



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 24, 2017

CBCA 4078

AFFILIATED WESTERN, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul H. Sanderford of Sanderford & Carroll, P.C., Temple, TX, counsel for Appellant.

Mary A. Mitchell, Office of General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **GOODMAN**.

SOMERS, Board Judge.

Affiliated Western, Inc. (AWI or appellant) appeals the final decision by a contracting officer for the Department of Veterans Affairs (VA, respondent, or Government) terminating for default AWI's contract for the renovation of the surgical unit at the Oscar G. Johnson VA Medical Center in Iron Mountain, Michigan. AWI seeks conversion of the termination for default to a termination for convenience. For the reasons explained below, we sustain the VA's termination for default and deny the appeal.

Background

I. The Solicitation

On March 27, 2013, the Government issued a solicitation for the renovation of a 19,400 square foot surgery unit and 705 square foot mechanical room at the Oscar G. Johnson VA Medical Center in Iron Mountain, Michigan. On April 10, 2013, the VA conducted a pre-bid site visit of the medical facility for interested bidders. The parties disagree on whether AWI attended this site visit.

On April 23, 2013, the Government amended the solicitation through amendment A00006 (amendment) and warned prospective bidders that the schedule for the project “is very aggressive” and involves “a very important department to the facility.” The amendment provided a phasing plan, requiring that the contractor complete the project in 400 days. Due to the impact on the medical center, the amendment emphasized the importance of maintaining the projected contract schedule. The amendment allotted each phase of the project the following durations:

- Mobilization/Submittals – 12 weeks
- Phase 1 – 14 weeks
- Phase 2 – 2 weeks
- Owner moving between phases 2 & 3 – 2 weeks
- Phase 3 – 18 weeks
- Owner moving between phases 3 & 4 – 2 weeks
- Phase 4 – 4 weeks
- Phases 0 and 5 work ongoing throughout project duration

Further, the amendment required that “[a]ny changes to this schedule shall be approved through the contracting office and justified through the approved CPM [critical path method] project schedule.”

Phase 1 required vacating the dental suite and relocating the ambulatory surgery wing to provide space for the contractor during the duration of the project. Phase 2 involved rerouting a corridor to allow for use of the vacated areas in phase 1 after the contractor finished phases 1 and 2. Phase 3, the most significant part of the project, involved the renovation of the operating rooms and the removal of the hospital roof to facilitate the installation of medical equipment. Phase 4 required the contractor to convert the phase 1 areas back into an ambulatory surgery wing. Phase 5 involved finishing the corridor and elevator lobby. Lastly, phase 0 involved site work to the mechanical room. The solicitation

called for phases 1 through 4 to be completed sequentially. Phases 0 and 5 could be performed throughout the duration of the project.

II. The Contract

In addition to the solicitation, the contract incorporated Federal Acquisition Regulation (FAR) 52.211-10 (48 CFR 52.211-10 (2012)), Commencement, Prosecution, and Completion of Work (Apr 1984), which stated:

The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than 400 days after NOTICE TO PROCEED.

FAR 52.236-15, Schedules for Construction Contracts (Apr 1984), also incorporated by reference into the contract, stated:

(a) The Contractor shall, within five days after the work commences on the contract or another period determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). . . . If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

Another provision, FAR 52.249-10, Default (Fixed-Price Construction), also incorporated by reference, stated, in pertinent part:

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

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

- (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. . . .
- (2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay.

III. Contract Performance

On June 11, 2013, the VA awarded the contract to AWI in the amount of \$6,363,000. Ten days later, the VA issued a notice to proceed (NTP), which established a contract completion date of July 26, 2014, with milestone completion dates to be set for phases 1, 2,

3, and 4 (work on phases 0 and 5 occurred throughout the project). The contractor had to complete phases 1 and 2 before it could begin to work on phase 3. Phase 3 had to be completed before phase 4 work could begin.

The contract required AWI to provide, within forty-five calendar days after receipt of the NTP, a CPM schedule. At the pre-construction meeting on July 9, 2013, the VA chief engineer, Arthur Ontto, stressed the importance of the schedule and emphasized that “[t]his is a tough place to work, more so than other VA(s). We have more rules and more inspectors, more people are watching the smaller facilities.” AWI submitted its baseline schedule to the Government on August 9, 2013.

