KADRI INTERNATIONAL CO. dba VALUECAD,	)	**AGBCA No. 2000-170-1**
Appellant	)	
Representing the Appellant:	)	
Robert W. Tate, Esquire 300 Grand Central on the Park 216 First Avenue, South Seattle, Washington 98104	)	
Representing the Government:	)	
Daniel B. Rosenbluth, Esquire Office of the General Counsel U. S. Department of Agriculture P.O. Box 25005 Denver, Colorado 80225-0005	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

June 4, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On August 7, 2000, the Board received and docketed this appeal from Kadri International Co. dba ValueCAD, of Portland, Oregon (contractor), concerning a contract, No. 53-82X9-9-078CO, with the respondent, the U. S. Department of Agriculture, Forest Service (Government). As part of an automated lands project (ALP), the contractor was to consolidate information and provide the Government with electronically-formatted data depicting various features (e.g., easements, ownership interests, boundaries, and natural features such as lakes) on particular townships or areas within Region 2 of the Forest Service (the Rocky Mountain Region). The contractor here appeals the termination for default of its contract, which occurred prior to the contract completion date.[1]

[1] Subsequent to the filing of this appeal, the contractor submitted a claim to recover $227,698.80, under a termination for convenience settlement proposal, based upon the theory that the termination for default was invalid and would be converted to a termination for convenience, thereby entitling the contractor to relief under the Termination for Convenience clause of the

contract. Proceedings regarding the claim, docketed as AGBCA No. 2001-150-1, are suspended pending the resolution of this docketed appeal.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). The Board denied a contractor motion for summary judgment. Kadri International Co., AGBCA No. 2000-170-1 (Mar. 15, 2002).[2] In denying the contractor's motion for summary judgment, the Board attempted to focus the areas of inquiry:

> The facts and legal bases relied upon by the contracting officer in default terminating the contract (e.g., that the contractor had not achieved a rate of successful completion to permit completion within an acceptable time frame and the contractor had failed to provide assurances as to when the contract could be completed) are not disproven by the existing record. Further, without drawing inferences adverse to the non-moving party (which is not to be done in resolving a motion for summary judgment), given the cure notice and notice to show cause and the Government attempts to obtain assurances that the contractor could and would perform the contract within an acceptable time, the Board cannot conclude that the Government actions constitute a waiver of its ability to default terminate the contract.

Kadri (slip op.) at 3. A hearing on the merits was held, with the transcript supplementing the documentary evidence (the appeal file, appeal file supplement, and exhibits accepted into the record during the hearing). The court reporter for the hearing, Executive Court Reporters, failed to provide a transcript for day one of the four-day hearing; however, testimony from that day is part of the record and could be referenced by either party in submissions or by the presiding judge and Board.

---

[2] Despite the reference by the Government to a cross-motion for summary judgment filed by the Government said to be dated March 1, 2002, Post-hearing Brief at 15 (¶ 57), the Board lacks a record of any such submission. The Board opinion acknowledges and resolves the contractor's motion. The submission by the Government dated March 1, 2002, is captioned "Government Reply Brief (Response to Rule 56 motion)"; it lacks a reference to a cross-motion or a discussion of such a request for relief. The Board held a telephone conference with the parties on March 12, 2002, to discuss the status of the record regarding a single motion, the contractor's motion for summary judgment. The Government did not suggest that it had an outstanding cross-motion for relief during that telephone conference, or in response to the memorandum of telephone conference issued by the presiding judge, or after receipt of the Board's ruling.

The Board makes a de novo determination on whether or not there existed a valid basis in support of the termination for default, and whether or not there existed a basis to excuse the default. Initially, the Government bears the burden of proof regarding a termination for default. The record amply supports the conclusion of the contracting officer. At the time of the default, this contractor was continuing to struggle with providing acceptable townships. The contractor demonstrated an inability to provide acceptable end products in sufficient quantities. The contractor did not identify a manner by which its performance would sufficiently improve. The Government lacked assurances that the contractor could complete performance by the end of the contract period or by any other specific time. The Government has met its burden of supporting the decision to terminate for default.

The Government was well aware that a termination for default is deemed to be a drastic action. This contractor was performing unsatisfactorily, had shown a lack of knowledge to complete many of the tasks at hand, and had failed to demonstrate a sufficient commitment of knowledgeable personnel or an attainable plan for progress that would ensure completion within an acceptable period of time. The Government's restraint in not terminating this contractor earlier does not represent forbearance precluding a default termination; rather, the Government worked with the contractor as the Government attempted to ensure that this contractor could complete the contract satisfactorily (in terms of work product and completion date). The demonstrated lack of competence to perform the needed tasks in a timely manner fully supports the termination for default. The quantity and quality of the submitted townships did not ensure a timely completion of the contract. The record does not support an excusable basis for the contractor's failures; the Government is not at fault for the contractor's failings.

The contractor premises much of its argument on an incorrect premise, when it asserts that the only legal option the Government had was to re-establish a new delivery date (Post-hearing Brief at 55). The final date for initial submission of all townships never changed; nothing in the Government's actions indicated that this completion date was to be altered. During performance, in communications and correspondence, the Government highlighted the fact that the contractor's performance was inadequate to meet this contract requirement. Rather than alter the completion date, the Government permitted the contractor to submit in excess of 30 townships per week (the contract maximum), as it sought assurances of the contractor's capabilities. The Government reasonably concluded that the contractor could not accomplish contract performance within an acceptable period.

Accordingly, the Board upholds the default determination and denies this appeal.

FINDINGS OF FACT

The Contract

1. In an overview section, the solicitation and contract address the purpose of the contract:

> The purpose of this contract is to provide Region 2, USDA Forest Service with spatial data for the Automated Lands Project (ALP) geographic information system. The Forest Service has created ARC/INFO® [3] coverages for each public land survey system (PLSS) township. The Contractor shall edit the coverages by the Best Method Available (see Appendix B), to include all lines necessary to portray the spatial features depicted on the edited Land Status Base plats, Road & Trail Right-Of-Way Status Plats, and associated attachments. Regions shall be created or edited for each parcel shown on the Status Plats, and for each theme (subclass). Regions created by the Forest Service shall be checked by the Contractor for proper spatial extent, and all necessary corrections shall be made. The completed townships shall be returned to the Forest Service, along with government furnished material provided to the Contractor. After review by the Forest Service, coverages with errors shall be returned to the Contractor for correction.

(Appeal File at 585.) Stated differently, the contractor was to consolidate information from various sources and provide the Government with electronically-formatted data depicting various features (e.g., easements, ownership interests, boundaries, and natural features such as lakes) on particular townships or areas within Region 2 of the Forest Service (the Rocky Mountain Region).

2. The solicitation and contract identify a performance period of 216 calendar days for the basic work--involving four forests, with work classified for each by complexity level and the number of townships involved. The contract also contains two options, for national grasslands, with work classified for each by complexity level and the number of townships involved; the performance periods for options one and two are 33 and 31 calendar days, respectively. For each complexity level, the contractor identified a unit price per township, with an extended price calculated for the stated number of townships. The contract identifies 762 townships for the base and option items, combined. (Appeal File at 525-26 (§ B).)

3. The solicitation and contract specify both that the contractor shall begin performance within five calendar days, and complete performance (of the basic work and options) within 280 calendar days, after receipt of the notice to proceed, and that the performance period is mandatory (not negotiable) (Appeal File at 521 (¶ 11)). "The total duration of this contract, including the exercise of any options under this clause, shall not exceed 280 calendar days." (Appeal File at 544 (¶ I.4(c)).)

4. The solicitation and contract identify Government-furnished material, which the Government shall provide to the contractor, including:

> Forest Service ALP AMLs (see Appendix A)

---

[3] ARC/INFO® is defined as the geographic information system (GIS) software used by the Forest Service for its corporate spatial database. ARC/INFO® is the core product, but the name is often applied to the whole family of products including ArcEdit and ArcPlot. (Appeal File at 612.)

> Initial ARC/INFO® township coverages
>
> Adjoining township coverages previously completed, for use in edge-matching
>
> Training -- Two days of training to two employees of the company at the Rocky Mountain Regional Office. The training may include how to use Forest Service AMLs. The training is mandatory for each Contractor and shall be scheduled within 14 calendar days of contract award.

(Appeal File at 585.) The solicitation and contract contain a multi-page "description of processes" detailing the sequence the Forest Service executes to complete township coverages. The description includes discussion of edgematching and wilderness restrictions in the subclass WILD. (Appeal File at 586-94.)

5. Appendix A of the solicitation and contract addresses the ARC/INFO® AML tools provided by the Government:

> The Forest Service shall make available upon request a number of ARC/INFO® tools (AMLs) used within the agency for ALP spatial migration work. Explanation of what these ARC/INFO® tools accomplish is provided in Forest Service furnished training or documentation.
>
> These tools were developed to ***partially*** automate the migration of legacy data for several Forest Service units nationwide. The data standards vary between units, and the land records and land parcel types which are the subjects of these vary considerably with the states and geographies involved. The staff developing the tools had limited resources and the tools were only intended to work in the most common circumstances. **These tools are not error-free and do not work correctly in all possible land status and land parcel situations.** The Contractor is not required to use the tools, and the tools are provided "as is", and without warranty. Failure of the tools shall not release the Contractor from the obligation to deliver the Township coverages in accordance with specifications.
>
> These tools were developed and tested with agency ARC/INFO® version 7 software on IBM AIX operating system. Some of these tools contain UNIX shell scripts and FORTRAN executables, and portability of tools may be an issue for the Contractor. The Forest Service is not responsible for porting these tools to other platforms. Source code for agency-developed executables may be shared with the Contractor upon request. However, the Contractor shall be responsible for interpreting and using the code.

(Appeal File at 597.)

6. Regarding the townships, the solicitation and contract contain the following provision:

> **B. NOTICE CONCERNING QUALITY OF TOWNSHIPS PROVIDED:**
>
> **Initial batch processes performed by the Forest Service are imperfect. The initial township coverages supplied by the Forest Service contain spatial and attribute errors which require editing. The work required by this contract cannot be accomplished by automated processes alone. Manual editing of features is a recognized and major element of the scope of work of this contract. Because discrepancies may appear in initial township coverages, frequent contact with the Forest Service is necessary.**

(Appeal File at 586.)

7. The solicitation and contract are explicit in describing how the Government arrived at the complexity levels of the townships for the forests and grasslands, stating in part:

> To determine the amount of time it may take to create a township coverage, the Forest Service has developed a complexity rating for each township. These were determined by evaluating the number of region features in subclasses required to portray Forest Service interests. Forest Service experience has shown that the number of regions created is a good indicator of the difficulty in creating and building a township. This number was determined by an automated process which counted the number of records in the input .LLD file for survey parcels, and number of records in the existing land records LOS files for ownership, easements and restrictions themes. The number determined by this process may vary slightly from the actual number of regions required, but shall still serve as a valid indicator of the relative complexity from township to township.

(Appeal File at 596.) Appendix C to the solicitation and contract contains a chart with the following description: "This chart shows each Forest/Grassland, and the number of townships by complexity level. These are established ratings that shall not change during the contract." (Appeal File at 599-611.)

8. Edgematching is expressly identified in various parts of the solicitation and contract. In describing the processes, the solicitation and contract note that the "Contractor is encouraged to complete the townships in a systematic order (by row & column) whenever possible in order to facilitate edgematching and the checking thereof." (Appeal File at 586.) Regarding the GCDB[4]

[4] GCDB – Geographic Coordinate Data Base. "A product and project of the BLM which establishes standardized positions (coordinates) for all PLSS ('section') corners, based upon 'all' official surveys and records of the BLM, and some other sources. GCDB is the federally mandated source for positioning the land grid for all federal agency GIS projects." (Appeal File at 613.)

township process and the CFF[5] township process, the solicitation and contract expressly address edgematching:

> When all necessary lines are present, edgematch the cover to all previously completed adjacent townships, including those in previously completed National Forests, according to the guidelines in Appendix F. If there are edgematch errors larger than the distances indicated, contact the Contracting Officer for instructions, and note such direction on the paper Status Plat.

