UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED IN PART; DISMISSED
FOR LACK OF JURISDICTION IN PART:
March 17, 2015

CBCA 2693

1-A CONSTRUCTION & FIRE, LLP,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Patricia A. Maier, Senior Partner of 1-A Construction & Fire, LLP, Hermiston, OR, appearing for Appellant.

Mary E. Sajna, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **GOODMAN**, **DRUMMOND**, and **LESTER**.

LESTER, Board Judge.

Appellant, 1-A Construction & Fire, LLP (1-A Construction), appeals the final decision by a contracting officer for the United States Forest Service (USFS) terminating for default 1-A Construction's contract for water system upgrades at five locations in the Umatilla National Forest. In its notice of appeal, 1-A Construction also asks the Board to award it monetary damages for various cost increases for which it blames the USFS, and, in turn, the USFS asks the Board to award it excess reprocurement costs associated with

completing the work that was required under 1-A Construction's contract. For the reasons explained below, in response to the parties' request for a decision on the record under CBCA Rule 19, 48 CFR 6101.19 (2014),[1] we sustain the USFS's termination for default, but we dismiss for lack of jurisdiction both 1-A Construction's request for monetary damages and the USFS's request for excess reprocurement costs.

Findings of Fact

I. The Terms of 1-A Construction's Contract

On May 28, 2010, the USFS awarded a fixed-price construction contract, contract no. AG-0489-C-10-0304 (the contract), to 1-A Construction for "upgrades to small water systems at five locations throughout the Umatilla National Forest," at a total price of $262,939.03. Appeal File (AF) at 35, 41, 114. The five project sites, each of which was remotely located in the Blue Mountains of eastern Oregon, were (1) the Fremont Work Center, within the North Fork John Day Ranger District of the Umatilla National Forest; (2) the Umatilla Forks Campground, in the Walla Walla Ranger District; (3) the Woodward Campground, also in the Walla Walla Ranger District; (4) the Ditch Creek Cabin Campground, in the Heppner Ranger District; and (5) the Bull Prairie Campground, also in the Heppner Ranger District. *Id.* at 41-42, 114-15, 303-04.

In describing the contract work, the USFS represented that the existing water systems at the project sites "were built as long as 40 years ago and now have pressure, and sanitary deficiencies." AF at 41, 114. The contract provided that the contract awardee would have to modify or entirely replace the "[s]upply, storage, and distribution systems . . . as needed to address these issues." *Id.* The work was to include, but was not limited to, (1) installation of three utility buildings, which would house a triple pressure tank system, a single pressure tank system, and a gravity fed system; (2) replacement of two 10,000-gallon steel water storage tanks with new fiberglass plastic reinforced tanks; (3) replacement and/or installation of approximately 6360 feet of water line; (4) installation of power, control, and telephone lines; and (5) installation of fourteen hydrant assemblies. *Id.* The contractor was required to "furnish the necessary personnel, material, equipment, services and facilities (except as otherwise provided), to perform the Statement of Work/Specifications" set forth in the contract. *Id.* at 42 (incorporating language from 48 CFR 452.211-72).

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[1] Although the parties originally filed cross-motions for summary relief under CBCA Rule 8(g), they subsequently converted those motions to a request for a decision on the record under Rule 19.

The project specifications for the contract indicated that the contractor would "have full use of premises for construction operations, including use of Project site, during [the] construction period." AF at 115 (section 5.4.A). Nevertheless, the specifications expressly warned the awardee that, because of the elevation of the project sites, heavy snowfall and cold temperatures could affect them:

> The elevation of the sites range from approximately 2700-5200 feet above mean sea level. The construction sites may experience heavy snowfall and cold temperatures, with snow on the ground typically from mid-September through June.

Id. at 115 (section 5.3.A). The specifications further provided that, because the five project sites would "be open to the public throughout the project," the contractor had to ensure that construction sites were "isolated for safety" and that "utility outages [were] according to the Project Specifications for minimal impact." *Id.* at 55 (section H-12).

The contract required 1-A Construction to submit to the contracting officer at the outset of contract performance a schedule for performing the project. The contract incorporated by reference the clause at FAR 52.236-15, "Schedules for Construction Contracts (APR 1984)," AF at 57, which provides that the awardee must submit within five days after work commences or another period of time that the contracting officer identifies a "practicable schedule" for the contracting officer's approval showing the manner in which the contractor proposes to perform the work, as well as "the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment)." 48 CFR 52.236-15(a). The schedule was to "be in the form of a progress chart of suitable scale to indicate approximately the percentage of work scheduled for completion by any given date during the period." *Id.* The contract provided that the contractor's failure to comply with the schedule submission requirement "shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion" of the contract "within the time specified in the contract," following which the contracting officer might terminate the contract for default. 48 CFR 52.236-15(c).[2]

The "Schedule for Construction Contracts" clause also required 1-A Construction, throughout contract performance, to enter its actual progress on the approved schedule chart on a regular basis. 48 CFR 52.236-15(b). It provided that, "[i]f, in the opinion of the

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[2] The contract also incorporated the clause titled "Default (Fixed-Price Construction) (APR 1984)" at 48 CFR 52.249-10. AF at 58.

Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government." *Id.*

The contract required numerous submittals for Government approval, including a quality control plan, product data for various contract deliveries (including water storage tanks, well pumps, utility boxes, and other items), and a cast-in-place concrete design mix. AF at 352-53. Although the submittals were due at varying times, each submittal was typically due prior to the start of the work covered by the submittal or, if the submittal applied to final inspection issues, fifteen days prior to final inspection. *Id.* The Government then was to have fourteen days to approve each pre-work submittal and fifteen days to approve final inspection submittals. *Id.* at 121, 352-53.

The contract required the awardee to start performance within thirty calendar days after receiving a notice to proceed (NTP) and to complete performance within 430 calendar days of the NTP. AF at 34 (block 11), 46 (clause F.2). The contract expressly indicated that work was not "estimated to begin" until August 1, 2010. *Id.* at 46.

II. The Build-Up to Issuance of the Notice to Proceed

At the post-award conference on June 16, 2010, the contracting officer indicated, consistent with the contract language, that "[c]ontract time will not be suspended for unproductive periods due to normally expected events, such as . . . winter weather and fire closures" and that "[a]llowances have been made in the contract to accommodate these unproductive periods." AF at 349. He also expressly identified the need for 1-A Construction to provide a proposed performance schedule within five days after work starts, "indicating the order in which work is to be performed, and starting and completion dates of significant segments of the work." *Id.* at 339. He indicated the need to "chart actual progress on a copy of the proposed progress schedule and furnish copies to the [contracting officer's representative] upon request." *Id.* If the contractor were to fall behind schedule, the contracting officer represented, 1-A Construction would have to take steps to increase progress, subject to the Government's right to terminate the contract for default if the contractor failed to do so. *Id.* The contracting officer also asked that 1-A Construction provide a tentative schedule for the USFS's review prior to issuance of the NTP, and 1-A Construction indicated that it would do so. *Id.* at 349, 356.

1-A Construction stated during the post-award conference that it would start "as soon as the ground dries out" and that "the only time issue will be getting materials ordered." AF at 356. 1-A Construction also mentioned that work "may shut down for 30 days or so during

the fire season" so that 1-A Construction could "work fires" under other contracts and so that it could work on two smaller projects. *Id.*

Over the course of the next several weeks, 1-A Construction and the USFS engaged in a series of questions, answers, and clarifications about the project drawings and specifications, about whether certain approaches would satisfy the specifications, and about 1-A Construction's required submittals, ordering of supplies, and efforts to obtain bonding. AF at 374-78, 386-415. Although it was discovered that water and power line length estimates through the Woodward and Fremont sites in the specifications had been developed from outdated information, the parties executed bilateral modification no. 1, increasing the contract price by $15,075 and resolving the issue before the incorrect length estimates impacted 1-A Construction's work. *Id.* at 449-51. During that period, 1-A Construction informed the USFS that it intended to do "some potholing," or preliminary digging, at the Woodward site during the next week, which, it represented, would "enable [it] to provide a more accurate schedule." *Id.* at 372. The USFS operations engineer told 1-A Construction in response that "we need to get a notice to proceed together and agree on a date" for its issuance and that the USFS would "need some notice" before any potholing so that the agency "can organize [its] inspection of this contract even if it's just potholing." *Id.* He also reminded the contractor that the majority of the work could not begin until the submittal process was completed and that the 430-day contract performance period "includes anticipated shutdowns for Winter, which could range from November/December to May/June depending on the sites that remain after this field season." *Id.* at 371.

On August 3, 2010, 1-A Construction informed the USFS that, following discussions with the Umatilla Electric Co-op, it "will plan on August 23" as a start date at the Woodward site. AF at 400. In response, on August 4, 2010, the USFS representative expressly informed 1-A Construction that the USFS would need 1-A Construction's proposed construction performance schedule and submittals before work commenced, in sufficient time for the USFS to review them. *Id.* Nevertheless, he asked whether, as a means of best accommodating 1-A Construction's needs, 1-A Construction wanted an effective date for its NTP earlier than August 23. *Id.* Then, on August 6, 2010, the USFS issued a work order requesting submittals, including manufacturers' literature, to indicate the exact model, size, and color of some of the products that 1-A Construction was proposing to supply. *Id.* at 406. In that work order, the USFS indicated that "[a] Notice to Proceed will be issued upon reciept [sic] of a construction schedule." *Id.*

On August 12, 2010, 1-A Construction provided the USFS with a schedule for work during a four-week period from July 30 through September 1, 2010, indicating an intent to pour a building slab at the Woodward site prior to issuance of the NTP and to perform some cement work at the Ditch Creek and Umatilla Forks sites soon thereafter. AF at 416-17. The

USFS responded on August 17, 2010, through work order 11, in which it approved the contractor's initial work schedule but reiterated the need for a complete project schedule for the performance of all contract work:

> The Contractor's initial work schedule has provided sufficient starting information for Woodward and the Forest Service will continue to be flexible, however, a comprehensive schedule including anticipated start, duration, and completion dates for all sites is still needed. A notice to proceed will be issued when this is received.

Id. at 428 (emphasis added). Two days later, the USFS verbally encouraged 1-A Construction's construction superintendent "to set a schedule." *Id.* at 430.

Despite the absence of a full construction project schedule, the USFS issued, and 1-A Construction received, the NTP on August 23, 2010. AF at 437.