Beginning in August 2013, the VA directed AWI to perform several changes under the contract due to architect/engineer errors and omissions in the contract specifications. Almost immediately, as reflected in a letter dated August 29, 2013, from AWI to the contracting officer, relations between the Government and AWI became strained. AWI asserted that the Government “favored” local contractors and contended that AWI was being held to a different standard. AWI claimed that if it had received approval of the schedule AWI had submitted at the initial pre-construction meeting, it would have been further along in the construction.

The VA had a different take, noting that it had rejected AWI’s initial proposed schedule because the schedule failed to include all information required by the contract. Over the course of several weeks, the VA and AWI went back and forth over the schedule requirements. Finally, in early October, the VA approved AWI’s revised baseline schedule. However, the VA requested that AWI update the schedule immediately to reflect actual progress on the project.

Despite hiring a scheduling consultant on October 31, 2013, AWI did not provide a monthly update of its schedule to the VA until November 20, 2013. The November update revealed that AWI was behind schedule, ranging from thirty-one to forty-five days for various phases of work. On November 21, AWI notified the VA that it would need to adjust the “Surgery Dept. Move Date” from December 20, 2013, to February 3, 2014 (forty-five days later than the approved schedule).

When it became clear to the contracting officer that AWI had fallen significantly behind schedule, the contracting officer issued a cure notice on December 6, 2013:

Based on the most current progress schedule update, submitted on 11/23/13 with the draft of Invoice #2, [AWI] has indicated that they are already severely behind schedule with the contract requirements of maintaining the interim

phase milestone completion dates as well as the overall project completion date.

Based on lack of satisfactory progress and pending overdue critical milestones, AWI is hereby notified that the Government considers AWI's failure to maintain the approved project schedule [to be] failure to maintain the terms of the contract, thereby endangering satisfactory performance of the contract for reasons not excusable within the terms of the FAR 52.249-10.

[W]ithin 10 days upon receipt of the cure notice, AWI shall either 1) submit an updated schedule demonstrating how it will recover time losses and maintain the original, approved Milestone completion dates, or 2) submit a proposed revised project schedule, which must be approved by the VA before this problem can formally be cured. If Option 2 is selected, although interim Milestone Completion Dates may be modified, the final contract completion date must be maintained as July 26, 2014.

On December 12, 2013, AWI met with VA representatives to discuss the cure notice and schedule. In that meeting, AWI presented a revised schedule, which proposed a new milestone for phases 1 and 2, and a new completion date for the contract of September 19, 2014. The VA rejected this proposal but agreed to allow AWI additional time to respond to the cure notice.

On December 17, 2013, when AWI failed to submit its response to the cure notice, the contracting officer sent an email message advising AWI that its response to the cure notice was incomplete and now overdue:

The VA has reviewed your proposed cure for the Late Schedule Milestone plan and theoretically it may be an acceptable proposal, however until AW[I] provides a formal revised schedule and detailed plan of action displaying that approved schedule and critical milestone completion dates shall be recovered and maintained for the duration of the project; the VA must then review and formally approve your proposed revised schedule before the cure notice issue can formally be closed.

Per the requirements of the Cure Notice a revised schedule needed to be submitted within 10 calendar days (i.e. no later than Monday 12/16/13). AWI is now formally late in providing a detailed cure for repairing the Late Schedule Milestones; if a revised schedule is not provide[d] by [close of

business] Thursday, December 19, 2013, the VA may be forced to proceed with a Surety Takeover or Termination for Default.

On December 19, 2013, Ethan Sironi, AWI's chief operating officer, emailed the contracting officer a second revised schedule, which maintained the original completion date. Mr. Sironi informed the Government that AWI would "make up time" in Phase 3, which would render a new completion date of July 30, 2014. As Mr. Sironi explained in his testimony during the October 2016 hearing:

[R]eally the only phase that we could then work with would be the Phase 3 and so we were proposing that, you know, let us look at Phase 3 and we're going to do everything we can to get our schedule to move back towards that July 30 date.

The VA agreed in concept, but required AWI to provide a detailed plan to show how the original July completion date would be met. On December 20, 2013, the surety, who had received a copy of the cure notice, asked the Government to keep it informed about the status of the project.

On January 15, 2014, the VA formally rejected AWI's second revised schedule because it had several missing items and other deficiencies. The VA gave AWI a new deadline of January 22, 2014, to submit a response to the cure notice. In addition, the VA agreed to allow AWI to extend the milestones deadlines, although it refused to extend the final completion date.