(Appeal File at 587, 591.) The "final ALP coverage specifications" identify edgematching as one of six enumerated headings, stating, in part: "Adjacent Townships are to be edgematched. Nodes on adjacent townships that should be coincident should be snapped together, even if this requires moving a point that originated from a GCDB (LX) file. The boundaries on adjacent townships shall also be coincident, with no gaps or overlaps." (Appeal File at 615.)

9. As to the required contract deliverables, the solicitation and contract address both an initial submission of three townships and a maximum of thirty completed townships per week thereafter:

> In order to ensure that township coverages are prepared according to contract specifications, an initial submittal of 3 townships shall be required. These will be returned to the Contractor with any necessary comments. A schedule shall be developed between the Contracting Officer and the Contractor to facilitate exchange of the completed townships. The Contracting Officer shall record when townships are provided to the Contractor, when the Contractor returns the townships, and corrections needed, and when the township is accepted as completed.
>
> Thereafter, the Contractor may deliver a maximum of 30 completed townships a week, inclusive of the final week of the contract, to the Contracting Officer for review. Those townships requiring correction shall be returned to the Contractor within 45 calendar days for editing. Such corrections may also require the Contractor to make changes to edg[e]matched townships. Corrected townships shall be returned within 14 calendar days to the Forest Service. Upon full acceptance by the Contracting Officer, payment will be made. As townships move between the Forest Service and the Contractor, hard copy Forest Service plats and attachments shall accompany the townships. All items prepared by the Contractor as part of the work are the property of the government and shall be returned prior to contract completion. Specific items that the Contractor shall provide to the Forest Service are listed below[.]

---

[5] CFF – Forest Service Cartographic Feature File coverages (Appeal File at 612).

(Appeal File at 594.)

10. The contract (with amendment two to the solicitation) includes the following questions and answers:

> **QUESTION:** What is the rationale behind limitation of townships that can be delivered per week?
> **ANSWER:** The limitations are set based on the availability of Government personnel to complete inspections of the submitted townships. If more than 30 are submitted per week there is no guarantee the initial inspection of the additional townships will be completed within the 45 calendar day inspection period allowed the Government.
>
> **QUESTION:** When townships are inspected, and returned for correction, is that the final inspection, or might new issues come up and have to be again corrected by the contractor?
> **ANSWER:** The townships are thoroughly reviewed once, and the only additional review involves those areas the contractor was to correct.
>
> **QUESTION:** Is it alright to finish the contract ahead of schedule?
> **ANSWER:** Yes, but the government can only review 30 townships a week. There will be no expectation on the part of the Government to accelerate performance.

(Appeal File at 519, 552.)

11. The solicitation states:

> Offerors may, at their discretion, submit alternate proposals or proposals which deviate from the requirement; provided, that an offeror also submit a proposal for performance of the work as specified in the statement of work. Any "alternate" proposal may be considered if overall performance would be improved or not compromised, and if it is in the best interest of the Government. Alternate proposals, or deviations from any requirement of this RFP, must be clearly identified.

(Appeal File at 580 (¶ L.6 (48 CFR 452.215-71, Instructions for the Preparation of Technical and Business Proposals, Alternate I (NOV 1996))).)

12. The Government and ValueCAD entered into a firm, fixed-price contract in the amount of $179,860, for the basic work and the two options, with an effective date of September 28, 1999 (Appeal File at 520, 579 (¶ L.3)). With an effective date of November 15, 1999, modification one to the contract eliminated six townships and altered some requirements, the new contract price became $178,010 for 756 townships for the basic work and the two options (Appeal File at 640-41).

13. The contract specifies over the signature of the contracting officer, in a box marked "award":

> Your offer . . . including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

(Appeal File at 520.) The offer sets forth no additions or changes identified as deviations from the terms and conditions of the solicitation. Consisting of several pages, the offer specifies that the contractor and subcontractor, combined:

> have 83 personnel resource[s] and 12 **ARC/INFO®** licenses and sufficient PLS expertise to successfully complete this project, including the two optional periods, within 247 calendar days. See Section 1.4 of the proposal for the details of our hardware/software capabilities. We anticipate approximately 5,600 hours of work. This translates into approximately four (4) full time, dedicated personnel to complete this project.

(Exhibit C at 8-9.) (Exhibits were accepted into the record during the hearing and are part of the appeal file.) Further, the offer alludes to a "[p]roven track record of quality and timely delivery at best value" and states, in part:

> Over the past three (3) years AverStar has refined a model quality system that resulted in the lowest rework rate in the industry. With an average rework rate of less than 1%, AverStar can ensure that the Forest Service will get on time delivery of the highest quality data -- the first time.

(Exhibit C at 9.)

14. In its offer, the contractor provided a preliminary operating plan, including:

> Start work is assumed to be October 18, 1999. All work is scheduled to complete on June 20, 1999 [sic, 2000]. Since our goal and practice is "zero re-work", the schedule does not include time for rework. The proposed schedule results in an average of 26 townships delivered per week.

(Exhibit C at 48-49.)

15. As specified in the solicitation, the contract contains the Default (Fixed-Price Supply and Service) (APR 1984) clause, 48 CFR 52.249-8, which states in pertinent part:

> (a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --

> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) of this clause); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).
>
> (2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) of this clause, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.
>
> . . . .
>
> (g) 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 536 (Contract, ¶ I.1).) Also, consistent with the solicitation, the contract includes an Inspection and Acceptance clause, 48 CFR 452.246-70 (FEB 1988) (Appeal File at 530 (¶ E.2)), a Government Delay of Work clause, 48 CFR 52.242-17 (APR 1984) (Appeal File at 531 (¶ F.1)), and the Changes -- Fixed-Price (alternate I), 48 CFR 52.243-1 (AUG 1987), and Termination for Convenience of the Government (Services) (short form) clauses, 48 CFR 52.249-4 (APR 1984) (Appeal File at 535 (¶ I.1)).

Performance

16. On October 21, 1999, the contractor received the notice to proceed (Appeal File at 351). The completion date, 280 calendar days thereafter (Finding of Fact (FF) 3), became July 27, 2000 (although the parties treated October 21 as the first day of performance and calculated the completion date to be July 26, 2000 (Appeal File at 652)). During a pre-work meeting held on October 21, the contractor and Government addressed and acknowledged that contract performance would involve many questions and answers between the contractor and contracting officer's representative, the contractor would provide a single point of contact and an alternate for exchanging information, the contractor would provide a progress schedule in accordance with the technical specifications of the contract, and the total performance period including the base and two options is 280 calendar days. During the meeting, the Government emphasized quality assurance by the contractor. As set forth by the Government in a memorandum of the meeting:

> Emphasized quality assurance by the contractor. Especially double checking before submitting townships for review. Consistent small mistakes in submitted end products can alert the Government that quality assurance is not being followed thoroughly enough by the contractor. These items will be brought to the attention of the contractor. Contractor agreed -- they have a thorough quality assurance process set up internally.

(Appeal File at 352-54.)

17. On October 21 and 22, 1999, the Government provided two days of training (Appeal File at 354). By day two of the training, the Government internally began to voice concern regarding the (in)abilities of the personnel the contractor sent to the training session. The individuals lacked some of the basic skills anticipated by the Government. (Transcript at 249-51). Consistent with her testimony lost by the court reporter, the contracting officer's representative discussed, in her declaration, this lack of basic skills: The contractor's personnel were "under-skilled and it had taken time away from production to coach these employees on how to complete basic ARCINFO commands. . . . [I] had no idea we would ever have to provide the basic, extensive and in-depth training that was needed just to get [the contractor's] employees into production. Our intent in working with the Contractor's representatives was to have our Contract successfully completed." (Exhibit A at 2 (¶ 6).) Although the contractor contends that it received less training that it had intended, the record demonstrates no fault by the Government. Rather, the record supports the conclusion that the contractor sent insufficiently experienced personnel to the training; as a result the contractor did not make the best use of the two-day training session.

18. In a revised schedule for performance, submitted on November 4, 1999, the contractor projects contract completion on July 26, 2000, with the final week of performance identified as entailing adjustments/final corrections. The schedule indicates that mobilization and training is to be complete by November 18, 1999; the "pilot projection/initial submittal" is to be complete by December 8, 1999; and the Gunnison, Uncompahgre, Grand Mesa (GUGM) National Forest work is to be complete by February 8, 2000. (Appeal File at 672.)

19. The contractor opted to port AMLs from Unix to Windows NT. In the process it encountered several difficulties. To accomplish this task, the contractor used much more time and effort than it had anticipated. (Appeal File at 343.) The record does not demonstrate that any of the porting problems arose because of the fault or negligence of the Government. Rather, particularly with the caveats placed in the solicitation and contract (tools are not error-free; Government is not responsible for porting tools to other platforms), a reasonable contractor would have anticipated some difficulties. (FF 5; Transcript at 111-14.)

20. On December 9, 1999, the contractor submitted an initial three townships (Appeal File at 346-47; Supplemental Appeal File at 498). (Appeal File at 273-74.) By memorandum of the same date, the Government provided the contractor with a response based upon its review. The Government reviewed one township and, after quickly checking a second township, "found similar

issues so we did not go any further reviewing the work you had submitted." Additionally, the Government states in the memorandum:

> The following comments are based on the initial township, but presumably also would apply to the other two townships we received. I want to make a couple of overall comments on the coverages. There were no attributes for SECTIONS or SP regions. The items were present . . . in the original files we sent to you. We don't know if the attributes got lost in transport back to us. Non-adjacent polygons can be made into a single region. I will address this further under particular subclasses.
>
> Subclass CD -- Created correctly[.]
>
> Subclass COUNTY -- There are three counties in the township, therefore there should be three regions. The polygons comprising Gunnison Co should be combined into one region.
>
> Subclass EASEMENTS-- It appears ROW 1 was digitized, both side of the easement being digitized. If the easement has to be digitized, it is necessary to digitize the center line and then offset it to create a polygon of the correct width. It is to be 59 feet wide, and on the coverage it is 83 feet wide. ROW 2 and 3 were not created. When you do make them, ROW 3 polygons will be one region.
>
> Subclass EXT_BDY – There are two forests shown, thus there should be only two regions in this subclass.
>
> Subclass OWN -- Parcels with the same number in a section should be constructed as one region. According to Modification 1, any "private parcels without federal interests" should not be created as regions.
>
> Subclass RANGER_DIST – Similar to previous situations, there should be only one region per district, in this case, there should be three regions.
>
> Subclass RES -- There is only one restriction in this townships, in section 12. The restriction was built correctly, but there should not be 36 other restrictions.
>
> Subclass SECTION and SP -- Both of these are correct in terms of geometry. However, they are not attributed.
>
> Subclass STATE -- Built correctly.
>
> Let us know when you are ready to do a conference call this afternoon.

(Appeal File at 346-47.) The record demonstrates no error by the Government in the assessment of these township submissions.

21. The declaration of the contracting officer's representative accurately conveys some of her testimony lost by the court reporter:

> Upon receipt of the initial townships, I became aware it was going to take some extra effort to get this company up to speed on this project. [The Government inspector] and I spent that time during December and January providing as much encouragement and support as the Contractor's employees seemed to need. I could only make an assumption [that the contractor] was kept informed of this activity and knew of the herculean effort the [Forest Service] was providing so that submittals would be timely and accurate. Repeated [appeal file] correspondence indicates we were cooperative, supportive, anxious for them to succeed, and never indicated nor wanted failure to be the result of this Contract. Our behaviour continued through the length of the Contract. There was never any attempt to deceive or mislead the Appellant.

(Exhibit A at 2 (¶ 7).)

22. By e-mail, dated December 15, 1999, the contractor informs the Government that the porting of AMLs from Unix to Windows NT is taking longer than expected; "not shipping any new townships till 31 Dec 1999" (Appeal File at 343).

23. On January 11, 2000, the contractor submitted another township (Supplemental Appeal File at 498.) On January 12, the Government did not approve a township submitted by the contractor. The Government provided the contractor with a memorandum detailing what the contractor did correctly and incorrectly. (Appeal File at 1279-80.)

