



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 10, 2012

CBCA 2136

SINGLETON ENTERPRISES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Wayne Singleton, Owner of Singleton Enterprises, Luthersville, GA, appearing for Appellant.

Marilyn J. Brown, Office of General Counsel, Department of Agriculture, Little Rock, AR, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **DRUMMOND**.

BORWICK, Board Judge.

Appellant, Singleton Enterprises, challenges the termination for default of its contract for the Hanson Marsh Hydrologic Restoration (Hanson Marsh) project with the United States Department of Agriculture, respondent, through the department's National Resources Conservation Service. For the reasons below, we sustain the contracting officer's decision terminating the contract for default.

Findings of Fact

Solicitation and contract terms and conditions

On February 6, 2009, respondent issued a solicitation for the Hanson Marsh project. The Hanson Marsh is located in Terrebonne Parish, Louisiana, at the intersection of Shell Road and U.S. Highway 90, and approximately 720 feet north of the Gulf Intracoastal Waterway (GIWW).

The purpose of the contract was to restore the aged Hanson Marsh by taking mineral-laden fill material from the borrow area and infusing the existing decaying top-level organic soil of the marsh with the mineral material to allow aquatic marsh plants to thrive. One of respondent's scientists testified that the effort was to put the marsh back in time.

The solicitation contained five bid items: (1) construction surveys; (2) mobilization and demobilization; (3) excavation, marsh creation, and dredging, with an estimated 50,000 cubic yards of fill needed to complete the project; (4) earthfill, containment dike, and open marsh area, with an estimated 5646 linear feet of dike to be created; and (5) staff gauge units. One award was to be made from an aggregate of all bid items; thus, the solicitation required bidders to complete all items.

Bid items one and two are self-explanatory. For bid item three, the solicitation explained that the contractor was to excavate dredge material from specified borrow areas and place the material in the marsh creation area to the lines and grades depicted on attached construction drawings. The contractor was to have on site the required length of dredge discharge pipe to reach from the farthest point within the borrow area to the farthest point in the marsh creation placement area. The estimated length of the pipe was between 4500 and 5000 linear feet.

Bid item four consisted of all work necessary to place and shape earth fill needed to complete earthen containment dikes to be constructed along the perimeter of the two marsh creation areas, designated east and west, as shown on the drawings.¹ All material for the earthen containment dikes was to be taken from the marsh creation areas. Bid item five required the contractor to provide and install staff gauge units in the marsh creation area for determining the fill elevation of the dredge fill material.

¹ The total acreage of marsh creation was twenty-four, with twenty being in the west marsh creation area and four being in the east. The marsh creation areas were separated by the Bart Canal. Each marsh creation area had its own access point.

The solicitation and resulting contract required the contractor to construct earthen containment dikes as shown on the drawings. The west marsh creation area required containment dikes on its north, west, and east borders and about one third of the southern border. The drawings did not specify earthen containment dikes for the remaining two-thirds of the southern border. The east marsh creation area required containment dikes on the north and west borders and about half of the southern border. No containment dikes were specified for the eastern border.

The solicitation and resulting contract required that the containment dikes be constructed to a minimum top elevation of +3.0 feet North American Vertical Datum (NAVD) 88.² After initial construction of the dikes, the contractor was to allow the dikes to settle and de-water for a period of sixty days. The contractor, at its option, could elect to use training dikes to facilitate placement of dredge material in the marsh containment area.

Dredge fill material was to be placed at a target elevation of +1.5 feet, with a fill tolerance of + or - .5 feet. The effluent discharge water control structures were to be managed daily to maintain a minimum ponding water elevation of +1.5 feet or an alternate concurred in by a contracting officer's technical representative (COTR). The maximum ponding elevation within the marsh area was +2.0 feet. No work could proceed when water elevation outside the marsh creation area was higher than +2.0 feet, because the areas could not then be de-watered to allow the fill material to reach its target elevation.

The contractor was not allowed to begin dredging operations until November 15, 2009. At least twenty-one days before the commencement of the work, the contractor was to present a dredging operations plan to meet the requirements of the contract. It was anticipated that the fill material would flow southward against emergent marsh vegetation, i.e., the dense marsh grasses--predominately Bullwhip grass--that were present in the area, along a contour line with an elevation of +1.5 feet as shown on the drawings. Towards that end, the contractor was to pump dredge material in a manner that would minimize southward flow and create a terrace along the southern realm of the marsh creation areas. Prior to

² NAVD 88 is a standard reference point, used by the North American countries, i.e., the United States, Canada and Mexico, from which to measure elevation in surveying and other activities. The reference point is, in fact, the local mean sea level height value at Rimouski, Quebec, Canada, established by the International Great Lakes Datum of 1985. *See* Wikipedia, at http://en.wikipedia.org/wiki/North_American_Vertical_Datum_of_1988, last visited April 4, 2012. For ease of reading of this opinion, we will dispense with repetition of the suffix nomenclature. When an elevation in feet is referenced, the reader is to assume the reference point is NAVD 88.

dredging the southern realms, the contractor was required to pump fill material to low spots to prevent excessive dredge fill material from flowing south into the GIWW.

Before adding dredge fill material, the contractor was to install effluent discharge control structures to ensure the confinement of dredged material to the marsh creation area and to ensure the minimum and maximum specified pond water elevations. Leakage or seepage of the discharge pipe was not permitted; if leakage or seepage occurred, work was to cease until the leak was repaired.

Contract award and first period of performance

Respondent awarded the contract to appellant on April 9, 2009, for a fixed price of \$486,200, which included a bid estimate of \$5.60 per cubic yard for work item three, dredging and excavation. Appellant entered into a subcontract with Tri-Native Contractors (Tri-Native) for a lump sum price of \$273,000 for dredging 50,000 linear feet of material at \$2.69 per cubic yard. Before subcontracting with Tri-Native, appellant did not request from Tri-Native financial or business information, or past job references.

On June 15, 2009 respondent issued to appellant a notice to proceed. Work was to commence on June 22, 2009, and be complete by January 19, 2010. The contract contained the standard Federal Acquisition Regulation (FAR) clause 52.211-10, which required work to commence within twenty calendar days after the contractor received the notice to proceed.

On July 13, 2009, the Tri-Native representative met with respondent's survey crew and inspector, but could not provide a starting date for work on the earthen containment dikes. On July 28, Tri-Native informed respondent that a marsh buggy necessary for excavation would arrive between July 29 and 31, and that Tri-Native hoped to begin work on August 1. The marsh buggy arrived on site on August 7, and construction of the dikes commenced on August 11. Construction of the dikes was complete on August 27 and Tri-Native demobilized from the area.

Appellant's dredging plan anticipated mobilization of equipment to the job site on or after November 15, 2009; utilization of a twelve inch dredge with a dredge fill production of 2000 cubic yards per day; a dredging sequence of east to west; and, prior to the start of dredging operations, filling the low spots on the southern realm with dredge material to prevent slurry from flowing south into the GIWW. The plan contemplated the start of dredging on November 15, 2009, sixty-five days before the contract completion date of January 19, 2010. The dredging plan was for appellant's subcontractor, Tri-Native, to be on-site to install staff gauges. Tri-Native's one-page dredge plan contemplated the start of

dredging on November 15, 2009, “if all goes well.” On November 19, the contracting officer informed appellant that the dredge was not on-site.

On November 20, 2009, appellant’s owner advised Tri-Native that appellant expected Tri-Native’s dredge and associated equipment to be on-site that week to allow dredging operations to commence. Appellant also complained to Tri-Native that it had an insufficient length of pipe to meet the contract requirement that the dredge pipe extend to furthest point identified by the plans and specifications of the contract. Appellant further noted that the marsh buggy Tri-Native intended to use to drag and pull the dredging pipe was smaller than the marsh buggy Tri-Native used to construct the dikes and was insufficient to accomplish the necessary work.

On November 20, respondent was advised by appellant’s on-site job superintendent that no work would be performed during Wednesday, Thursday, Friday, and Saturday due to the Thanksgiving holiday.

On November 24, 2009, appellant threatened to terminate Tri-Native’s subcontract for default because: (1) appellant and the Government had been on standby since September 9 waiting for the on-site mobilization of dredging equipment; (2) Tri-Native did not own a marsh buggy that worked, and the marsh buggy it did own was inoperable and would need \$50,000 worth of repairs to make it operable; (3) Tri-Native lacked the finances to rent a suitable marsh buggy; (4) Tri-Native lacked a suitable tugboat to move the dredge to the site because Tri-Native’s tugboat was impounded by court order and Tri-Native lacked the finances to rent another tugboat; (5) the dredge Tri-Native intended to use had been sunk in water over one year previously and had not been operated since it was raised; furthermore, there was no foreseeable date when the engine and electrical system could be repaired or when the dredge could be brought into compliance with regulations of the United States Coast Guard; and (6) the required certificate of insurance that Tri-Native provided was fraudulent.

Tri-Native assured appellant that the dredge would be mobilized and ready to start on December 1, 2009. Tri-Native assured appellant that 50,000 cubic yards of fill material could be pumped in twelve days. In response to respondent’s inquiries, on November 30, appellant stated that it was not terminating Tri-Native’s subcontract, and that in fact, the dredge would arrive on-site on December 1. Appellant stated that the reason the dredge was not on-site by the date of November 15 anticipated in the dredging plan was because of high water and mechanical issues with the dredge.

Appellant terminated Tri-Native's subcontract on December 1. On December 2, appellant provided written notice to the contracting officer of an alleged mistake in bid, but did not advise her that appellant had terminated Tri-Native's subcontract. On December 4, the contracting officer sent an e-mail message to appellant advising it that the dredge was not on-site and requesting a plan that would provide for completion of the work by January 19, 2010. Appellant did not respond to the e-mail message.

On December 17, appellant's on-site superintendent notified respondent's inspector of Tri-Native's termination and that a new subcontractor would examine the site. He also advised the inspector that contract work would be suspended on December 23 for the Christmas holidays and resume on January 4. The contracting officer again asked appellant its plans for obtaining a new subcontractor and completing the project. Appellant did not respond.

Cure notice and first default termination

On December 21, 2009, the contracting officer issued a cure notice for appellant's failure to begin dredging operations and for failure to submit surveyor qualifications for a replacement surveyor. Respondent demanded cure of these conditions within ten days upon pain of default.

On December 21, at 2:50 p.m., appellant's marsh buggy arrived at the nearest town to the site, Houma, Louisiana. The marsh buggy arrived at the work site on December 22 at 10:30 a.m.

On January 11, respondent terminated appellant's contract for default for failure to diligently prosecute the work involving mobilization and dredging operations so that the contract could be timely completed, and for failing to address other issues in the cure notice.³

Contract reinstatement and setting of new completion date

On February 9, 2010, appellant, respondent, and appellant's surety met to discuss the termination. Appellant requested a chance to complete the contract. Appellant's owner stated he was out of the country when the cure notice arrived and thus did not have a chance

³ During the sixty-five day period between November 15, 2009, and January 19, 2010, United States Geological Survey data for Houma, Louisiana, showed that there were twenty-eight days when the mean tidal height was below +2 feet and forty-seven days when the minimum height was below +2 feet.

to adequately respond to that notice. Respondent agreed that it would be better to give appellant another chance to perform and complete the dredging work before the water levels began to rise, rather than wait and obtain another contractor.

On February 15, 2010, the contracting officer reinstated the contract with the following work to be completed: (1) installation of de-watering weirs; (2) submission of material certification of staff gauges; (3) dredging of 50,000 cubic yards of fill; (4) submission of daily quality control reports of earthen dike construction; (5) submission of certified payrolls; (6) submission of survey data; (7) recapping of containment dikes⁴; and (8) submission of a revised construction schedule. The contracting officer did not specify a new completion date.

Second period of performance

Appellant reinstated its subcontract with Tri-Native on February 16, 2010. On February 19, the contracting officer wrote appellant to express her understanding that appellant would mobilize on the job site on March 8 and commence dredging operations on March 12. The contracting officer also noted that appellant had not provided the items listed in her letter of February 15. By letter of March 1, appellant submitted a construction schedule showing dredging and excavation between March 12 and May 15, which was the same sixty-five-day completion duration from the start of dredging contemplated in appellant's schedule for the original contract. On March 3, the contracting officer approved the revised schedule.

On March 11, 2010, appellant's superintendent advised respondent that the dredge would be on-site on Friday, March 12. On March 12, Tri-Native advised respondent that the dredge was being mobilized and was en route to the job site. Appellant requested that the original contract work hours of ten hours per day be enlarged to twelve- to fourteen-hour shifts, six days per week, to allow completion of dredging operations. The contracting officer approved the extension of work hours on March 22.

On March 15, the dredge was anchored at an off-site canal; there was no marsh buggy on-site. Appellant began laying discharge pipe and started on necessary equipment repairs. The dredge arrived at the site on March 18.

⁴ Containment dikes constructed the previous August needed to be recapped, i.e., topped off, due to natural leakage and settling.

Measured water at the site was lower than +2 feet and work was capable of being performed on the following days: March 15-16, March 18-22, March 23-26, March 29-31, April 1, April 5-10, April 12-17, April 19-23, April 26-30, and May 5-6.

Appellant's work throughout the reinstated period of performance was repeatedly delayed by tardy arrival of necessary subcontractor equipment on-site, and performance delays and mechanical problems unrelated to the presence of high water. A few examples will suffice.

As noted above, instead of the dredge arriving on-site on March 12 as scheduled, the dredge arrived on March 18. Appellant used a four-person crew to perform the work, which including recapping of dikes, moving pipe, and operating the dredge. Despite the dredge being present as of March 18, actual dredging did not begin until April 7. Tri-Native, however, could only dredge for two hours and forty-five minutes that day, not the twelve to fourteen hours that it was allowed under the daily schedule. Additionally, the discharge pipe was in a different location from the one dictated by the contract specifications.

On April 8, Tri-Native was only able to dredge four hours because of a broken keel hose, and there were numerous stops and starts on dredging. The dredge was moved to the middle of the dredge area, as opposed to where it was supposed to be. On April 9, only three hours and thirty minutes of dredging was performed, with appellant's superintendent finally telling Tri-Native to move dredge material to the correct location. On April 10, no dredging was performed because Tri-Native's crew was moving the dredge pipe. On April 12, no dredging was performed because appellant's crew was connecting a discharge pipe and repairing the marsh buggy. On April 13, no dredging was performed because of continual repairs to the marsh buggy and because of movement of the discharge pipe. Additionally, there was only one worker present. On April 14, Tri-Native only dredged for fifty minutes due to a broken pipe.

On April 15, Tri-Native performed six and three-quarters hours of dredging. Dredging had to be interrupted to clean the dredge's cutter head. On April 16, Tri-Native dredged for eight hours, but dredging was again interrupted because of problems with a cable in the cutter head and because of necessary repairs to a mule. On April 17, Tri-Native dredged for four hours, with interruptions for a cable in the cutter head and a broken pulley. Also, there was a build-up of material at the end of the discharge pipe, and the pipe had to be moved. On April 19, no dredging work was performed because Tri-Native was moving the discharge pipe. On April 20, Tri-Native dredged for one hour and twenty-five minutes, but stopped because water was flowing over the discharge water control structure. On April 21, no dredging was performed and the contracting officer's technical representative met with

appellant's on-site representatives to discuss lack of adequate personnel and proper equipment to perform the requirements of the contract.

On April 22, dredging work was performed for three hours due to debris clogging the cutter head. No dredging was performed on April 23 because of high winds and stormy weather. At this point, during a conference call, the COTR expressed the view that dredging was five percent complete, with appellant's owner stating that dredging was ten percent complete. Dredging work was unable to be performed on April 24 and April 26 because of water levels exceeding +2 feet. From April 27 through April 30, when water levels were lower than +2 feet, only nine hours and fifteen minutes of dredging was performed because of the requirement to move the discharge pipe and mechanical breakdowns of equipment, i.e., the pipe and anchor chain of the dredge.

No work was performed on May 1, May 5 through May 8, and May 10. For those days, the measured water elevations were less than +2 feet. Water elevations were not recorded on May 7 or May 8. Water elevations were more than +2 feet on May 3 and 4, so no dredging was performed on those days.

By letter of May 10, 2010, appellant sent Tri-Native a "cure notice." Appellant's letter gives further particulars as to the subcontractor's difficulty in prosecuting the work. According to appellant, a winch had broken on the dredge, making it impossible for the anchor to be raised or lowered, so dredging operations could not be continued or completed. Also, on May 3, a rental company removed the marsh buggy for Tri-Native's failure to pay the rent, making it impossible to move the discharge pipe so that dredging operations could be completed. According to appellant, Tri-Native failed to properly man the project with experienced personnel to operate the dredge and the discharge pipe in the containment area.

When Tri-Native increased the number of personnel, the individuals it brought to the site were inexperienced. Part of the crew walked off the job because they were not paid or their pay checks bounced. According to appellant, Tri-Native never cured its providing a bogus insurance certificate, and failed to comply with the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act.

The dredge was not strong enough to cut through debris, and the discharge pipes appellant used were old and rusted. A lack of personnel hindered progress, since the marsh buggy was used to move pipe and the driver of the marsh buggy also operated the dredge.

On May 10, the contracting officer wrote appellant and noted the following performance deficiencies to date: 1. The southern realm of the marsh creation area had not been completed. 2. The discharge pipe was placed in the wrong area to enable fill to be

placed in the southern realm, which was the first area of dredge performance. 3. No workers from appellant were present to ensure that dredge fill material was reaching target elevations within the marsh creation area. 4. Given Tri-Native's haphazard pattern of removing fill from the borrow area, accurate surveys could not be made of the fill removed. Additionally, very little progress was made in placing fill in the containment system. 5. Appellant had not provided enough information to enable respondent to make an informed response to appellant's earlier request to raise the permissible ponding water elevation to +2.5 feet. 6. Respondent had not received certified payrolls from the contractor. 7. No information was received from appellant as to how the dredge operator was meeting contract requirements for limits in the borrow cut.

The contracting officer also noted that since the on-site meeting, there had been no construction activity at all on the project and that no dredging had occurred. The contracting officer noted that contract performance would end on May 15 and requested appellant's plans to correct the deficiencies and a time line for their correction. Dredging was not performed on May 13. On that day, the respondent asked appellant if it had terminated Tri-Native's subcontract, and appellant responded that it had.

Second termination for default

On May 18, the contracting officer issued a show cause order to appellant as to why the contract should not be terminated for default, given appellant's failure to perform within the time frames required by the contract and to cure the deficiencies noted in her letter of May 10. The contracting officer gave appellant ten days after receipt of the notice to present in writing any facts that would bear on the question of whether the failure to perform arose from conditions beyond the contractor's control and without the contractor's fault or negligence.

On May 19, 2010, appellant advised respondent that it was ceasing all work on the contract due to alleged impossibility of performance, citing the lack of full containment, inability to regulate ponding height, insufficient ponding height, and continuous high water levels.

On May 28, appellant responded to the show cause order, alleging impossibility to perform because historical water elevations were above +2 feet, and that there was not a day that dredging could have occurred when hydraulic conditions existed that would have allowed de-watering of the marsh containment area. Appellant also maintained that lack of full containment made it impossible to maintain the minimum and maximum specified ponding water elevation. Appellant argued that the six-inch specified ponding depth was insufficient to let slurry settle out. Appellant further maintained that the requirement to fill

in low spots in the southern realm of the marsh creation area would not solve the problem because filling in low spots did not create the required full containment necessary to perform the contract.

Appellant stated that it had been prepared to hire another subcontractor to complete performance, but was delayed in doing so by the opinion of a government inspector that the contract was not “doable.” Appellant maintained that contract performance was impossible without full containment dikes. Appellant stated that “regardless of what we may or may not have done under the contract to date,” its performance failures “cannot be due to the fault or negligence of the contractor if the contract as designed is impossible to perform in the first place.” Appellant thus considered the work “constructively suspended.”

On May 29, 2010, appellant again wrote the contracting officer and stated that the southern realm emergent vegetation was not a substitute for full containment because heavy sediment would deposit against the grass and light sediment would spill out into the GIWW. Appellant stated that high water elevation above +2 feet and the lack of a full containment system for creating the marsh made performance impossible due to high water levels. Appellant refused to continue work unless respondent remedied the alleged defects in the specifications.

On June 15, 2010, the contracting officer issued a termination for default for appellant’s failure to prosecute the work diligently and to complete the project in accordance within the time specified in the contract. The respondent surveyed the work site and estimated that out of the 612 hours the revised schedule made available for dredging, appellant dredged for forty-eight hours and placed 6000 cubic yards of fill in the marsh containment area.

The replacement contractor completes the work

Respondent hired a replacement contractor, Coastal Contractors (Coastal), to complete the job. Coastal’s contract contained the same terms and specifications as the original contract. The performance time was from December 2010 through March 2011. First, Coastal brought in a suitable marsh buggy, a Caterpillar 320, and recapped the dikes. Then it filled in low elevations in the southern realm. After filling in the low elevations, Coastal dredged, an activity which took about thirty-seven days, between mid-January and March 4, 2011. According to respondent’s estimates produced through surveys, Coastal dredged between fifteen hundred and two thousand cubic yards per day. There was some minor seepage of dredge material past the containment dikes around the southern end of the project; the seepage was easily handled by Coastal building contractually-allowed training dikes. Recapping the dikes took Coastal about fifteen days.

Contrary to the predictions of appellant as to the impossibility of performance given the lack of full containment, the dredge fill material was held in place by the vegetation along the southern realm that was not bordered by a containment dike. Dredge fill material did not escape south when water elevations exceeded +1.5 feet. When water levels in the marsh creation area exceeded +2.0 feet, Coastal stopped dredging and de-watered until the elevation reached +2.0 feet or below. The water levels outside of the marsh creation area were consistently below +1.5 feet during Coastal's performance time, but even when the ponding elevations were between +1.5 feet and +2.0 feet, dredge fill material did not flow outside the marsh creation area.

Expert opinion as to ebb and flow of the tide

In this appeal, appellant retained an expert to establish that the ebb and flow of the tides made the contract impossible to perform. The expert did not personally visit the site or take tidal measurements at the site; rather his conclusions were based solely upon his review of the contract plans and specifications. In this expert's opinion, without full containment along the southern border of the marsh creation area, the dredge fill material would pour out of the area. He came to that opinion based upon his assumption gleaned from note 3 of contract drawing A/5 (typical cross section) that the highest daily tide was +2.9 feet and the lowest tide was +.5 feet, a variance of 2.4 feet on a four-tide cycle, i.e., two high tides and two low tides per day. That note said "MEAN HIGH WATER = +2.9 ft. MEAN LOW WATER = +.5 ft." The note did not designate whether the measurement was daily, annual, or a period in-between.

A government design engineer with degrees in biological and agricultural engineering testified as an independent rebuttal expert that the tidal numbers in that drawing referred to the annual mean high and low tide, not the daily high and low tide, and that if the note meant to refer to the daily high tide it was in error. Furthermore, in the area of GIWW, the tide was two-cycle and the measured differential in tidal heights in the area of the Hanson Marsh was .4 feet, with a gradual rise over a twelve-hour period. Under such tidal conditions, the natural vegetation in the southern realm was quite sufficient to retain the dredge slurry material placed in the marsh creation area. Contrary to the prediction of appellant's expert as to the impossibility of the specifications producing the desired results, photographs taken at the marsh creation area after Coastal completed its work showed a restored marsh that was green and lush.

Discussion

A termination for default is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *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 1697, 10-1 BCA ¶ 34,380, at 169,745. When the Government terminates a contract for default because the contractor has failed to make progress, the Government must establish that at the time of termination, there was no reasonable likelihood that the contract could be performed within the time remaining for performance. *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1016 (Fed. Cir. 2003);⁵ *Danzig v. AEC Corp.*, 224 F.3d 1333, 1336-37 (Fed. Cir. 2000).

In this case, respondent waived the original January 19, 2010, completion date and the original default. But when reinstating the contract, appellant and respondent mutually agreed upon a new completion date of May 15, 2010. *DeVito v. United States*, 413 F.2d 1147, 1155 (Ct. Cl. 1969). They also agreed that dredging would be performed between March 12 and May 15. The question, therefore, is whether the Government has met its burden of showing that there was no reasonable likelihood of appellant's timely performance during the reinstated period of February 15 through May 15, with particular emphasis on the dredging period of March 12 through May 15. In answering this question, we employ a de novo standard of review, not the arbitrary and capricious standard that respondent urges. *V & W Construction & Services Co.*, ASBCA 2003-147-1, 04-2 BCA ¶ 32,692; *Chambers-Thompson Moving & Storage*, ASBCA 43260, 93-3 BCA ¶ 26,033. The case relied upon by respondent for the contrary proposition, *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343-44 (Fed. Cir. 1999), has been called into question by subsequent cases. See *McDonnell Douglas Corp.*, 323 F.3d at 1018 n.3.

Here, the Government has met its burden. Appellant's performance was plagued with faulty equipment and an undermanned work force throughout the period of performance, starting with the issuance of the notice to proceed on June 15, 2009. Appellant's subcontractor's inability to mobilize on-site resulted in appellant threatening to terminate its subcontractor and eventually following through on that threat. These problems remained during the reinstated period of performance from February 15 through May 15, 2010. Instead

⁵ A subsequent and related Federal Circuit decision, *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340 (Fed. Cir. 2009), was reversed and remanded on other grounds by the United States Supreme Court. *General Dynamics Corporation v. United States*, 131 S. Ct. 1900 (2011).

of equipment being on-site and ready to dredge on March 12, as contemplated in the revised, agreed-upon schedule, the dredge was not near the site until March 18 and dredging did not begin until April 7, a delay of twenty-six days in the sixty-five-day dredging schedule. Appellant's subcontractor was unable to dredge the allowable twelve-hour days because the subcontractor's equipment was plagued with breakdowns, just as it was during the initial period of performance. The discharge pipe leaked, which, under the terms of the contract, required stopping the work. In addition, the subcontractor's marsh buggy was repossessed during the performance period by the rental company and appellant lacked the experienced workers to fully staff the job so as to enable it to complete performance in a timely manner.

Appellant's excuse for its inability to complete the contract is that the water was too high to enable appellant to dredge. This was not the case. As indicated in our findings of fact, during the sixty-five day period of renewed performance, there were forty-seven days when measured water in the marsh creation area was low enough to proceed with the dredging. Appellant's subcontractor represented that this task could be completed in twelve days, and the completion contractor actually performed it in thirty-seven days. The sporadic instances of high water above +2 feet in the marsh creation area was not a cause of appellant's lack of performance and thus does not excuse appellant's default.

We also reject appellant's argument that the default is excused because the lack of full containment made the contract impossible to perform. Appellant bears the burden of showing commercial impossibility. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283 (Fed. Cir. 2002); *Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1373-74 (Fed. Cir. 2001). The defense requires appellant to show that: (1) a supervening event made performance impracticable or impossible; (2) the non-occurrence of the event was a basic assumption upon which the contract was made; (3) the occurrence of the event was not appellant's fault; and (4) appellant did not assume the risk of occurrence. *Seaboard*, 308 F.3d at 1294-95; *MMI Capital, LLC v. General Services Administration*, GSBICA 16739, 2006 WL 2170507 (Aug. 2, 2006); *Restatement (Second) of Contracts* § 266(1).

The doctrine of impossibility is based upon an objective, not a subjective standard. *MMI Capital*, 2006 WL 2170507, at *6. Thus, it is not enough to show that performance was impracticable for the individual contractor; it must be shown that performance would have been impossible for any similarly situated contractor. *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 410 (Ct. Cl. 1978). The ability of other contractors to perform disputed work is persuasive evidence that the contract was not impossible to perform. *Id.*

The lack of containment dikes along part of the southern realm of the marsh creation area was shown on the solicitation drawings that were made part of the contract. Appellant

should thus have been fully aware that it was required to perform under those conditions, employing those means and methods that would enable it to successfully complete the work.

In some cases, courts have found impossibility arising from defective design specifications when the immutable laws of physics and chemistry prevented the satisfactory performance expected from the specifications, *Ordance Research, Inc. v. United States*, 609 F.2d 462, 479 (Ct. Cl. 1979) (explosion of magnesium igniters produced as specified); *Maxwell Dynamometer v. United States*, 386 F.2d 855, 872 (Ct. Cl. 1967) (roller of specified dimension could not meet horsepower, time, and speed performance requirements), or when the condition would have an adverse affect on any contractor attempting performance, not just the particular contractor. *International Electronics Corp. v. United States*, 646 F.2d 496, 510-12 (Ct. Cl. 1981) (labor strike excused default given shortage of calibration technicians in Far East necessary to perform contract).

In this instance, the record does not show impossibility of performance because of defective specifications. Appellant's expert opinion as to impossibility was based on an erroneous reading of an contract drawing note that was ambiguous at best, or erroneous at worst, and upon erroneous assumptions as to the tidal cycle. Appellant's opinion as to impossibility was successfully rebutted by the rebuttal testimony of the Government's expert and, more importantly, by the reality of the successful completion of the project by the completion contractor.

Decision

For the reasons stated above, the Board sustains respondent's termination for default. The appeal is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JEROME M. DRUMMOND
Board Judge