AWI submitted a third revised project schedule on January 29, 2014, one week past the due date. On February 21, 2014, the contracting officer agreed to extend the phase 1 completion date to March 24, 2014, and the overall project completion date to August 30, 2014, but only if:

AWI demonstrates they have cured this schedule problem by completing Phase 1 no later than March 24, 2014, the VA will formally document Cure Notice 1 as being resolved. If AWI is unable to maintain a Phase 1 completion date of March 24, 2014, the VA may be forced to proceed with a Termination for Default.

Because AWI failed to meet the new phase 1 completion date, the contracting officer did not extend the contract completion date. As a result, the contract completion date remained July 26, 2014.

As a result of various multiple contract revisions caused by design changes and updated requirements, the VA asked AWI to submit proposals for additional tasks. Although AWI submitted cost proposals, the parties could not agree on the additional costs. As a result, the contracting officer prepared an independent government estimate. On March 31, 2014, the contracting officer unilaterally issued modification P00004, which added the additional tasks to the contract with a “not to exceed” amount of \$89,921. The modification extended the phase 1 completion date to April 28, 2014, the phase 2 completion date to May 12, 2014, and the overall contract completion date to July 28, 2014.

On April 3, 2014, AWI stated that it would “proceed[] with this work ‘under protest’ since there has been no agreement between [the parties] concerning the scope cost value or the required schedule adjustment associated with the added work.” The next day, AWI submitted a Phase 2 planning narrative and requested an additional four to six weeks extension for the completion of phase 2.

On April 10, 2014, AWI submitted what it identified as “AWI Claim No. 1.” AWI sought “to summarize and make formal our claim for extra costs and schedule adjustments associated with the work items identified under Modification P00004.” As AWI explained:

The Modification P00004 issued by the VA, provides for costs and schedule changes not consistent with the proposals issued by AWI, and not agreed in cooperation with AWI. The VA has not provided complete rationale [sic] for the assigned cost values of the various changes, has ignored the associated schedule adjustments and the costs of AWI’s continuing overhead, and in some cases has assigned cost values to changes for which AWI has yet to complete a proposal.

While AWI conceded that it had “not completed the cost estimating associated with several of the changes assigned to us by the VA under Modification P00004, [and] a precise final figure is not available,” AWI proposed a fixed price modification of \$241,381.17, based upon its estimate of costs to be incurred.

After reviewing AWI’s phase 2 planning narrative, on April 14, 2014, the contracting officer denied AWI’s request to extend the completion date for phase 2, stating in pertinent part that:

The VA has determined that the majority of the items [AWI] addressed are simply a matter of means and methods.

While this is an extension list of items that must be completed in phase 2 and coordinated with the work in other phases, these are not “additional scope of works.” They are clearly part of the work described in the project documents. It would appear that the contractor’s perpetual lack of a legitimate project schedule and project management is the primary issue, not unforeseen conditions.

As the VA assistant chief engineer, Adam Steinbrecher, testified at the hearing, in the Government’s view, AWI never justified its request for a time extension for phase 2. He also testified that AWI never properly requested an extension of the overall contract completion date.

Next, in a letter dated April 24, 2014, AWI submitted a “Request for Contract Modification,” in which it proposed the Government increase the contract amount to cover additional costs of \$450,725, based upon ten amendments to the solicitation issued prior to bid and the nineteen requests for proposal issued subsequent to bidding. AWI asserted that the VA was unable and/or unwilling to address discrepancies between actual field conditions and contract drawings and specifications. AWI stated that the proposal is based upon the assumption that “the delays currently estimated remain as estimated,” and asserted that AWI “currently expect[s] to achieve Substantial Completion about November 22, 2014, approximately 136 calendar days beyond the contract completion schedule.” AWI did not provide a revised proposed project schedule, nor did it request an extension of the overall project completion date in this submission.

By letter dated May 30, 2014, the VA responded to AWI’s April 24, 2014, request for contract modification. First, the VA stated that it “does not agree that AWI is due monetary compensation, nor an estimated 136 day time extension due to AWI [sic] alleged costs due to the VA’s failure to ‘supply complete, unambiguous and coordinated construction documents.’” The VA rejected AWI’s claim that it could not provide an accurate bid proposal due to an alleged set of incomplete documents, stating that if AWI needed more time to review the documents, it should have requested an extension at the time of the solicitation. Second, the VA noted that AWI should have anticipated dealing with design clarifications and certain unforeseen existing conditions. The VA noted that, based upon the expedited schedule requirements as set forth in the contract documents, a knowledgeable contractor should have anticipated the need for double and triple work shifts at times through the duration of most of the project, asserting that AWI’s bid under-calculated the staffing requirements.

