



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: February 28, 2014

CBCA 2245, 2345

ACM CONSTRUCTION AND MARINE GROUP, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Lars E. Anderson and James Y. Boland of Venable LLP, Tysons Corner, VA, counsel for Appellant.

Bernard J. McShane, Office of the Chief Counsel, Maritime Administration, Department of Transportation, Washington, DC, counsel for Respondent.

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

HYATT, Board Judge.

These consolidated appeals arise from a contract entered into between ACM Construction and Marine Group, Inc. (ACM) and the Department of Transportation's Maritime Administration (MARAD) to replace the deck covering in the galley and cadet mess of the training ship Empire State. ACM asserts that MARAD improperly terminated its contract for cause in the appeal docketed as CBCA 2245. In the appeal docketed as CBCA 2345, ACM seeks the amount of \$194,320 in termination for convenience costs. For the reasons provided below, we grant the appeal of the termination for cause and convert the termination to one for the convenience of the Government. We award the amount of \$194,320 in termination for convenience costs.

Findings of Fact

1. ACM is a small business headquartered in Norfolk, Virginia. It performs general construction and repair work primarily in the maritime industry. Its president and owner has a degree in engineering from a maritime academy and is licensed by the state of Virginia for contracting in the areas of building, refrigeration, elevators, motors and pumps. He also has experience in electrical work associated with elevators, motors, and pumps.

2. Capitol Finishes, Inc. (Capitol Finishes), ACM's subcontractor, is also located in Norfolk, Virginia. It specializes in installation and replacement of deck covering systems on ships, and is a certified Dex-O-Tex flooring installer. Capitol Finishes has installed terrazzo deck coverings in more than one thousand ships, and in hundreds of galleys on many types of vessels, from tug boats to destroyers and aircraft carriers. Capitol Finishes has successfully performed deck covering contracts for the Navy for close to twenty years. The foreman of Capitol Finishes' crew testified that he has worked on hundreds of ship galleys. Capitol Finishes and ACM had collaborated on maritime deck renewal projects prior to the award of this contract.

3. The Empire State is a United States Government-owned training ship provided by MARAD to the State University of New York (SUNY) Maritime Academy for the purpose of training student cadets for a career in the maritime industry. Training exercises include cadet cruises, typically scheduled during the late spring and summer months.

4. In June 2010, a MARAD port engineer (also the contracting officer's technical representative (COTR)), who had recently been assigned to the Empire State, was informed that the deck covering of the Empire State's galley and cadet mess needed to be replaced. At that time, the deck covering consisted of quarry tile in the galley and terrazzo deck covering in the cadet mess.

5. The COTR testified that he conducted market research on terrazzo marine flooring, in particular Dex-O-Tex products, which are manufactured by the same company that made the terrazzo materials installed in the cadet mess deck. The manufacturer of Dex-O-Tex referred the COTR to a commercial seller and installer for more information. After visiting the vessel to assess the floors to be replaced, that vendor, Coast to Coast Contracting Group, Inc. (Coast to Coast), provided the COTR with a quote for the project. The quote contained a description of the work the company proposed to perform. Coast to Coast quoted the amount of \$252,689 to perform this work.

6. The quote provided by Coast to Coast stated the following with respect to the galley deck floor replacement:

Remove entire deck down to the steel and cove base. Approximate square footage: 1,530 sq. ft./240 lineal ft. of 6” cove base. Remove any obstructions (ex. appliances, cabinets, etc.) Scale and wire brush. Prime with 150 Primer.

For the cadet mess, the quote provided this description:

Remove deck complete down to the steel. Approximate square footage: 2,367 sq. ft. and 145 lineal ft. of 6” cove base. Scale and wire brush. Remove any obstructions. Prime with 150 Primer.

7. The COTR used the quote from Coast to Coast almost verbatim in preparing the statement of work (SOW) for the deck replacement solicitation. In pertinent part, the solicitation’s, and subsequent contract’s, statement of work provided as follows:

5.2 Removal, disposal and replacement of the entire decking system in the vessel’s cafeteria. (CLIN 0001):

5.2.1 Remove deck completely down to the steel deck. Approximate square footage: 2,367’ sq. ft. and 145’ lineal ft. of 6” cove base. Scale, grind and wire brush to white metal. Remove any obstructions. Prime with 150 Primer.

5.3 Removal, disposal and replacement of the entire decking system in the vessel’s Galley (CLIN 0002)

5.3.1 Remove entire deck and cove base down to the steel deck. Approximate square footage: 1,530’ sq. ft./240’ lineal ft. of 6” cove base. Scale, grind and wire brush to white metal. Remove any obstructions. Prime with 150 Primer. Remove any obstructions (appliances, cabinets, kick pipes, etc.)

8. The solicitation included a provision entitled “Site Visit and Ship Check,” advising that “[i]nterested parties are strongly urged to attend a ship check of the vessel scheduled for 10:00 a.m. ET, **Thursday, August 18, 2010.**”

9. The COTR and the vessel’s chief engineer expected the contractor to take all equipment out of the galley and store it elsewhere on the ship. Their intent was announced

to all prospective bidders who attended the site visit. The pre-bid site visit was not mandatory and no notes memorializing the information conveyed therein were provided to prospective bidders.

10. ACM did not attend the pre-bid site visit, although its president, who had worked on the ship previously, undertook to view the mess hall and galley space in late August during an unrelated visit to the vessel. This occurred shortly after ACM had submitted a bid to perform the work. There are differing accounts of the exchanges that took place between ACM's president and the COTR. The COTR expressed his opinion that ACM had no idea what the SOW called for in terms of the areas to be renovated and was trying to add work to the contract; ACM's president testified that he was well aware of what the contract called for in terms of the space that was intended for the new deck covering.¹ This dispute is illustrative of the relationship between the COTR and ACM's president.

11. Following this pre-award interchange with ACM, on August 31, 2010, the COTR prepared a document entitled "Clarification of Deck Renewal SOW," intended by him to be added to the solicitation, so that all the "contractors understood that the equipment had to be removed." The clarification document included a statement that

"As stated in the SOW, the contractor will be responsible to remove all obstructions. This refers to all appliances located in the cafeteria and galley (i.e. galley ovens), cabinets, tables, serving stations, etc. The contractor will be responsible to replace all these obstructions and prove their function after the deck renewal is complete to the satisfaction of the COTR and/or his onsite consultant.

The COTR also stated his intent that the contractor be required to replace or repair, at his discretion, any damaged equipment. He further stressed that no condition reports would be accepted, seeking any additional costs associated with stripping and preparing the decks for installation of the new flooring system.

12. This clarification document was forwarded to the contracting officer but was never added to the solicitation so as to disclose to prospective contractors the COTR's understanding of the effort to be expended by the awardee.

¹ About six months before the solicitation for the deck renewal work was advertised, ACM successfully completed a contract for the installation of ventilation fans in the engine space on the Empire State.

13. Three offers were received in response to the solicitation, including ACM's and an offer from Coast to Coast. ACM and the third offeror were close in price; Coast to Coast's price was the same as its original proposal from which the SOW had been developed. The price disparities caused the COTR to express an opinion that the two low offerors had "not read" or understood the SOW.

14. On September 9, 2010, the technical evaluator for the procurement requested that the contracting officer ask ACM to clarify its bid submission. In response to his concern that he needed more information demonstrating ACM's ability to perform the work, the contracting officer advised that the solicitation's technical capability paragraph required only that the offeror have a certified Dex-O-Tex installer perform the work and stated that ACM's provision of a proper certification should suffice for that purpose. In addition, the contracting officer informed the technical evaluator that the COTR's clarification document was not a part of the solicitation and, to the extent information therein was not in the specifications, that interpretation would not be enforceable.