III. Contract Performance During the Fall of 2010

1-A Construction did not wait for issuance of the NTP to start performing. By August 19, 2010, four days before the NTP had issued, it had already begun potholing at the Woodward site. AF at 430. It worked sporadically at Woodward throughout the fall and then, beginning on November 1, 2010, expanded its work efforts to the Umatilla Forks site before shutting down for the season at both sites because of the onset of winter weather. *Id.* at 571. Although 1-A Construction seems to suggest in its briefing that the USFS somehow directed it to start work at these two sites, the record makes clear that 1-A Construction chose which sites to work and when.

Throughout the fall of 2010, 1-A Construction plainly demonstrated difficulties understanding its performance obligations. As an example, early in its excavation work at the Woodward site, 1-A Construction broke through some roadway surface, and, in response to the USFS inspector's question about a plan for backfilling and resurfacing that roadway, became defensive and indicated that it did not intend to resurface the road, AF at 459, even though, pursuant to section 00301 of the project specifications, it was required to make "[r]oad repair where trenches [that the contractor excavated] bisect roads." *Id.* at 104 ¶ 1.5(D)(p). Although the USFS said that it would allow 1-A Construction to use gravel to cover the roadway surface rather than to repave it, 1-A Construction continued to refuse any responsibility for restoration. *Id.* at 668. After three months of inaction, the contracting officer informed the contractor that, if it truly believed that it was not responsible for the resurfacing, it still was required to comply with the contracting officer's direction, but then could submit a claim. *Id.*; *see* 48 CFR 52.233-1(i) (Disputes clause requiring contractor to

proceed diligently with performance and to comply with any direction of the contracting officer pending resolution of any dispute). Yet 1-A Construction continued to object.

The USFS continually found deficiencies in 1-A Construction's work. The USFS inspector noticed gashes in large trees caused by the construction work at the Woodward site, AF at 460, 463-65, and later found unapproved work and other damage to trees at that site. *Id.* at 471-79. 1-A Construction poured concrete at the Woodward site prior to inspection, in violation of the contract requirements. *Id.* at 471, 489. It broke a hydrant line after ignoring a suggestion from the USFS inspector that could have avoided it, saturating an excavated trench. *Id.* at 508. When 1-A Construction started building a framed structure at the Umatilla Forks site, it left gaps around door frames so that the structure's interior was not adequately protected from the impending winter weather. *Id.* at 714. When questioned about possible problems or deficiencies, the 1-A Construction on-site project manager often became defensive or argumentative and sometimes simply refused to comply with the specifications. *See id.* at 617; Affidavit of Robert Williams ¶ 9.

The USFS also continued to try to obtain a comprehensive project construction schedule from 1-A Construction throughout the fall, to no avail. In early September, the USFS operations engineer sent 1-A Construction a work order that printed out the language of FAR 52.236-15 and its requirements for a full construction schedule. AF at 467-69. In response, 1-A Construction provided a single-page outline on September 26, 2010, that said nothing more than that it intended to do some particular work at Woodward on September 27, that it would finish work at Umatilla Forks (where it had, at most, conducted some potholing) by October 2010, and that it would complete work at Bull Prairie (where it had not yet performed any work) by November 2010. *Id.* at 506. Yet it failed to perform any work at Woodward on September 27, contrary to the representation in its schedule outline, *id.* at 508; it did not begin any work at Umatilla Forks until November 2010; and it did not perform any Bull Prairie work in the fall at all. In lieu of a comprehensive schedule, 1-A Construction continually gave the USFS short updates about what it hoped would be coming up in the next few days, followed by changes in plans or a simple failure to work on the days that it had indicated. *See, e.g.*, *id.* at 462, 485, 490, 495, 505, 508. Further, there were weeks during the fall when no work was performed. *See, e.g.*, *id.* at 490, 508, 619-21. The USFS asked 1-A Construction for a meeting, which occurred on November 18, 2010, during which the USFS discussed problems in communications between the USFS and 1-A Construction, the need for timely submittals from 1-A Construction, and the need for a comprehensive project schedule. *Id.* at 648-51. No comprehensive schedule followed.

By the end of November, heavy snow accumulation and below freezing temperatures made further activity at the Woodward and Umatilla Forks sites impracticable until the spring. AF at 663. Although the number of days that 1-A Construction actually worked on

this contract during the fall of 2010 is unclear from the record, the contractor did not complete either of the two sites that it opened that fall before winter weather set in. In reviewing the status of work at the two sites, the USFS determined that, accounting for rework necessary to correct deficiencies, it would take about ten days, "working efficiently and weather permitting," to complete work at Woodward. *Id.* at 622. At the Umatilla Forks site, the USFS found a significant amount of necessary work remaining and problems with some of the work that had been done. *Id.* at 707-12. By the time that winter weather shut down work, 1-A Construction had not yet started any work at the Fremont, Bull Prairie, or Ditch Creek sites.

In reviewing the problems that the USFS had encountered with 1-A Construction's work during the fall, the USFS contracting officer considered terminating the contract, having received a recommendation from the USFS operations engineer that the contract "is headed down a bad path." AF at 664. However, the contracting officer decided that, without a performance schedule from the contractor, it was not possible to find that 1-A Construction was truly behind schedule, even though he had serious concerns. Williams Affidavit ¶ 13. Despite the deficiencies that needed to be corrected, he decided that the risk of continuing with the contract was a better option than a default termination. *Id.* In lieu of termination, the USFS, on December 7, 2010, issued another work order, again directing 1-A Construction to provide a comprehensive construction schedule:

> The Forest Service will continue to be flexible as unanticipated time conflicts arise, however, the Contractor shall provide a comprehensive construction schedule including anticipated start, duration, and completion dates for all sites. The Forest Service will provide an example Schedule upon request.

AF at 680 (emphasis added).

IV. The Spring of 2011

As expected (in light of the contract's representations about the typical severity of winter weather), 1-A Construction did not work the sites during the winter. Williams Affidavit ¶ 14. However, in March 2011, 1-A Construction asked the USFS inspector about the degree of specificity that the anticipated construction schedule needed to have. AF at 788. Despite representing that it would soon provide a comprehensive week-by-week schedule, *id.*, it did not provide one. Williams Affidavit ¶ 14. Instead, on March 30, 2011, it provided the USFS with another schedule outline indicating completion at Umatilla Forks in April 2011, work at Woodward from early to late June 2011, Bull Prairie work beginning in March and ending in June 2011, completion of Ditch Creek work by late July 2011, and Fremont work beginning in March and ending no later than August 2011. AF at 790-91.

On April 12, 2011, following an e-mail message from 1-A Construction indicating that it hoped to return to the Umatilla Forks site within a few days, AF at 804, the USFS inspector informed 1-A Construction that Umatilla Forks was "clear, dry, ready for work." *Id.* at 809. The USFS also notified 1-A Construction on May 5, 2011, that the Bull Prairie site was dry enough for work. *Id.* at 824, 834. No work began.

On May 31, 2011, 1-A Construction told the USFS inspector by e-mail message that the Fremont site now appeared "in really good shape." AF at 852. Yet, as of that date, the contractor had still not commenced work at that or any of the other sites. Instead, it told the USFS inspector that it hoped "soon" to commence work at Umatilla Forks, *id.* at 853, desiring to wait until it "warm[s] up good because we need solid ground for the tanks," *id.*, with a start at Bull Prairie the week of June 13 "if Umatilla Forks is done by then." *Id.* at 852. It also mentioned that it "was not sure about finishing up Woodward," but might have to "wait until July for it dry out, and the same for Ditch Creek," but "nothing set in stone." *Id.* It did not provide any more detail or any comprehensive schedule. The USFS inspector told 1-A Construction in response that the Fremont site would soon be open to the public for the summer, but that the USFS could cancel cabin rentals there if and when needed for 1-A Construction to "complete its work efficiently." *Id.*

At the end of May 2011, the USFS contracting officer retired from federal service, and a new contracting officer was assigned. AF at 855; Williams Affidavit ¶ 16.

V. The Summer of 2011

1-A Construction finally started work at the Umatilla Forks site sometime around June 20, 2011. AF at 870. But work apparently did not last long, and, on July 11, 2011, 1-A Construction sent an e-mail message to the USFS inspector indicating that the company had ordered materials for Umatilla Forks and would recommence work there after the materials arrived, which it anticipated would be in another week or so. *Id.* at 908. The USFS inspector summarized her subsequent July 12, 2011, conversation with 1-A Construction about its plan for performing the contract work:

> Equipment is being mobilized to Bull Prairie to remove the tank this Thursday. I asked if Umatilla Forks will be farther along by the time we move into Bull Prairie and Pat said this could happen if parts and their second crew come available. I then asked about Woodward and if Joe will be completing the wiring and plumbing. Pat responded that Joe would like to finish the electrical at Woodward and then as soon as Bull Prairie and Umatilla Forks are done they will be back to Woodward. Once all three sites are complete, Pat says

> they will send two crews to Fremont and Ditch Creek to complete simultaneously.

Id.

By this point in time, with very little work having been performed at any of the sites since November 2010, and with only four months of contract time remaining, the newly assigned contracting officer was very concerned about 1-A Construction's ability to perform the contract work. By e-mail message dated July 14, 2011, he told 1-A Construction of his concern about its lack of progress and said that he would not allow any work at the Fremont and Ditch Creek sites to commence until 1-A Construction had completed the first three sites or had worked out an arrangement with him. AF at 925. He asked for a detailed schedule for the remainder of contract performance to show how 1-A Construction could complete all five project sites:

> [Y]ou currently have three sites (Woodward, Umatilla Forks and Bull Prairie) opened up and all are in various stages of completion. This is creating problems for the Forest Service as the use of these sites by the public is currently not allowed with the exception of potentially Bull Prairie. In fact at a minimum there are pipes that are uncapped and trenches open that are not clearly marked or barricaded, which is really a safety hazard, and creates a liability for not only the Government but also your company. As I understand it a couple of the sites just need a few more days of work and they could be completed and cleaned up. The Government will not allow any new work to begin at any of the other sites until the three that are currently being worked on are completed or an agreement has been reached with the Contracting Officer. To assure all work will be completed by Oct. 27, 2011 please provide a detailed schedule, which clearly describes in detail your plans for completion of the contract.

Id. (emphasis added).

In response, 1-A Construction told the contracting officer that its immediate plan was "to complete Woodward, Bull Prairie, and UF as soon as possible before we move onto either Ditch Creek or Fremont." AF at 924. By July 14, 2011, it had commenced excavation at the Bull Prairie site, *id.* at 920, and the USFS acknowledged on July 20, 2011, that, with the exception of some minor final checklist items, the Bull Prairie site was complete. *Id.* at 941. That same day, 1-A Construction told the USFS that it planned to finish at Umatilla Forks by July 25, 2011, and that it was going to start work at Woodward on July 21 with an estimated completion two weeks later. *Id.* at 940.