IV. Subcontractors

AWI awarded a subcontract to Berger & King (B&K) in the amount of \$2,442,815. The subcontract required B&K to perform the work required under phase 3, identified as the most significant and complex part of the project. Mr. Ontto testified that:

[The mechanical subcontractor] provided not only the HVAC, which includes all the ductwork, they had a new chiller they were putting in; they were providing chill[ed] water between the sub-basement and sixth floor; they're providing hot water from sub-basement to the sixth floor inside a shaft; they were doing all the plumbing; they were doing the med[ical] gas.

B&K was one of only two contractors in the remote area of Iron Mountain that held the medical gas certification necessary to perform the mechanical work on the project.

On April 30, 2014, B&K notified AWI that it had not yet received payments for invoices for the months of February, March, and April of 2014. B&K stated that if it did not receive payment by May 2, 2014, it would not perform any further work on the project. In addition, B&K informed the VA that AWI had not paid it for invoiced work, despite the fact that the VA had paid AWI all outstanding invoices.

Upon becoming aware of the fact that AWI had not paid B&K, the VA reminded AWI that the contract required AWI to make prompt payment to its subcontractors pursuant to FAR 52.232-27, Prompt Payment for Construction Contracts (Jul 2013). According to Sandy King, B&K's treasurer, AWI provided no response to its request to be paid for its services. On or about May 2, 2014, in light of AWI's failure to pay its invoices, B&K walked off the job site. According to Ms. King, at the point that B&K abandoned the project, the February, March, and April outstanding invoices totaled \$418,293.05.

AWI issued a notice of termination for default to B&K on May 15, 2014. On or about the same day AWI terminated B&K from the project, AWI removed the locks from B&K's on-site storage trailers. On or about May 20, 2014, the VA's Mr. Steinbrecher, at the direction of the contracting officer and accompanied by VA police, entered B&K's storage trailers to relocate materials paid for by the VA to the VA's storage units. AWI contended that the VA's removal of such materials hindered its ability to perform, specifically plumbing and electrical work, on the project.

Meanwhile, at that same time, AWI had not yet hired a contractor to start phase 3 roof demolition, which, according to the original schedule, should have started in January 2014 and been completed in July 2014.

V. Termination for Default

On May 13, 2014, the contracting officer issued a show cause notice citing AWI's failure to complete phases 1 and 2 within the time required by the modified contract. The contracting officer stated that:

AWI has failed to prosecute the work outlined in the contract with the diligence that would ensure that AWI would meet the completion of the entire contract by the contract completion date of July 28, 2014 or a revised completion date of August 28, 2014 if granted.

On May 20, 2014, AWI responded by stating that:

AWI disagrees with the government's statement that AWI has failed to complete Milestones 1 and 2 within the time required by [the] contract. AWI completed Phase 1 Milestone on time per the contract modifications. Actually, AWI is months ahead of schedule; that fact would be clear if the VA were to promptly process and approve the multiple proper claims submitted by AWI to date, which have languished in the VA bureaucracy.

AWI has prosecuted the work outlined diligently and with haste, but has been routinely and systematically hindered and obstructed by the Government. The Phase 2 Milestone was discussed and documented with the government to take 5 to 6 weeks. We are currently still inside this time frame.

On May 22, 2014, AWI submitted a two-week look-ahead schedule, which did not contain an overall completion date for the project or phases. According to Mr. Steinbrecher, the two-week schedule was not in accordance with the specifications. The contracting officer also testified that AWI did not send him a proposed schedule nor did it send enough details about its plan for him to consider giving AWI a time extension. AWI's Mr. Adams confirmed in his testimony that he did not provide the VA with a schedule to support its claims for additional days on the project. According to Scott Lowe, the VA's schedule and time impact expert, the VA did not provide an automatic time extension because:

[The VA didn't] have a time extension request from the —we have a request, but no analysis from the contractor, we don't have an [Associated Consulting Technicians (ACT)] report, we don't have any basis for extending the time. Plus we know that we can save time. The VA could move in one week rather than two weeks. The contractor might be able to complete phase three in

substantially less time by working two shifts, so the bottom line here is that the VA didn't have any basis really for extending the time.

[T]he VA had information sufficient to determine what the appropriate time extension in their mind was for phases one and two, and that's what they awarded. They didn't have enough information to determine what the appropriate time extension for the ultimate project was, and they didn't.