24. By letter dated January 14, 2000, the contracting officer[6] informs the contractor of concerns of the Government:

---

[6] The letter dated January 14, is signed by the contracting officer. A cover letter addressed to the contractor is signed by the contract specialist, who identifies herself as a contracting officer. (Appeal File at 341.) The same contract specialist identified herself as the contracting officer at the pre-work meeting held on October 21, 1999 (Appeal File at 352). By her own testimony, the contract specialist was not a warranted contracting officer on this procurement, "I did not have the warrant to be the actual contracting officer who signed with a warrant." (Transcript at 394, 554). This makes misleading and incorrect the statements in her declaration, in which she represents herself as the contracting officer (Exhibit L). During the hearing (e.g., Transcript at 535-36, 539) and in its post-hearing brief (Post-hearing Brief at 22), Government counsel identifies the contract specialist as a contracting officer, although she was not a contracting officer on this contract. This decision will consistently refer to the individual as the contract specialist. The ostensible abuse of the warranted contracting officer system, as the contract specialist seemingly overstepped her authority in representing herself as the contracting officer, is not material to the issues in dispute. Nevertheless, the Board expressly finds these misleading actions of Government counsel and the

> There is concern regarding your progress on Contract Number 53-82X9-9-078CO, Automated Lands Project II, for Region 2 of the Forest Service.
> According to the progress schedule submitted by your company on November 4, 1999, half of the Gunnison, Uncompahgre and Grand Mesa National Forests should be complete by January 16, 2000. As of January 11, 2000 no townships have been submitted for review other than the original trial submittal of three. Of the trial submittal, all three townships were returned to you for correction. None have been resubmitted.
>
> As part of our contract management, the progression of the contract performance period is monitored. The end of this week marks the point where 28 weeks remain for contract completion. Based on our calculations, you will need to submit 30 townships every week 25 ½ weeks to meet the deadline. This calculation allows you 2 ½ weeks of "buffer" time for any delays that prevent a submittal of fewer than 30 townships per week.
>
> To assure success in completing the project on time, and to ensure we receive the highest possible customer service you can provide, please submit a revised progress schedule and comment on how you plan to meet the performance period set forth in the contract.
>
> Please forward the requested information to [the contract specialist] with any questions or comments pertaining to this contract.

(Appeal File at 342.) As explained in the final paragraphs above, the Government specifies that it wants to assure success in completing the project on time. The Government also indicates that the contractor will have to submit 30 townships each week for 25.5 weeks to meet the completion date, which translates to little "buffer" time for the contractor. Nothing in the letter suggests that the Government will alter the contract-determined completion date.

25. The contractor's initial response is revealed in a memorandum to the file prepared by the contract specialist, dated January 18, 2000. The contractor has not disputed this account of the communication:

---

contract specialist to be unacceptable. The warranted contracting officer system is not to be abused.

> Received a call from [a representative] of ValueCAD regarding the letter I faxed to him on Friday [i.e., January 14]. He said they are working with . . . the project COR [contracting officer's representative], and some national ALP technical people in Portland to figure out the problems with the AMLs, the main reason they are falling behind.
>
> He told me he is getting efficient and thorough assistance from Government personnel regarding any questions or problems they encounter. He hopes the AML problems delaying them will be solved by Friday.
>
> By the middle of next week he plans on sending me a revised progress schedule and additional comments.

(Appeal File at 340.)

26. In a memorandum to the contractor, dated January 26, 2000, the contracting officer's representative provides a review of one township recently submitted:

> Subclasses CD, COUNTY, EXT_BDY, RANGER_DISTRICT, SECTION, STATE, and TOWNSHIP -- all correct[.]
>
> Subclass EASEMENTS -- There were several errors in the easements, all of which we went over by phone. The ends of some easements are snapping together because of the node snap settings. All easements were not equally offset on each side of the road. Some of the easements were not in the correct location. The 100-meter radius circle is not to be created for features prior to talking with us. Sometimes we will have information here that we can provide you to locate the features so the circle symbology does not have to be used.
>
> Subclass OWN and SP -- We talked at some length regarding these two subclasses. A review of sections 35 and 36 showed OWN parcels that do not match the status plat. It is important for your quality control team to monitor your products to catch these types of errors. We discussed SP to help you to better understand that it is your responsibility to edit parcels if they aren't created correctly, attribute parcels that are not correctly attributed through lidlink, and preserve any attributes that exist by moving them to the correct parcel if they mislinked. We went through a step by step example regarding creating missing parcels as well as shifting attributes from incorrect parcels to correct ones. Without spedit working, or an aml that you develop, this task will be cumbersome.
>
> I am very concerned that 14 weeks of the contract period have passed and there are not any approved townships. We have reviewed five coverages and found a variety of errors on all of them. In order to complete the contract within the time allowed it

> is critical that ValueCAD get into full production as quickly as possible. Although it is to be expected that some start up time is required for this project, I anticipated that you would be well into full production by now. I want ValueCAD to be successful with this project and continue to be available for assistance that you might need. Please submit your new timeline to [the contract specialist] as soon as possible.

(Appeal File at 258.)

27. In a memorandum to the file, dated January 27, 2000, and captioned progress of contract, the contract specialist states: "This morning the contract COR . . . spoke to [an employee of the contractor] on the phone, expressing her concerns regarding their technical grasp of the contract's expected end product and the company's ability to meet deadlines the company set for themselves." In the memorandum, the contract specialist states that she spoke with an employee of the contractor "to find out when he was going to provide written confirmation of the company's intent to successfully complete the contract. He made the following statements and requests:"

- Plans on sending [contractor employee] and a representative from their subcontractor . . . to Denver for a day or two to get additional training from . . . the Region 2 "ALP guru". He has already made [the COR] aware of his intent.

- All the AML problems are settled except for the PSCCID, which he says will be settled today.

- Requested an extension to the performance period.

- Requested permission to submit more than 30 townships per week for the remainder of the contract.

- After our discussion he will put the intended actions in writing and send them to me.

. . . .

> I specifically did not respond to his request for an extension to the performance period. At this point, based on discussions with [the contractor employee and COR], I feel that the situation can be solved with the Contractor increasing his submittal quantities and solving his AML problems. If additional time were to be added to the performance period the Government would expect reciprocal compensation from the Contractor, probably in the form of reduced prices. This may be an option later in the contract, but not now.

(Appeal File at 336-37.)

28. In a submission to the contracting officer's representative dated January 27, 2000, the contractor provided the following written response:

> Thanks for all your support for this project. We do appreciate the feedback and want to provide the final product that meets your objectives. We share your concern of not being able to start production for the past several weeks. With your help we have made good progress in editing and porting the AML's and are getting ready to start the production.
>
> As we have discussed so far the effort level has been predominantly to port the AML's to NT. Last week [the Government's developer of the AML's] worked on the two AML's that he had originally developed. I understand he was rewriting the code in JAVA for ease of use and porting. We also discovered that some of the AML's were not robust enough to work on Unix without problems. Good news is that when we are finished with all the editing and porting, Forest Service will have a set of AML's in NT in good working condition.
>
> ValuCAD and AverStar have expended lots of effort in this area that will be beneficial for Forest Service. As you know this has been a time consuming process. We agreed to have [an employee of the contractor] and his support personnel come to Denver to go over the pilot in detail. One option could be that you and [another Forest Service employee] come to Portland to our office and work with our team to go over the pilot with us. Since we are on NT platform and you are about to transit to NT it could be beneficial for Forest [S]ervice team to be exposed to the NT environment. We are very willing to pay the travel and living expenses for you and Tom for this trip.
>
> Please be assured that we are doing all that can be done to get the project in production. Per my conversation with [the contract specialist] this morning we are committed to get the pilot (three townships) delivered and accepted by Forest Service by February 12th. We would like to deliver and go over this pilot with you in person either in Denver or in Portland. I am trying to reach [another Forest Service employee] to determine the timing that will be best for him to get together.
>
> Your patience and understanding in this regard is certainly appreciated.

(Appeal File at 333.)

29. On February 11, 2000, the Government approved two, and rejected one, of the resubmittals of the three initial townships (Appeal File at 1223).

30. The Government provided extensive, substantive help to the contractor. The contractor requested and received additional training from the Government in February and March 2000. (Transcript at 260-61, 318, 595, 597-98; Appeal File at 18, 340; Appeal File Supplement at 398.)

The inspector stated that the reason for the follow-up training session was because "the contractor lacked the basic GIS skills and knowledge of the subject matter to learn the techniques that we showed them the first time or even the first and second time." (Transcript at 260.) The Board finds that these conclusions of the inspector are amply supported by the record.

31. The contracting officer sent the contractor a cure notice, dated February 23, 2000:

> You are notified that the Government considers your failure to make acceptable progress a condition that is endangering performance of [the] contract . . . Unless this condition is cured, the Government may terminate for default under the terms and conditions of FAR Clause 52.249-8, Default (Fixed Price Supply and Service), in 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 to the undersigned within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Please be as thorough in your response as possible that I have all the information necessary to make my decision on how to proceed with this effort.
>
> 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.
>
> Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages. It is not the intention of the Government to condone any delinquency or to waive rights the Government has under the contract.

(Appeal File at 326.)

32. The contractor provided a written response, dated March 8, 2000, to the cure notice (Appeal File at 307-17). In substance, the submission begins:

> It is understandable the frustration your letter shows in the project's progress. We share some of those frustrations as well. The opportunity to explain the factors leading to the delay in deliverables is appreciated. We remain committed to provide the contracted services to the Forest Service. We are also very thankful for the support provided to our team by [the COR and another Forest Service employee].
>
> Please note some of the factors of complexity that were not anticipated that have been encountered in getting this project to production stage. Following is the outline of the discovery of the unknown factors, the effort level expended so far by

> ValueCAD and AverStar to complete this project and the out of scope items for your consideration.

(Appeal File at 307.) The attached schedule of deliveries projects a mix of 20, 25, or 30 townships for the weeks ending March 3 through April 30, 2000, a mix of 30, 35, or 40 townships for the weeks ending May 7 through July 23, 2000, and of 45 and 48 townships for the weeks ending July 30 and August 6, 2000, respectively. This schedule identifies the submission of 762 townships. (Appeal File at 310.) Near its conclusion, the letter states:

> Your understanding and willingness to work with us in the past and giving us the opportunity to complete the project in a timely fashion is appreciated. We request that you accept the revised delivery schedule or extend the date of the contract to receive a maximum of 30 Townships per week.

(Appeal File at 309.) In the letter, the contractor also identifies what it characterizes as factors unanticipated or unknown to the contractor and subcontractor, as its good faith effort to deliver the townships, and as out-of-scope items (two types of data to be used) (Appeal File at 307-09).

33. In a memorandum dated March 12, 2000, to the contractor, the Government addresses its review of submitted townships: "Your work is looking better. Be sure that edge matching is completed prior to submittal and that coverages are checked for errors. I think these errors could have been caught in a review at your office." The memorandum identifies five townships that have been approved and five townships that have been rejected, with specific errors identified for each rejected township. (Appeal File at 1038.)

34. In a memorandum dated March 28, 2000, to the contractor, the Government identifies thirteen townships that have been approved and eleven townships that have been rejected, with specific errors identified for each rejected township. (Appeal File at 996.)

