSTS as reflecting the contents of books and records and the allocations and computations based thereon. If the Government fails to verify any of the items in the SCHEDULE OF COSTS, the party's response shall specify each such item to

which it takes exception with a complete explanation of the reason for such exception. In the case where the Government proposes alternate amounts, it shall submit an ALTERNATE SCHEDULE OF COSTS for such items in the same manner as prescribed for the SCHEDULE OF COSTS in (4) above. A party shall be deemed to have waived challenge to the accuracy of all items in the SCHEDULE OF COSTS that are not specified in its response as the subject of exceptions.

E. *Exhibit List*

(1) On or before *Friday, August 8, 2003*, each party shall serve upon the other party copies of all documents that it intends to offer into evidence at the hearing, together with a list of any physical exhibits to be offered. The Board should be provided with a copy of the forwarding letter and a list of exhibits; the Board's copy of the exhibits should be retained for submission at the hearing.

(2) It would be helpful if the proposed documentary exhibits are arranged in either a chronological or subject matter sequence, numbered (A-1, A-2, etc. for the Appellant, G-1, G-2, etc. for the Government) tabbed, indexed, and bound in some easily usable fashion; exhibits will not be provided to the Board in three ring binders. Provision should be made for photographing or reducing outsize or physical exhibits for easy retention by the Board in the record. Exhibit pages shall be "Bates" stamped or otherwise numbered in those exhibits with multiple pages.

(3) Each party shall prepare a hearing exhibit consisting of the *curricula vitae* of each of its fact witnesses.

(4) Each party shall provide the other party and the Board with any unresolved objections to the admissibility of any exhibit to be offered by the other party by *Friday, August 22, 2003*.

(5) Any documents not exchanged or other exhibits not listed will not be received into evidence unless good cause is shown for the failure to exchange or list them.

(6) Any exhibits listed and not objected to will be admitted into the record at the beginning of the hearing.

(7) Each party will be limited to a total of 25 hearing exhibits (not including witness' *curricula vitae*); except for good cause shown, the Board, after a party has introduced 25 exhibits into evidence at the hearing, will not allow entry by that party of any further exhibits into evidence.

F. *Witness List*

(1) On or before *Friday, August 8, 2003*, each party shall send the other party and the Board, a list of witnesses it intends to call at the hearing. Include for each witness so listed: a) his or her position at the time of the events in the dispute; b) a brief summary of the subject matter of his or her testimony; and, c) an estimate of the time required for his or her testimony (including cross-examination). This requirement does not apply to witnesses who are to be called solely for the purpose of impeachment or rebuttal.

(2) If a party intends to offer the testimony of an expert witness, such witness shall be identified to the other party by *Friday, March 21, 2003*. If a witness will testify as an independent expert, provide the following information to the other party by *Friday, April 18, 2003*: a) his or her present location; b) any present or past relationship of any kind to the party calling the witness; c) expected duration of the witnesses direct testimony; d) a detailed narrative summary of the witness' planned testimony, including a complete listing of all documents, data, and authorities to be relied upon by the witness in his or her testimony, or, alternatively, submit a complete written statement of the expert's direct testimony to be received into evidence in lieu of direct testimony; and e) a resume or statement of qualifications of each expert witness suitable for introduction into evidence in lieu of direct testimony as to his or her qualifications. If the alternate written statement of the complete testimony of the expert witness is used, the witness, after he or she is sworn at the hearing, may adopt the written statement as his or her testimony, after being given the opportunity to highlight major aspects of his or her expert testimony before cross-examination takes place and the written statement will be received into evidence.

(3) Each party shall provide the other party and the Board with any unresolved objections to the competency or qualifications of the other parties' witnesses by *Friday, August 22, 2003*. Any objection pursuant to

this paragraph includes objections to the qualification of an identified expert witness to testify as an expert; in the absence of such objection, except for good cause shown, the Board will qualify a party's expert and will not permit *voire dire* of an identified expert at the hearing.

(4) Any witness not listed will not be permitted to testify unless good cause is shown for failure to list him or her. The Board will be especially strict if it believes a party is attempting to gain advantage by presenting a surprise witness. It is expected that any witness listed will be present at the hearing; the party listing the witness shall have the obligation to take the necessary steps to insure the witness' presence.

(5) If a subpoena of a witness will be necessary to insure the presence of a witness at the hearing, such request for subpoena must be filed with the Board on or before *Friday, August 1, 2003*. The Board directs the parties' attention to Rule 21 (C) with regard to requests for subpoenas.