AWI also did not inform the VA whether it had found a qualified replacement mechanical subcontractor to complete the project. As the contracting officer testified:

They did not address why they failed to meet the schedule other than to say that they hadn't failed to meet the schedule. They said, for example, for the critical phase two, well, we're not late, we're on schedule because we said we needed four or five more weeks. So, in their minds, that was justification for not meeting the schedule.

But that didn't respond, that didn't explain to me how they were going to replace their mechanical subcontractor that they terminated, and they needed that mechanical subcontractor to finish phase two, phase three, and you know, the rest of the critical phases.

Mr. Steinbrecher confirmed in his testimony that by May 22, 2014, AWI had not replaced, or developed a plan to replace, its mechanical contractor.

On May 27, 2014, AWI completed the pre-drywall installation for certain rooms under phase 2 of the project and advised the VA that the work was ready for inspection. On May 30, 2014, AWI had a potential mechanical subcontractor, Mid AIR Mechanical (Mid AIR), conduct a walk through of the job site to review the status of the mechanical and plumbing work terminated from B&K. According to AWI's employees Mr. Adams and Mr. Sironi, AWI did not inform the VA of any plan to bring Mid AIR into the project as B&K's replacement mechanical subcontractor. Furthermore, AWI did not present evidence to establish that this new potential subcontractor held the necessary medical gas certification required for the project.

On June 2, 2016, the contracting officer issued a termination for default, asserting that AWI failed to maintain Phase 2 completion date and "prosecute the work with the diligence that would ensure that AWI would complete the entire contract by the contract completion date of July 30, 2014."

The contracting officer stated in his justification for termination that:

[T]he delinquent contractor's mechanical subcontractor walked off the job further delaying completion of Phase 1 and Phase 2 with no real end in sight; and contractor has not yet determined required resources or hired a Contractor to start Phase 3 roof demolition which should have started in January 2014 and been completed in July 2014. There is truly no end in sight for how long it would take the contractor to complete Phase I, Phase II, or the entire project if we don't take immediate action to terminate the contract.

. . . [T]he contractor is approximately 40% complete with the overall project with Phase 0 estimated at 35% complete, Phase 1 estimated at 95% complete (over the 34 week duration) and Phase II estimated at 50% complete (over a 3.5 week duration). The contract completion date is still July 26, 2014. Phase III is by far the most difficult and time intensive phase of the project. The only approved schedule submitted by AWI showed Phase III duration at 24 weeks. At the weekly construction meeting on May 1, 2014 AWI Project Manager Don Adams stated they project the Phase II completion date to be five weeks or on June 2, 2014. During this week's meeting, AWI was not able to confirm where they are at with a proposed completion date for Phase II, [s]o who knows when Phase III will begin. In addition, it was confirmed at this week's meeting that AWI still does not have a plan in place to complete Phase III work as they are still trying to determine who will complete the required work.

Given that there are only 9 weeks remaining until the overall project completion date of [July 30, 2014] [sic] of which 4 weeks are allocated for VA moving time, and based on AWI's demonstrated performance to date, it is highly improbable, if not impossible that AWI will be able to successfully complete this project on time.

At the hearing, the contracting officer testified:

[I]t had come to my attention that their primary subcontractor had walked off the job. I went up to physically visit the site and saw that there was no work going on, so that let me know that it was basically impossible for the contractor to complete phase two or any other critical phases of the contract. I issued a show cause notice and shortly thereafter AWI terminated their primary subcontractor, their mechanical subcontractor.

I had to terminate [AWI]. They had not explained why they were justified why it was not their fault for being delinquent, and they couldn't explain to me how they were going to go about hiring a new replacement contractor or when they were going to hire a new replacement contractor, subcontractor to take on this critical work. So there was no end in sight.

Now the bottom line is, without a mechanical contractor, it doesn't matter if I extended it out or if I wrote down July being the end date or December. Without a mechanical contractor, it's impossible for them to complete the project. And we're taking on water; we got the surgery suite shut down, we can't do any surgeries. AWI is not responding, saying, well, look, okay, I ran into a problem with our mechanical contractor, this is what I'm going to do about it, I'm going out and I've hired a additional contractor, he's going to start on such-and-such date. None of that was articulated.

According to the contracting officer:

[T]he reason why the subcontractor walked off the job was because AWI wasn't paying them, so [AWI] indicated to me that they didn't have the resources to hold onto the subcontractor, then I didn't see how they could go and get another subcontractor, another critical mechanical subcontractor.