35. By letter dated April 12, 2000, the Government sent the contractor a show cause notice. The letter begins by noting that it "appears you have failed to cure the conditions endangering performance" under the contract. The letter continues:

> The Government is considering terminating the contract under the provisions for default. 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. In making this determination the following factors are considered.
>
> Award of this contract was based on the information provided by your company in your technical and price proposal. The skill levels and expertise of personnel that you submitted as part of your technical proposal could only lead the evaluation panel to conclude that you possessed the requisite personnel to perform this contract

successfully. Based on your performance to date, it appears you do not have the level of expertise required. This is based on the following:

> 1. It is now 172 days (61.4%) into the 280-day contract performance period. There are 108 days (38.8%) remaining. Out of 756 townships in the contract only 76 (10%) have been submitted. This leaves 90% of the work under the contract to be completed in 38.6% of the contract time remaining. Of the reviewed townships, 21 (23.3%) have been rejected and 15 of those are not yet approved, after resubmittal. It is not understood how contract terms can be successfully met based on these facts.
>
> 2. Communication with Forest Service personnel, namely the project Contracting Officer Representative (COR) and appointed Inspectors, was an expected element of the contract, as stated in the contract specifications, Part II, Item B, "Because discrepancies may appear in initial township coverages, frequent contact with the forest Service is necessary." You have required assistance beyond the intent of this statement.
>
> Since contract inception, numerous questions submitted to the technical personnel have resulted in responses referring your company to information you already possess in hard copy plats and contract specifications. A six month time period after the effective start date of a nine month contract term would lead one to conclude that a learning curve would have been reached and excessive communication would have eased. The continual communication between your company and Forest Service personnel is significantly impacting successful contract performance.
> 3. . . . Submittal of townships began with an initial three on December 9, 1999. No submitted townships were found acceptable until February 11, 2000. The maximum number of townships to be submitted under the contract terms is thirty per week. This per week maximum includes re-submittals. You submitted a revised schedule in your letter dated March 9, 2000 to complete performance by August 6, 2000. Based on the fact that there are 680 townships left for submittal with 15.42 weeks remaining for contract completion, it appears impossible to successfully complete this contract within the stated time frame.
>
> 4. Quality assurance appears to be lacking. This is based on the repetitive mistakes leading to the need to re-submit townships. For example, a memorandum sent to you on March 28, 2000 from the COR indicated rejection of 11 townships out of 24 reviewed. Errors

> were not from complex editing needs. OWN parcels, restrictions and easements were not created correctly. Edge matching was not correct on 6 townships and one township showed no editing completed at all. If instructions in your step-by-step internal editing directions as attached to your March 9, 2000 letter were being followed, all of the mistakes would have been caught. These are simple mistakes that should rarely be overlooked by internal quality control.
>
> Accordingly, you are given the opportunity to present, in writing, any facts bearing on the above to: [the contracting officer at a given address], within ten calendar days after notice of receipt of this notice.
>
> Your failure to present any excuses within the ten calendar day time period 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.
>
> Any assistance given to you in this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(Appeal File at 273-74.)

36. The Government sent the contractor a memorandum dated April 14, 2000, regarding the review of submitted townships. The memorandum states:

> It was very discouraging to review these townships. More than half of these were rejected. Many if not all of the errors should have been caught in your quality control process. Until performance improves, townships will only be reviewed until an error is found and then will be rejected. It is not an efficient use of time to review an entire township that has errors in it that should be found during quality control checking. The Forest Service is not providing quality control for the contract; that is the responsibility of the contractor. A review of how many townships have been submitted indicates that 45% of the townships for the G[UGM] have been submitted. Until performance improves and a higher percentage of townships have been submitted, I am not willing to provide additional data for another Forest.

(Appeal File at 906.) The memorandum then individually identifies thirteen townships that received Government approval, and nineteen townships that were rejected, with reasons stated in support of each rejection (Appeal File at 906-08).

37. A memorandum dated April 18, 2000, to the contractor contains comments regarding the Government's review of submitted townships. The memorandum states: "The following [thirteen

GUGM] townships that have been reviewed. Only one of them was accepted. The rest are rejected. The coverages were only checked until an error was found. There may be additional errors in the coverages." The memorandum then individually identifies the one township that received Government approval, and twelve townships that were rejected, with reasons stated in support of each rejection (Appeal File at 885-86).

38. In a memorandum dated April 21, 2000, the Government informs the contractor of its review of submitted townships. The memorandum states: "As you will see, there are errors occurring in many subclasses and the overall approval rate is far below 50%. I will put these townships in the mail to you on Monday." The memorandum then individually identifies eight townships that received Government approval, and fifteen townships that were rejected, with reasons stated in support of each rejection (Appeal File at 868-69).

39. By a submission dated April 21, 2000, the contractor responded and took "exception" to the show cause letter (Appeal File at 202-06). In the submission, the contractor maintains that many reasons contributed to the delays in submitting townships, but that "the Forest Service must accept much of the responsibility for the delay." By way of example, in support of its assertion, it states:

- The contract was awarded to us on September 28, 1999. The first training session was held in Denver on October 21, 1999. It is important that the Forest Service understand that anticipated contract performance and progress was premised on a productive initial training session, after which, ValueCAD had assumed in its proposal, that a rapid learning curve for the purpose of achieving the required contract production rates would be achieved. ValueCAD's bidding assumption is critical to your understanding of the postion ValueCAD now finds itself.

- During the first training session in Denver, we could not finish a single township because of Forest Service System problems. The result of this was that when we actually started working on the project, a lot of unanticipated judgements had to be made by our technicians. This did lead to many questions to the Forest Service and the Forest Service determined, upon our request, that another training session in Portland was required. This training session took place on February 3rd and 4th, 2000 in Portland with [a Government employee]. Thus, in essence, the training and production could not and did not start till Feburary 7th, 2000.

- The Forest Service did provide Arc/Info AML tools with the caveat that these tools are not error free and do not work correctly in all possible land status and land parcel situations. The tools were developed by the Forest Service and tested on an IBM AIX operating system. For more efficient use, we made the decision to port the AML's to an NT operating system. While doing the port of the AML's, we encountered a large number of errors in the AML's provided by the Forest Service; far more than could have been anticipated based on the bidding information provided by the Forest Service. . . . Even though we knew that the AMLs had some bugs, we did not realize the full extent of the volume of bugs that resided in the AMLs. Since

the Forest Service was using the AMLs, we reasonably assumed at the time of the bid that they would be in reasonable working order. . . . .

- The cost proposal for this project was prepared based on level of complexity, by township. The Forest Service determined the level of complexity and of the 103 townships submitted, we have determined that 29 were over the level determination (28%) and 4 were under the level determination (4%). This error in level determination by the Forest Service has caused increased production time and more cost. This understated difficulty level by Forest Service has also caused our estimate of deliveries to be overstated.

- The Show Cause letter states that the Forest Service has received 76 townships as of April 12, 2000. **This is inaccurate.** We have delivered 103 townships as of April 9, 2000 (36% more than what you stated) and 113 as of 4/16/200[0] that compares to the 129 scheduled for 4/9/2000. This schedule was submitted in our Cure Letter. **It is obvious that ValueCAD has overcome many obstacles and still managed to be very close to achieving schedule.** Even though to the best of our knowledge, the Forest Service was accepting our schedule of deliveries in the Cure Letter, the Show Cause letter compares the percentages of delivery to the signing of the contract. This over statement by Forest Service causes us to believe that Forest Service does not wish to cooperate in completing this project with ValueCAD.

- We are aware that the pilot of this project was completed in 13 months and contained approximately 300 townships. This contract requires us to complete 756 townships in nine months. This equates to an expectation by Forest Service of four times the output of the most recent past experience of the Forest Service. We can reasonably conclude that Forest Service had this knowledge and over estimated the output required from a contractor for this project by a significant margin.

(Appeal File at 202-03.) Although the contractor has not identified in the record any basis to support its allegations regarding the number of townships submitted, the record does contain a Government record of the townships, submittals and inspection dates and results. The contractor submitted 77 distinct townships prior to April 12, 2000 (the date of the show cause notice). The contractor had submitted 89 townships, as of April 9, 2000, only if one counts multiple versions of the same township, that is, resubmittals after an initial (and, perhaps, subsequent) rejection. Similarly, as of April 16, 2000, the contractor had submitted 103 distinct townships, or 115 townships, if multiple versions of the same township are counted. The record shows that on April 17, 2000, the Government received from the contractor 28 additional distinct townships; however, on that same date the contractor recalled 10 of the townships, and of the 28 township submittals, the Government approved 10 and disapproved 18. (Appeal File Supplement at 498-506.) The contractor's response fails to give weight to the Government's statement that it makes its calculation "[o]ut of 756 townships in the contract"; that is, the Government considers distinct townships submitted, not revised submissions.

40. In the submission, the contractor next references the contract provision that states that because discrepancies may appear in initial township coverages, "frequent contact with the Forest Service is necessary," and responds to the Government's assertion that the contractor is making excessive frequent inquiries, stating in part:

- There are two reasonable interpretations of this clause's intent. We understand the frustration with the frequent communication with the Forest Service during this project and have had the same experience at our end, as well. Your interpretation again understates the complexity and the changes in the specification of this project.

- ALP process is technically demanding and requires many decisions to be made by Forest Service cadastral surveyors and land status experts. We feel strongly that continued communications are needed to successfully complete this project. We have always viewed our relationship with clients as a partnership and feel that a true partnership is the only way to successfully complete a project.

- At this point, after reading the Show Cause letter, it is our opinion that this partnership does not exist because the Forest Service does not value such a relationship. To the contrary, ValueCAD is very much interested in expanding a partnership with the Forest Service for this project as this appears to be the only way your program objectives can be met in a cost effective manner.

(Appeal File at 203.)

41. In the response to the show cause notice, the contractor also addresses the Government's assertion that quality assurance (QA) and quality control (QC) appear to be lacking:

> However, we would like the opportunity to explain how the QC issues relate generally to the difficulties outlined above. We agree that some of the quality issues are controllable by us and therefore, ValueCAD has taken the following measures to reduce such problems by proposing the change in the process outlined below in italics. However, the Forest Service must take responsibility for the quality issue of the items discussed earlier. The following are examples of items that were rejected of which we take exception:
>
> - Out of all the rejected townships, 20% have been rejected for not being edgematched. When these were rejected, the Forest Service instructed us that we must drop nodes on township edges, to link to a node of a feature on an adjoining township edge. <u>There is no mention the specifications that we must split lines on adjoining townships to link them with features on our edit township edge</u>. This is very time consuming and is not a requirement of the contract.
>
> - Another 20% of the rejected townships involved WILD-regions missing. There is not a legend on the Land Status Plat to show the wilderness boundary or there is no

mention in the specifications as what depicts the WILD region. This information, we discovered, resides on the back page of Plat Edit Form. This item was never covered in any training or previous conference calls. We would have reasonably expected that a checklist of items to be covered in the training session would have been used by the Forest Service to inform us of such data and depiction.

- At this time we are not able to evaluate the other rejected townships since the plats and related information is in the hands of Forest Service. We will promptly address these items upon receipt of the documents.

- *We do have a solution for improving the quality of our submissions. We will be changing the process where ValueCAD personnel will be doing the first edit and AverStar (our sub-consultant) personnel will do the second edit or the Quality Assurance on all the remaining townships. This will be implemented for all new submissions of Townships.*

(Appeal File at 205.) Of the 77 different townships submitted by the contractor prior to April 12, 2000, the Government approved 32 and disapproved 45. Of the 103 distinct townships submitted prior to April 17, 2000, the Government approved 42 and disapproved 61. (Appeal File Supplement at 488-506.) The contractor has not identified any error by the Government in rejecting any of the townships. Regarding edgematching and the WILD subclass, the Board finds to be credible and true, particularly given that the contractor has not supported a contrary position, the assertions of the contracting officer's representative: "Adding nodes to the adjacent township, (edge match township), is a standard step in edge match procedures." "WILD subclass was discussed at length at both the initial Denver training session and again in Portland. It was discussed because it is a special use restriction that has its own subclass instead of being place[d] in the REStriction subclass." (Appeal File at 196).

42. In the response to the notice, the contractor further states:

4. We agree that to continue with this project, a revised delivery schedule will need to be developed. Additionally, we also believe that new specifications need to be drafted to include the significant constructive changes by the Forest Service to reflect the actual complexity of the project. We also want the opportunity to review our pricing structure based on the complexity levels and revised specifications.

5. We are attaching with this response a copy of the latest Second Edit (Quality Assurance) document for your review as well as a flow chart that tries to capture the decision process to complete a township. We would have reasonably expected that Forest Service should have provided such documents to us. In good faith we have expended resources to accumulate these documents to incorporate the significant constructive changes required to complete this project for Forest Service.

(Appeal File at 206.)