Further, despite the contracting officer's statement regarding restrictions on commencing work at Fremont or Ditch Creek, the record makes clear that the USFS was willing to work with 1-A Construction to get the project completed. By e-mail message dated August 4, 2011, the USFS inspector suggested that, if 1-A Construction finished with Woodward the following week, as 1-A Construction had told her it might, it should consider having the crew start at Fremont next. AF at 992. The USFS inspector even went so far as to draft a sample comprehensive schedule for the remaining project work at the four remaining sites for 1-A Construction's review and consideration. *Id.* at 992-93.

Nevertheless, even though having essentially finished work at Bull Prairie, 1-A Construction continued leaving Umatilla Forks and Woodward unfinished. The record documents management problems at both sites, AF at 1016, and continuing deficiencies in 1-A Construction's work. *See, e.g.*, *id.* at 1041-42, 1075. There were also many days in August and September 2011 when no work was performed on the contract, *id.* at 1041, 1067, 1087, most likely because, as 1-A Construction later acknowledged, it had taken on several other jobs (including installing a tank at a travel center, installing a water system extension for a municipality, and four firefighting details), which it performed in August and September 2011, to assist with its cash flow, leaving it with no available crews for this contract. *Id.* at 1087, 1099, 1115, 1247, 1255. In any event, by August 17, 2011, 1-A Construction acknowledged to the USFS that it was behind on the schedule – with neither Woodward nor Umatilla Forks finished – and that it was going to delay starting work at Fremont until August 29. *Id.* at 1044. It did not meet this deadline, and, by mid-September, it indicated that it did not know when it would start at Fremont. *Id.* at 1087.

VI. The Fall of 2011

By September 20, 2011, 1-A Construction had still not finished the Umatilla Forks or Woodward sites, and it had still not started on-site work at Fremont or Ditch Creek (although it had built a structure at its shop for transport to the Ditch Creek property). AF at 1099. After hearing that 1-A Construction now anticipated starting at Fremont on October 3, the USFS inspector requested "an updated schedule showing work dates for Fremont, and Ditch Creek as well as the finish work at Umatilla Forks and Woodward to insure that [the USFS] folks are available as needed." *Id.* 1-A Construction responded with a general comment that it hoped to finish work at Woodward the next week, to set a tank at Fremont by October 7, and to start work at Ditch Creek. *Id.*

On September 27, 2011, the contracting officer issued a notice of noncompliance, indicating his concern about the progress of the project. AF at 1101-03. He stated that, "with 7.00% of the Contract time remaining, approximately 40% of the work has yet to be completed." *Id.* at 1101. He informed the contractor that he needed "a practicable schedule

showing the order in which the Contractor proposes to perform the remaining work at all sites, and the dates on which the Contractor contemplates starting and completing." *Id.* at 1102. He further indicated that the contractor "shall submit a schedule prior to the start of work at Fremont" and that he would withhold approval of progress payments until the schedule was submitted. *Id.* "Should the work of this Contract not be completed by October 27, 2011," he said, "the Contractor will be working in default." *Id.*

In response, 1-A Construction provided the USFS inspector with potential start dates for Fremont and Ditch Creek, while stating that it hoped to finish work at Woodward and Umatilla Forks by October 3. AF at 1107. The USFS inspector responded by e-mail message on September 28, 2011, stating that those dates needed to be "firmed up in the construction schedule we have requested." *Id.* at 1115. She suggested that 1-A Construction could "update the sample schedule" that she had previously provided "or one of your own," but that the USFS needed the schedule by September 30, 2011. *Id.* at 1115-16. 1-A Construction then complained that it had been set back by weather and fires in the area, but the contracting officer responded in an e-mail message that he found those excuses unpersuasive. *Id.* at 1115.

On September 30, 2011, 1-A Construction provided the contracting officer with a list of reasons for delays on the project, including inaccurate drawings, inaccurate material descriptions, extreme weather issues, interference at the Bull Prairie site by district personnel, and a delayed payment of one invoice, all of which created excusable delays. AF at 1114. It then stated the following about a schedule for completing the work:

> We needed more trained manpower to complete Fremont and Ditch Creek timely. As of today, we are certain we can begin or complete the tank setting at Fremont by the end of next week. I cannot give you an exact start date, but by the end of the week, then the following weeks.

Id. (emphasis added). 1-A Construction added that, because it did not know for certain what its workers would find underground on a portion of the project, it could not provide anything other than a "loose schedule" and could not "at this moment tell you that the guys are going to be on site with equipment Tuesday or Wednesday." *Id.* at 1112. It stated that, if the USFS "has a suggestion as to how" to complete a thorough schedule, "I am more than willing to do as you request." *Id.*

By e-mail message dated October 3, 2011, the USFS contracting officer informed 1-A Construction of his concern about the "very serious situation on our hands." AF at 1129. He indicated that, as of that date, 1-A Construction had completed only sixty percent of the work and had not even started work at two of the five contract sites, but that ninety-five

percent of the contract time had already expired. *Id.* He complained that, over the course of the project, "we received [an] email describing the things that were occurring that day or week but not once has the contractor provided a detailed progress schedule as requested numerous times as well as required by contract clause FAR 52.236-15." *Id.* He insisted that 1-A Construction provide a detailed construction plan for the remaining work and that, until it did, it could not start new work at the two remaining sites, Fremont and Ditch Creek. The contracting officer feared that, without an actual and realistic plan, 1-A Construction would not be able to finish work there before the winter weather forced it to abandon the sites, which the USFS would then have to pay to be reworked in the spring after snows melted:

> Based on the percentage of time used and work completed it is apparent that there is most likely no way the work will be completed by October 27, 2011. The Government does not want to end up in the same situation as the Fall of 2010 [when] the contractor opened up a site and then had to leave it over the winter [due] to snow. Therefore the Government will not allow starting any new work at Ditch Creek or Fremont until a detailed progress schedule that contains a plan that will convince the Government the work can be completed by no later than October 27, 2011 is provided by the contractor and approved by the Contracting Officer.

Id.

The following day, on October 4, 2011, the USFS contracting officer issued a cure notice to 1-A Construction, stating that, within ten days after receipt, 1-A Construction had to provide "a detailed plan of work, rates of planned progress, and other details that show clearly how the contract will be completed and is in conformance with contract specifications." AF at 1131. He recognized that, in prior communications, 1-A Construction had expressed its belief that there were excusable delays, as defined in 48 CFR 52.212-4(f), justifying a time extension beyond the existing October 27, 2011, contract performance deadline, but that he had never seen any documentation that clearly supported a time extension request. *Id.* at 1130. He rejected 1-A Construction's assertion that the snow lasted longer than usual during the prior winter, stating that 1-A Construction "never provided any documentation that supports that having snow in the mountains of Eastern Oregon in May would be unusual." *Id.* He further stated that, even though 1-A Construction blamed delays on its need to send its employees to extinguish fires, "[w]orking on fires" under separate contracts "for the Forest Service does not allow a contractor to have additional contract time" under this contract. *Id.* Because he considered 1-A Construction's failure to perform the work as endangering performance of the contract, he represented that "the Government may terminate for default under the terms and conditions of the Default Clause, 52.249-10," if the condition is not cured within ten days after receipt of the cure notice. *Id.* at 1130-31. He

again reiterated that, until he approved a construction plan, "no more work is to occur on Ditch Creek or Fremont," but stated that "the work on the ground, by the end of this cure period, must clearly show you have acceptable quality of work performed." *Id.* at 1131 (emphasis in original). "Your full compliance with this CURE NOTICE," he represented, "is imperative if you wish to avoid termination for default." *Id.*

While the cure notice was being issued, 1-A Construction was communicating with the USFS on-site inspector, who was attempting to convince 1-A Construction to complete the remaining work at the Woodward and Umatilla Forks sites, given that "we don't have far to go" at either site. AF at 1140; *see id.* at 1137, 1141. 1-A Construction responded that it was "not objecting to finishing Woodward," but that it did not completely understand what the USFS wanted it to do. *Id.* at 1138.

1-A Construction formally responded to the cure notice on October 6, 2011, providing a proposed daily schedule for work on the Fremont, Ditch Creek, and Woodward/Umatilla Forks sites beginning October 10, 2011, that would purportedly allow completion of Woodward and Umatilla Forks on October 14, 2011, and of the Fremont and Ditch Creek sites on October 29, 2011, two days after the existing contract deadline. AF at 1178-79. The proposed schedule was fairly vague, proposing, for example, to "[c]ontinue piping" at Fremont for ten straight days without further explanation. *Id.* at 1179. 1-A Construction blamed weather for having delayed its work at Woodward and flooding for delays at Umatilla Forks, and it asserted an additional sixteen hours of delay at Woodward "due to a Logger contracted by the [USFS] to remove logs in Woodward" and another sixteen hours to "do a road cleanup . . . which was paid by a [USFS] credit card." *Id.* at 1178. In support of its weather-delay position, it attached weather information, including monthly rainfall and snowfall amounts, for a weather station at Pendleton, Oregon, from October 2008 through October 11, 2011. *Id.* at 1181-89. It also stated that it did not agree with the USFS inspector's decision that it should perform further clean up at the Woodward and Umatilla Forks sites. AF at 1179. 1-A Construction further requested a ten-day contract extension, while reserving the right to request additional extensions. *Id.* at 1180.

On October 9, 2011, the contracting officer rejected 1-A Construction's proposed schedule as unacceptable, stating that it "lacks the intensity and detail of the major components of the remaining, and most complex, water systems." AF at 1194. He detailed specific tasks that 1-A Construction needed to perform at each of the four remaining construction sites, as well as missing submittals for Woodward and Umatilla Forks, and informed 1-A Construction that it must submit a more detailed schedule that would "demonstrate performance to complete the minimum" tasks that he had identified. *Id.* at 1194-95. He also indicated that "[a]t this time the Government does not plan to modify the contract and add additional time." *Id.* at 1194. In an e-mail message that accompanied the

contracting officer's letter, the USFS inspector reiterated that the agency still "want[s] the first three sites [Woodward, Umatilla Forks, and Bull Prairie] to be 100% completed before any additional work begins at the other locations," except that 1-A Construction could potentially move forward with pouring concrete at the Ditch Creek site. *Id.* at 1196.

1-A Construction responded with a more detailed daily schedule proposal on October 10, 2011. *See* AF at 1198-1202. In this new schedule, 1-A Construction proposed final walk-throughs at Woodward and Umatilla Forks on October 13, 2011. *Id.* at 1199. As in its October 6 proposal, it indicated that it would begin work at Fremont and Ditch Creek on October 10, 2011, but now stated that it would not complete work at those sites until November 4, 2011 (instead of October 29, 2011). *Id.* It also asked for a contract extension to and including November 4. *Id.* at 1202.