By contrast, AWI's Mr. Adams testified:

I know there was a dispute over payment, but my recollection of it is that B&K was billing improperly. They were billing way beyond the actual completion of the work, they were not providing the backup documentation that we're required to provide, and I'll let somebody else speak to the nuts and bolts of that.

Mr. Sironi of AWI testified:

Q. Why didn't you pay Berger & King?

A. We did pay Berger & King.

Q. Why didn't you pay them full payment that they were asking for?

A. Because there's a lot of problems, but when you say full payment, they were asking for items that had not yet been paid for by the VA and it was a pay when paid contract.

At a hearing held in this matter on October 24-25, 2016, in Washington, D.C., the parties presented fact and expert witnesses. After the hearing, the parties submitted post-hearing briefs.

Discussion

I. The VA's Initial Burden of Proof

A termination for default is “a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence.” *Paradise Pillow, Inc. v. General Services Administration*, CBCA 3562, 15-1 BCA ¶ 36,153, at 176,441 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)); *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,740. A termination for default is a government claim, and the Government bears the burden of proof that its action was justified. *Lisbon Contractors*, 828 F. 2d at 765; *ACM Construction Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150; *C-Shore International*, 10-1 BCA at 169,740.

The Government terminated its contract with AWI under the provision of the Default clause that allows termination if the contractor's failure to make progress endangers performance. A termination for default for failure to prosecute the work requires “a reasonable belief on the part of the contracting officer that there was ‘no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.’” *Lisbon Contractors*, 828 F.2d at 765; see *Singleton Enterprises v. Department of Agriculture*, CBCA 2136, 12-1 BCA ¶ 35,005, at 172,038 (citing *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1016 (Fed. Cir. 2003) (adopting this formulation as the controlling standard in default cases involving a failure to make sufficient progress)). A termination for failure to make progress usually occurs where the contractor has fallen so far behind schedule that timely completion becomes unlikely. *Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363, at 169,699 (citing *Hannon Electric Co. v. United States*, 31 Fed. Cl. 135, 143 (1994), *aff'd*, 52 F.3d 343 (Fed. Cir. 1995) (table)). The Government is not required to prove that it was impossible for the contractor to complete performance on time. *Id.* Rather, a termination for default will be upheld where “a demonstrated lack of diligence indicates that [the Government] could not be assured of timely completion.” *Id.* (quoting *Lisbon Contractors*, 828 F.2d at 765).

The initial burden of proving that there are good grounds and solid evidence to support the termination action falls to the VA, which must establish that its decision to

terminate for default was justified in light of the circumstances as they existed at the time the decision was made. *Lisbon Contractors*, 828 F.2d at 765. The Government can meet this burden upon a showing that the contractor failed to meet contract terms and that timely performance was beyond its reach. *Id.* The contracting officer may also consider the contractor's failure to meet its own representations concerning the progress of the work. *Global*, 10-1 BCA at 169,699 (citing *Guenther Systems, Inc.*, ASBCA 14032, 72-1 BCA ¶ 9,443, at 43,869).

“In determining whether a default termination was justified, a [tribunal] must review the evidence and circumstances surrounding the termination, and that assessment involves a consideration of factual and evidentiary issues.” *McDonnell Douglas Corp.*, 323 F.3d at 1014. The contracting officer's decision must be based on “tangible, direct evidence reflecting the impairment of timely completion.” *Id.* at 1016. “[A tribunal's] review of default justification does not turn on the contracting officer's subjective beliefs, but rather requires an objective inquiry.” *Id.* Therefore, “to determine whether a default termination is justified, this tribunal ‘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.’” *Armour of America v. United States*, 96 Fed. Cl. 726, 744 (2010).

Along with the contracting officer's testimony and contemporaneous documents relevant to a default determination, a board of contract appeals may also consider other factors, “such as a comparison of the percentage of work completed and the amount of time remaining under the contract; the contractor's failure to meet progress milestones; problems with subcontractors and suppliers; the contractor's financial situation; as well as a contractor's performance history; and other pertinent circumstances surrounding the decision in order to determine whether the contracting officer had a valid basis for his conclusions.” *McDonnell Douglas Corp.*, 323 F.3d at 1016-17 (citations omitted). The contracting officer need not be correct in his assessment, but only needs to be “justifiably insecure about the contract's timely completion.” *Id.* at 1017.