(6) As instructed above, each party shall submit a hearing exhibit consisting of the *curricula vitae* of its fact witnesses. It is the Board's expectation that direct testimony relating to a witnesses education, experience, and responsibilities relating to the contract at issue will not be necessary. Cross-examination of fact witnesses relative to their education, experience and responsibilities will be permitted.

G. *Dispositive Motions*

Any motion, the granting of which would be dispositive of all or any part of these appeals, except for jurisdictional motions, will not be considered unless such motion is filed on or before *Friday, June 27, 2003*.

H. *Hearing*

(1) At the PREHEARING CONFERENCE, the Board and the parties set the date for commencement of the hearing as September 9, 2003. The hearing will be conducted in the San Antonio, Texas area. The hearing is currently scheduled for four weeks, September 9-October 3, 2003. The Board will provide the exact location for the hearing at a later date.

(2) In the event of the unexcused absence of a party or its Counsel, the hearing will proceed and the case will be regarded as having been submitted on the record on the part of the absent party.

(3) Each party is expected to present a brief opening statement at the commencement of the hearing. The statement should include identification of the issues, a summary of the facts, which the party intends to prove, identification of the witnesses in the order they will be called and the particular factual matters the party intends to establish by each witness. The statement should include a brief summary of the legal theories of the parties' respective positions. Each party will be allowed 15 minutes to make its opening statement.

(4) Each side may present a closing argument at the conclusion of the hearing in lieu of submitting a posthearing brief. The argument should be a brief analysis of the issues, the evidence, and the law involved in the appeal. Each party should prepare a written list of any cases or other legal precedent to be cited in the closing argument. Copies of the list shall be made available at the hearing to the presiding judge, opposing Counsel, and the court reporter. If a party elects to make a closing argument, the argument will be limited to a maximum of 20 minutes. Any party electing to make a closing argument will not be permitted to submit a posthearing brief.

(5) Any party having special audio-visual or electronic requirements for its trial presentation shall inform the Board of such requirements on or before *Friday, July 11, 2003*

I. *Alternative Dispute Resolution*

(1) The Board directs the parties to continue to confer on whether the use of Alternative Dispute Resolution methods is appropriate for these appeals. If the parties determine to utilize alternative dispute resolution methods, the Board should be informed as soon as possible prior to the date set for hearing.

(2) Substantial discussion concerning the possibility of entering into ADR in an attempt to resolve all or part of the matters in dispute in these appeals took place during the PREHEARING CONFERENCE. The parties

agreed to seriously discuss conducting an ADR proceeding in these appeals. It is the Board's suggestion that the parties seriously consider either formal or informal ADR proceedings to take place no later than June 2003. As discussed, any ADR proceedings will take place in the Board's offices in Washington, D.C. or telephonically. The Board expects the parties to keep the Board informed concerning these efforts.

(3) The Board refers the parties to VA Directive 7433.3, VA Handbook 7433.3 and FAR 33.214. If one party requests the use of ADR and such use is rejected by the other party, the rejecting party shall provide a Board the written reasons for rejection of the use of ADR as provided for in FAR 33.214(4)(b). The Board expects to be provided with a copy of any such request and any reply rejecting the use of ADR.

J. *Conferences*

(1) The Board urges the parties to meet or converse to clarify issues, exchange information, develop stipulations, agree on scheduling, and to discuss settlement.

(2) Either party may request a conference of both parties with the Board, to be held in person or by telephone, as determined by the Board, if the parties consider it would help resolve preliminary matters. The Board may also schedule conferences on its own motion when it determines they may be beneficial.

(3) The Board will convene a final telephonic PREHEARING CONFERENCE at 11:00 AM, Eastern Time, *Wednesday, August 27, 2003*.

The Board considers the schedule established in this ORDER to be firm. Extensions or changes in the schedule will be made only upon good cause. A party wishing to change the schedule or otherwise amend this ORDER shall consult with opposing counsel before submitting a written request to the Board for such change. Any such request shall include the reasons for the request, and whether the opposing counsel concurs or objects to the request. A copy of the written request shall also be provided to the opposing counsel. The parties shall

continue submit JOINT STATUS REPORTS, *Friday, April 4, 2003* every thirty days thereafter. In the JOINT STATUS REPORTS, the parties shall report on their efforts to comply with this ORDER and any other issues that may arise relative to this appeal.

IT IS SO ORDERED

DATE: March 12, 2003

RICHARD W. KREMPASKY
Administrative Judge