Later on October 12, 2011, 1-A Construction informed the USFS inspector that, even though it had not yet received a response to its October 10 proposed schedule, it was following the schedule. AF at 1228. On the afternoon of October 13, 2011, 1-A Construction faxed to the USFS inspector a submittal for a concrete pour scheduled for the next day at Ditch Creek and said that it needed the USFS to turn that submittal around that day, *id.* at 1234, even though, under the contract, the USFS was to have fourteen days to review it. *Id.* at 121, 352. Within hours, the USFS responded that the concrete mix design did not meet specifications. *Id.* at 1236. Over the next several days, 1-A Construction performed various tasks and communicated with the USFS, but the record does not reflect that it was performing tasks in accordance with the October 10, 2011, schedule that it had submitted. Further, by e-mail message dated October 14, 2011, 1-A Construction requested an extension of sixty work days. *Id.* at 1244.

On October 17, 2011, the contracting officer met with 1-A Construction to review the work remaining and indicated that only sixty percent of the contract work was complete. AF at 1247. Although 1-A Construction was adamant that the two remaining sites were less complex than Woodward, the contracting officer disagreed and indicated that, based upon 1-A Construction's response to the cure letter, he did not feel that it could be successful and intended to terminate for default if the work was not completed by October 27. *Id.* Nevertheless, he encouraged 1-A Construction to complete its work at the Woodward and Umatilla Forks sites and to finish pouring concrete and setting the building at Ditch Creek as a means of mitigating the reprocurement costs that it might have to pay to the Government. *Id.*

In response that same day, 1-A Construction complained that the problems on this contract were the USFS's fault. AF at 1255. It asserted that 1-A Construction was given extra work through change orders but without sufficient extra time to complete them, that the

Government had precluded 1-A Construction from working at Fremont, and that the USFS's "dated boiler plated" specifications and drawings were defective. *Id.* It said that 1-A Construction had just completed two other significant jobs in the past five weeks, with two crews, showing that it ought to be able to finish the remaining work on this contract quickly. *Id.* "The facts of the matter are," it said, "'[i]f the government would not have directed our work, the work could have been completed based on our own work history and the crews we have working." *Id.* It asked for permission to go to Fremont and Ditch Creek to perform all of the remaining contract work there.

The USFS conducted a final inspection, at the contractor's request, at the Woodward and Umatilla Forks sites. AF at 1276. On October 19, 2011, it provided 1-A Construction with a two-page list of deficiencies at those sites that needed correction. *Id.* at 1277-78. 1-A Construction reported on October 27, 2011, that both Woodward and Umatilla Forks were "completed per the contract with extras." *Id.* at 1323. Nevertheless, at subsequent site visits, the USFS discovered incomplete finishing work at both sites that would have to be corrected, *id.* at 1727-33, and it found that the Ditch Creek site, where 1-A Construction had poured a concrete slab and installed the structure that it had built at its shop, was "a mess," with a large area of land torn up, damaged trees, exposed ground and water/drain lines, and piles of dumped rocks. *Id.* at 1717.

By the required contract completion date, 1-A Construction had finished one site (Bull Prairie); claimed to have finished two more sites (Woodward and Umatilla Forks) at which the USFS found multiple deficiencies in the work; and had plainly not finished the last two (Ditch Creek and Fremont). By final decision dated November 4, 2011, the contracting officer terminated 1-A Construction's contract for default, indicating that the contractor had failed to complete the contract within 430 days after issuance of the NTP, or October 27, 2011, as required by the contract. AF at 1725 (citing FAR 52.249-10).

This appeal followed. In its notice of appeal, 1-A Construction not only challenged the termination decision, but also sought $8533.96 in damages for extra work that it allegedly performed – an amount that it has increased to more than $300,000 in its briefing. The USFS, in turn, has requested recovery of excess reprocurement costs.

Discussion

I. Standard of Review

The parties have elected to submit this case for a decision on the record without a hearing under Rule 19 of the Board's rules.

Pursuant to Rule 19, the parties are entitled to include in the written record (1) any relevant documents or other tangible things they wish the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party's positions and defenses. *See* 48 CFR 6101.19. Based upon those submitted materials, the Board is entitled to make findings of fact, even if such findings require "credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved," and can decide issues of law based upon those factual findings. *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967.

Submission on the written record "does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses." *Ravenna Arsenal, Inc.*, ASBCA 17802, 74-2 BCA ¶ 10,937, at 52,064 (discussing Armed Services Board of Contract Appeals' rule comparable to CBCA Rule 19). "While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish," by a preponderance of the evidence, "that it is entitled to relief." *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,472. "A party . . . acts at its peril, in a Rule [19] procedure, where it fails to provide the Board sufficient factual information, supported by affidavits or probative documentary evidence." *Sefco Constructors*, VABCA 2747, et al., 93-1 BCA ¶ 25,458, at 126,802 (1992).

"A claimant's failure to present affidavits of sufficiently clear and probative documentary evidence will almost surely result in denial of its appeal." *Renette Johnson*, VABCA 5470, 98-2 BCA ¶ 30,060, at 148,731. Further, "the mere allegation in an affidavit without additional explanatory facts or outside substantiation will not necessarily be sufficient to carry the burden of proof." *Schoenfeld*, 87-1 BCA at 99,472. Instead, to evaluate the reliability of conclusory statements in affidavits, the Board will consider several factors in determining whether the moving party's position is more reliable than its adversary's:

> In determining the reliability of conclusory statements, we look at whether there is other corroborative evidence supporting the statement, whether the other facts and circumstances surrounding the allegations make the allegations more believable than not, and to what extent the parties' version of the events and conclusions differ or can be reconciled. In weighing these elements, however, the moving party's position must be more reliable than its adversary in order for us to find in its favor.

Id. In this case, the Government has presented several detailed affidavits in support of its arguments, but 1-A Construction has presented none.

II. The Absence of Counsel

CBCA Rule 5(a) expressly permits partnerships and corporations to proceed without hiring an attorney. 1-A Construction, which is registered with the Oregon Secretary of State Corporate Division as a domestic limited liability partnership under chapter 67 of the Oregon Revised Statutes, elected to have one of the partnership's senior partners, rather than an attorney, represent it in this case. The absence of counsel is evident here from pleadings that often contain very cryptic allegations about causes for delay, recurrently without any citation to support in the evidentiary record. Further, appellant's legal arguments are sometimes made in a single sentence, without adequate (or any) development, explanation, context, or citation.

Generally, "[w]e give greater procedural latitude to pro se appellants than we give to parties represented by lawyers." *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062. Although it is questionable whether a partnership like 1-A Construction should receive the same leniency provided a pro se individual,[3] we have applied that latitude here, "mak[ing] inferences" about the arguments being raised "based upon ambiguous or procedurally errant filings." *Dildy v. United States*, No. 12-624T, 2013 WL 676088, at *2 (Fed. Cl. Feb. 26, 2013). Nevertheless, "this more lenient standard for interpreting pleadings does not change a pro se litigant's burden of proof or our weighing of the factual record." *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991, at 171,975. We are not "obliged to scour the record, seek out uncited facts that might favor [appellant's] position, speculate

[3] Technically, a corporation or partnership appearing without an attorney is not appearing pro se. To appear "pro se" means to appear "[f]or oneself" or "on one's own behalf." *Black's Law Dictionary* 1416 (10th ed. 2014). Accordingly, to appear pro se, "[a] person must be litigating an interest personal to him" and cannot, at least in federal court, "appear on another person's behalf in the other's cause." *Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998). A senior partner representing a limited liability partnership – or an officer representing a corporation – is technically not litigating his or her personal interests, but the interests of a collective partnership or corporate entity, from whose debts the individual partners and/or shareholders, at least to some extent, have shielded themselves. *See S. Stern & Co. v. United States*, 331 F.2d 310, 313 (C.C.P.A. 1963) (individual partner is separate from and does not represent the interests of the entire partnership); *Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1309-10 (2d Cir. 1991) ("when one partner appears on behalf of the partnership, he is representing more than just himself"). As a result, it is not entirely accurate to call a partnership being represented without a lawyer a pro se appellant.

about facts not in the record, and articulate [appellant's] arguments and evidentiary objections for [it], essentially taking up the torch for [appellant] and acting as [its] *de facto* counsel." *Quinn v. Deustche Bank National Trust Co.*, No. 13-0115, 2014 WL 1410430, at *9 (S.D. Ala. Apr. 11, 2014). Yet, in this case, "we have strained our proper role in adversary proceedings to the limit, searching this lengthy record to see if [appellant] has a cause of action somewhere displayed," *Ruderer v. United States*, 412 F.2d 1285, 1292 (Ct. Cl. 1969), or, for purposes of this appeal, a viable basis for challenging the agency's default termination. As we will explain below, despite our exhaustive review of the record in this case, we have found none.

III. The Standards Applicable to Default Termination Challenges

A. The Government's Initial Burden

A contractor's unexcused present or prospective failure to perform its contractual obligations to the Government on time constitutes a contractual default. 48 CFR 49.401(a). When faced with such a default, the contracting officer has broad discretion in deciding whether to terminate the contract for cause. *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343 (Fed. Cir. 1999). Nevertheless, default termination "is a remedy to which the Government should not lightly resort." *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996). It is a "drastic sanction" that "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)). "[W]hether the default termination is proper depends upon the facts and circumstances of each case." *Olson Plumbing & Heating Co. v. United States*, 602 F.2d 950, 955 (Ct. Cl. 1979).

There are two different grounds for default that are relevant to this case. First is 1-A Construction's failure to complete contract performance by October 27, 2011, the deadline established in the contract. Failure to complete contract work by the contractual deadline is a well-settled ground for a default termination. *Consolidated Industries*, 195 F.3d at 1344; *Churchill Chemical Corp. v. United States*, 602 F.2d 358, 362 (Ct. Cl. 1979); 48 CFR 52.249-10(a). Generally, "the existence of a contract deadline itself establishes that time is of the essence." *Empire Energy Management Systems, Inc. v. Roche*, 362 F.3d 1343, 1354 (Fed. Cir. 2004) (citing *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969) ("Time is of the essence in any contract containing fixed dates for performance.")). "In undertaking a contract, the contractor promises to perform according to the contract specifications," including delivery and completion deadlines, "and the Government has the right to insist on contractor performance in compliance with them." *Jet Construction Co. v. United States*, 531 F.2d 538, 543 (Ct. Cl. 1976). Upon non-delivery by the contractual due date, the

Government, barring valid excuses from the contractor, has an immediate right to terminate for default. *General Cutlery v. General Services Administration*, GSBCA 13154, 96-1 BCA ¶ 27,957, at 139,651 (1995); *System Development Corp.*, VABCA 1976, et al., 87-2 BCA ¶ 19,946, at 100,950. When the contractor challenges the termination, the Government bears the initial burden of establishing a *prima facie* case that the contractor failed timely to deliver and was, therefore, technically in default. *Alton Iron Works, Inc.*, GSBCA 6532, et al., 83-1 BCA ¶ 16,175, at 80,382 (1982); *see Abcon Associates, Inc. v. United States*, 49 Fed. Cl. 678, 686 (2001), *aff'd*, 52 F. App'x 510 (Fed. Cir. 2002); *Empire Energy Management Systems, Inc.*, ASBCA 46741, 03-1 BCA ¶ 32,079, at 158,553 (2002), *aff'd*, 362 F.3d 1343 (Fed. Cir. 2004).

Alternatively, if the contract completion date has not yet passed, the Government may terminate a contract for default based upon the contractor's failure to make progress or to prosecute the work in a manner so as to ensure timely completion. A failure to make progress or to prosecute the work "is obviously something different from failure to deliver, or else the default clause would not provide separately for both." *Universal Fiberglass Corp. v. United States*, 537 F.2d 393, 398 (Ct. Cl. 1976). Such terminations are "appropriate if a demonstrated lack of diligence indicate[s] that the Government [cannot] be assured of timely completion." *Discount Co. v. United States*, 554 F.2d 435, 441 (Ct. Cl. 1977). Although it "does not require absolute impossibility of performance or a contractor's complete repudiation or abandonment," it requires more than mere "concerns" about the contractor's ability to meet the future completion deadline. *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1015 (Fed. Cir. 2003), *vacated and remanded on other grounds sub nom. General Dynamics Corp. v. United States*, 561 U.S. 1057 (2011). Specifically, if the contracting officer reasonably believes "that there [is] 'no reasonable likelihood that the [contractor] c[an] perform the entire contract effort within the time remaining for contract performance,'" he is entitled to terminate the contract for failure to make progress or to prosecute the work. *Lisbon Contractors*, 828 F.2d at 765 (quoting *RFI Shield-Rooms*, ASBCA 17374, et al., 77-2 BCA ¶ 12,714, at 61,735). Nonetheless, tribunals will only uphold such default terminations if the contracting officer "has carefully examined the contractor's ability to complete the remaining work before the contract completion date." *Hannon Electric Co. v. United States*, 31 Fed. Cl. 135, 143 (1994), *aff'd*, 52 F.3d 343 (Fed. Cir. 1995) (table). In undertaking that examination, "the contracting officer may consider, among other things, the contractor's failure to meet its own representations concerning the progress of the work and the contractor's performance history." *Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363, at 169,699 (citations omitted). The Government bears the burden of proving that the contractor's actions actually endangered performance. *Lisbon Contractors*, 828 F.2d at 765; *Hannon Electric*, 31 Fed. Cl. at 143.

With regard to progress failures, "[w]hen the government has reasonable grounds to believe that the contractor may not be able to perform the contract on a timely basis, the government may issue a cure notice as a precursor to a possible termination of the contract for default." *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000). "A 'cure notice' identifies a deficiency in the contractor's performance that the Government considers to endanger performance of the contract, and warns the contractor that the contract may be terminated for default if the problem is not 'cured' or addressed, within a specified period of time." *Decker & Co.*, 76 F.3d at 1576 n.2. Although the Government is required to issue a cure notice before default terminating a supply or services contract for lack of progress, *see* 48 CFR 49.402-3(d), 52.249-8(a)(2), it does not have an obligation to do so before terminating a construction contract incorporating the termination clause at 48 CFR 52.249-10. *Professional Services Supplier, Inc. v. United States*, 45 Fed. Cl. 808, 810-12 (2000); *B.V. Construction, Inc.*, ASBCA 47766, et al., 04-1 BCA ¶ 32,604, at 161,363 n.2. Nevertheless, once the contracting officer elects to issue a cure notice relating to a construction contract, "the contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor." *AEC Corp.*, 224 F.3d at 1337; *see McDonnell Douglas Corp. v. United States*, 567 F.3d 1340, 1350 (Fed. Cir. 2009) (after cure notice is issued, burden is on the contractor to advise the Government how it will complete the contract on time, according to contract requirements), *vacated and remanded on other grounds sub nom. General Dynamics Corp. v. United States*, 561 U.S. 1057 (2011). If the contractor fails to respond to the cure notice with adequate assurances of timely completion, the contracting officer is entitled to terminate for default. *Hannon Electric*, 31 Fed. Cl. at 143.

B. The Contractor's Burden After the Government Establishes Default

Once the Government establishes the existence of default, the burden shifts to the contractor to prove that there were excusable delays under the terms of the default provision of the contract that render the termination inappropriate, *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000), or that it was making sufficient progress on the contract such that timely contract completion was not endangered. *McDonnell Douglas*, 567 F.3d at 1353.

To establish excusable delay, the contractor must show, by a preponderance of the evidence, "that the delay resulted from 'unforeseeable causes beyond the control and without the fault or negligence of the Contractor.'" *Sauer*, 224 F.3d at 1345 (quoting 48 CFR 52.249-10(b)(1)); *see Fluor Intercontinental, Inc. v. Department of State*, CBCA 59074, 13 BCA ¶ 35,334, at 173,446 ("An excusable delay must arise from unforeseeable causes beyond the control and without the fault or negligence of the contractor."). Examples of such delays include, but are not limited to, acts of God, acts of the Government in either its

sovereign or contractual capacity, floods, fires, epidemics, and unusually severe weather. 48 CFR 52.249-10(b)(1).

Yet, to relieve itself from the consequences of having failed (or of an anticipated failure) to complete work within the time period allowed by the contract, the contractor cannot merely show that there were excusable delays. Such delays affect the contracting officer's right to terminate for default only if the delay impacted "overall contract completion" and precluded timely contract performance. *Sauer*, 224 F.3d at 1345 (citing *Mel Williamson, Inc. v. United States*, 229 Ct. Cl. 846, 850–51 (1982) (contractor must establish that unforeseeable event "caused delay in the overall contract performance")); *see Robert P. Jones Co.*, AGBCA 391, 76-1 BCA ¶ 11,824, at 56,457 ("contractor is entitled to only so much time extension as the excusable cause actually delayed performance"). Accordingly, the contractor must prove by a preponderance of the evidence "the extent to which completion of the contract work as a whole was delayed" by excusable delays. *Santa Fe, Inc.*, VABCA 1943, et al., 84-2 BCA ¶ 17,341, at 86,410 (quoting *Wilner Construction Co.*, VACAB 1421, 80-2 BCA ¶ 14,529, at 71,628). To do so, the contractor must demonstrate how the delay, or delays, affected activities on the contract's critical path and impacted the contractor's ability to finish the contract on time. *Sauer*, 224 F.3d at 1345.

IV. The Government's Default Termination Was Justified

A. The Government Met its Initial Burden of Proving Default

The USFS contracting officer based the default termination decision at issue here on 1-A Construction's failure to complete performance by the contractual deadline of October 27, 2011. 1-A Construction does not contest that it did not complete its work by that deadline, and, as previously discussed, such a failure is a well-settled ground for a default termination. *Consolidated Industries*, 195 F.3d at 1344. Accordingly, the Government has satisfied its initial burden of proving default.

The USFS has also met its initial burden of establishing its alternative ground for termination: the contractor's failure to make progress on the contract. Although the contracting officer based his termination decision on failure to complete on time, it is well-settled that a default termination can be sustained "if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason." *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994). In this particular case, the record makes clear that, although terminating for a technical failure to meet the contract completion deadline, the contracting officer had evaluated 1-A Construction's progress and ability to perform and based many of his decisions upon that analysis. Throughout the summer and fall of 2011, the contracting

officer justifiably had great concerns about the progress of contract performance: he had no comprehensive schedule from 1-A Construction for this project and, despite repeated efforts by the USFS, could not get 1-A Construction to provide one; 1-A Construction had failed to meet even the general deadlines contained in the schedule outline that it had delivered in March 2011; 1-A Construction would make representations about the short-term work that it intended to perform, but then would not do it; 1-A Construction was having its crews work on unrelated contracts, leaving no crews to work at any of the five project sites for this contract for extended periods of time; the contracting officer's staff was finding various workmanship problems on the limited amount of work that was being done; and 1-A Construction would become defensive and argumentative, rather than responsive, if questions about contract work were raised. By October 4, 2011, with only twenty-three days of the original 430-day contract performance period remaining, 1-A Construction had performed only sixty percent of the contract work and had yet to start work at two of the five project sites. Although 1-A Construction argues that it had performed some building structure assembly work at its shop and that the contracting officer's assumptions about the percentage of work completed were therefore too low, the record is clear that, regardless of the specific percentage, there was still a great deal of work unperformed. In such circumstances, the contracting officer was more than fully justified in issuing a cure notice on October 4, 2011, demanding a day-by-day schedule showing how 1-A Construction could complete this job satisfactorily by the contract deadline of October 27, 2011.[4]

1-A Construction's response to the cure notice was insufficient to preclude default termination. Initially, 1-A Construction responded with a schedule with very little detail, indicating that it would start on-site work at both the Fremont and Ditch Creek sites on October 10 and finish both on October 29, two days after the contract completion deadline. After the contracting officer insisted upon a more detailed and realistic plan, 1-A Construction submitted slightly more detail, but revised the completion date for Fremont and Ditch Creek to November 4, which it would meet by utilizing two separate crews. Then, on October 14, 2011, it requested an extension of sixty work days, to and including late December 2011. Through its schedules and extension requests, the contractor plainly acknowledged its inability to complete the contract by its deadline, justifying a progress failure determination.

Further, the contracting officer was well within his rights to question the very optimistic schedule that 1-A Construction had proposed and not simply to accept the

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[4] As previously noted, the particular termination clause at issue here, FAR 52.249-10, does not require a cure notice before termination for failure to make progress, *Professional Services*, 45 Fed. Cl. at 810-12, but the USFS contracting officer elected to issue one.

contractor's assertions at face value. In *RFI Shield-Rooms*, ASBCA 17374, et al., 77-2 BCA ¶ 12,714, the ASBCA considered a contractor's "unduly optimistic" forecast in response to a cure notice, finding that "[n]othing which transpired before termination could possibly have engendered that degree of optimism." *Id.* at 61,736. The ASBCA recognized that, in essence, "what must be proved" by the Government to justify a progress failure termination "is that at the time of termination action the contracting officer had a reasonable, valid basis for concluding, on the basis of the entire record, that there was no reasonable likelihood that appellant could perform the entire contract effort within the time remaining for contract performance." *Id.* at 61,735 (emphasis added). The contractor's cure notice response is only one piece of that record, and the contracting officer is not required simply to assume that all representations there are true. Where "[f]rom beginning to end appellant's performance failed to indicate any sense of urgency or of full understanding of the contractual requirements or any semblance of a coordinated, planned endeavor," a contractor's overly rosy and unrealistic cure notice response will not suffice to provide the type of "adequate assurance" that the contracting officer needs to continue contract performance. *Id.* at 61,736; *see AIW-Alton, Inc.*, ASBCA 45032, 96-1 BCA ¶ 28,232, at 140,979 (contracting officer, when evaluating a contractor's ability to perform, is entitled to consider the contractor's "history of broken promises under th[e] contract," along with "the absence of persuasive demonstration by appellant to the contracting officer at the time that it could meet the [contract completion] date"); *Emsco Screen Pipe Co. of Texas*, ASBCA 11917, et al., 69-1 BCA ¶ 7710, at 35,792 ("there was no basis for any conclusion other than that [the contractor's] past failure to make progress was a prologue to a continuing incapacity of an increasingly serious character").

Here, when the cure notice was issued, 1-A Construction was struggling to complete the three sites that it had started, even though it had been working for over 400 days, and the idea that it would be able to start and finish two additional sites in less than three weeks was wholly inconsistent with its past performance. 1-A Construction argues that, "to show that the schedule could have been met," it established in its cure notice response that it "was going to work 8 people," which allegedly would have allowed it to complete work a few days after the contract's required completion date. Appellant Motion at 26. Even without considering 1-A Construction's concession in its cure notice responses that it would not perform on time, *see DeVito*, 413 F.2d at 1154 ("Time is of the essence in any contract containing fixed dates for performance."), the contracting officer acted reasonably in discounting 1-A Construction's representations. The contractor had previously informed the USFS in a construction schedule outline on March 30, 2011, that it was going to put two crews in place at two different sites; again proposed using two crews in May 2011; and represented that it would have "three guys free to work" after June 10, 2011, AF at 853. But it had always failed to follow through on these representations. 1-A Construction had repeatedly made representations about when it expected to complete work at various sites or

to complete various milestones, only to miss them by significant margins. In fact, 1-A Construction had previously represented – in its March 30, 2011, schedule outline – that it would take six to seven weeks to perform the Fremont work and four weeks at Ditch Creek, a representation that was inconsistent with its new truncated schedule proposal. Further, the USFS has submitted evidence that the Fremont and Ditch Creek sites were the most difficult technically because of the electrical interfacing that each site would require, *see* Affidavit of Dave Ammons ¶ 5, making 1-A Construction's representations about the speed at which those sites could be completed even more suspect. The record makes clear that, after evaluating 1-A Construction's cure notice response, the contracting officer reasonably lacked any confidence in the contractor's ability to finish the contract either by the contract completion deadline or any time soon thereafter.

1-A Construction argues that, when a contractor has substantially completed its work, the Government cannot terminate a contract. It also appears to argue that, because it represented in its cure notice response that it would complete its work only a few days after the contract completion deadline, the USFS abused its discretion by not allowing it to finish the job. Appellant's Response Brief at 14; *see UB Corp.*, GSBCA 7701-COM, et al., 86-2 BCA ¶ 18,831, at 94,895 ("The idea of substantial performance is that a contract should not be terminated for default just as the contractor is on the verge of completing it."). We need not evaluate the viability of the doctrines that 1-A Construction has asked us to consider because, in this case, neither would affect the outcome. Although 1-A Construction had completed or almost completed three project sites when it wrote its cure notice responses, it had not started the other two (except for a concrete pour and structure placement at Ditch Creek), precluding any argument that it had "substantially completed" its contract work. In addition, the contracting officer, as discussed above, reasonably found 1-A Construction's predictions of contract completion overly optimistic, particularly in light of 1-A Construction's performance history. Because 1-A Construction's representations were unrealistic, there is no need to evaluate whether, had its representations been reasonable, the contracting officer would have to have considered granting a short time extension.

B. Appellant Has Not Overcome the Government's Showing

1. No Showing that Excusable Delays Affected Timely Completion

As previously discussed, once the Government establishes the existence of default, the contractor bears the burden not only to show that there were excusable delays during contract performance, but also that those excusable delays impacted "overall contract completion" and precluded timely contract performance. *Sauer*, 224 F.3d at 1345. The reason for requiring an impact upon the contract completion deadline is simple: an excusable delay is relevant to the contractor's ultimate ability to perform on time only if the delay

caused, or contributed to, the contractor's inability to perform. If, for example, the contractor in this case were to show that an excusable weather delay precluded it from working on one of the five project sites in a particular month, but it turns out that the contractor had not planned to work at that site during that month, the weather issue plainly was not the cause of, and is irrelevant to, the contractor's actual performance problems. The contractor should not be able to use the fortuitous timing of irrelevant events to avoid the consequences of its own performance failures. Instead, the contractor has the burden of presenting a viable cause-and-effect analysis: the cause (that is, the excusable delay) must affect the ultimate contract completion date. *See, e.g.*, *Advanced Engineering & Planning Corp.*, ASBCA 53366, et al., 05-1 BCA ¶ 32,806, at 162,323 (2004) (requiring "causal connection between the alleged delaying events and the delays to the project"); *Gerald Miller Construction Co.*, IBCA 2292, 91-2 BCA ¶ 23,829, at 119,417 (requiring "proof of a cause and effect relationship" in establishing impact of delay); *Polote Corp.*, PSBCA 1297, et al., 87-1 BCA ¶ 19,490, at 98,497 (1986) (requiring proof of cause-and-effect for defective specifications damages). *See generally Law v. United States*, 195 Ct. Cl. 370, 384 (1971) ("[T]he mere fact that defendant took four weeks, or four months, or even longer, is in itself meaningless. The length of time is meaningful only in relation to the effect it had on the project operations.").

1-A Construction asserts that its delays in performing the contract are excused because of numerous events, including severe weather, defective drawings and specifications, and others. But it has made no effort to submit any kind of schedule analysis showing how specific delays impacted overall contract completion. Instead, it simply tosses out a series of reasons for delay and then suggests that, with more time, it could have finished the job. "[A] contractor cannot demonstrate excusable delay based upon a 'total time theory.'" *Catel, Inc. v. United States*, No. 05-1113C, 2012 WL 3104366, at *34 (Fed. Cl. July 30, 2012) (citing *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 134 (2001), *aff'd*, 36 F. App'x 452 (Fed. Cir. 2002) (table)). Under the "total time theory," the contractor "simply takes the original and extended completion dates, computes therefrom the intervening time or overrun, points to a host of individual delay incidents for which defendant was allegedly responsible and which 'contributed' to the overall extended time, and then leaps to the conclusion that the entire overrun time was attributable to defendant." *Law*, 195 Ct. Cl. at 382. Because the theory improperly "assumes that the government is responsible for all of the delay," *Morganti National*, 49 Fed. Cl. at 134, it "is insufficient to meet the contractor's burden to prove that government-caused delay actually delayed the overall completion of the project." *Fireman's Fund Insurance Co. v. United States*, 92 Fed. Cl. 598, 669 n.88 (2010).

To prove that an excusable delay actually impacted timely contract completion, 1-A Construction was required to identify the "critical path" of contract performance and demonstrate how excusable delays, by affecting activities on the contract's "critical path," actually impacted the contractor's ability to finish the contract on time. *Sauer*, 224 F.3d at

1345. "A 'critical path' is a way of grouping interrelated activities in a construction project," and a "delay to an activity that is on the 'critical path' usually results in a corresponding delay to the completion of the project." *Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (en banc). "[O]nly construction work on the critical path [has] an impact upon the time in which the project was completed." *Id.* (quoting *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984)). To show how the critical path of contract performance evolved over the life of the contract and how excusable delays impacted that path, a contractor, at a minimum, needs a reasonable "as planned" schedule and an "as built" schedule, which it can incorporate into an analysis to show "the interdependence of any one or more of the work items with any other work items" as the project progressed. *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 428 (1993).

Here, 1-A Construction never had an "as planned" schedule, either formal or informal. Without that, 1-A Construction has no basis for showing what work it reasonably should have anticipated performing in the fall of 2010, before winter weather was likely to shut down performance, or how much work it reasonably should have planned to perform in 2011 after the winter season. It cannot show how long it reasonably expected winter weather to last or how any severe weather actually affected its plans. Because it cannot show what it planned to do before allegedly defective specifications delayed it, it cannot show the extent to which (or if) those defects actually caused a delay beyond the work performance period originally anticipated. It cannot show how many crews it anticipated having on site at any particular time, whether those crews were sufficient to meet the contract deadlines, how long it anticipated work at each site would take, what activities would take more time than others, or when it expected to perform particular work at any site. Without such information, it cannot show that any excusable delay actually impacted its ultimate contract completion. *See Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,176 (2014) (difference between costs of construction under initial plans and costs under final plans cannot be determined where no initial plans existed).

Although 1-A Construction asserts that there were numerous critical path delays, the biggest of which was an alleged 365-day delay in getting approval of a pump for the Ditch Creek site, Appellant's Motion at 23-25, its argument shows its misunderstanding of the term "critical path." Even if there were a 365-day delay at Ditch Creek for which the Government was wholly responsible (a position for which we can find no support in the record), 1-A Construction provides nothing to show how that delay impacted its ability to perform at any of the <u>other</u> four project sites, not to mention its ability to perform other required work at Ditch Creek. Similarly, 1-A Construction takes what it claims were thirty-four days of Government-caused delay at Fremont, thirty-six at Ditch Creek, twenty-eight at Woodward, fifteen at Umatilla Forks, and twenty-six at Bull Prairie, and it adds them together to claim a total of 136 excusable critical path delay days. *Id.* Yet, to show that a

fifteen-day delay at Umatilla Forks constituted a delay to the critical path of contract performance, the contractor has to establish the interrelationship between the delayed activity and the remaining project activities, both at Umatilla Forks and the other four project sites, and how the delay to the single Umatilla Forks activity impacted its ability to complete other work at all of the project sites. *See Mega Construction*, 29 Fed. Cl. at 428. Without any kind of "as planned" schedule that it incorporates into a critical path analysis, it cannot meet that burden.

2. No Showing of Excusable Delays

Even if 1-A Construction could prove that the delays it identified impacted contract completion, we cannot find any justification in the record to support 1-A Construction's allegations that those delays are excusable:

The Contracting Officer's Direction Not to Work at Fremont or Ditch Creek. 1-A Construction's most compelling excusable delay allegation relates to the contracting officer's direction in July 2011, and again in early October 2011, not to perform any work at the Fremont and Ditch Creek sites pending receipt of a comprehensive construction schedule. Nevertheless, in the circumstances here, it is clear that the contracting officer's direction was not the cause of 1-A Construction's inability to complete its work. The record establishes that, despite the contracting officer's July 2011 representation, access to Fremont and Ditch Creek was not denied, and 1-A Construction did not defer work at those two sites because of it. Rather, as 1-A Construction indicated, as of July 2011, it did not plan to work the Fremont and Ditch Creek sites until it had finished Bull Prairie, Woodward, and Umatilla Forks, and, by August 2011, it was anticipating starting work at Fremont by August 29. In fact, the USFS inspector was actively encouraging 1-A Construction to work at Fremont. By mid-September, it had not yet started work at Fremont – not because the contracting officer had precluded it from doing so, but because it had moved its crews to other contracts that it had accepted as a means of increasing its cash flow. By October 4, 2011, when the contracting officer again told 1-A Construction not to start work at Fremont or Ditch Creek until the parties had agreed on a realistic schedule for continued performance, it was clear that 1-A Construction could not perform in a timely manner. To the extent that the contracting officer's direction had any effect on the manner in which 1-A Construction performed, it did not ultimately make any difference: absent the contracting officer's direction, 1-A Construction still would not have finished its contract obligations by October

27, 2011, or at any reasonable time thereafter. The contracting officer's direction not to start work at Fremont and Ditch Creek was not the cause of 1-A Construction's default.[5]

Unusually Severe Weather. 1-A Construction asserts that weather was a constant problem that precluded it from performing on time. However, the USFS expressly indicated in the contract itself that, because "elevation of the sites range from approximately 2700-5200 feet above mean sea level," the "construction sites may experience heavy snowfall and cold temperatures, with snow on the ground typically from mid-September through June." AF at 115. Because the contract expressly called the awardee's attention to this weather issue, 1-A Construction "was required in bidding on the job to take into account the uncertainty of the weather." *Cape Ann Granite Co. v. United States*, 100 Ct. Cl. 53, 72 (1943). Further, even without the contract's express warning, a contractor cannot rely upon bad weather to excuse non-performance unless that weather is unusually severe for the specific location at issue. "Unusually severe weather is weather that is abnormal compared to past weather at the same location for the same time of year," and "[w]eather is not unusually severe if it was foreseeable." *Trinity Resources*, AGBCA 80-187-1, 83-1 BCA ¶ 16,505, at 82,019; *see Ryll International, LLC v. Department of Transportation*, CBCA 1143, 11-2 BCA ¶ 34,809, at 171,306 ("Unusually severe weather is determined based on a comparison of the conditions experienced by the contractor and the weather conditions of prior years."). "A mere variation from average does not establish the fact that weather was unusually severe since variations in the weather are to be expected." *Yumang, O'Connell & Associates*, AGBCA 83-171-1, 84-2 BCA ¶ 17,313, at 86,281. Here, the record makes clear that the project sites were generally available, with an absence of snow, for periods of time longer than those estimated in the contract. Although 1-A Construction represented to the USFS that there was snow at Woodward and Ditch Creek in July 2011, AF at 1133, there is

[5] In addition, the contracting officer was well within his rights under the Suspension of Work clause at 48 CFR 52.242-14, which was incorporated into this contract, AF at 46, to suspend 1-A Construction's work at Fremont and Ditch Creek, subject to the contractor's right to compensation for any unreasonable period of suspension, following 1-A Construction's failure to provide a realistic and comprehensive construction schedule. The contract obligated 1-A Construction to provide such a schedule near the outset of contract performance, subject to termination for default if it failed to do so, *see* 48 CFR 52.236-15, and, despite repeated efforts by the Government to obtain one, 1-A Construction simply would not provide one. We find nothing unreasonable about the contracting officer's demand for a schedule – showing that 1-A Construction could, in fact, finish the job – as a condition of continued performance. To the contrary, the contracting officer evidenced extraordinary restraint in allowing performance to continue for as long as he did despite 1-A Construction's repeated failures to provide a comprehensive schedule.

no evidence in the record to support this assertion. 1-A Construction also cites to a weather report for a site other than the project sites at issue, as well as some YouTube videos purporting to show snow in the project area sites between December 2010 and April 2011. None of this evidence shows anything unusual about the winter weather "for the particular work location and the time of year." *Id*. Accordingly, 1-A Construction cannot rely upon unusually severe weather to excuse timely performance.

Delayed Issuance of the Notice to Proceed. 1-A Construction complains that the NTP, which was issued on August 23, 2010, should have been issued by late June and that the delay in its issuance reduced the available on-site work time before winter weather closures. Appellant's Motion at 6. Yet, the solicitation in this case expressly indicated that work was not "estimated to begin" until approximately August 1, 2010. AF at 46. Although that language "did not bind the government to deliver a notice to proceed by any particular date," *M.A. Mortenson Co. v. United States*, 843 F.2d 1360, 1362 (Fed. Cir. 1988), it gave 1-A Construction reasonable notice not to anticipate the NTP in June. Further, the record is clear that 1-A Construction actually requested the August 23, 2010, issuance date and that the USFS accommodated that request. In fact, the contracting officer even suggested an earlier date, asking, "Do you want the notice to proceed dated for August 23rd or an earlier date?" AF at 400. In any event, 1-A Construction failed to protest or even complain about the alleged NTP delay at the time (when the Government could have taken action to eliminate the delay) or at any time before filing this appeal, thereby waiving its objection. *See Ling-Temco-Vought, Inc. v. United States*, 475 F.2d 630, 637-39 (Ct. Cl. 1973); *Calfon Construction, Inc. v. United States*, 18 Cl. Ct. 426, 439-42 (1989), *aff'd*, 923 F.2d 872 (Fed. Cir. 1991).

The USFS's Alleged Direction as to the Order of Work. 1-A Construction asserts that the USFS directed the order in which it had to perform work, forcing it to start with Woodward and then Umatilla Forks, and that it would have been able successfully to complete all work if only it had been allowed to order work in the manner that it wanted. The contemporaneous documents of record make very clear that it was 1-A Construction, not the USFS, that decided to start at Woodward, then move to Umatilla Forks, and so on.

Defective Specifications. 1-A Construction blames delays on the Goverment's alleged defective drawings and specifications, asserting that they contained errors ("such as bad part numbers or model numbers, etc."), omissions, and inconsistencies. Appellant's Motion at 9-10. In support, it cites a laundry list of problems that it found in the drawings and specifications. *Id.* But anything that 1-A Construction has identified is either (1) a relatively minor issue that the USFS quickly addressed and corrected, or (2) a problem not in the specifications themselves, but with product approval submittals by 1-A Construction that sometimes proposed items that were not fully compliant with the specifications. Throughout

the performance of this contract, there were only six contract modifications, all of them bilateral, totaling less than $20,000, the largest of which added length to water and power lines at the Woodward and Fremont sites within days of NTP issuance. AF at 449-51; *see* AF at 491-92, 594-615, 677-78, 751, 897-89 (modifications adding insulation to the new pump house buildings for $750, changing the applicable wage determination, switching drinking fountain fixtures and a water tank for $2818.30, permitting the USFS to pay 1-A Construction for a tank not yet delivered to the project site, and changing to the manner of installation of a tank float valve at Bull Prairie at no cost). Each of these bilateral contract modifications created an accord and satisfaction as to the changes covered by the modifications, barring 1-A Construction from now relying on the specification issues underlying the modifications as a basis for claiming excusable delay. *See Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1344 (Fed. Cir. 1999) (barring contractor from relying upon delays identified in bilateral modifications as excuses in response to default termination). Even without that accord and satisfaction, 1-A Construction has identified no significant defects that could reasonably have caused it anything beyond a minimal non-critical delay. The contractor that finished the work which 1-A Construction had left undone was able to complete the work based upon the drawings and specifications from 1-A Construction's contract, and it had no problems with them, indicating that they were not defective. Ammons Affidavit ¶¶ 3, 5. From our searching review of the record, we have not located any viable support for 1-A Construction's defective specifications allegations.

1-A Construction also complains that the drawings and specifications were incomplete, improperly "expecting [the] contractor to design through submittals." Appellant's Motion at 9. Yet, that was exactly what the contract anticipated that the contractor would do. Where specifications "merely set forth an objective without specifying the method of obtaining the objective," they constitute performance specifications, *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002), which "leave it to the contractor to determine how to achieve th[e] results" that are to be obtained. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987); *see Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,775, at 171,130 (quoting *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1357 (Fed. Cir. 2002)). Many of 1-A Construction's complaints relate to the USFS's submittal responses, which sometimes expressed the USFS's concerns that the submittals did not seem to satisfy the performance requirements of the specifications, and the reevaluation and resubmission that 1-A Construction would have to undertake after a submittal rejection. That 1-A Construction sometimes had trouble responding to the performance requirements of the specifications does not mean that the specifications were defective. It means only that 1-A Construction did not completely understand the requirements of its contract.

The USFS's Allegedly Slow Responses to Submittals. 1-A Construction asserts that the USFS inordinately delayed responding to its submittals, with it sometimes taking months to get a submittal approved. The record completely conflicts with 1-A Construction's assertion. Under the terms of the contract, the USFS had fourteen days to approve each pre-work submittal and fifteen days to approve any final inspection submittals. AF at 121, 352-53. The USFS was generally very swift in reviewing 1-A Construction's submittals, particularly in 2011 when it would often turn submittals around in a day as a means of trying to get the project moving. 1-A Construction's real complaint is that the USFS did not always approve submittals and sometimes returned them for reevaluation and resubmission when the USFS found that proposed products did not satisfy the requirements of the project specifications. If there were times when the USFS took more than its allotted fourteen days to review a submittal, 1-A Construction has not established that it actually impacted timely contract completion.

Fires. 1-A Construction also claims that fires delayed its ability timely to complete its work. Although fire is a recognized basis for excusing timely performance under the Default clause, 48 CFR 52.249-10(b)(1), 1-A Construction's allegations have nothing to do with fires at any of the project sites that it had to work. Instead, 1-A Construction voluntarily entered into separate firefighting contracts while it was working on the contract at issue in this case, leaving it with no crews available to work this contract. The "fire" delay that the Default clause excuses is one that is "beyond the control and without the fault or negligence of the Contractor." *Id.* The direct cause of 1-A Construction's lack of available crews was its decision to accept other contract work when it lacked the capacity to do so while performing work under this contract, which is not a cause "beyond the control" of the contractor. 1-A Construction cannot rely on fires to excuse its untimely performance.