When the Government “has reasonable grounds to believe that the contractor may not be able to perform the contract on a timely basis, the government may issue a cure notice as a precursor to a possible termination of the contract for default.” *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,553 (quoting *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000)); see *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340, 1350 (Fed. Cir. 2009) (after cure notice is issued, burden is on the contractor to advise the Government how it will complete the contract on time, according to contract requirements), *vacated and remanded on other grounds sub nom. General Dynamics Corp. v. United States*, 563 U.S. 478 (2011). If the contractor fails to

respond to the cure notice with adequate assurances of timely completion, the contracting officer is entitled to terminate for default. *I-A Construction & Fire, LLP*, 15-1 BCA at 175,553 (citing *Hannon Electric*, 31 Fed. Cl. at 143).

Here, the question is whether the VA satisfied its burden that “there was no reasonable likelihood of [AWI’s] timely performance” by July 28, 2014. *Singleton Enterprises*, 12-1 BCA at 172,038. We conclude that the VA has met its burden. The Government established that following the issuance of the notice to proceed on June 21, 2013, the contract obligated AWI to submit a schedule for approval and to proceed with the work so as to complete the construction within 400 days, or no later than July 26, 2014 (later extended by two days through contract modifications). Early into performance, AWI fell behind completing the first phase of the project by its completion date. Subsequently, two weeks before the planned phase 1 completion date, the VA issued a cure notice. AWI responded with a revised interim schedule and provided assurances that it would recover for lost time in phase 3. Nonetheless, as explained in detail above, AWI never completed the phases in the time required, nor did it submit any detailed schedule to show how it planned to complete the work.

Nor did AWI provide a satisfactory response to the second show cause notice issued after AWI’s mechanical subcontractor abandoned the job site. At the time the show cause notice was issued, phase 2 had yet to be completed, and phase 3 could not begin without the necessary subcontractors. AWI provided no information on how it planned to replace its mechanical subcontractor, nor had it informed the VA that it had entered into a subcontract with a roof demolition contractor, which it needed to do to perform Phase 3. In addition, regardless of whether AWI would be able to replace its mechanical subcontractor and hire a roof demolition subcontractor, the record shows that it was, at best, questionable whether AWI could afford to pay and keep its subcontractors on the project in light of its failure to pay its first mechanical subcontractor.

AWI failed to produce updated and detailed schedules outlining the prosecution of work in accordance with the contract specifications; failed to meet critical schedule milestones; failed to timely and completely pay its subcontractors, further jeopardizing completion of critical phases of the project as well as overall project completion; and failed to replace its mechanical subcontractor, who had primary responsibility for the tasks specified in phase 3. Accordingly, we find that the Government has met its burden of proof to show that the contracting officer was justified in finding AWI to be in default under the contract.

II. Burden Shifts to AWI After Government Establishes Default

“Once the Government establishes the existence of default, the burden shifts to the contractor to prove that there were excusable delays under the terms of the default provision of the contract that render the termination inappropriate, or that it was making sufficient progress on the contract such that timely contract completion was not endangered.” *I-A Construction & Fire, LLP*, 15-1 BCA at 175,553 (citations omitted). It is well-established that, “if the contractor is bound to build according to plans and specifications prepared by the [Government], the contractor will not be responsible for the consequences of defects in the plans and specifications.” *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 417 (1993) (quoting *United States v. Spearin*, 248 U.S. 132, 136 (1918)). Indeed, both parties to the contract are expected to avoid anything that would “prevent, hinder, or delay performance.” *Id.* at 423 (citing *Lewis-Nicholson, Inc. v. United States*, 213 Ct. Cl. 192 (1977)). The Government violates this expectation where its actions or inactions result in delays and increased costs to the project. *Id.* Thus, when this occurs the contractor may claim damages. *Id.*

Nevertheless, to recover on an excusable delay claim, a contractor “must show: (1) the delay is of an ‘unreasonable length of time,’ (2) the delay was proximately caused by the Government’s actions, and (3) the delay resulted in some injury to the contractor.” *Mega Construction Co.*, 29 Fed. Cl. at 424 (citations omitted); *Allen Ballew General Contractors, Inc.*, VABCA 6987, et al., 07-1 BCA ¶ 33,465, at 165,907 (2006). Appellant must show that the Government “was the ‘sole proximate cause’ of the delay, and that no concurrent cause would have equally delayed the contract regardless of the Government’s actions or inaction.” *Mega Construction Co.*, 29 Fed. Cl. at 424. Therefore, “[w]here both parties contribute to the delay, neither can recover damage[s], unless there is a clear apportionment of the delay and expense attributable to each.” *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525, at 166,103 (quoting *Blinderman Construction Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir 1982)). Time extensions granted by the contracting officer do not mean that he or she concedes actual delay for the purposes of damages or an equitable adjustment. *See Pathman Construction Co. v. United States*, 227 Ct. Cl. 670, 675 (1981).