43. The contractor concludes its response to the show cause notice with the following:

> We are not offering excuses for the dilemma this project is currently in. We feel strongly that we have assigned the most qualified personnel to this project and have worked diligently beyond the original scope of the contract. We want to continue with the contract and strongly advocate working with the Forest Service as a partner.
>
> For the Forest Service to start this project with another contractor will inevitably cost more time and resources to complete. Another contractor will go through a similar learning curve for this most complex process. This will also require additional Forest Service resources to support the contractor. We believe we are at 95% of the learning curve and can deliver quality product in larger numbers.
>
> We have a total of 8 personnel who are assigned to this project and well positioned to deliver the product. We strongly request Forest Service to partner with us to complete the project. It is by far the most reasonable and best option for Forest Service and ValueCAD.
>
> We offer to have a meeting to remedy, on a partnership basis, the impact on the quality, delivery and cost from the revised scope and specification of this project. We are dedicated to work with Forest Service personnel who have developed a professional and supportive relationship with us. We want this to work for us and for the Forest Service. We strongly urge you to continue the contract with us. It is in the best interest of the Forest Service.
>
> We would rather celebrate a timely completion of this project with the Forest Service than to waste our mutual time and resources in non constructive activities. I'm available to meet with you at your convenience to discuss this response or any other issues concerning this contract.

(Appeal File at 206.)

44. In a memorandum dated May 1, 2000, the Government informs the contractor of the results of a review of submitted townships. The memorandum states:

> Based on [contractor's] question on our conference call on April 27, 2000, I reviewed the following townships to verify the errors. I also tried to provide additional information on what the errors were. The approval/rejection of townships does not change since all of these townships also have other errors. Please let me know as soon as possible if any of this does <u>not</u> clarify your questions. Thank you for letting me know about these so that I could clarify the various situations.

(Appeal File at 846.) The memorandum then individually identifies five townships that were rejected (Appeal File at 846-47).

45. By memoranda to the contractor dated May 4, 2000, the Government verifies that certain townships submitted by the contractor contain errors (Appeal File at 782, 797).

46. In a memorandum dated May 5, 2000, the Government informs the contractor of the results of a review of submitted townships. The memorandum identifies ten townships for which coverage is approved and three townships for which errors are identified. Of the ten townships approved, it appears that at least seven had been previously submitted and rejected. (Appeal File at 772, 908, 996, 1088.)

47. The record fully supports the credibility and accuracy of the conclusions of the Government, as expressed by its inspector on this project, who worked significantly with the contractor throughout performance: "We never felt that they fully understood the basic elements that they were to perform. Throughout the life of the contract, they would continue to ask very basic procedural elements." (Transcript at 254-55.) The inspector stated that the reason for the follow-up training session was because "the contractor lacked the basic GIS skills and knowledge of the subject matter to learn the techniques that we showed them the first time or even the first and second time." (Transcript at 260.)

48. Prior to the contracting officer making a determination on the proposed termination for default, the contracting officer's representative had thoroughly considered and rebutted each allegation raised by the contractor in response to the show cause notice (Appeal File at 36-43). The declaration of the contracting officer's representative aptly sums up the contractor's performance and what led to the termination for default:

> The overruling concern was the lack of quality in the work being submitted, the seeming inability to learn from past mistakes, and an obviously missing quality control process on the part of Appellant. The Government was continually expected to provide quality assurance for the Contractor, in spite of the fact that this was one of the proud boasts in their Technical Proposal.

(Exhibit A at 2). The record fails to demonstrate that the Government should have deemed acceptable any township disapproved at any time during the course of this contract. As of May 9, 2000, the Government had approved fewer than 100 townships; the contractor had the data to work on in excess of 80 townships for which no submissions had been made, and there remained several townships which required rework, because initial (and some subsequent) submissions had not been approved. From the Government log and record as a whole, the Board finds that as of May 9, the information available to the Government would have revealed the following regarding submissions by date, approvals and disapprovals; the chart indicates the number of townships (#) the contractor provided to the Government on a given date, and the numbers of those township submissions approved (A) and disapproved (D):

date	#	A	D	
dec 9	3	0	3	
jan 7	3	2	1	
jan 11	1	0	1	
jan 25	1	0	1	
feb 14	2	1	1	
feb 22	2	0	2	
mar 6	22	14	8	
mar 7	3	0	3	
mar 12 11	4	7		
mar 28 35	7	28		
apr 6	6	4	2	(excluding a "resent" township, #155)
apr 12	26	10	16	(excluding a "resent" township, #156)
apr 17	46	21	20	(on May 24: 1 approved and 4 disapproved)
may 1	9	1	3	(on May 24: 4 approved; on Jun 2: 1 approved)
TOTAL	170	64	96	(10 reviewed after May 9)

(Appeal File Supplement at 498-506) (for the May 1 submission: townships #120 and #160 deemed submitted May 1.) The Board does not find corroborating support in the the record for some of the figures proposed by the Government with the explanation: "During lost COR testimony as extrapolated from [Appeal File] documentation, a chart was offered into evidence summarizing [contractor's] progress. This chart follows." (Post-hearing Brief at 12 (¶ 46).) The chart was accepted into evidence at the conclusion of the hearing, as it was exhibit 2 to the contractor's motion for summary judgment, here referred to as Exhibit Q (Transcript at 658), not by the Government with the witness. A useful approach in the brief would have referenced the material in the record so as to support the figures.

Termination for Default

49. A memorandum to the file, dated May 9, 2000, signed by the contract specialist (as having prepared the document) and the contracting officer (as having approved the document), contains the determination and finding regarding the decision to terminate for default the contract here in dispute. The document sets forth the Government's view of the contractor's position, as well as the position of the contracting officer. This view of the contracting officer is stated as follows:

> The Contractor has breached a number of Contract terms, including timely submittal of the end product to complete the project, quality control of the end product, late re-submittal of unacceptable end products and misrepresentation of company's skills, expertise and capabilities. The representation is apparent when the content of the original proposal submitted by the Contractor is compared with their performance thus far. This misrepresentation resulted in reliance on the Forest Service to provide basic training of skills thought to already be possessed by the Contractor. The possession of these skills and expertise was an essential reason for awarding the Contract to complete the included work.

(Appeal File at 16). The document specifies that the contract should be terminated for default in its entirety because the contractor failed to "make progress and that failure endangers performance of the Contract." (Appeal File at 25.)

50. By letter dated May 9, 2000, the contracting officer informed the contractor that the contract "is terminated in whole for default"; May 10, 2000, is the effective date of the default. The letter specifies that the contractor has no right to proceed further under the contract. The Government shall pay the contract price for completed work delivered and accepted. (Appeal File at 45-46.) By way of explanation, the letter states:

> The Government has made numerous attempts to assist you in accomplishing the work under the contract, including additional training of your personnel, and guidance in the basics of ARC/INFO system use. Regrettably, these communications have not resulted in improvement on the rate of the project's progress towards completion in a timely manner under current contract terms. Upon review of [] all contract actions and the file documentation as a whole, this decision of default was made.

(Appeal File at 45.) The letter details the reasons for the default:

> 1. Failure to make delivery and perform the services within the time specified in the Contract, which is not excusable. Namely, not submitting work at a sufficient rate early enough in the contract to complete the contract work by the end of the contract time within the maximum submittal rate of 30 townships per week, and not re-submitting corrected townships within 14 calendar days. These deficiencies by your company are a result of lack of skill in the areas necessary to accomplish the work and failure to provide the tools and resources you represented you possessed in the proposal submitted by your company; information upon which award was based.
>
> 2. Failure to make progress and that failure endangered performance of the contract. Namely, not progressing beyond 13% of approved work under the contract when 62.5% of the contract performance period had passed.

(Appeal File at 45-46.)

Contract Specialist and Other Information

51. The contract specialist testified: "based on the information I had, the problems with performance were significant, so significant that I didn't think more time and money would result in successful completion if it was extended as suggested." (Transcript at 499.) Further, she testified that the contractor was not capable of performing without the assistance of the Government. "The fact that the people who had been on the contract to that point had not been proficient, did not give me confidence that adding additional people of the same caliber were going to help with the contract." A concern was the quality of the product being delivered. "Since they were unable to produce an end product that had quality in it affected their ability to deliver and progress." (Transcript at 538-39.) The lack of additional data from the Government did not delay the contractor. The contract "had so much work to do and they hadn't submitted it to us." (Transcript at 541.) Prior to the default, "they weren't doing a very good job. And we told them that we didn't feel they were doing a good job. And we had their record of how they had done to that point to show that, and it was confusing why they still didn't quite see it or didn't quite get it. We had been as frank as possible about the situation, and to the end they still didn't realize that there were problems. I didn't quite understand what their block was in that respect." (Transcript at 544.) "There was a consistent high level of questions to the point that the technical personnel involved in administering the contract spent most of their time answering the questions and taking the contractor through step by step in e-mails and on the phone, to the point where they couldn't get their work done. And one of the considerations is, if we're spending all this time telling the contractor how to do the contract and how to do their work that they were supposed to be able to do, would the contract continue or should we continue holding the contractor's hand through the whole thing?" Also, "there was little or no quality in the product that was provided to us." (Transcript at 547.)

52. The Government's "final" question to and the answer by the contract specialist, has merited particular attention:

> Q In theory, could a contractor submit 756 townships initially the final day of performance?
>
> A The way the contract is written, that could have happened, yes.

(Transcript at 551.) Thereafter, after affirming her view that the contract permits the contractor to submit all of the initial townships on the last day of the contract, the contract specialist responded to further questions:

> Q So the contractor's alleged lack of sufficient progress is fictitious because they could have submitted the complete townships during the last week?
>
> A Yes, but we were aware of the problems with quality as a result of them submitting townships before the end of the contract, which was the main concern.

> Q Was it possible for the contractor to improve the quality over the last couple months of the contract?
>
> A I -- they probably could have improved the quality. We were aware of poor quality and that's what we were responding to.

(Transcript at 553.) The contractor presented no evidence that it interpreted the contract as permitting the submission of all townships in the final week of contract performance. Moreover, as indicated in the findings above, and throughout the evidentiary record, throughout performance the Government, particularly the contracting officer's representative, revealed an interpretation that the contract permitted a maximum weekly submittal of thirty townships, although the Government would accept a greater number to enable the contractor to successfully perform by the completion date.

53. Each party elicited testimony during the hearing and introduced into the evidentiary record documents pertaining to the ALP pilot project, which involved the Forest Service, Region 2, and a contractor not a party to the contract here in dispute. The Board has reviewed such evidence and the allegations of the parties. The record fails to establish that the discrete pilot project contract or conduct of the parties under that contract are relevant or material to this dispute; without a sufficient nexus to this contract, the facts regarding the different pilot project contract and actions thereunder do not assist in contract interpretation or an objective review of the underlying default action. Accordingly, the Board does not make more particular findings regarding the evidence reviewed.

54. Each party also elicited testimony during the hearing, and the contractor introduced into the evidentiary record documents, pertaining to one of its contracts with the Forest Service, Region 6. The Board has reviewed such evidence and the allegations of the parties. The record fails to establish that the discrete contract or actions thereunder are relevant or material to this dispute; without a sufficient nexus to this contract, the facts regarding a separate contract and actions thereunder do not assist in contract interpretation or an objective review of the underlying default action. Accordingly, the Board does not make more particular findings regarding the evidence reviewed.

55. The contractor elicited testimony and developed the evidentiary record regarding the contractor's attempt to get the Government to approve the contractor's flow charts and quality assurance materials and procedures. Although the Government cooperated and provided comments regarding such materials (Transcript at 581, 584), the Government would not approve or reject any such submissions because the Government viewed the method of performance to be the contractor's responsibility. Should the contractor perform according to the flow chart or procedures but the resulting townships were not acceptable, the Government did not want to assume the responsibility for such deficiencies. (Transcript at 364-65.)

56. Testimony was elicited during the hearing regarding the contractor's proposed QA/QC system. In its proposal, the contractor indicates various steps and duties regarding its QA/QC policy. Regarding the materials requiring further work (i.e., townships reviewed and not approved

by the Government), the proposal identifies under the "best approach" step that "plots could have been marked-up using a certain color scheme." (Exhibit C at 56). This language does not specify that the Government must take specific action during its review process; the proposal does not identify any aspect of the proposal or QA/QC system as containing a deviation from the terms and conditions of the contract. The contractor has not identified language in this contract by which it should benefit by the lack of awareness of Government employees on this contract with practices of the contractor and a different region of the Forest Service under a different contract (Transcript at 300-01). Although the contractor may have envisioned a collaborative effort in finalizing townships, the contract states that Government thoroughly reviews a township once (FF 10). The contractor has not identified language in the contract which obligates the Government to become part of the quality control process as envisioned by the contractor.

57. The solicitation and contract specify the following regarding the automated determination of complexity levels: "The number determined by this process may vary slightly from the actual number of regions required, but shall still serve as a valid indicator of the relative complexity from township to township." (FF 7). The evidentiary record contains information presented by the contractor regarding the complexity levels of various townships. The information was developed based upon the number of regions in a given township. (Supplemental Appeal File at 435-439; Transcript at 599, 607). The information presented by the contractor is not determinative of the complexity levels, given the express statements that the complexity level is not solely dependent upon the number of regions (Exhibit F; Transcript at 334, 651-56). The evidentiary record fails to demonstrate that the Government calculated any complexity level other than as represented in the solicitation and contract; the contractor has not identified any township for which it has established a miscalculation.

58. The contractor has asserted that the Government delayed its operations in various ways. It contends that the Government failed to provide data needed to complete a township and that the Government ceased sending township information for processing when the Government was contemplating the termination for default. Although the Government did take time to ascertain and ensure that the contractor had the correct and complete information to complete various townships, and the Government did stop sending new materials to the contractor, the record fails to demonstrate that the contractor was unreasonably delayed in its performance. The record does not demonstrate that the delays said to arise from incomplete information are other than those typically encountered in a contract such as this. Regarding the lack of new townships, the contractor had material for several townships to be completed (either initially or on revision). The record does not demonstrate that the contractor was impeded in performing the contract by the lack of new materials. Rather, the contractor could expend its efforts on completing townships within its control. The Board finds credible and accurate the views of the contracting officer's representative in commenting upon the contractor's responses to the show cause notice:

> We do[] not have any concerns with the timeliness of our delivery of government furnished material. We are always willing to allow for mailing delays or would allow for any kind of delays that we have caused. The issue with lack of performance on this contract is not due to material delivery from the government.

> The contractor has not been timely with their delivery of completed coverages, and those that have been delivered have been so delivered with a less than 50% approval rate. Lack of skills, lack of quality control and lack of management are the issues effecting the successful completion of this contract, none of which are the responsibility of the Forest Service.

(Appeal File at 43.)

Dispute

59. On August 7, 2000, the Board received a notice of appeal and complaint from the contractor. In the complaint, the contractor maintains that there is no basis for the Government's termination action, and that the decision to terminate for default is not supported by the applicable facts or law, and, therefore, is arbitrary, capricious, and constitutes a breach of contract. In seeking to invalidate the termination for default, the contractor also asserts that the Government breached the contract by (1) issuing defective specifications, (2) failing to cooperate with the contractor, (3) failing to disclose information necessary to perform the contract, and (4) intentionally withholding information in the proposal stage of the selection process.

DISCUSSION

In its post-hearing brief, the contractor pursues various theories in support of its position that the termination for default is improper. The contractor maintains that the testimony of the contract specialist "standing alone, can support the [contractor's] entire case" and that "based on this evidence and this evidence alone, [the Board] could find that the Termination Notice is unsupported, and indeed, that the default rationale is 'fictitious' and thus incapable of supporting the 'drastic' sanction of a Default action." Further, relying upon the developed record and DeVito v. United States, 413 F.2d 1147, 1153 (Ct. Cl. 1969), the contractor contends that the Government waived its right to terminate the contract for default. Additionally, it contends that the Government imposed its own pass/fail QA/QC system, which constitutes either a breach of the contract or a constructive change, thereby entitling the contractor to relief. The contractor also characterizes this as a Government failure to disclose a material requirement in the solicitation. The contractor also alleges that specific Government-caused delays significantly impacted the progress under the contract and that such delays serve to invalidate the termination for default. Specifically, the contractor identifies the following as Government-caused delays: (1) the Government imposed its own QA/QC system on the contractor; (2) the Government delayed the delivery of Government-furnished data on numerous occasions; (3) the Government "resisted, and thus delayed, the delivery of needed instructions, flow charts, and the like necessary for the [contractor] to develop its 'Work Instructions' so that production could be improved"; (4) there "were many instances of delays in providing government data needed to complete individual townships during contract performance"; and (5) the Government withheld township data requested by the contractor, when the contractor began to run out of work. (Post-hearing Brief at 2, 5, 20.) The following discussion addresses and resolves each of these contentions.

Termination for Default Standard

The Government terminated the contract for default. A stated reason for the default determination is the contractor's failure to make progress with that lack of progress endangering performance. (FF 50.) As the Federal Circuit has directed, "the test formulated in Lisbon [Contractors, Inc. v. United States, 828 F.2d 759 (1987),] controls the determination of whether the government justifiably default terminated a contractor for failure to make progress." McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016 (Fed. Cir. 2003).

> In applying that standard, we have required that the contracting officer's termination decision be based on tangible, direct evidence reflecting the impairment of timely completion. In other words, a court's review of default justification does not turn on the contracting officer's subjective beliefs, but rather requires an objective inquiry.

McDonnell Douglas, 323 F.3d at 1016 (citations omitted). "Thus, the trial court should focus on the events, actions, and communications leading to the default decision in ascertaining whether the contracting officer had a reasonable belief that there was no reasonable likelihood of timely completion." McDonnell Douglas, 323 F.3d at 1017.

Contract Specialist

The contract specialist testified that the contract permitted the contractor to submit all of the townships during the final week of the contract and that it was possible for the contractor to improve the quality of its work over the final months of the contract, so that the alleged lack of progress is fictitious (FF 52). The contractor maintains that the testimony of the contract specialist "standing alone, can support the [contractor's] entire case." Also, that "based on this evidence and this evidence alone, [the Board] could find that the Termination Notice is unsupported, and indeed, that the default rationale is 'fictitious' and thus incapable of supporting the 'drastic' sanction of a Default action." (Post-hearing Brief at 5.) Factually and legally, this basis for relief is flawed.

First, the testimony is not controlling, it is but one element of the evidentiary record. Based on an objective inquiry, the Board determines if the record supports the termination for default. An aspect of the default analysis is contract interpretation, which is a legal question to be resolved by the Board, not the contract specialist.[7] The solicitation and contract state that the contractor "may deliver a maximum of 30 completed townships a week, inclusive of the final week of the contract" (FF 9). The explicit language of the contract did not permit the contractor to submit all remaining

[7] The contractor posits inconsistent contract interpretation arguments. As noted below, the contractor premises its arguments of Government forbearance on the interpretation that the contract permits a maximum submittal of thirty townships per week. Here, it maintains that the contract permitted all submittals in the final week.

townships during the final week of the contract. The Board concludes that the plain language of the contract, as written, permits a maximum submittal of thirty townships per week, not the initial submission of more than thirty townships during the final week of the performance period (FF 9, 10).

Moreover, the testimony fails to reflect a true interpretation of the contract evidenced during performance. During performance, neither party interpreted the contract to permit the initial submission of all remaining townships during the final week of the contract; the parties were working with the understanding that a sufficient number of townships were to be delivered on a weekly basis. (FF 24, 35, 52.) The contractor requested permission to submit in excess of thirty townships per week. The Government permitted the contractor to submit in excess of thirty townships per week, in an attempt to have this contractor complete performance by the completion date of the contract (FF 48). This relaxation of a contract term by the Government does not alter or negate the language of the contract and the clear understanding and application of the language evidenced during performance.

Second, the testimony of the contract specialist is more limited than the contractor alleges. The testimony does not begin and stop with the words that the contractor relies upon. The contract specialist testified that in her view, in theory, the contract enabled the contractor to submit all townships in the final week and that it was possible for the contractor to improve its quality over the final months of the contract. A theory and a possibility are not assured events. More importantly, the testimony must be viewed in context. The contract specialist testified that the quality and quantity of the contractor's work was inadequate to assure completion within the performance period, and that there was no basis to conclude that the quality or quantity would improve sufficiently to assure such completion. (FF 51.) Thus, although it was possible for the contractor to improve, the contract specialist testified that sufficient improvement was not likely based upon contractor-demonstrated performance. Her conclusion regarding the unlikelihood of sufficient, timely performance (even had the Government permitted the remainder of townships to be submitted during the final week) , is well-supported by the record and the contractor's performance during the contract.

The testimony of the contract specialist is one element to be considered in determining if the record supports the termination action (that is, if Government has met its burden of proof regarding the termination for default). The testimony, when taken in context, does not invalidate the termination for default.

No Contracting Officer at Hearing

The contractor alleges that it was

> compromised in its ability to explore the issue of excusable delay due to the unexplained absence of the only Contracting Officer legally charged with the authority to terminate [the contractor's] contract in Region 2. . . . Since the government elected to make the Contracting Officer unavailable for the Hearing, the

> government seeks to avoid close examination of the facts and circumstances surrounding the actual decision to terminate ValueCAD. In doing so, the appellant's ability to critically examine the basis for the government's termination is lost, and its rights before the Board are compromised.
>
> To allow the government to sustain its burden of proof by support of a contract "forfeiture," without the testimony of the Contracting Officer who took the action, violates the appellant's rights under the contract, and deprives the appellant of basic constitutional "due process." Given the conflicting evidence that now exists in the record, the absence of [the contracting officer], the one person who was responsible for actually taking the action, should nullify the Default termination under dispute.

(Post-hearing Brief at 21.)

The assertions ring hollow. The contractor had not identified the contracting officer on its witness list as a potential witness to be called; it raised the matter initially in its post-hearing brief, not during the hearing, and without having sought to call the contracting officer as a witness. Although the Government had placed the name of the contracting officer on its witness list, the contracting officer did not testify and was not at the hearing. The Government was not obligated to elicit live testimony from the contracting officer during the hearing.[8] The contractor was permitted to engage in discovery and to develop the evidentiary record during the hearing on the merits. The Government has not altered the bases claimed in support of the termination for default action. Regarding the suggestion that conflicting evidence exists in the record, it is the Board, not the contracting officer, that makes findings of fact and legal conclusions to resolve this dispute. The contractor could have identified the contracting officer as a witness it would call at the hearing. It did not do so. The litigation strategy and decisions of the contractor do not serve to nullify the default action of the Government.

---

[8] The Board conducts an objective review, not a subjective review based solely on the analysis of the contracting officer. When engaging in a de novo review of the contracting officer's actions in dispute, the Board is not bound by the findings, analysis, or conclusions of the contracting officer. 41 U.S.C. § 605(a). Here, the Board is to consider if the contracting officer's termination decision is based on tangible, direct evidence reflecting the impairment of timely completion; the analysis does not require the testimony of the contracting officer.

The suggestion of prejudice, made initially in its post-hearing brief, is not supported under such circumstances when the contractor elected not to identify the contracting officer on its witness list as its own potential witness.

Summary Judgment and DeVito

In its post-hearing brief, the contractor renews its motion for summary judgment, and alternatively, based upon the fully developed record, seeks a ruling that the Government waived its right to terminate the contract for default based upon the decision in DeVito. On the first matter (the renewed motion), the Board denies the belated request to reconsider the decision denying the motion for summary judgment. On the second matter (based on the fully developed record), the Board concludes that the Government did not waive its right to terminate for default.

The contractor premises this theory of relief on the number of townships to be delivered, the thirty township maximum per week and the contract completion date in July 2000. The contractor maintains that there was no contractually enforceable schedule after January 2000, when it became impossible to deliver over 700 townships in weekly increments not exceeding thirty. The contractor references the provision of Federal Acquisition Regulation, 48 CFR 49-402-3(c), that states: "Subdivision (a)(1)(i) of the Default Clause covers situations when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time" and the following from DeVito, 413 F.2d at 1153-54:

> Where the government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given. . . .
>
> The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

The contractor then maintains that the record supports

> the unrebuttable conclusion that the [contractor] failed to achieve a production rate at the end of January 2000 that would have completed all townships by the established completion date of July 26, 2000 without exceeding 30 townships a week. On May 9, 2000, the [contractor] was retro-actively terminated for default on this very basis, 3 ½ months after this crucial date had long been passed.

(Post-hearing Brief at 51.)

The contractor's analysis and attempted application of DeVito to this case are misguided. The contractor continues to take a narrow view of the bases raised by the Government in support of the termination for default. The Government does not state that the contract was terminated because the contractor had failed to meet a delivery date. This termination for default is not premised on a specific failure by the contractor to deliver initial townships or revised townships pursuant to the delivery schedule; the Government does not here simply rely upon provision (a)(1)(i) of the Default clause (FF 15). Rather, the Government relies upon provision (a)(1)(ii) and the contractor's failure to make progress so as to endanger timely completion of the contract. Therefore, although the contractor asserts that the only legal option the Government had was to re-establish a new delivery date (Post-hearing Brief at 55), the final date for initial submission of all townships never changed; the Government explicitly sought assurances from the contractor that the contractor could complete performance within the performance period.

The Government did not retroactively terminate the contract for default. Although by the end of January it became impossible for the contractor to complete the contract by the completion date with a maximum weekly submittal of thirty townships, the Government indicated a willingness to (and, in fact, did) accept more than thirty townships per week, while keeping the completion date fixed. The Government terminated the contract because of the inadequate quality and quantity of submissions; the contracting officer concluded that the contractor's performance and responses to the several inquiries and the cure and show cause notices indicate that the contractor was not able to satisfactorily perform. The due date for performance had not passed; it remained July 2000. The default is premised on the contractor's demonstrated inability to meet that completion date and failure to provide assurances that the contractor could satisfactorily perform.

Moreover, the Government's actions do not indicate forbearance so as to preclude a termination for default. In the notices and correspondence, the Government reminded the contractor of the completion date and demanded assurances that the contractor would timely complete performance. In the letter dated January 14, 2000, the Government indicated that it wanted to "assure success in completing the project on time," and required the contractor to submit a "revised progress schedule and comment on how you plan to meet the performance period set forth in the contract" (FF 24). By memorandum dated January 26, 2000, to the contractor, the Government expressed concern regarding the quality and quantity of the townships submitted; the Government stated: "In order to complete the contract within the time allowed it is critical that ValueCAD get into full production as quickly as possible" (FF 26). In the cure notice dated February 23, 2000, the Government specified that it considers the contractor's "failure to make acceptable progress a condition that is endangering performance" (FF 31). The show cause notice, dated April 12, 2000, specifies that the contractor has failed to cure the conditions endangering performance. The rejection rate of townships submitted and the time remaining for performance are highlighted as a preface to the Government's statement that it "is not understood how contract terms can be successfully met based on these facts." (FF 35.) The cure notice and notice to show cause both specify that "it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract" (FF 31, 35). Throughout performance, the Government continued to notify the contractor of the need to complete the contract by the completion date and the Government's dissatisfaction with the performance of the contractor, performance which jeopardized timely completion.

At best, from the perspective of the contractor, "the facts indicate that [the Government] was aggressively attempting to require [the contractor] to provide a completion schedule in order to determine whether forbearance was appropriate." A.R. Sales Co. v. United States, 51 Fed. Cl. 370, 374 (2002). The Government's working with the contractor and permitting the contractor to submit in excess of thirty townships during some weeks does not equate to the contractor having no further responsibilities under the contract to provide assurance of timely completion. The contractor could not have reasonably concluded that the completion date was no longer a binding term of the contract. The Government's actions do not amount to forbearance. The show cause notice (and earlier correspondence) expressly put the contractor on notice that the failings of the contractor were not acceptable and that the Government was insisting on completion by the date in the contract.

The Objective Inquiry

As noted above, the initial burden is on the Government to justify the termination for default. The Government here maintains that the contractor had not achieved a rate of successful completion to permit completion within an acceptable time frame and that the contractor had failed to provide assurances as to when the contract could be completed. The record fully supports the conclusions of the Government.

The contractor was performing poorly, in terms of the quality and quantity of townships submitted, and the learning curve demonstrated by the approval rate of the submissions at the given rates. The contractor's response to the show cause notice provides no substantive assurance that the contractor was capable of completing performance within the contracted period (or any acceptable time thereafter). In short, the contractor's performance demonstrated its inabilities and lack of expertise, and its explanations as to how it intended to complete the contract justified the conclusions of the contracting officer that this contractor would not be able to perform the contract in a timely manner.

An objective inquiry (the review of the information available to the contracting officer, as of May 9, 2000) reveals the stated numbers of approvals (A) and disapprovals (D) of the given number of townships submitted on the stated date:

date	#	A	D	
dec 9	3	0	3	
jan 7	3	2	1	
jan 11	1	0	1	
jan 25	1	0	1	
feb 14	2	1	1	
feb 22	2	0	2	
mar 6	22	14	8	
mar 7	3	0	3	
mar 12 11	4	7		
mar 28 35	7	28		
apr 6	6	4	2	(excluding a "resent" township, #155)

apr 12	26	10	16	(excluding a "resent" township, #156)
apr 17	46	21	20	(on May 24: 1 approved and 4 disapproved)
may 1	9	1	3	(on May 24: 4 approved; on Jun 2: 1 approved)
TOTAL	170	64	96	(10 reviewed after May 9)

(FF 48). Or, if one considers the approvals and disapprovals based on the date of review by the Government (because the Government did not always review together all townships submitted on a given date; submissions from a given date could be reviewed and returned on different dates), one sees the following for the given date of review:

feb 11: 2 approved, 1 rejected (of initial 3 townships on resubmittal) (FF 29)
mar 12: 5 approved, 5 rejected (FF 33)
mar 28: 13 approved, 11 rejected (FF 34)
apr 14: 13 approved, 19 rejected (FF 36)[9]
apr 18: 1 approved, 12 rejected (FF 37)
apr 21: 8 approved, 15 rejected (FF 38)
may 5: 10 approved, 3 rejected (FF 46)[10]

Both sets of figures reflect the actual number of townships submitted, such that they include resubmissions with corrections based upon Government-identified errors. As of May 9, 2000, the Government had approved fewer than 80 townships; the contractor had the data to work on in excess of 80 townships for which no submissions had been made, and there remained several townships which required rework (FF 48). The contractor had demonstrated an inability to submit acceptable townships of a sufficient quantity to complete the contract by the end of July or even within several weeks of that date. Any improvement in the contractor's submittals subsequent to the show cause notice was inadequate to demonstrate competence and an ability to timely perform.

In addition to the quality and quantity of township submissions, the Government correctly also considered the response to the show cause notice. The Government had specifically identified its

---

[9] The Government's memorandum to the contractor detailing the results specifies that it was a "discouraging review" because more than half of the townships are rejected; errors should have been caught in the quality control process (FF 36).

[10] At least seven of the approved townships were revisions to those previously rejected (FF 46).

concerns in the show cause notice dated April 12, 2000, and sought explanation from the contractor to be considered when making the determination on default (FF 35). As detailed in the following paragraphs, an objective inquiry into the contractor's response and the pertinent record results in the conclusion that this contractor lacked a basis to excuse its performance or to mitigate against a default determination.

In response to the show cause notice, the contractor raises various reasons as to why the Government must take responsibility for much of the delay (FF 39-43). Most tellingly, the response lays blame on the Government without providing a substantive explanation regarding improved performance (other than stating that it will institute a change in its processes, with the contractor to perform the first edit, and the subcontractor a second edit). Objectively, the excuses are unconvincing and are not supported by the record. The contractor's failure to address how quality and quantity will improve to permit contract completion further supports the conclusion that the contractor was not capable of successfully completing performance within the allotted time.

Initial Training

The contractor contends that the initial training session was not productive, and that it "had assumed in its proposal, that a rapid learning curve for the purpose of achieving the required contract production rates would be achieved." The contractor further contends that during the initial training session it could not finish a single township because of Forest Service system problems, and that a second training session was required; it concludes that its production could not start until after the second training session was complete (FF 39).

The contractor has not identified, and the Board has not found, a provision in the solicitation or contract that supports the reasonableness of the various, stated assumptions of the contractor. That is, the record does not demonstrate that, during the two-day training session, the Government was obligated to permit the contractor to complete a township or that the guaranteed result of the training session was to be a contractor that could achieve a satisfactory production rate. What the record does support is the conclusion that the contractor provided people for the training session who lacked many skills required to achieve a satisfactory production rate; one could not reasonably expect the Government in two days to fully train individuals who lacked basic concepts required to perform at the start of the contract.

The Government did not cause the need for the second, or for multiple training sessions. Rather, the record demonstrates that the inabilities of the contractor-provided personnel were the precipitating causes of the need for additional training. The contractor was unable to complete townships initially and failed to identity mistakes through its quality control process (despite the assurances found in its proposal that the product would be error-free upon initial submission). The lack of basic skills cannot be attributed to the Government.

The Government did not misrepresent the training it would provide. The solicitation and contract state that the Government would provide two days of mandatory training to two employees of the contractor (FF 4). The Government provided two days of training initially (FF 17) and several days

of training thereafter (FF 28, 30, 32). The record does not demonstrate that the initial training was deficient because of Government action or inaction. Rather, the Board finds that the contractor provided individuals for training who lacked basic skills, such that much of the training time was expending on elementary materials, rather than the more specific and detailed training that more experienced people would have obtained (FF 30, 47).

The contractor's assumptions regarding what it would obtain during the training session are no more than its own assumptions. The assumptions are not reasonable or imputable to the Government, particularly given that the solicitation and contract provide no basis in support of such assumptions, and the contractor failed to make the Government aware of its assumptions and make such conditions for acceptance of its offer. (FF 13.)

AMLs

The contractor maintains that it encountered various errors in the AML tools, "far more than could have been anticipated based on the bidding information provided" (FF 39). The solicitation and contract expressly place a potential and actual contractor on notice that the tools are not error-free, but are made available "as is" without warranty. The solicitation and contract specify that portability may be an issue. The contractor signed the contract with these explicit notifications and the statement that the "[f]ailure of the tools shall not release the Contractor from the obligation to deliver the Township coverages in accordance with specifications." (FF 5.) The contractor has demonstrated no misrepresentation, as it attempts to shift to the Government risks expressly placed upon the contractor by the terms and conditions of the contract. Given the language in the solicitation and contract, the record does not demonstrate that the difficulties were other than a reasonable offeror would have anticipated. The alleged errors in the AMLs do not constitute a basis to excuse the performance by the contractor or make the default determination inequitable.

Complexity Levels

The contractor contends that the Government inaccurately stated the complexity levels of approximately one-third of the townships submitted by the contractor (FF 39). The solicitation and contract indicate how the Government determined the complexity levels identified in the contract (FF 7). The record does not demonstrate that any complexity level was determined contrary to the methodology identified in the solicitation and contract (FF 57). Therefore, with complexity levels accurately described, this does not constitute an excusable basis for inadequate performance. Secondarily, even if complexity levels were understated, the contractor has not demonstrated what that impact was on its performance. Rather than simply requiring additional time to complete an acceptable township, this contractor was largely unable to complete acceptable townships.

Productivity and Quality

The contractor takes exception to the Government's calculations in the show cause notice of the number of townships submitted (FF 39). As the Board states in the findings (FF 39, 48), the Government's numbers are generally accurate, while the figures proposed by the contractor are

either misleading or lack support in the record. The contractor was not close to achieving an acceptable rate of performance, in terms of quantity and quality, to achieve timely completion.

A Different Contract

In responding to the show cause notice, the contractor addresses a pilot project that was the predecessor to this contract in dispute:

> We are aware that the pilot of this project was completed in 13 months and contained approximately 300 townships. This contract requires us to complete 756 townships in nine months. This equates to an expectation by Forest Service of four times the output of the most recent past experience of the Forest Service. We can reasonably conclude that Forest Service had this knowledge and over estimated the output required from a contractor for this project by a significant margin.

(FF 39.)

The contractor's reliance on the pilot project contract is misplaced and its conclusions unreasonable. This solicitation and contract placed this contractor on notice of the maximum time for performance. One could readily extrapolate the required satisfactory production levels to complete the contract on time. Contrary to the statement of the contractor, the Government did not over-estimate the required output by the contractor. The solicitation and contract make clear the number of townships to be completed and the length of the performance period. The risk of accomplishing satisfactory production levels is on the contractor, not the Government. It appears that the contractor attempts to blame the Government for not properly anticipating this contractor's abilities. Such allegations merit no further comment from this Board, but when considered objectively at the time of the default determination, the response to the show cause notice is an excuse (unsupportive of the contractor's true ability to perform) rather than a positive statement that would assure the Government that this contractor possessed the ability and capability to perform.

Communications

In the notice to show cause, the Government notes that communication between the parties is recognized as an important element under the contract; however, the Government states that continual communication is significantly impacting successful performance (FF 35). The contractor addresses this in its response to the show cause notice (FF 40).

The contractor references the complexity of the project and changes to the specifications. The record does not demonstrate that the complexity of the project is other than identified in the solicitation and contract. The record also does not demonstrate changes in the specifications. The Government was not to resolve every decision to be made under the contract with the contractor simply keying in information. The record fully supports the frustrations of the Government in dealing with repetitive questions, when an experienced contractor would have learned and built upon prior questions and answers. The record demonstrates that the contractor was making repeated

inquiries revealing a lack of understanding and learning. Further, as indicated in the Government's review of townships, the contractor's submission of townships initially or multiple times containing errors also demonstrates the contractor's inability to learn from mistakes. (FF 36-37, 47-48.)

The Government did not cut off communication. What the Government sought was some assurance that this contractor would not expect the Government to do the work required of the contractor--namely, correctly deciding how to resolve the multiple questions which had been addressed previously. A reasonable conclusion from the request and lack of a positive method of controlling communications, so as to be productive and beneficial, is that the contractor fails to demonstrate an ability to complete the contract without significant Government input beyond that dictated by the contract.

Partnership

The contractor demands that a partnership must exist, which is suggestive of the Government sharing in the work for which the contractor is paid under the contract (FF 40). The contract is not a partnership agreement, although the Government extensively cooperated with the contractor and provided assistance well-beyond that required or suggested under the contract. As is borne out by the record (FF 21, 25, 30), and recognized by the contractor ("Thanks for all your support for this project" (FF 28); "We are also very thankful for the support provided to our team"; "Your understanding and willingness to work with us in the past and giving us the opportunity to complete the project in a timely fashion is appreciated" (FF 32)), the Government cooperated with the contractor, but demanded that the contractor demonstrate an ability to complete the contract. Once again, rather than assure the Government that the contractor is capable of performing this contract, the contractor demands that a partnership exist with changes to the terms and conditions of the contract.

Quality Assurance/Quality Control

The Government expresses concerns that the contractor was providing inadequate quality assurance or quality control. The Government suggests that by submitting unacceptable townships in such large quantities, the contractor was not providing quality control; the Government did not wish to act as the contractor's initial quality control. (FF 35.) The contractor acknowledges that some of the quality issues are within its control, as it proposes a change in its processes (discussed below); however, it maintains that the Government must take responsibility for various quality issues addressed already (FF 41). The Board has found that the Government is not responsible for any of these items the contractor has raised as excusing the default.

Edgematching

The contractor insists that the Government is requiring edgematching in a manner not identified in the solicitation and contract (FF 41). The solicitation and contract specifically denote edgematching as a process the contractor is required to perform (FF 4, 8). The contractor has failed to substantiate its assertion; namely, it has not proven that the Government required edgematching other than as

specified in the contract and understood in the industry. The Government required the contractor to perform according to the terms and conditions of the contract.

WILD Regions

The contractor raises the matter of WILD regions (FF 41). As part of the description of processes, the solicitation and contract discuss wilderness restrictions in the subclass WILD (FF 4). Assuming that the contractor is correct that this information resides on the back page of the Plat Edit Form (FF 41), the contractor has not indicated why it was not responsible to look to that page. The contractor's asserted expectation "that a checklist of items to be covered in the training session would have been used by the Forest Service to inform us of such data and depiction" is not reasonable and lacks support in the solicitation and contract. The Government required the contractor to perform according to the terms and conditions of the contract (moreover, terms and conditions discussed early in the performance period).

Other Rejected Townships

In responding to the cure notice, the contractor reserves comments regarding rejected townships for which it lacked pertinent information (FF 41). The contractor has not demonstrated on this record that the Government erred in not approving any given township (FF 20, 41, 48).

Proposed Solution

The contractor proposes a solution to improve quality: for all new submissions of townships, the contractor will perform the first edit and the subcontractor will perform the second edit or quality assurance (FF 41). Assuming to be true what is not stated, that the subcontractor would pick up previously undetected problems, this partially addresses the concerns of the Government. However, there is no mention as to the impact on the quantity of submissions or how the contractor can complete the contract by the completion date.

Revised Delivery Schedule and Specifications

In its response to the cure notice, the contractor states that a revised delivery schedule will need to be developed, that new specifications need to be drafted to include significant constructive changes, and that the contractor wants the opportunity to review its pricing structure based upon complexity levels and revised specifications (FF 42). The contractor does not indicate a viable delivery schedule. It positively states neither that it could make all initial township submissions before the completion date of the contract nor that it will be able to submit townships of any quantity on a weekly basis. From this lack of information, the Government reasonably concluded that the contractor failed to provide assurance that it could perform.

Regarding the other matters, revised specifications, constructive changes, and a basis for repricing, the contractor has failed to substantiate these allegations. Accordingly, this aspect of the contractor's response does not provide a reasonable basis to not default terminate the contract.

Quality Assurance Processes

With its response to the cure notice, the contractor provided a copy of its second edit procedures and a flow chart "that tries to capture the decisional process to complete a township." The response adds: "We would have reasonably expected that Forest Service should have provided such documents to us. In good faith we have expended resources to accumulate these documents to incorporate the significant constructive changes required to complete this project for Forest Service." (FF 42.)

Despite its assertion, it is not reasonable for the contractor to have expected the Government to provide documentation of the decisional process to complete a township or a quality assurance process, or flow charts. The solicitation and contract did not identify those as Government-furnished materials (FF 4). Under the contract, the contractor was to deliver acceptable townships; the contractor was responsible for quality control and quality assurance. The methodology of accomplishing those tasks was not dictated by the Government. Thus, the Government reasonably refused to specifically approve or reject any decisional process or quality assurance program proposed by the contractor, although the Government did provide input and comments on various processes proposed by the contractor. The result, not the process, was of importance to the Government. It was not for the Government to produce initially or to approve the contractor's charts or processes. It was up to the contractor to deliver acceptable townships.

The response of the contractor, which alludes to significant constructive changes that have not been demonstrated on this record, indicates that as of April 21, 2000, the contractor was still attempting to develop a process to satisfactorily complete townships. This was so, despite the contractor's proposal that promised expertise and a proven track record of quality and timely delivery with a stated goal and practice of "zero rework" (FF 13, 14). Thus, even assuming that the written processes were satisfactory, the contractor failed to demonstrate that it could follow its written processes and that it could produce sufficient quantities of townships of acceptable quality. Given the past failings of the contractor, the Government reasonably found little solace in the response by the contractor.

Contractor Conclusions

In concluding its response to the cure notice, the contractor maintains that it has assigned the most qualified personnel to this project and has worked diligently. It notes that it believes that it is at 95% of the learning curve and can deliver quality product in larger numbers. It advocates working as a partner with the Government, as it desires to complete the project, as it seeks to revise the scope and specifications of the project. (FF 43.)

These conclusions of the contractor rightfully would give the Government great discomfort on the ability of this contractor to satisfactorily perform. As noted, this contract does not entail a partnership between the contractor and Government, it requires the contractor to produce acceptable townships in sufficient quantities by the contract completion date. The scope and specifications of the project were not made more difficult throughout performance. More troubling are the assertions

that the contractor has assigned its most qualified personnel and has achieved 95% of the learning curve. The townships delivered to date were of insufficient quality and quantity. If such was accomplished by the most qualified and at 95% of the learning curve, the contractor could not accomplish performance by the competition date or any time in the near future.

The response of the contractor fails to provide positive assurances of its abilities to complete the contract satisfactorily. This response comes from a contractor which claimed expertise, excellent credentials, and an ability to delivery error-free product on the initial submission. The Government reasonably concluded that this contractor simply failed to demonstrate an ability to successfully complete the contract.

Post-hearing Brief

In its post-hearing brief, the contractor pursues various additional theories (breach of contract, constructive change, and Government delay) which could serve to invalidate the termination for default. These matters are addressed here, to the extent that they have not been resolved already.

Alleged Government-imposed Pass/Fail QA/QC System

The contractor maintains that the Government imposed its own pass/fail QA/QC system. Such action, as the contractor asserts, constitutes either a breach of the contract or a constructive change, thereby entitling the contractor to relief, or represents a Government failure to disclose a material requirement in the solicitation.

Factually, these allegations are not demonstrated in the record. The Government did not impose a quality assurance or quality control system. Quality assurance and control were the responsibilities of the contractor. The Government was required to review townships submitted, provide comments, and review revised submissions. The Government more than satisfied its contractual obligations.

The contractor asserts that its proposal identifies a specific system that obligated the Government to take specific actions in the quality control process. This argument fails for various reasons. The language in the proposal does not indicate that the Government is required to perform specific work (FF 56). Also, the proposal does not identify any deviations from the terms and conditions of the contract (FF 13), particularly when the contract states that the Government will thoroughly review a township submission once (not multiple times as the contractor here suggests) (FF 10). Without explicit notice in the proposal, the Board concludes that the parties did not mutually agree that the contract would entail explicit Government actions not called for elsewhere in the solicitation and contract. Further, by awarding the contract, the Government did not approve the proposed process or alter the obligations of the parties. The contractor remained obligated to utilize a quality control process that enabled the contractor to deliver acceptable townships in terms of quality and quantity within the performance period.

The contractor does not benefit by its assertions that it here intended to adapt quality control and assurance procedures (with the Government an active and essential element of the quality control

and assurance processes) similar to those utilized while performing a different contract with a discrete region of the Forest Service (FF 54). The contractor has not demonstrated that its intentions and reliance upon actions under a distinct contract were reasonable or material to the interpretation of this contract. The unilateral assumptions of the contractor as to the practices of the Government under this contract, when language in the contract does not support the assumptions, do not alter the interpretation of the contract. The contractor was not reasonable in assuming that, based upon the language in the contractor's proposal, the Government here was obligated to use color coding and engage in multiple reviews of townships. Regarding the QA/QC process, the Government neither breached nor changed the contract, it did not fail to disclose a material requirement of the solicitation. This basis raised by the contractor does not serve to invalidate the termination for default.

Alleged Government-caused Delays

The contractor also alleges that specific Government-caused delays significantly impacted the progress under the contract and that such delays serve to invalidate the termination for default. Specifically, the contractor identifies the following as Government-caused delays: (1) the Government imposed its own QA/QC system on the contractor; (2) the Government delayed the delivery of Government-furnished data on numerous occasions; (3) the Government "resisted, and thus delayed, the delivery of needed instructions, flow charts, and the like necessary for the [contractor] to develop its 'Work Instructions' so that production could be improved"; (4) there "were many instances of delays in providing government data needed to complete individual townships during contract performance"; and (5) the Government withheld township data requested by the contractor, when the contractor began to run out of work. (Post-hearing Brief at 2, 5, 20.)

These matters merit but a few comments in addition to those found in the facts and discussion above. Factually, the contractor has failed to demonstrate either that Government-caused delay occurred or that any such delay truly impacted performance. What is critical to the analysis in this matter inquiring into the validity or not of the termination for default is that this contractor failed to provide acceptable townships in sufficient quantities and failed to demonstrate its ability to produce acceptable townships in sufficient quantities to complete performance within the contractual period. By relying upon broad allegations, lacking specific reference to and support for actual delay, the contractor has not demonstrated that the alleged delays, even if proven, should impact the conclusion that this contractor lacked the ability to ensure contract completion within an acceptable time frame.

Summary

This contractor demonstrated a lack of knowledge and expertise, and an inability to provide townships in sufficient quality and quantity to complete the contract within the performance period. Despite the Government's working with the contractor, and the Government's generous assistance, the contractor failed to achieve a level of productivity that would permit completion within the performance period. Through a show cause notice, the Government sought assurances and input from the contractor before ultimately terminating the contract for default. The contractor's response does not suggest that this contractor could timely perform this contract; the response offers no

substantive assurances that this contractor would be able to begin submitting acceptable townships in sufficient quantities to perform the contract within an acceptable period. With an objective review, the record amply supports the Government's actions and the default determination. The contractor was in default; the default was not excusable.

DECISION

The Board denies the appeal.

_____
JOSEPH A. VERGILIO
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
June 4, 2004