15. Subsequently, on September 15, 2010, the contracting officer wrote ACM seeking clarification of certain aspects of its offer. In particular, the contracting officer requested a "detailed breakdown of [ACM's] subcontractor's labor, equipment, and materials," explaining that ACM's price was "significantly lower than the other prices and the Government estimate."

16. ACM provided a ten-page response on September 16, 2010, including, among other things, documentation from Crossfield Products Corporation, the manufacturer of Dex-O-Tex, certifying that ACM's installer was factory-trained in the application of Dex-O-Tex products; a proposal from the installer describing how it intended to accomplish the deck replacement work for ACM; and a separate statement from the installer identifying the materials and tools intended for use to perform the job.

17. The technical evaluator for the procurement reviewed these materials and, on September 17, 2010, informed the contracting officer that the proposed subcontractor met the requirement to be a Dex-O-Tex-recognized installer and observed that ACM appeared to understand the intent of the original SOW. He concluded that he could see no justification to find the proposal technically unacceptable.

18. On September 20, 2010, in accordance with Federal Acquisition Regulation (FAR) 9.104-1, 48 CFR 9-104.1 (2009), the contracting officer issued an affirmative determination of responsibility for ACM.

Award of Contract

19. The contract was awarded to ACM, in the amount of \$188,900, on the afternoon of September 24, 2010. The cover letter announcing the award stated that ACM's quote, and clarifications in response to the solicitation, received through September 22, 2010, had been accepted. The contract work was to commence on October 4, 2010 and be completed by October 15, 2010.

20. In addition to the statement of work in the solicitation, the contract incorporated contract terms and conditions applicable to commercial item purchases pursuant to FAR 52.212-4:

(c) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes*. This contract is subject to the Contracts Disputes Act of 1978, as amended Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of the contract, pending final resolution of any dispute arising under the contract.

(l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if

the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Section H.6 (Indemnity and Insurance) of the contract provides that:

The Contractor shall exercise reasonable care and use its best efforts to prevent injury or damage to all employees, persons and property in and about the work and to the vessel or portion thereof upon which work is done.

21. ACM awarded a subcontract to Capitol Finishes to remove the old flooring, prepare the surface, and install a new deck cover. Promptly after the contract was awarded, ACM and Capitol Finishes undertook to plan and mobilize for the project. This included ordering materials, setting up a production schedule, employing the necessary manpower, and the like.

22. A kick-off meeting was held on September 29, 2010. At this meeting, which was attended by ACM's president, a representative of Capitol Finishes, the COTR, and the ship's engineer, the COTR again stated his view that the contract required all galley equipment to be moved out of the area before work began. ACM's president stated his understanding that the specification called only for the removal of obstructions, and not the removal of all equipment, explaining that not all equipment would necessarily obstruct the work.

23. Before commencing the contract work, a Capitol Finishes employee walked the galley and the cadet mess to ascertain what items would obstruct its ability to tear out the existing decking and, thus, would need to be removed or raised. ACM undertook to remove or raise the items identified by Capitol Finishes before the rip-out started.

24. On Friday, October 1, 2010, the COTR sent a letter expressing misgivings about the ACM contract to the contracting officer and to her immediate supervisor. He reported that, at the kick-off meeting, he was informed by ACM's president that, in his view, not all "obstructions" needed to be removed to perform the job and that Capitol Finishes would be able to work around some of the equipment. The COTR was concerned that ACM

did not understand the scope of the contract with respect to the need to remove all of the equipment in the areas.

25. The supervisory contracting officer (hereafter the contracting officer)², sent an electronic mail message to ACM's president on the afternoon of Monday, October 4, 2010, relaying the COTR's concerns and requesting that ACM file a conditions report to allow the Government to respond to and clarify the contractor's concerns.

The Start of Contract Work

26. On Monday, October 4, 2010, crews from both ACM and Capitol Finishes arrived at the Empire State to begin work. ACM and Capitol Finishes began the rip-out of the existing deck covering in the cadet mess, intending to proceed to the galley. Although ACM removed or raised all equipment that Capitol Finishes requested it to, the contractor proceeded to tear out the old decking materials without physically removing all of the equipment that the COTR considered should be moved.

27. The rip-out of the cadet mess proceeded as expected, and based on the early progress in this area, ACM predicted that the rip-out work under the contract would be completed by October 8, 2010, the end of the first week on the job. Relying on this preliminary assessment, and without informing ACM at the time, the COTR scheduled an inspection to be performed by third-party American Bureau of Shipping (ABS) surveyors on October 8.

28. Once work was started in the galley, which was covered in quarry tile, rather than terrazzo, ACM submits that it encountered substantial rust and deterioration and that the steel decking was significantly pitted. The state of the galley decking caused ACM and Capitol Finishes to require several more days than anticipated to complete the rip-out and prepare the surface for a new covering. ACM and Capitol Finishes witnesses attributed this largely to a defective installation performed by the previous contractor. Notably, from what they saw, the steel had not been primed³ and the prior deck covering had not been properly

² Two contracting officers participated in this project for MARAD, the original contracting officer and her supervisor, who substituted for her during an absence and who eventually took over the administration of the contract. They are referred to interchangeably as the contracting officer in this decision.

³ ACM supports its conclusion that the galley deck had not been primed by comparing it to the cadet mess deck, which, when uncovered, had a coat of green primer paint.

installed, with the result that rusting of the steel was far more extensive and time-consuming to remove than had been anticipated by ACM. Capitol Finishes had to resort to the use of jackhammers to remove the worst of the rust, generating noise and large amounts of dust and debris.

29. As a consequence of the extent of the rust affecting the galley steel deck, ACM was delayed in completing surface preparation following rip-out. This impacted the ability of the ABS surveyors, who came on October 8, 2010, to assess the condition of the galley deck. The surveyors determined that the cadet mess hall deck would not need an ultrasonic test (UT) for thickness. They also observed that the galley deck was in substantially worse condition than the mess hall deck and would require a UT survey, which they did not want to perform until rip-out was fully completed and all the rust had been removed.

30. Immediately after the ABS surveyors finished the inspection, the COTR sent an email message to his supervisor and the contracting officer acknowledging the poor condition of the galley deck, but attributing the delay in rip-out and surface preparation to the contractor's failure to remove all equipment from the galley so that the surveyors could complete their testing.

31. Following the kick-off meeting, and in response to the COTR's concerns about removal of "all obstructions," on October 4, 2010, the contracting officer had sent an email message to ACM asking that it address the concerns raised by the COTR related to the need for clarification of the designation of obstructions in the performance area. ACM did not reply immediately, but rather, commenced performance. Once the rip-out started and the state of the steel underlying the galley deck was discovered, ACM prepared a series of Condition Found Reports, which were emailed to the contracting officer on October 11, 2011.

32. With respect to its concerns about the deterioration of the steel galley deck, on October 9, 2010, ACM's president sent condition report number 7 to the COTR, advising that while removing "the existing decking system from the galley areas ACM discovered wasted, deteriorated and holed steel areas of the deck throughout the galley," and that the galley decks exhibited "heavy metal loss." ACM also offered to perform an audio gauge survey of the galley.

33. In condition report number 3, ACM explained that Capitol Finishes had determined what items in the performance area were deemed obstructions to performance and confirmed that ACM had undertaken to either remove or raise those items to provide Capitol Finishes with unobstructed access to the deck. ACM also provided a list of items it deemed to obstruct access to the performance area. For the cadet mess, obstructions were

“benches, beverage cabinet and wooden furnishings attached to the deck,” and for the galley, obstructions were “the garbage disposer, steamer, fryolators, griddle ovens, convection ovens and ice machine.”

34. After receiving copies of ACM’s condition reports, the COTR emailed the contracting officer asserting that ACM had not complied with the contract requirements, in particular the requirement to remove “all” obstructions in the galley and cadet mess areas. He also complained that ACM had told him the decks would be ready for ABS inspection by Thursday, October 7, and that he had scheduled the inspection for the next day. In particular he noted that all equipment had not been moved and the decks were not stripped to white metal.

35. The COTR also rejected ACM’s condition reports, in particular numbers 3 and 7. He rejected report number 3 on the ground that ACM did not attend the site visit prior to submissions of offers, was given “numerous opportunities for clarification of the SOW,” and was told on numerous occasions that “all obstructions must be removed in the cafeteria and galley as stated in the contract.” He also rejected ACM’s explanation for delays in the rip-out process and asserted instead that the delays were caused by the contractor’s failure to remove obstructions as required. Finally, he rejected ACM’s proposal to gauge the steel decks, asserting that ACM was holding up the ABS surveyors by failing to remove all obstructions in the performance area.

36. ACM received no direction from the contracting officer concerning the issues raised with respect to repair of deteriorated and holed steel plating it encountered during the rip-out. Both MARAD and ACM agreed that the contractor could not proceed with priming the steel and installation of the new deck covering until the damaged steel decks were repaired.

Termination of Contract

37. On the morning of Thursday, October 14, 2010, the COTR and the ship’s engineer met to discuss the ACM contract. The engineer then emailed various personnel, including the ship’s captain and the contracting officer, with concerns about ACM and ongoing issues with respect to the intent and “verbiage” of the contract specification to “remove all galley equipment while the decking was being removed and new deck installed so that none of the equipment would be damaged or fouled with debris and dust.” He further stated that “knowing we would encounter deck steel corrosion and replacement issues the equipment needed to be removed so that we could allow access to ABS, USCG [United States Coast Guard], and gauging contractors, could make [their respective] inspections and we could initiate repairs.”

38. At approximately the same time on the morning of October 14, 2010, the COTR sent a lengthy email message to the same individuals making similar assertions to the effect that ACM was not complying with contract requirements and that problems were “escalating.” He added a complaint that ACM was using heavy equipment in the galley “no doubt causing damage to equipment that has not been removed.” Finally, he pointed out that ACM’s failure to remove all equipment in accordance with his instructions was impeding the ABS surveyors, who would not perform gauging until this had been accomplished. Exhibit 62.

39. On the afternoon of October 14, the contracting officer telephoned ACM’s president to inform him of her intent to terminate the contract for cause based on his refusal to comply with the contract’s specification concerning the removal of obstructions. She followed up, later that day, with an email message that stated:

After several attempts to convince you to comply with the terms and conditions of subject contract, you have failed to progress and comply with the stated requirements, primarily “removal of obstructions” which has resulted in damage to the ship and its equipment. . . . [Y]ou were verbally notified by me . . . today via telephone of the government’s intention to **TERMINATE FOR CAUSE**, in accordance with FAR 52.212-4.

As verbally directed, you are to **IMMEDIATELY CEASE AND DESIST** and remove all personnel and subcontractor personnel from the Empire State ship. You are no longer authorized ship access.

A formal termination will be issued and remedies identified within 30 days of the date of this email.

40. That same day, ACM and Capitol Finishes personnel were required to stop work and were escorted off the ship. They had no option but to leave most of their equipment in place and were not permitted to clean up the work area prior to departure.

41. The Capitol Finishes representative telephoned the COTR that same day and entreated for permission to clean up. The COTR refused that request, but the two were able to come to an arrangement to store the substantial quantities of materials (underlayment, glue, primer and the like) remaining on board the ship in an environmentally controlled space.

42. The Capitol Finishes crewmen were permitted to return to the ship the next day to retrieve their equipment, but were still not permitted to clean the dust and debris generated by the floor preparation process. After that, ACM and Capitol Finishes personnel returned to Norfolk.

43. On October 18, 2010, ACM provided a letter to the contracting officer objecting to the termination of its contract for cause. ACM's president represented that the company "was ready, able, and willing to return to work immediately to perform the scope of work contracted by our firm to perform."

44. In a second letter dated October 21, 2010, ACM's president explained the company's position that it had complied with the contract's requirement that it move any obstructions. ACM also pointed out that no milestone dates existed regarding removal of obstructions or accommodation of an ABS surveyor, and added that it considered that the poor condition of the steel had impacted its production schedule. ACM further asserted that the condition of the workspace was attributable to the fact that all contractor and subcontractor personnel had been ordered off the ship with no opportunity to clean.

45. ACM, in the October 21 letter, also suggested that the parties might resolve the dispute if all parties met in person to discuss it. ACM noted as well that it had never been notified by MARAD of any damage to the ship and disputed that this was the case. ACM closed the letter by pointing out that it was "ready, willing and able" to complete contract work and repeated its request for a meeting.

46. Following receipt of ACM's letters, the contracting officer prepared a memorandum to the file in which she set forth the Government's position with respect to the termination. She again stated the MARAD position that the contract SOW required the removal of all obstructions in the performance areas. She also opined that the failure to remove all equipment from the galley had resulted in damage to the equipment that remained.

47. On October 28, 2010, ACM's president submitted another letter to MARAD expressing an interest in reaching a resolution and stating that ACM was "ready, willing, and able to complete all work within the scope of our contract." ACM pointed out that if MARAD's intent had been to have all the equipment removed from the space, it should have stated that specifically. ACM also requested an opportunity to inspect the work on the ship to make an accurate assessment of the work necessary for completion, and reminded MARAD that a meeting between the parties had yet to be scheduled.

48. On November 8, 2010, ACM's president and Capitol Finishes' representative attended a meeting at MARAD's Norfolk, Virginia office. The meeting was attended by the original contracting officer, the main contracting officer, the COTR's supervisor, and the COTR, who participated by telephone.

49. The next day, November 9, 2010, the contracting officer emailed ACM's president, stating her understanding that all parties had come to "a mutual understanding that this contract will be completed as per the statement of work and original intent of the contract." This statement was accompanied by a lengthy description and list of work to be accomplished, including a detailed list of equipment in the galley that was required to be removed. She also added a detailed requirement that, following installation of the new deck covering, the contractor would be required to replace and restore all obstructions removed to the same condition as they were before the start of the contract, to be verified by the ship's engineer and captain, the COTR, and the food service contractor. She concluded the email message with a signature line that read, "Received and agreed to by ACM."

50. ACM responded by letter dated November 10, 2010, pointing out that the contracting officer's letter "contains many errors and clearly misrepresents what was discussed at [the] meeting." In particular, ACM asserted that there had been no mutual understanding and no agreements had been made. ACM's president declined to sign the contracting officer's statement, which he described as a revised version of the existing contract.

51. In his letter, ACM's president further explained that the additional disputed work that MARAD was demanding as a condition to allowing ACM to return to the ship was beyond the scope of the statement of work on which he had priced his bid. Had the solicitation included the detailed list of items that MARAD specifically wanted performed, he would have bid accordingly. ACM offered to price the additional work if MARAD wanted it performed. He concluded his response with the statement that ACM was "ready, willing and able to promptly complete work agreed to in the contract."

52. On November 11, 2010, the contracting officer replied to ACM's president, stating: "Please submit your proposal for what you perceived as additional work, but was indeed included in the original scope of work under a performance-based contract." She continued: "We will evaluate your proposal and determine if [it is] in the best interest of the government to continue given the poor performance and that other offerors submitted their proposals with a full and complete understanding of the commercial performance-based requirements without additional illumination."

53. After considering the contracting officer's communication asking for submittal of a price proposal, ACM responded on November 12, 2010, that given the tone taken by the contracting officer, the adversarial conditions it faced working on the vessel, and the inherent risks of offering to perform the additional items to the personal satisfaction of the COTR, the ship's senior officers, and an unnamed third party food service contractor, it had "reconsidered its position and offer to perform additional services for you outside of our existing contract and statement of work on this project." ACM's president repeated the company's original offer to complete the work contained in its original contract and work statement.

54. After ten days with no response from MARAD, on November 22, 2010, ACM's president requested a status update from the contracting officer.

55. On November 26, 2010, the contracting officer issued a formal contract termination notice:

You are hereby notified that your right to proceed with work under Contract DTMA2P10182 is terminated completely for cause under contract clause 52.214-4. The termination is effective immediately, confirming termination notice issued October 14, 2010. This action is taken due to your failure to make progress to ensure completion of the contract within the specified time, to perform in accordance with the requirements of the contract, and damages sustained to the ship and its equipment due to your lack of compliance with and understanding of contract requirement[s].

The notice provided that the "effective date" of the termination was October 14, 2010.

Testimony Relevant to Failure to make Progress

56. ACM's president informed MARAD in an email message dated October 12, 2010, that ACM and its subcontractor had encountered deteriorating and holed steel during the rip-out, and the conditions were "negatively impacting the end date" of the project. He testified at the hearing that the contracting officer at no time issued a cure notice or communicated any concerns about completing the work on time. The contracting officer also confirmed in testimony that generally the Government will provide additional time to complete the work so long as it can reasonably do so. The COTR also testified that MARAD was not "in a hurry" and that when a contractor needs additional time he will usually issue a modification to extend the performance time. He believed that it was ACM's responsibility to formally request the extension.

57. The Empire State was not scheduled to embark on a cruise until May 7, 2011, approximately five or six months from the date when ACM's contract was terminated.

58. The primary purpose of the two-week performance period was to ensure that the contractor performed the contract diligently and not divert resources for other jobs and then seek extensions of time. The COTR testified that completing performance in two weeks was "not a big deal."

Retrieval of Materials From Ship

59. On December 8, 2010, following the formal termination for cause, ACM was asked to retrieve the substantial quantity of materials that remained on the ship. ACM responded, pointing out that it was wasteful to ask ACM to remove the materials when they would be needed by the replacement contractor. ACM's president offered to sell them to the Government at cost. At the same time, ACM agreed to remove the materials as directed by the contracting officer, but noted that there would be an impact on its claim.

60. On December 13, 2010, ACM submitted an invoice to MARAD showing a projected cost of \$30,140 for the retrieval of the materials still on board the Empire State. ACM calculated this amount based on the cost of labor and transportation to send four men on a three-day trip to New York from Norfolk to remove the materials and return.

61. On December 20, 2010, the contracting officer responded to ACM, acknowledging ACM's offer to sell the materials to the Government, but confirming that MARAD wanted ACM to retrieve the materials.

62. ACM then contacted the ship's engineer to arrange to retrieve the materials. The engineer decided to have the crew use cranes to off-load the equipment onto the pier, where ACM picked them up on January 4, 2011.

Condition of Equipment and Appliances in the Galley

63. Capitol Finishes' witnesses testified that, although not all equipment and appliances were removed from the galley, they took care to cover the items with plastic sheeting and were mindful of the need to avoid hitting these items during rip-out and surface preparation.

64. The COTR and ship's engineer testified that they had concerns that equipment would be subject to damage and dust as a result of ACM's method of performing the work. The COTR also asserted his opinion that vibrations caused by the jack-hammering necessary

to remove the rust in the galley would inevitably damage any equipment and appliances not completely removed from the galley.

65. Although this was stated to be a major concern at the time of termination, no evidence of actual damage to the equipment and appliances has been produced by MARAD.

Replacement Contractor

66. Effective February 1, 2011, MARAD entered into an agreement with Fairfield Maxwell Services, Ltd. (Fairfield), to assist with the procurement of all necessary repairs to the ship in anticipation of the summer cruise scheduled for May 2011. One of the responsibilities assigned to Fairfield under that agreement was remediation of the dust in the galley and cadet mess, along with completion of installation of the new flooring system in those areas. Fairfield was awarded a task order under its agreement in the amount of \$300,000 to complete that task. The task order gave Fairfield two months to achieve that task, permitting a work schedule of twelve-hour days, seven days a week.

67. Fairfield worked with the COTR to revise the SOW and to solicit bids for completing the floor replacement. The new solicitation included terms that were not in ACM's contract, such as replacement of the flooring under the steam kettle containment area and galley cleaning gear locker. A new CLIN 003 was added, providing for cleaning, inspecting, and testing of all the equipment in the galley, cadet and crew messes, and scullery, as well as the ventilation system.

68. Fairfield awarded the contract work to Southern Services Group (Southern) on February 10, 2011. Southern's quote stated that it would complete the work in two phases by moving all the galley equipment into the cadet mess while installing the new floor system in the galley, and then, move the equipment back and proceed to the cadet mess. Southern was given sixty days to finish the project.

CBCA 2345

65. On December 22, 2010, ACM filed a termination for convenience proposal with MARAD, seeking payment of \$194,320 under the terminated contract. The claim consisted of costs of \$164,180 for work completed at the time of the termination and \$30,140 for the costs associated with ACM's retrieval of the materials stored on board at the time ACM was ordered to leave the ship after the Government declined to purchase the materials. On March 17, 2011, at which time no decision had been rendered by the contracting officer, ACM appealed the deemed denial of the claim.

66. ACM's invoice, attached to its certified claim, provides the following information:

Original Contract Amount:	\$188,900.00
Less Supplemental Labor and Material:	<\$17,500.00>
Total Clin 001 and 002	\$171,400.00
Total amount this invoice:	\$164,180.00
Less Previous Invoices:	\$0.00
Prime contractor Labor and Material	\$36,700.00
Subcontractor Labor and Material:	
Capitol Finishes	\$102,000.00
JB Battaglia	\$2,400.00
G/A, Insurance	\$23,080.00
Total Amount Due:	\$164,180.00

67. ACM's president and Capitol Finishes' employees testified consistently that, at the time ACM was ordered to depart the vessel, it would have taken approximately four to five full-time days to complete the remaining work under the contract.

68. ACM and Capitol Finishes also provided testimony that the exceptional extent of the rust encountered on the galley deck added some four to five days to the contract work.

69. Testimony provided by appellant and its subcontractor also establishes that ACM had performed some fifteen full-time days of work, consisting of thirteen men working ten hours per day on and off the ship.

70. Testimony concerning the level of completion is consistent with ACM's contention that the rip-out and deck preparation process was close to completion at the time ACM and Capitol Finishes were ordered by the Government to leave the ship. For example, a Capitol Finishes employee attested that the rip-out work and rust removal in the galley was

ninety percent completed at that time, with another day of effort needed to be ready for priming. The COTR similarly testified that the cadet mess decking rip out and metal preparation was fully complete and that approximately eighty percent of the galley area rip out and metal preparation had also been completed.

71. ACM also attached an invoice for the work required to travel to New York and retrieve, transport, and dispose of the materials it had purchased to perform the installation of the replacement floors. The invoice is in the amount of \$30,140, and is itemized as follows:

Labor:

80 hours @ 50.00/hr	<u>\$4,000.00</u>
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Materials/subcontractor:

Shipping/Trucking:	\$2,400.00
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Fuels/tolls:	\$1,100.00
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Restock Fee:	\$16,400.00
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Total: Material/subcontractor:	<u>\$19,900.00</u>
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General and administrative expenses, Profit	\$4,740.00
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Travel/Per Diem to New York, NY from Norfolk, VA and return	\$1,500.00
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TOTAL:	\$30,140.00
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Discussion

Validity of the Termination for Cause

Under Board precedent, a termination for cause is treated as the equivalent of a termination for default. *E.g., Ryll International, LLC v. Department of Transportation*, CBCA 1143, 11-2 BCA ¶ 34,809; *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,742. 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)); accord *U.S.I.A. Underwater Equipment Sales Corp. v. Department of Homeland Security*, CBCA 2579, slip op. at 8 (Jan. 27, 2014); *Singleton Enterprises v. Department of Agriculture*, CBCA 2136, 12-1 BCA ¶ 35,005; *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1697, 10-1 BCA ¶ 34,380, at 169,745. A termination for cause is a government claim and the Government bears the burden of proof that its action was justified. *Lisbon*, 828 F.2d at 764-65. If the Government presents a prima facie case that the termination was proper, the burden shifts to the contractor to rebut the prima facie case. *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,971; *Integrated Systems Group*, 98-2 BCA, at 147,742.

The contracting officer’s decision offered three justifications for the determination to terminate ACM’s contract for cause. First, she stated that ACM had failed to make progress to ensure completion of the contract within the specified time. Second, the decision asserted that ACM failed to perform in accordance with the contract’s requirements. Third, the contracting officer alleged that ACM’s performance methods, up until the time it was ordered to leave the vessel, had damaged the ship and its equipment. Respondent argues that for the reasons identified by the contracting officer, the decision to terminate ACM’s contract for default was fully justified on the facts of this case. In addition, MARAD directs us to the language of the termination for cause article of the contract authorizing such a termination when the contractor fails “to provide the Government, upon request, with adequate assurances of future performance,” as further support for the contracting officer’s decision.

Appellant argues that MARAD has not met its burden to prove any of the grounds that it contends justified the termination for cause and that, even if it could be said that ACM was technically in default for failure to make sufficient progress to complete the contract timely, the decision was nonetheless an abuse of discretion under the standards enunciated in *Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987) (“[T]he default article of the contract does not require the Government to terminate on a finding of default, but merely gives the procuring agency the discretion to do so, and that discretion must be reasonably exercised.”). In short, when all of the relevant facts and circumstances are considered, the overall decision to terminate the contract for default must have been a reasonable exercise of discretion.

The fundamental underpinning of this dispute is the parties’ differing understandings of what the contract required in terms of performing the work. In particular, the controversy focuses on the varying interpretations of the parties of the statement of work’s requirement

to move “any obstructions.” MARAD, consistent with the views of the COTR and the contracting officer, insists that the requirement meant that the contractor was obligated to remove all equipment from the mess and galley areas in order to remove the old flooring, prepare the underlying metal surfaces for new flooring, and install the new Dex-O-Tex system. ACM, just as adamantly, contends that it reasonably construed the language to require it only to move equipment that would impede removal of the old floor and installation of the new decking materials.

Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). But if the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and it is the Board's task to determine which party's interpretation should prevail. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 06-2 BCA ¶ 33,320, at 165,210.

An ambiguity exists when a contract is susceptible to more than one reasonable interpretation. See, e.g., *E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1341-42 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics and Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). When a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, tribunals apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document. *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004); *United States v. Turner Construction Co.*, 819 F.2d 283, 286 (Fed. Cir. 1987). If an ambiguity exists, the next question is whether that ambiguity is patent. An ambiguity is patent if the ambiguity is so glaring that it is unreasonable for the contractor not to discover and inquire about it. The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter. More subtle ambiguities are deemed latent, and the general rule that such language is interpreted in favor of the nondrafting party will apply. See *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997); *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434-35 (Fed. Cir. 1992).

It is not the subjective intent of the drafter, but rather the intent that is conveyed by the language used, that governs the contract's interpretation. See, e.g., *JAVIS Automation*

& Engineering, Inc. v. Department of the Interior, CBCA 938, 09-2 BCA ¶ 34,309, at 169,480 (citing *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971)). In addition, “the language of [the] contract must be given the meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances,” *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006), “unless a special or unusual meaning of a particular term or usage was intended, and was so understood by the parties.” *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

We start by reviewing the relevant contract provisions. These include the contract terms and the language of the statement of work. Beginning with the statement of work, the pertinent language states with respect to the cadet mess:

- 5.2.1 Remove deck completely down to the steel deck. Approximate square footage: 2,367’ sq. ft. and 145’ lineal ft. of 6” cove base. Scale, grind and wire brush to white metal. Remove any obstructions. Prime with 150 Primer.

Similarly, with respect to the galley, the contractor is to:

- 5.3.1 Remove entire deck and cove base down to the steel deck. Approximate square footage: 1,530’ sq. ft./240’ lineal ft. of 6” cove base. Scale, grind and wire brush to white metal. Remove any obstructions. Prime with 150 Primer. Remove any obstructions (appliances, cabinets, kick pipes, etc).

The record shows that this specification was drafted by another Dex-O-Tex supplier, because the COTR did not himself have the experience to draft the statement of work. ACM and its subcontractor interpreted its obligation to be limited to removal of any items that actually impeded its performance of the work, which is how they customarily performed this type of work. ACM balked at accepting the COTR’s more expansive view of this requirement because that interpretation would have required a significantly more time consuming and labor intensive undertaking to remove everything the COTR and ship’s engineer wanted removed. ACM and Capitol Finishes are experienced contractors in marine deck replacements. Witnesses from both companies offered convincing testimony that work of this nature can be and often is accomplished without actually clearing the area of all equipment and appliances so long as it is possible to access the entire floor surface. The contractors thus understood the statement of work to require only that they remove any items

that interfered with the work, and ACM based its offer on that understanding.⁴ In fact, the point was made that the Government's interpretation of the statement of work transformed the primary effort under the contract to equipment removal, rather than floor replacement, because the effort required to fully remove everything from these areas would have exceeded the effort and expense to replace the deck coverings. In addition, the testimony establishes that the Government's interpretation is not the usual practice in the industry.

Upon examination of the record, we conclude that the specification is not readily susceptible to the interpretation advanced by the Government. The COTR's subjective intent that the areas be completely emptied was not reflected in the language of the statement of work. Based on the plain meaning of the specification, an "obstruction" would ordinarily be defined as something that hinders the ability to perform the work. We thus find that ACM's understanding of the specification was the only reasonable one. The record bears out that it was in fact possible to perform the work as interpreted by ACM, which had completed nearly all of the rip-out work and much of the metal preparation at the time it was ordered to leave the ship. In addition, the written record shows that the COTR apparently understood that the statement of work needed to be clarified, and requested that an amendment to the solicitation expressly stating his perception of how the work must be performed. The Government opted not to do this, but made its award on the basis of the offers received in response to the solicitation. In reviewing the relevant provisions, especially in the context of the experience-based testimony provided by ACM and Capitol Finishes, we find that the wording of the contract is not ambiguous, but rather was properly construed by ACM.⁵

Under the contract terms, the Government was not entitled to order a change to the work unless mutually agreed upon. In this case, although the COTR and contracting officer sought to impose the COTR's interpretation of how the work should be performed, ACM never agreed to their views. There was no bilateral modification of the contract, and, in any event, the contracting officer never issued a written direction to proceed with the work as defined by the Government. The situation placed ACM in an untenable dilemma. It could perhaps have changed its performance method to appease the Government and taken the risk

⁴ Even a witness from the subsequent contractor, Southern, testified to his understanding that the instruction to move "any obstructions" meant anything that would prevent the contractor from achieving the work.

⁵ MARAD also asserts that any ambiguity was a patent ambiguity creating a burden on ACM to inquire as to the meaning of the language. Although we find there is no ambiguity, even if, for the sake of argument, there is an ambiguity, it was far from glaring or patent, thus requiring that the ambiguity be resolved in favor of the contractor.

of prevailing on a claim for a constructive change. *See Hawaii CyberSpace*, ASBCA 54065, 04-2 BCA ¶ 32,744, at 161,946 n.1 (observing that FAR 52.212-4 does not include a Changes clause authorizing unilateral changes, but not addressing whether a constructive change or breach of contract claim might exist because the parties did not make that argument). Given that the contracting officer never issued a written direction to ACM instructing it to comply with the Government's understanding of the contract, ACM should not have been expected to assume that risk.

We turn now to respondent's first argument offered in support of its position that the termination for cause was justified, namely that ACM had failed to make progress such that timely completion of the contract work was beyond the contractor's reach. This is so, the Government contends, because at the time that the contracting officer ordered ACM off the ship there was only one full day left to complete the contract, and it maintains that completion within one day would not have been possible. MARAD also contends that this inability to complete by the close of the next business day was attributable to the fact that the contract was undermanned by Capitol Finishes.

This position is not tenable. Although technically ACM could not have finished the work by the next day, which was the original completion date, it has offered persuasive evidence that the extensive rust encountered on the galley floors required significantly more effort to remove than would ordinarily be encountered. Although the ship's engineer and the COTR expressed the opinion that the rust should have been anticipated because of minor buckling in isolated areas of the galley floor, the testimony of the Capitol Finishes witnesses, who have considerable experience in replacing maritime floors, is more convincing on this subject. They testified that the buckling was not sufficiently pronounced as to have put them on notice to expect the unusual degree of rust and pitting that was encountered. They also noted that there was no primer under the galley flooring that was removed, thus explaining the unusually extensive degree of rust and pitting. ACM has met its burden to show excusable delay. Moreover, both the contracting officer and the COTR freely admitted that they would customarily approve an extension of time in these circumstances. The COTR frankly attested that his only reason for specifying a two-week performance window was to ensure that the contractor would start and finish at a steady pace, without diverting resources to more lucrative jobs. Thus, even if the default were justified for failure to make progress, which it was not, under the admissions made by MARAD personnel, the exercise of the termination for cause option was not appropriate.

Respondent also argues in its post-hearing brief that ACM had a duty to proceed as directed by the contracting officer in her letter requesting that ACM provide a price proposal to do the work as more specifically defined by the Government in the period after ordering the contractor off the ship. MARAD directs our attention to *Stoekert v. United States*, 391

F.2d 639 (Ct. Cl. 1968). This case concerned a contract for the installation of tile in a powerhouse for a dam. After the contractor had installed a considerable portion of the tile using its preferred method for obtaining a bond with the concrete slab, the Government determined that the bond had failed over a substantial area of the floor and directed the contractor to remove the tile and reinstall it properly. The contractor refused to comply with this directive except at Government expense and insisted that the Government specify the method of obtaining a satisfactory bond. The termination for default was sustained, based on the contractor's obligation under the Disputes clause to proceed as directed and press a claim for equitable adjustment rather than to decline to perform.

The Government's citation to case law that stands for the proposition that the contractor must proceed with a contracting officer's directive with which it disagrees and then file for an equitable adjustment, is unpersuasive. The *Stoeckert* case is inapposite under the facts of the subject appeal. The Government is equating a begrudging request for a price proposal to an order to proceed with the work. This communication was issued following the cease and desist order removing ACM from the ship and stating the intent to terminate the contract for cause. The letter repeats the Government's position that all of this work was encompassed within the specification to remove any obstructions and seeks to obtain ACM's agreement to do that work without agreeing to amend the contract. The letter did not explicitly direct ACM to proceed with the work as defined in that communication. ACM repeatedly confirmed that it would complete the work as defined in the contract. Thus, in contrast to *Stoeckert*, ACM in no way abandoned its obligations -- the Government ordered ACM to cease and desist and never permitted it to return to the ship to proceed with the work. It is arguable that if a unilateral order had been issued directing ACM to proceed in accordance with the Government's more explicit statement of what was required, ACM would have had to do so, but this is not what happened. No such order was ever issued and, consequently, ACM was under no obligation to proceed, nor could it, without permission to return to the ship.

Moreover, up until the point at which MARAD issued the termination for cause, there had been an ongoing dialogue as to what the contract required ACM to do and what the Government wanted ACM to do. Absent a warning from the contracting officer that failure to provide a price proposal would result in the termination of the contract for cause, the Government was not free to terminate for the failure to proceed. See *A.J.C.A. Construction v. General Services Administration*, GSBICA 11541, et al., 94-2 BCA ¶ 26,949, at 134,204 (citing *Delfour, Inc.*, VABCA 2049, et al., 89-1 BCA ¶ 21,394, at 107,858 (1988)). Here, the parties had been discussing means of resolving their dispute, and ACM had no means to proceed with performance in the face of the Government's decision to order the contractors off the ship. Under the reasoning of *Delfour* and *A.J.C.A.*, the Government was

obligated to take affirmative steps to cut off the dialogue and set forth what it expected the contractor to do to avoid a termination for cause.

The Government also argues that the termination was proper because ACM failed in its obligation to provide adequate assurances that it would clean and protect equipment in the galley. To bolster this contention, it directs us to the insurance and indemnity clause of the contract, which provides that the contractor shall exercise reasonable care and use its best efforts to prevent injury or damage to all employees, persons, and property in and about the work and to the vessel or portion thereof upon which work is done.

The obligation to provide a contracting officer with adequate assurances is set forth in FAR 52.212-4(m), which states that a termination may be justified when the contractor fails to provide the contracting officer, upon request, with adequate assurances of future performance. Because MARAD ordered ACM to cease and desist and leave the ship premises before the deadline to complete the work had passed, the Government could, prior to terminating for cause, have issued a cure notice to ACM in order to seek adequate assurances that the contract would be performed in accordance with its interpretation of the specification. The COTR and, eventually, the contracting officer did ask ACM on various occasions to agree to comply with the “contract requirement” to move all equipment from the galley. The written communications came, however, during the last half of October and the month of November, when the Government was seeking to secure ACM’s agreement to perform the work in accordance with its interpretation of the contract’s scope. MARAD’s tentative offer to allow ACM to resume work was predicated upon receiving a plan showing that ACM would perform the work as defined by the COTR and would remove all of the galley equipment from the area to protect it from potential damage occasioned by the deck flooring replacement process, all for the original contract price. As we have held, the contract did not require ACM to do this. ACM did cover equipment with plastic and Capitol Finishes recognized its obligation to clean the area and equipment thoroughly once the new floors were installed. In fact, the subcontractor’s employees requested the opportunity to clean up before vacating the ship, but they were not allowed to do so.

Respondent also attempts to characterize the email message sent on October 4, 2010, the first day on which ACM was permitted to work on the vessel, as a “cure” notice. MARAD asserts that ACM never provided the “assurances” requested and thus cannot challenge the termination for cause. Respondent’s characterization of this communication is entirely inaccurate. The missive itself merely stated that the COTR had concerns and asked for a conditions report from ACM. In the context of its timing, issued virtually before any work had commenced, and its vague observations, this email message does not operate as a cure notice within the meaning of the FAR.

Tellingly, as ACM points out, although the Government has repeatedly alleged that ACM failed to provide adequate protection against damage from exposure to dust, debris, and vibration for equipment in the galley, MARAD produced no evidence to back up its claim that ACM's method of performance actually caused any damage to any of the equipment.

On the record developed by the parties, we find that the Government did not meet its burden to prove the termination for cause was justified. Accordingly, we grant the appeal in CBCA 2245 and convert the termination of ACM's contract to one for the convenience of the Government.

Termination for Convenience Damages

Before discussing the monetary award to which ACM is entitled under the termination for convenience clause of its contract, we address ACM's argument that, in addition to compensation in accordance with the termination for convenience provision of the contract, it should also be awarded breach of contract damages, notably anticipatory profits on the terminated work. In support of the breach claim, ACM maintains that the COTR acted in bad faith in attempting to achieve ACM's removal from the project because of personality clashes with ACM's president and because the contract had not been awarded to the contractor that he preferred. ACM also argues that the Government's inability to show the termination for cause was justified demonstrates a breach of the contract.

Although it is clear from the record that there was considerable tension existing between the COTR and the contractor prior to and during contract performance, on balance the record does not reflect that the Government's actions were taken in bad faith. Rather, the termination decision was largely a result of the COTR's genuine, but misguided, belief that the specification as drafted required the removal of all equipment in the galley, rather than just those items of equipment that could not be raised, so as to permit the proper performance of the job. The COTR was also concerned that the galley equipment had been damaged as a result of the jackhammering required to remove the rust. Because the Government never proved what, if any, damage to equipment was attributable to ACM's failure to move all equipment from the galley, and use of jackhammers in cleaning the rust from the galley floor, the termination for cause was not justified for those reasons.

Nonetheless, this does not mean that ACM has met the arduous burden to prove bad faith conduct on the part of MARAD's COTR or contracting officer. As the Board has recently observed:

Allegations of bad faith conduct on the part of agency employees are difficult to prove, particularly in light of the well-settled precept that government officials are presumed to act conscientiously and in good faith in the discharge of their duties. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238 (Fed. Cir. 2002); *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Spezzaferro v. Federal Aviation Administration*, 807 F.2d 169, 173 (Fed. Cir. 1986); *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982); *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976). The Court of Appeals for the Federal Circuit, observing that ‘showing a government official acted in bad faith is intended to be very difficult,’ has explained that:

[i]n order to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable. ‘Almost irrefragable proof’ amounts to clear and convincing evidence. In the cases where the court has considered allegations of bad faith, the necessary ‘irrefragable proof’ has been equated with evidence of some specific intent to injure the plaintiff.

Galen Medical Associates, Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (citations omitted); *accord AFR & Associates, Inc. v. Department of Housing and Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226, at 169,170; *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *see also Am-Pro*, 281 F.3d at 1239-40 (clear and convincing evidence is ‘evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is ‘highly probable’). This burden is substantially higher than the preponderance of the evidence standard commonly applied to breach claims. *Am-Pro*, 281 F.3d at 1239-40; *Singleton Enterprises v. Department of Agriculture*, CBCA 1981, 12-1 BCA ¶ 34,924.

ALK Services, Inc. v. Department of Veterans Affairs, CBCA 1789, et al., 13-1 BCA ¶ 35,260, at 173,074-75. Additionally, the Court of Appeals for the Federal Circuit made clear in *Darwin* that abuse of discretion is not the substantive equivalent of acting in bad faith. 811 F.2d at 598. Accordingly, we conclude that the decision to terminate for cause was not tantamount to an action taken in bad faith. ACM has not met its burden to show it is entitled to anticipatory profits on the unfinished portion of the work.

Appellant prepared and presented a settlement proposal under the parameters of the clause set forth in its contract. Appellant seeks the amount of \$194,320, consisting of \$164,180 for work completed at the time of the termination for cause, and \$30,140 for costs associated with retrieval of the materials stored on board the vessel after the contracting officer declined ACM's offer to sell the material to MARAD at cost.

The commercial items contractor's recovery under the termination for convenience clause is reflected as "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination," plus reasonable charges that the contractor can demonstrate resulted from the termination. *E.g.*, *Russell Sand & Gravel Co. v. International Boundary and Water Commission*, CBCA 2235, 13-1 BCA ¶ 35,455, at 173,869; *Corners & Edges, Inc. v. Department of Health and Human Services*, CBCA 693, et al., 08-2 BCA ¶ 33,961; *Geo-Marine, Inc. v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048. In analyzing the parameters of this provision, the courts and this board have acknowledged that the basic principles governing the purpose of a termination for convenience settlement apply to both commercial and non-commercial item contracts.

In terms of general guidance, the FAR provides that:

A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

48 CFR 49.201(a) (2009).

This Board and its predecessor boards have construed the commercial items termination for convenience clause to achieve the broad purposes of the relevant FAR clauses calling for fair compensation. The methodology need not, as the Government argues, limit a contractor's recovery to a percentage of physical work performed prior to termination, plus settlement charges, but may, under the rubric of "reasonable charges," and using an appropriate measure for calculating the percentage of the work completed, consider what other expenses should be awarded.

The clause permits payment of reasonable charges that have resulted from the termination. The clause does not restrict charges resulting from the termination to those incurred subsequent to the termination for convenience nor does the clause expressly limit

the term “reasonable charges” to settlement expenses.⁶ A contractor may have reasonably incurred costs in anticipation of performing the entire contract, but those costs may not be fully reflected as a percentage of the work performed. *See Russell Sand & Gravel Co.*, 13-1 BCA at 173,869; *Corners & Edges, Inc.*, 08-2 BCA at 168,023; *Jon Winter & Associates*, AGBCA 2005-129-2 (June 20, 2005) (small claim decision).⁷

ACM seeks the amounts of \$164,180 for work performed prior to the termination and \$30,140 for work performed after the termination, for a total amount of \$194,320. ACM states that the record reflects that at the time of termination, which was not formalized until November 26, ACM had completed approximately eighty percent of the work. When the contracting officer ordered ACM and its subcontractor to leave the ship, rip-out and surface preparation was one hundred percent complete in the cadet mess and close to completion in the galley. This was the most labor intensive part of the job. The remaining work, after completion of the surface preparation in the galley, would require many fewer men to oversee installation, drying, and curing of the Dex-O-Tex system. ACM built in fifteen full-time days to complete the work. After extending these days to account for the extensive rust removal required in the galley, the contract scope would be approximately nineteen days to completion. Using this analysis, ACM maintains it had completed about eighty percent of the job.

ACM also believes it is entitled to an adjustment to the contract price of \$51,420, for the “undisclosed site condition” to compensate for the increased number of days and manpower required to perform rip-out and surface preparation. The additional four days needed to complete the contract represent about thirty percent of the contract performance period. Thirty percent of the contract price comes to \$51,420.

⁶ Settlement expenses are defined in FAR 31.205-42 as expenses caused by the termination, including but not limited to: accounting, legal, clerical, and similar costs reasonably necessary to prepare and present a settlement claim to the contracting officer and to terminate and settle subcontracts; reasonable costs for storage, transportation, protection, and disposition of property acquired or produced for the contract; and indirect costs related to salary and wages incurred in connection with preparing the settlement claim.

⁷ *Winter* was issued pursuant to the small claims procedure provided for by the Contract Disputes Act, so it may not be cited as binding precedent. The reasoning set forth, however, has previously been noted with approval both by this Board, *Russell Sand & Gravel Co.* and *Corners & Edges, Inc.*, as well as by a District Court reviewing the same legal issue, *Red River Holdings, LLC. v. United States*, 802 F. Supp. 2d, 648, 656 (D. Md. 2011), and we adopt the reasoning as well.

ACM has cited no authority to support this last approach. The commercial items clauses were primarily intended for use for standard purchases of off-the-shelf supplies and hourly services. Thus, there is no term providing for an adjustment to the contract price to compensate a contractor for this circumstance. We agree that there should be some means by which the contract price can be adjusted to account for the increased work, but this would traditionally be through an equitable adjustment of the contract price to compensate for the actual cost of performing the extra work. As the Board has noted in *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,698 (2010):

An equitable adjustment encompasses the quantitative difference between the reasonable cost of performance without the added, deleted, or substituted work, and the reasonable costs of performance with the addition, deletion, or substitution. *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1370, (Ct. Cl. 1969) (citing *Bruce Construction Corp. v. United States*, 324 F.2d 516, 519 (Ct. Cl. 1963)). “When a party seeks recovery of costs incurred, it has ‘the burden of proving the amount . . . with sufficient certainty so that the determination of the amount . . . will be more than mere speculation.’” *Benmol Corp. v. Department of the Treasury*, GSBCA 16374-TD, 05-1 BCA ¶ 32,897, at 162,979 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961)); *Advanced Materials, Inc. v. United States*, 54 Fed. Cl. 207, 209 (2002); *Twigg Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,975). “It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough - but some convincing basis must be advanced.” *Twigg Corp.*, 00-1 BCA at 151,976.

Accord Reliable Contracting Group, LLC v. Department of Veterans Affairs, CBCA 1539, 11-2 BCA ¶ 34,882 at 171,561-62. ACM has not offered any explanation for why the price increase would not be calculated based on evidence of actual costs to the extent possible. Although ACM has not provided a separate calculation of its increased costs, it has provided the calculation of costs it incurred prior to the termination action. These costs amount to \$164,180.

MARAD counters that under the termination for convenience article in this contract, ACM’s recovery should be extremely limited. First, it suggests that the contract price must

be reduced from ACM's fixed price bid in the amount of \$188,900. The parties agree that the price is properly reduced by the amount of \$17,500, which represents work that was not ordered. MARAD then claims that the price of materials, in the amount of \$48,000, must also be deducted from the contract price to limit ACM's recovery to a percentage of the adjusted amount of \$123,400. The Government further proposes that the percentage of completion be determined by referring to the number of man hours (1600) included in supporting documents requested by MARAD for the purpose of evaluating ACM's proposal and comparing those hours with the hours reflected on the ship's log for the Capitol Finishes crews that worked aboard the vessel (approximately 445) prior to the contracting officer's order requiring that ACM immediately leave the ship. Based on this calculation, and using testimony of a Capitol Finishes witness who estimated that rip-out would be about forty percent of the work,⁸ respondent contends that the percentage of completion of the work is 28.8 percent. Under MARAD's analysis, ACM would recover no more than \$23,552.

ACM refutes MARAD's approach, pointing out that the number of hours logged by crews on board the ship is not representative of time spent for the job or of the percentage of completion of the work. Capitol Finishes' proposal was merely an estimate of the number of hours it would use to complete the work. Its subcontract was firm fixed-price and it would have made more money if it completed the job in fewer hours. ACM thus reasons that estimates of labor hours are not an appropriate measure for determining the percentage of completion of the work at the time of termination.

Together with Capitol Finishes, ACM invested many hours in preparation for performance before traveling from Virginia to New York. In addition, ACM explains that rip-out was close to completion, it was the most difficult and time-consuming aspect of the job, and the final stage of the job required far less labor because there was no longer debris to be hauled off the ship and much of the installation time would have been waiting for the Tex-O-Dex materials to dry or cure.

Finally, ACM explains that the record demonstrates that ACM personnel performed substantial work aboard the ship, such as site preparation, removal of obstructions, and hauling of debris in buckets off the ship. The ship's visitor logs showed that ACM and Capitol Finishes logged upwards of 790 hours. At least 300 of these hours were expended by ACM personnel. ACM also expended considerable time off the ship, preparing to

⁸ This testimony was given in the context of the percentage of the contract price allocated to rip-out, surface preparation, and primer. The witness also confirmed that most of the labor manhours are used during this process, which is the most difficult and time-consuming aspect of the job.

mobilize and travel, and tending to other logistical matters. ACM contends that these tasks are an integral part of the contract work and must be included in the calculation of the percentage of work performed.

MARAD's approach is inconsistent with both the language of the contract clause and the purpose of the convenience termination remedy. Comparing hours from documentary support for ACM's proposal price to hours logged on the ship is not the appropriate measure of completion of the work, and there is no basis, under a firm fixed-price contract, to restrict recovery to this measure. ACM has demonstrated that many hours were spent by both companies in preparing and performing the work that are not reflected by the ship logs.

The most convincing evidence of the level of completion of the work is that of the ACM and Capitol Finishes witnesses whose testimony established that the rip-out and metal surface preparation work was complete in the mess area and close to completion in the galley. The rust was close to being completely removed in the galley. The witnesses stated that one more day of metal preparation would have sufficed to move on to priming the surfaces and installation of the new floor system. Their testimony establishes that another four to five days at most would have been required to finish the job. Most of these additional days were needed because of the extensive rust build up and pitting on the metal flooring in the galley. The preponderance of the evidence supports ACM's position that this was not a condition that would be obvious from an examination of the existing floor surface. Based on this testimony, ACM would have been entitled to additional time and compensation for the conditions it encountered in preparing the metal surface for the new flooring.

ACM rebuts MARAD's contention that it must deduct the cost of materials from the contract price, pointing out that the clause provides for payment of a percentage of the contract price, including labor, materials, overhead, and profit. The Government did not agree to purchase the materials for use by the follow-on contractor, so it is not entitled to deduct this amount from the contract price.

We agree with ACM's analysis. Thus, the adjusted contract price amount is \$171,400, plus the costs attributable to the extensive rust removal necessitated in the galley. Although we cannot determine precisely what the contract price adjustment should be, we are satisfied that the evidence in the record justifies ACM's actual claimed amount. We also find that the contract was approximately eighty percent complete by the time the cease and desist order was issued. We therefore award ACM the amount it invoiced – \$164,180 – to represent an eighty percent completion level. In addition, ACM has provided sufficient support for reasonable charges, in the amount of \$30,140, it incurred to retrieve, transport, and dispose of the materials purchased for installation of the new flooring system. This is

justifiable in light of the Government's refusal to purchase the materials, which had been selected expressly for this project, and its insistence that ACM remove the materials from the vessel. ACM has proven that it is entitled to the amount of \$194,320.

Decision

The appeals are **GRANTED**. The termination for cause is converted to a termination for convenience under the terms of the contract. ACM is awarded the amount of \$194,320, with interest pursuant to the terms of the Contract Disputes Act.

CATHERINE B. HYATT
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

ALLAN H. GOODMAN
Board Judge