Appellant must not only prove that the Government was the sole cause of the alleged delay, “but [also that] the delays must have affected activities on the critical path.” *I-A Construction & Fire, LLP*, 15-1 BCA at 175,554. “An interruption in one phase of the work under a contract does not always result in an increase in the time necessary for total performance. In such a case, the absence of any delay would obviously preclude recovery therefore.” *Paul Hardeman, Inc. v. United States*, 406 F.2d 1357, 1361 (Ct. Cl. 1969). “The ‘critical path’ is the sequence of work on a project that will take the shortest time to

complete.” Steven W. Feldman, Government Contracts Guidebook, *Construction Contracts* § 29:10 (4th ed. 2016). Determining the critical path is essential to recovering on a delay claim because:

[O]nly construction work on the critical path ha[s] an impact upon the time in which the project [i]s completed. If work on the critical path [i]s delayed, then the eventual completion date of the project [i]s delayed. Delay involving work not on the critical path generally ha[s] no impact on the eventual completion date of the project.

Mega Construction Co., 29 Fed. Cl. at 425. Thus, to prove a delay to overall project completion with reasonable certainty, courts and boards of contract appeals have expressed a clear preference for critical path schedule analysis, providing that:

[I]n order to properly demonstrate delay to a project, the CPM schedule must be kept current to reflect any delays as they occur. *Fortec Constructors v. United States*, 8 Cl. Ct. at 505. “The required nexus between the government delay and a contractor’s failure to complete performance at some unspecified earlier date cannot be shown merely by hypothetical, after-the-fact projection.” *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1060 (Fed. Cir. 1993). Part of one’s understanding that an activity belongs on the critical path of a project is also an understanding of how that activity affects the other activities. *Wilner v. United States*, 26 Cl. Ct. 260, 262-63 (1992), *rev’d on other grounds*, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); *see also Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 424 (1993). “A general statement that disruption or impact occurred, absent any showing through use of updated CPM schedules, logs or credible and specific data or testimony, will not suffice to meet the [appellant’s] burden.” *Preston-Brady, Co.*, VABCA Nos. 1892, 1991, 2555, 87-1 BCA (CCH) ¶ 19,649 at 99,520, 1987 WL 41248 (1987).

PCL Construction Services, Inc. v. United States, 53 Fed. Cl. 479, 489 (2002).

Here, appellant argues that the VA’s contract specifications were defective and resulted in delays to the project. Specifically, AWI argues that because modification P0004 extended phases 1 and 2 by 129 days, the Government should have also extended the overall completion date by at least 129 days to December 5, 2014.

AWI’s assertion that extension of time for part of the project should automatically extend the total performance date is unsupported by law. *Mega Construction Co.*, 29 Fed.

Cl. at 425; *Paul Hardeman, Inc.*, 406 F.2d at 1361. Indeed, AWI failed to request a time extension or provide a CPM schedule demonstrating how the extension of phases 1 and 2 impacted the critical path. Even when AWI requested a contract modification extending the time for contract performance, in addition to seeking delay damages of \$450,725, AWI failed to provide a revised project schedule to support its request. In fact, AWI conceded at the hearing that it had failed to provide the VA with a schedule showing whether the work affected critical path activities.

AWI failed to provide any evidence that it had fulfilled the contract requirement to provide the contracting officer with a schedule identifying the critical path and demonstrating how the schedule would be impacted by the VA's alleged actions. Indeed, based upon the evidence provided, the Board faces the impossible task of identifying, quantifying, and assigning responsibility for critical path delay. The absence of critical path analysis for the project prevents the Board from determining that critical path delay, attributable to the Government, actually occurred with respect to the claimed changes. AWI has failed to prove that excusable delays under the terms of the default provision of the contract rendered the termination inappropriate, or that it was making sufficient progress on the contract such that timely contract completion was not endangered. Accordingly, we find that the VA properly terminated AWI for default.

Decision

For the reasons stated above, the appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge