V & W CONSTRUCTION & SERVICES CO.,	)	**AGBCA No. 2003-147-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Willie Woulard, President	)	
V&W Construction & Services, Co.	)	
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Moss Point, Mississippi 39563	)	
	)	
Representing the Government:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

July 6, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On January 31, 2003, the Board received and docketed this appeal from V & W Construction & Services Co., of Moss Point, Mississippi (contractor), concerning a contract, No. 50-4568-01-0029, with the respondent, the U.S. Department of Agriculture, Forest Service (Government). The contractor was obligated to renovate and make an addition to an existing dormitory building at the Coweeta Lab, Macon County, North Carolina. The contractor here appeals the termination for default of its contract, which occurred after the bilaterally extended contract completion date had passed with performance incomplete.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). A hearing on the merits was held on March 29, 2004, with the transcript supplementing the documentary and other evidence (the appeal file and exhibits). Each party submitted a post-hearing brief.

The Board makes a de novo determination as to whether or not there existed a valid basis in support of the termination for default, and whether or not the default is excusable. Initially, the Government bears the burden of proof regarding a termination for default. After the initial completion date had passed, with work incomplete, the Government and contractor entered a bilateral contract modification establishing a new completion date. The contractor did not complete performance within the agreed-upon extended performance period. After considering responses to a cure notice and a show cause notice, with performance unfinished, the Government issued a termination for default. The Board finds and concludes that the contractor was in default, the performance period had passed with performance incomplete. Moreover, the Government considered and reasonably concluded that the contractor failed to demonstrate that it could complete performance within an acceptable period.

The contractor bears the burden of establishing that the default was excusable. The contractor has not met that burden. The contractor mistakenly attempts to provide an excuse because of the actions and inactions of its subcontractor. However, the alleged delays and poor performance of the subcontractor do not constitute excusable bases for default under the clause. The contractor claims interference by the Government in making inadequate and excessive progress payments and progress payments for work which was ultimately deemed unacceptable. Initial delays in payment by the Government were overcome by a double payment, such that progress payments exceeded the amount to which the contractor was entitled. The Government payments did not relieve or alter the contractor's obligations to perform within the contract period while providing contract-compliant work. The contractor has not established that any action or inaction by the Government caused (or was a factor in) the contractor's failure to perform. The contractor has not demonstrated the existence of a basis to excuse its failure to perform in accordance with the contract, as modified.

Because the contractor was in default and the contractor has failed to substantiate a basis that would excuse the default, the Board upholds the termination for default and denies the appeal.

FINDINGS OF FACT

The Contract

1. The Government issued a solicitation to obtain a contractor to renovate and make an addition to an existing dormitory building at the Coweeta Lab, Macon County, North Carolina (Exhibit 16 at 2).

2. June 28, 2001, is the award date of the contract between the contractor and the Government (Appeal File at 8). As awarded, the contract price was $465,980.00. The solicitation and contract specify that the contractor is to furnish "all equipment, labor, transportation and incidentals necessary to perform the work required in accordance with the terms, conditions, and

specifications of the RFP[1] and resultant contract." (Appeal File at 15.)

3. As specified in the solicitation and contract:

> The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than 180 [calendar days after receiving the notice to proceed.] The time stated for completion shall include final cleanup of the premises.

(Appeal File at 17). The solicitation and contract specify elsewhere that the contractor is required to complete performance within 180 calendar days after receipt of the notice to proceed. The performance period is mandatory. (Exhibit 16 at 2 (¶ 11).) On August 8, 2001, the Government issued the notice to proceed. The notice specifies that the "time on this contract will start at the beginning of business on 8-13-01." (Appeal File at 318.) With a start date of August 13, the completion date became February 8, 2002.

4. As specified in the solicitation, the contract incorporates the Payrolls and Basic Records (FEB 1988) clause, 48 CFR 52.222-8 (Exhibit 16 at 19). The clause specifies that the contractor shall maintain payrolls and basic records, and shall submit weekly a copy of all payrolls to the contracting officer for each week in which contractor work is performed. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. With each submitted payroll, the contractor or subcontractor who supervises the payment of persons employed under the contract shall certify that each laborer or mechanic employed during the payroll period has been paid the full weekly wages earned.

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[1] The reference to an RFP is inaccurate, as the solicitation indicates that the Government conducted a sealed bid procurement (Appeal File at 10, 386-87; Exhibit 16 at 2, 50 (¶ K.6), 65).

5. As specified in the solicitation, the contract incorporates the Payments under Fixed-Price Construction Contracts (MAY 1997) clause, 48 CFR 52.232-5 (Exhibit 16 at 20). In pertinent part, this clause states that the contractor's request for progress payments shall include an itemization of the amounts requested, a listing of the amount included for work performed by each subcontractor, a listing of the total amount of each subcontract, and a listing of the amounts previously paid to each subcontractor (¶ 52.232-5(b)). With each request for progress payments, the contractor must provide a certification (to the best of one's knowledge and belief) that the amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract, and that payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by the certification (¶ 52.232-5(c)). The clause addresses the refund of unearned amounts: "If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract," the contractor shall notify the contracting officer of such performance deficiency and be obligated to pay the Government interest on the unearned amount (¶ 52.232-5(d)). Regarding title, liability, and reservation of rights, the clause dictates:

> All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not be construed as --
>
> (1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or
>
> (2) Waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(¶ 52.232-5(f)).

6. As specified in the solicitation, the contract contains the Default (Fixed-Price Construction) (APR 1984) clause, 48 CFR 52.249-10, which states in pertinent part:

> (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in

this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall

> be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.
>
> (c) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(Appeal File at 20 (Contract, ¶ I.1).)

Performance

7. Work progressed under the contract. The contractor had subcontracted the majority of the work (approximately $400,000 of the original contract price of $465,980) to L&R Contracting, Inc. (subcontractor) (Exhibit 6). Through bilateral contract modifications one through five, with effective dates of and between September 19, 2001, and June 12, 2002, work under the contract was added, deleted, or altered. The contract price increased from the initial award amount of $465,980.00 to $578,823.83. None of these five modifications explicitly addresses a change in the completion date. (Appeal File at 32, 44, 56, 83, 94.) Prior to each modification being issued, the contractor proposed a price; it did not request additional time for performance (Appeal File at 36-43, 49-54, 63-70, 88-89, 97-98).

8. On February 8, 2002, performance was not complete. Although the contractually established completion date passed with much work remaining, before and after the date, the Government continued to deem the work acceptable, without immediately imposing a new completion date. (Appeal File at 468-77, 482-84, 488-507.) However, the Government was concerned with project completion, as indicated in e-mail correspondence from an assistant research scientist to the contracting officer and a Government station engineer. The exchange indicated the expectation that these recently appointed individuals would get the project back on track: "To say that we are frustrated with the progress on the building is an understatement. It is especially disconcerting since the project started off well and was ahead of schedule in September 200[1]." The correspondence highlights areas of concern, one being the completion date: "We are targeting early to mid-June 2002 for a completion date given the information from [the subcontractor/superintendent] and others at yesterday's meeting." (Appeal File at 479.)

9. The parties have not successfully reconciled differences in individual and total amounts said to be invoiced by the contractor or paid by the Government under the contract. (Compare Appeal File at 236-38 with 337-51, 486, and Exhibit 5). (The subcontractor also made unreconciled demands upon the contractor (Appeal File at 197; Exhibits 1, 4).) The Government had problems making payments early in the contract period (late September and October 2001) and it appears that the Government did not make a timely progress payment on an invoice for $85,195.00 (the amount that remained and for which the contractor submitted a separate invoice after the Government indicated that additional support was needed for an invoice totaling $97,855.80, but paid the contractor $12,660.00) (Appeal File at 144, 146-47, 236; Transcript at 73-74, 192). However, the contractor received interest on amounts deemed to be properly invoiced and not timely paid (Appeal File at 337-38). By the contractor's records, the contractor received a double payment on October 25, 2001 (Appeal File at 236; Transcript at 192-93). The two payments are for a single invoice for $85,195.80, with interest added (Appeal File at 338, 341, 347). By the contractor's own reckoning, because of the double payments, it had received greater progress payments than amounts invoiced and due for the period of October 25, 2001, through June 17, 2002 (Appeal File at 237-38).

10. In March and May 2002, the contracting officer notified the contractor of the continuing need to submit certified payrolls under the project on a weekly basis, in accordance with the contract. The contractor had not submitted payrolls for the week beginning February 4, 2002, or for any period thereafter. (Appeal File at 181, 186.) As of July 17, 2002, the contractor had not yet provided the certified payrolls (Appeal File at 227).

11. Throughout May and June 2002, the contractor and the subcontractor were in significant disagreement concerning alleged delays affecting performance and failures of the contractor to timely pay the subcontractor. Both the contractor and subcontractor kept the Government apprised of the disagreements and the threat to continued performance. (Appeal File at 184-85, 188-98, 200, 522, 530). Each claimed to have an original version of the contractor-subcontractor agreement, although the versions differed in significant respects. (Appeal File at 231; Transcript at 213-14.) The subcontractor stopped work in October 2001, December 2001, and June 2002, because it claimed the contractor had failed to provide progress payments due (Appeal File at 150, 152-53, 535). In June 2002, the parties were corresponding regarding checks from the contractor to the subcontractor that had been returned for insufficient funds (Appeal File at 197, 200).

12. As of June 24, 2002, the subcontractor ceased performance on the job, informing the Government that the subcontractor took this action because the contractor had failed to make payments due (Appeal File at 535-38).

13. By letter dated June 30, 2002, the contractor informed the Government: "In view of the delays and receipt of five Modifications to above referenced contract, we have not received any additional days for contract completion. We are requesting an extension for a contract completion date of October 11, 2002." (Appeal File at 199.)

14. On July 1, 2002, the contracting officer spoke with the contractor. The contracting officer and contractor discussed the significance of the situation with the subcontractor. The contractor stated that it would be attempting to resolve issues with the subcontractor. The contracting officer indicated that there would still be a meeting on July 8 "with an agenda that would result in either an agreement to complete the job and resolve the differences between [the contractor and the subcontractor] or that [the contracting officer] would issue [the contractor] a cure notice." On the issue of the requested time extension, the contracting officer indicated that he could not grant the time extension based upon the reasons described in the letter, but the denial would be "pending negotiation of the contributors to the delays." (Appeal File at 539.)

15. On July 8, 2002, the contracting officer held an in-person meeting with other contracting personnel of the Government, the contractor, and its subcontractor. As indicated in minutes of the meeting (Appeal File at 540-42) and supported by tape recordings (Exhibits 11-12), during that meeting, the subcontractor indicated that it would not resume performance. The subcontractor continued to conclude that it was entitled to additional payment from the contractor for work performed. The Government indicated during the meeting that, based upon the information presented, including certified statements from the contractor for progress payments, that the subcontractor would be entitled to additional payment. The contractor acquiesced in some of these conclusions during the meeting. After the subcontractor departed the meeting (after indicating that it would not resume performance), the Government and contractor discussed how to proceed with the contract. The contractor indicated that a new superintendent and a work crew would be on site the following day. The Government informed the contractor that the requested three to four months additional time to complete the project was not acceptable. The contractor agreed to provide to the Government by July 15, 2002, an aggressive

progress schedule and proof of payment for all progress payments received. (Appeal File at 540-42.)

16. Throughout the development of the record and through the hearing on the merits, as indicated in its questioning of witnesses, the contractor was of the view that the contracting officer stated during the meeting that if the contractor did not retain the subcontractor, the contracting officer would issue a termination for default. Only the president and vice president of the contractor testified to such a recollection (Transcript at 179, 197-98). Near the conclusion of the hearing, the contractor introduced a tape recording of portions of the meeting. Neither that tape, which is part of the evidentiary record (Exhibit 11), nor tapes made by the subcontractor of portions of the same meeting (Exhibit 12), support the position of the contractor. Rather, when the contractor specifically questions the contracting officer if a default termination will be issued if the contractor does not retain the subcontractor, the contracting officer replies no. This is twice confirmed later in the meeting, when the contracting officer again responds to and assures the contractor that the only way to avoid a cure notice is to have someone, specifically not limited to the subcontractor, on the job the following day. Moreover, after the subcontractor indicated that it would not resume performance and departed the meeting, the Government continued the meeting with the contractor in an attempt to obtain assurances that the contractor would complete performance (Finding of Fact (FF) 14).

17. In written response to the written request for a contract extension (FF 13), by letter dated July 11, 2002, the Government initially denied the request "until it is determined to what extent [the contractor] has contributed to the delays encountered on this project and receipt of the promised progress schedule on Monday, July 15, 2002." The letter specifies: "You are currently operating under an expired contract completion date and the progress schedule coupled with the determination of time due will allow us to reestablish a new completion date." (Appeal File at 205.)

18. By letter dated July 11, 2002, the contractor put the Government on notice that the contractor understands that its former subcontractor is removing materials from Government property and that the contractor is "holding the Government liable for any materials or supplies removed from government property other than the personal tools of [the subcontractor]" (Appeal File at 208). The Government responded to the concerns of the contractor, explaining that the Government could not verify that it had paid for any of the material said to be removed by the former subcontractor (Appeal File at 215, 217-18, 225). The contractor

has failed to demonstrate on the record that the subcontractor improperly removed any item.

19. By letter dated July 18, 2002, an attorney informed the Government:

> I have been retained by [the contractor] and my purpose in writing is to inform you that my client's subcontract with L&R Contracting has been terminated. It is V&W's intention to complete the remainder of the project in a timely manner and without inconvenience to the Government.
>
> V&W has reason to believe that L&R Contracting has failed to pay one or more of its subcontractors and that the balance in L&R's subcontract will not be sufficient to complete the remaining work and pay the subcontractors in question. Accordingly, any contention of L&R that it is unpaid is disputed and will not constitute a basis for the Government to withhold funds from V&W.

(Appeal File at 230.)

Cure Notice of July 29, 2002 and Subsequent Contract Modification

20. By e-mail dated July 24, 2002, the contracting officer's representative provided the contracting officer with an assessment of the project. The correspondence indicates that although experienced and qualified employees could complete performance by September 27, 2002, the contractor had not so staffed the job. The correspondence identifies examples of the contractor's incorrect performance, misreading of specifications, poor quality control, and the departure of some workers. (Appeal File at 554-55.) The memorandum concludes with the following:

> My evaluation of the situation is that very minimal progress has been made since V&W took over the physical construction of the dorm, and that the completion of this contract in a timely manner and with quality workmanship is not possible with the efforts and progress exhibited thus far by V&W. Can we put V&W on notice to supply an experienced workforce in sufficient numbers to complete the project by the September 27 completion date? If V&W can't do this, I think we should begin default proceedings.

(Appeal File at 556.)

21. The Government provided the contractor with a cure notice dated July 29, 2002. In the notice, the Government states that it deems the contractor's failure to provide a competent superintendent and work crew, as promised during the meeting on July 8, 2002, to be a condition that is endangering performance of the contract. The notice elaborates, regarding incorrect work and an inability to understand contract specifications and drawings, delinquencies by the contractor in failing to provide certified payrolls (despite contract requirements for the same), and the contractor's failure to provide verification of all money received by the Government in connection with the contract (despite promises by the contractor that the verifications would have been provided). The letter concludes with the admonition that unless the conditions are cured within ten days after receipt of the notice, the Government may issue a termination for default. (Appeal File at 233.)

22. By letter dated August 8, 2002, the contractor responded to the cure notice. The contractor identifies its superintendent, specifies that it believes the superintendent and crew are competent, and states that it will increase the manpower at the project. The contractor provides certified payrolls. It also verifies that it has received payments of $495,289.67 from the Government on this project, and provides its ledgers reflecting dates, invoices and payments. (Appeal File at 236-38, 240-41.)

23. The parties signed contract modification six, with an effective date of August 20, 2002. The modification specifies: "The purpose of this modification is to extend the current completion date to September 27, 2002 as reflected in the revised progress schedule dated 8/14/02 at no additional cost to either party." (Appeal File at 114.) The record does not demonstrate that the contractor was entitled to a time extension greater than that agreed upon because of the contract modifications, weather, or otherwise.

24. The revised progress schedule, referenced in modification six, identifies by "principal contract feature" a percentage completed (as of July 15, 2002), an "estimated cost," and the month in which the work is to occur (July, August, and/or September), with a stated end of contract date of September 27, 2002 (Appeal File at 359). From this information, one can calculate that contract work valued at approximately $115,154.70 remained unperformed.

Cure Notice of September 6, 2002

25. By letter dated September 6, 2002, the contracting officer provided the contractor with a cure notice. The letter begins:

> You are notified that the Government considers your failure to progress sufficient to meet the September 27, 2002 completion date a condition that is endangering the successful completion of the contract. One electrician with one helper has succeeded in completing an estimated 90% of the rough-in electrical work to date. Site work remaining to be accomplished includes: forming, pouring and finishing concrete sidewalks and steps with handrails; installation of site drainage lines; landscaping and seeding; removal of a septic tank; and construction of two parking areas.

(Appeal File at 271.) The letter continues with an identification of additional contract work which remains to be completed. The letter concludes:

> Therefore, unless within 10 days after receipt of this notice a **DETAILED** plan is submitted as to how the condition will be cured, the plan is determined acceptable by the Contracting Officer and Contracting Officer's Representative and there has been evidence on the job of significant increases in levels of effort sufficient to support the plan that you propose, the Government may terminate for default under the terms and conditions of the FAR 52.249-10, Default (Fixed-Price Construction) (APR 1984) clause of this contract.

(Appeal File at 271.)

26. By letter dated September 17, 2002, the contractor responded to the cure notice, stating in pertinent part:

> Attached you will find a revised contract progress chart reflecting the schedule or plan pursuant to which V&W will accomplish the remaining work. The chart includes all of the work mentioned in your notice and, with the exception of forming, pouring, and finishing concrete sidewalks, steps and handrails, provides for substantial completion by Christmas, barring unforeseen circumstances. Unlike the previous schedule, we believe this reasonable and realistic.

> Additionally, we are confident that you have observed recent significant increases in levels of effort sufficient to support the attached plan.

(Appeal File at 275.)

27. By letter dated September 26, 2002, the Government informed the contractor that the response to the cure notice

> did not provide sufficient and convincing detail to allow the COR [contracting officer's representative] or me [the contracting officer] to make a determination regarding your proposed cure to current contract deficiencies. Furthermore, your modified progress schedule suggests that the Government modify the terms and conditions of the existing contract though you present no offer of consideration or explanation. Finally, as mentioned in the Cure Notice, you were informed that acceptance of your plan to cure the contract deficiencies would be conditioned upon concurrent progress observed in the actual work and work crews noted by the COR on the work site. While the COR noted satisfactory exterior work, the interior progress and levels of effort appear to be insufficient.
>
> Based upon the information that you have furnished to date, the Forest Service is not prepared to agree to your proposed cure to contract deficiencies. A more thorough examination and feedback regarding your proposal will be provided no later than September 30, 2002 via FEDX. Examples of additional information required may include, but are not limited to, the subcontractors you plan to use by company name, description of work crews that each subcontractor will use on the jobsite, and specific dates tied to a revised schedule of values with milestones that correspond to percentages of work completed. Without additional information, a contract modification with clearly described performance conditions and consistent progress on both the interior and exterior work, the Forest Service will not be prepared to accept your proposed cure to the contract deficiencies.
>
> The Forest Service reserves its rights under the clause in the contract entitled, FAR 52.249-10, Default (Fixed-Price Construction) (APR 1984).

(Appeal File at 276.)

28. By a follow-up letter dated September 27, 2002, the Government provided a list that "broadly summarized incomplete contract work elements that should be addressed in your detailed plan" (Appeal File at 279). Following the list and other direction, the letter concludes with the following paragraph, which states in part:

> I must receive a revised response to the Cure Notice no later than the close of business on October 4, 2002 reflecting a plan that includes the specifics detailed above. Additionally, direction from the Forest Service end user indicates that your revised progress schedule must reflect a completion date of not later than December 13, 2002.

(Appeal File at 280.)

29. The contractor responded to the Government by a letter dated October 4, 2002, advising that it "has been required to seek the assistance of its surety as a result of the extra contractual and ever changing conditions imposed by the Government." It states that it understands "that a representative of the surety will be on site on October 4, 2002 and upon completion of the surety's investigation you will be advised of [the contractor's] intentions." (Appeal File at 284.)

Show Cause Notice of October 11, 2002

30. The Government provided the contractor with a show cause notice, dated October 11, 2002. The notice states in pertinent part:

> Since you have failed to cure the conditions endangering performance under [the contract] as described to you in the Government's letters of September 6, 2002, September 26, 2002, and September 27, 2002, the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question . . . . Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

(Appeal File at 288.)

31. The contractor sent the Government a letter dated October 23, 2002, stating in full:

> This will respond to your show cause notice of October 11, 2002 and notify you that [the contractor] hereby voluntarily terminates the foregoing contract due to its financial inability to complete the work. This voluntary termination is with a full reservation of rights with respect to events and occurrences prior to the date hereof.
>
> Further, [the contractor] will make no claim with respect to the contract balance and retainage, all of which should be paid to the [surety company] pursuant to my previous instructions.
>
> Should there be any questions, please let me know.

(Appeal File at 304.)

Termination for Default and the Dispute

32. By letter dated November 5, 2002, the Government provided the contractor with notification of the termination for default of the contract. The letter states in pertinent part:

> [The contractor] failed to perform the contract in accordance with the contract terms and conditions most specifically failed to complete the project within the reestablished completion date of September 26 [sic--27], 2002. The response received from [the contractor] dated October 23, 2002 to the Show Cause Notice dated October 11, 2002 provides evidence that [the contractor] cannot complete the contract due to its financial inability to complete the work. This notice constitutes the Contracting Officer's decision that the reason offered by [the contractor] for failure to complete the project is not excusable.

(Appeal File at 1.)

33. The Government considered, but rejected, the option of ending the contract on a basis other than a termination for default, such as a no-fault termination (Transcript at 250-51, 256-57, 260-61, 268-70).

34. By a submission to the Board dated January 30, 2003, the contractor noticed its appeal of the contracting officer's decision to default terminate the underlying contract.

Involvement of the Attorney

35. Regarding its letter (FF 31), dated October 23, 2002, responding to the show cause notice, the contractor had requested

> that the letter be removed as evidence because it was not used for intentions it was written for.
>
> The letter was written to have the project completed by the bonding company, but not for [the contractor] to be defaulted because there was a prearranged agreement to the letter.
>
> [The contracting officer] changed the agreement, therefore I am requesting the letter be withdrawn as evidence.

(Exhibit 7.) In support of the contentions that there existed an agreement and the contracting officer changed the agreement, the contractor refers to a letter, dated October 23, 2002, from the attorney who had been dealing with the Government for the contractor (FF 19). The letter states that the contracting officer "has agreed to proceed on the basis of a voluntary termination which will avoid the need for a termination of default. I have prepared a letter of voluntary termination for your signature which is attached. If there are no questions, please sign and return the letter to my attention for transmission to" the contracting officer. (Exhibit 9.)

36. By the testimony of the contractor's president, the contractor was not communicating with the contracting officer, and the contractor was not part of any agreement reached between the contracting officer and the attorney (Transcript at 208). Although the attorney held beliefs as to how the Government would proceed, the attorney testified that he had reached no verbal or written agreement with the contracting officer that the contracting officer would not issue a termination for default of the contractor (Transcript at 133-34, 145). Correspondence between the attorney and contracting officer, prior to the contracting officer issuing the default termination, uses terminology of a "voluntary default and takeover agreement" and a "voluntary termination/default." The contracting officer informed the attorney that "I just FAXd to [the contractor] a notice of termination for default. We can now

proceed with the takeover agreement." The attorney voiced no objection to the default before finalizing the takeover agreement. (Exhibit 14; Transcript at 135.) The letter is part of the evidentiary record; the contracting officer changed no agreement. Despite the allegations of the contractor, the Government and contractor (by itself or through the attorney) had not reached an agreement that the Government would not issue a termination for default.

Contractor-alleged Improper Conduct

37. The contractor asserts that it is "evident that the government interfered with the affairs and relationship of the prime and sub[contractor] by having personal dealings (Transcript pgs. 44, 60) with the subcontractor" (Post-hearing Brief at 3). From the transcript citations, the contractor appears to rely on a statement by the contracting officer that he had a good relationship with the subcontractor, and the contractor's belief that the contracting officer had been on a boat of the subcontractor. During the hearing, the contracting officer testified that his relationship with the subcontractor was good, "[a]s it was with [the contractor]", that he had some casual conversations with the subcontractor and understood that the principals of the subcontractor owned a boat. By testifying that he had never been on a boat of the subcontractor, although he had seen pictures of a subcontractor boat, the contracting officer denied allegations of the contractor (Transcript at 44-45). Further, the contracting officer testified that he frequently communicated with the subcontractor and that he referred the subcontractor to web sites within the Small Business Administration web pages, as "I do any contractor that approaches me as a contracting officer for the government" (Transcript at 60-61). The record does not demonstrate that the contracting officer had personal dealings with the subcontractor outside of the context of this contract (or as the initial subcontractor selected by the surety to complete performance) and the contracting officer's status as a Government employee. No improper conduct is demonstrated by the record.

DISCUSSION

This dispute involves a termination for default. Initially, the Board must determine if the contractor was in default. If the contractor was in default, the contractor bears the burden of demonstrating that the default was excusable. DCX, Inc. v. Perry, 79 F.3d 132, 135 (Fed. Cir. 1996).

The Contractor was in Default

The Default clause of the contract permits the Government to terminate a contractor's right to proceed if the contractor fails to complete performance within the contract period (FF 6). Although the Government permitted the contractor to continue performance after the initial completion date in the contract (FF 8), the Government took appropriate action through communication and a bilateral contract modification to establish a new completion date. Through modification six, the contractor became obligated to complete performance by September 27, 2002. (FF 23.) The Government sought assurances from the contractor both before and after this date that the contractor would timely perform or perform within an acceptable period. Performance was not complete by September 27, 2002. This failure by the contractor entitled the Government to terminate the contractor's right to proceed. Moreover, the contractor did not demonstrate that it could perform within an acceptable period of time thereafter, despite the Government's requests through the cure notice and notice to show cause (FF 25-31). Rather, ultimately, the contractor indicated that it lacked the finances to continue with performance (FF 31). The contracting officer considered but rejected alternative methods of concluding the contract (FF 33).

The contractor was in default as of September 27, 2002, given that the project remained incomplete. Additionally, based upon an objective review of the record and the information available to the contracting officer, the contracting officer reasonably concluded that the contractor could not perform within an acceptable period. The Government has met its burden of proof; the record supports the conclusion that the contractor was in default.

The Record Does Not Support a Basis to Excuse the Default

In its post-hearing brief, the contractor pursues relief on the theory that the Government interfered with the contractor's relationship with its subcontractor, thereby causing the contractor to fail to timely perform. This alleged interference excuses the default, claims the contractor. The contractor contends that the Government interfered with the contractor in two critical respects. First, the Government approved and paid the contractor for defective and delinquent work performed by the subcontractor. Second, the Government insisted that the contractor pay the subcontractor for the defective and delinquent work. "This conduct rendered it impractical, if not impossible, for [the contractor] to terminate its subcontract with L&R and depleted [the contractor's] assets to the point [the contractor] became unable to proceed with the project." (Post-hearing Brief at 1.)

In asserting this position and rationale, the contractor states:

> The problems and delays exi[s]ting on July 8, 2002 are attributable in their entirety to L&R because L&R was the superintendent and subcontractor for most of the period of the contract. Admittedly, L&R was not performing the work in a timely manner or making timely payments to its subcontractors and suppliers, yet the Government believed that L&R was due as much as $40,000.00 and the Government made the request that [the contractor] pay L&R $20,000.00. Additionally, the Government suggested at this time that progress payments to [the contractor] would be suspended unless L&R was paid.

(Post-hearing Brief at 1-2 (citations omitted).)
The contractor makes its arguments in apparent disregard of the Default clause and case law, and based upon facts other than those supported in the record. The Default clause identifies bases which excuse the default by the contractor. In particular, the clause identifies "delay in completing the work aris[ing] from unforeseeable causes beyond the control and without the fault or negligence of the Contractor." One potentially relevant example of such causes, identified in the clause, is acts of the Government in its contractual capacity. Another example is delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers. (FF 6.)

In addressing a similar, but not identical clause, the Default (Fixed-Price Supply and Service) (APR 1984) clause, 48 CFR 52.249-8, the Federal Circuit has stated:

> The default clause in the contract excused any default caused by certain enumerated actions, including "acts of the Government." The default clause added, however, that "the failure to perform must be beyond the control and without the fault or negligence of the Contractor" or (in the case of a subcontract) "beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either."

DCX, 79 F.3d 132, 134, aff'g DCX, Inc., ASBCA No. 37671, 94-2 BCA ¶ 26,661.

To the extent that the contractor asserts that the problems and delays existing on July 8, 2002, are attributable in their entirety to its subcontractor, the contractor is foreclosed from establishing an excusable basis for relief. The stated failures of the subcontractor, an agent of the contractor, are not beyond the

control of both the contractor and subcontractor, and are not without the fault or negligence of both. The contractor relies upon actions which are not excusable under the clause.

The contractor seeks to establish an excuse for the default by the actions of the Government in making progress payments to the contractor for work that was not performed or for work that was not performed in accordance with the terms and conditions of the contract. Under the contract, neither of these allegations constitutes a basis which excuses the default. The Government made progress payments in response to certifications submitted by the contractor that work was performed in stated amounts, in accordance with the provisions of the contract. Payment by the Government does not absolve or alter the contractor's responsibility to ensure performance in accordance with the contract. (FF 4, 5).

The Board also finds the facts to be at variance from those underlying the assertions of the contractor. The Government did not insist at the July 8 meeting that the contractor pay the subcontractor any amount of money (FF 15). The contractor did not make any payment to the subcontractor at or as a result of the meeting, but the Government continued to work with the contractor, permitting the contractor to continue with performance.

The contractor also fails with respect to the causation it attempts to establish, when it contends that the actions of the Government rendered it impractical, if not impossible, for the contractor to terminate its subcontract. The contractor did terminate the subcontract (FF 19). The record simply does not establish that the actions of the Government hindered the contractor's ability to act.

The contractor also maintains that the actions of the Government depleted the assets of the contractor, such that the contractor was unable to proceed with performance. The record fails to establish any action of the Government that depleted an asset of the contractor. For the period after receiving a erroneous double payment in October 2001, the contractor had received progress payments in excess of the percentage of work completed in accordance with the terms and conditions of the contract. The excess payment by the Government did not deplete the contractor's resources.

By focusing on the meeting of July 8, the contractor also distorts the record. From October 2001 through the termination, the contractor had received greater progress payments than it was entitled to receive under the contract, not only in dollar amounts but also because of the contractor's failure to provide certified payrolls (FF 9, 10). Despite the initial delays by the Government

in making payments, the record fails to establish that the alleged Government actions or inactions caused the contractor's default. The bilateral modification, with a new completion date, was entered into after the contractor had terminated its subcontractor. The contractor has not pursued a basis to invalidate the bilateral modification and has not demonstrated that the completion date should be altered (FF 23).

Further, the Government had a legitimate interest in holding the meeting of July 8, when the contracting officer attempted to ensure that the contractor would timely complete performance. The contracting officer reasonably inquired into the allegations by the subcontractor that the contractor was failing to pay the subcontractor, despite certifications in the requests for progress payments. The contractor did not object to the meeting. During the meeting, the contractor did not convince either the contracting officer or the subcontractor that the contractor had made all payments to which the subcontractor was entitled. (FF 15.)

In the course of proceedings before the Board, prior to the hearing on the merits, the contractor identified what it deemed to be valid bases excusing the termination for default. The contractor categorizes the bases into three areas: improper Government interference and control; payment difficulties, shortages, and delays; and a threatening and hostile environment. The record fails to substantiate any of these bases as existing so as to constitute a basis excusing default. Similarly, the specific assertions of improper contracting officer conduct are not supported by the record. (FF 35, 37.)

The contractor has failed to demonstrate a basis excusing default under the Default clause. The Government was not a direct or indirect cause of the ultimate inability of the contractor to perform. The difficulties arose because of foreseeable causes within the control of either the contractor and the subcontractor.

DECISION

The Board denies this appeal. The termination for default is sustained.

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JOSEPH A. VERGILIO
Administrative Judge

Concurring:

_____ _____
HOWARD A. POLLACK **ANNE W. WESTBROOK**
Administrative Judge Administrative Judge

Issued at Washington, D.C.
July 6, 2004