Floods. 1-A Construction also alleges flooding as an excusable delay, citing to a YouTube video purporting to show some flooding at some point near the Umatilla Forks project site. Appellant's Response Brief at 5. In response to the USFS's challenge to the existence of any flooding, 1-A Construction asks that we "watch the video, as it looks like a flood to us and it was near Umatilla Forks campground." *Id.* 1-A Construction has not identified any impact from flooding on its ability to work at that project site. The alleged flooding has to cause a delay in completing the contract work for it to constitute an excuse to a default termination, 48 CFR 52.249-10(b)(1), something that 1-A Construction has not shown.

Other Alleged Excusable Delays. In its pleadings, 1-A Construction has identified several other alleged delays, but without any real development of its allegations. It alleges that the USFS "did not share their superior knowledge of their design" with 1-A Construction, *see* Appellant's Statement of Material Facts ¶ 11; that 1-A Construction was

delayed sixteen hours by a third-party logger at Woodward, *see id.* ¶ 32; that it was delayed by "Bull Prairie District personnel interference," *id.* ¶ 30; that the USFS denied it effective access to an unidentified project site by not shutting off water for a period of time because of campers, Appellant's Response Brief at 9; and that there were differing site conditions that 1-A Construction would have discovered had it been allowed a pre-bid site visit, *id.* at 10. Even a pro se appellant must develop and prove its case, based upon actual evidence. "[A]lthough we make some allowances for 'the [pro se] plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements,' the [tribunal] cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janner*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). The allegations and the record here are simply too sparse to allow us to find that 1-A Construction has met its burden of proving the existence of any of these excusable delays.[6]

3. No Showing of Ability to Timely Perform

As an alternative to establishing that there were excusable delays affecting contract completion, a contractor can overcome a default termination for failure to make progress by showing that its actual progress was sufficient to avoid actually endangering timely contract completion. *McDonnell Douglas*, 567 F.3d at 1353. For the reasons previously discussed, 1-A Construction did not rebut the Government's showing to the contrary.

V. 1-A Construction's Other Bases for Challenging The Default Termination

A. Failure to Report to the Small Business Administration

1-A Construction argues that the default termination is procedurally defective because the USFS "was required to notify the [Small Business Administration (SBA)] of the termination of this woman owned small business" prior to termination and that it failed to

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[6] 1-A Construction also alleges that the USFS interfered with its work by allowing cabins at the Fremont site to be rented. Appellant's Statement of Material Facts ¶ 18. Yet, the contract expressly informed 1-A Construction that all sites would be open to the public during contract performance, AF at 55, and the USFS inspector expressly informed 1-A Construction that, while the Fremont site would be open to the public during the summer, the USFS could cancel any cabin rentals there if and when needed for 1-A Construction to "complete its work efficiently." AF at 852. Because 1-A Construction never worked at Fremont and never asked the USFS to cancel rentals, it has no basis for this complaint.

do so. Appellant's Motion at 20; *see* Appellant's Reply at 6. 1-A Construction is mistaken about the USFS's termination authority. Although procuring agencies are to involve the SBA in default termination decisions under contracts awarded pursuant to the 8(a) subcontracting program, *see, e.g.*, 13 CFR 124.518(a); *Small Business Administration (Mills Enterprises, Inc.)*, AGBCA 76-165, 77-2 BCA ¶ 12,657, at 61,360, this contract was not awarded through that program. Instead, the USFS awarded this contract directly to 1-A Construction under the auspices of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, and 1-A Construction has identified nothing in that statute, its implementing regulations, or the language of the contract itself that requires referral of default termination decisions to the SBA. It is true that the SBA, in providing policy guidance to agencies about the ARRA, "strongly encouraged" agencies "to take advantage of authorized small business contracting programs to create opportunities for small businesses," *see* SBA's Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009 ¶ 1.6 (Apr. 3, 2009),[7] but that guidance did not preclude agencies from making contract awards to small businesses outside those specialized programs. Because "the discretion to set aside or not set aside a given procurement for award under Section 8(a) inheres in the procuring agency, not SBA," *Ray & Ray's Carpet & Linoleum, Inc.*, GSBCA 5666, 83-1 BCA ¶ 16,184, at 80,415 (1982),[8] 1-A Construction has no basis for complaining about the USFS's election or the lack of SBA involvement in this contract.[9] Its assertion that the default termination decision is defective because the SBA did not review and approve it is meritless.

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[7] The Executive Office of the President distributed that SBA guidance to the heads of all federal agencies on April 3, 2009.

[8] Although the SBA Administrator might appeal a procuring agency contracting officer's decision not to utilize a specialized small business program for a particular procurement, such appeals are heard and decided within the procuring agency. *See, e.g.*, 15 U.S.C. § 637(a)(1)(A); 13 CFR 124.505; *id.* 126.610, .611; *id.* 127.508, .509.

[9] Even if 1-A Construction believed that its contract should have been subject to the provisions of a specialized small business program, that alleged defect was obvious to offerors during the procurement process. 1-A Construction waived any complaint about the manner in which its contract was awarded by failing to protest that issue to the contracting officer before submitting its offer. *See Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985) (discussing waiver of solicitation defects); *Evergreen Forest Management, Inc.*, AGBCA 84-299-1, 88-3 BCA ¶ 20,950, at 105,873 (same).

B. Allegations of Agency Bad Faith

1-A Construction repeatedly argues that the replacement contracting officer acted in bad faith toward it, Appellant's Motion at 29-30, which we assume it raises as a basis for challenging the validity of the default termination. A contracting officer's bad faith in administering or terminating a contract can constitute a potential basis for overturning a default termination. *Libertatia Associates, Inc. v. United States*, 46 Fed. Cl. 702, 706 (2002); *Schmalz Construction, Ltd.*, AGBCA 86-207-1, et al., 91-3 BCA ¶ 24,183, at 120,963. Such bad faith could include a course of government conduct that was "designedly oppressive," *Struck Construction Co. v. United States*, 96 Ct. Cl. 186, 222 (1942); that initiated a "conspiracy to get rid of" a contractor, *V.I.C. Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 1598, 09-2 BCA ¶ 34,284, at 169,364 (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002)); or that showed "a pattern of animus on the part of particular individuals," *North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158, 189 (2007). Nevertheless, in considering any bad faith allegation, we must "start out with the presumption that the official acted in good faith." *Knotts v. United States*, 121 F. Supp. 630, 631 (Ct. Cl. 1954), *quoted in Am-Pro Protective Agency*, 281 F.3d at 1239; *see ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, et al., 13 BCA ¶ 35,260, at 173,075 ("government officials are presumed to act conscientiously and in good faith in the discharge of their duties"). "[I]t requires 'well nigh irrefragable proof' to induce [a tribunal] to abandon the presumption of good faith dealing." *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976). That "'irrefragable proof' has been equated with evidence that the Government had a specific intent to injure the contractor," *HKH Capitol Hotel Corp.*, ASBCA 47575, 98-1 BCA ¶ 29,548, at 146,472, an intent that must be shown by clear and convincing evidence. *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004). As the Court of Appeals for the Federal Circuit has recognized, "showing a government official acted in bad faith is intended to be very difficult." *Am-Pro Protective Agency*, 281 F.3d at 1240.

1-A Construction's allegations of bad faith are generally based upon supposition and suspicion. 1-A Construction complains that the contracting officer issued a change request requiring it to move three boulders, Appellant's Motion at 21, but it does not explain why, if it thought the work was not covered by its contract, it could not have submitted a claim for compensation.[10] It further asserts that the contracting officer did not timely process an

[10] As support for its bad faith allegation, 1-A Construction cites to Exhibit 17.0.13 from the appendix to its motion. That document is titled "Change Request No. 028," and 1-A Construction asserts that it is a July 30, 2011, change order request for moving the three boulders. Appellant's Motion at 21. It is one of several documents in 1-A Construction's

invoice from a subcontractor, misdescribed a 2010 letter as a "cure notice" when it was not, ordered it to use a non-compliant suction valve, and ordered another change, most without any citation to the record. *Id.* at 20-22. Nothing in these allegations, much less in the record itself, indicates, much less establishes, that the contracting officer had a specific intent to injure 1-A Construction.

1-A Construction's most specific bad faith argument relates to the contracting officer's direction in July 2011 that 1-A Construction could not start work at Fremont or Ditch Creek until it had finished work at the three other project sites. Yet, the record is clear that the contracting officer gave that direction to protect the Government's interests, not to injure 1-A Construction. Earlier in the year, the USFS had paid for rework necessary because of 1-A Construction's prior failure to provide adequate protection of uncompleted work before the winter snows at the Woodward site. By July, given 1-A Construction's slow progress in performing at the first three project sites and its failure to complete work at any of them with only three months of contract time remaining, the contracting officer (notwithstanding that 1-A Construction would essentially complete the Bull Prairie work in August) was justifiably concerned about 1-A Construction's ability satisfactorily to complete three open projects if, at the same time, it was going to start two more. Given 1-A Construction's performance history, he justifiably feared that the contractor could not finish two new projects in less than three months, would be in contract default, and would leave unfinished work open to the elements through another winter. There is nothing in the record to suggest that the contracting officer was trying to injure 1-A Construction, rather than to protect the USFS. The record does not show governmental bad faith.

C. Promissory Estoppel

1-A Construction also argues that the USFS somehow induced it to perform a contract with numerous defects and that it is entitled to some relief through the doctrine of promissory estoppel. Although understanding the basis of 1-A Construction's argument is difficult, we need not try to define the basis further because a contractor cannot pursue, before the Board,

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appendix whose authenticity the USFS has questioned. The USFS informs us that 1-A Construction did not submit some of the documents contained in the appellant's appendix (including Exhibit 17.0.13) during contract performance, but instead created them for purposes of settlement negotiations well after the contract at issue here was terminated. In the extensive record of e-mail messages between the parties from the contract performance period in the appeal file, there is no mention of this change request. We do not find Exhibit 17.0.13 to be authentic. We need not decide the authenticity of the other questioned documents because, even if legitimate, they would not affect the result here.

a cause of action against the Government founded upon promissory estoppel. *Embarcadero Center, Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362, at 107,681 (1988). "[P]romissory estoppel is essentially an equitable cause of action whereby one who reasonably relies on another's promise can subsequently require that person to make good on his promise." *Carter v. United States*, 98 Fed. Cl. 632, 638 (2011). Because it is based on equity, "[a]n obligation based upon promissory estoppel is a type of contract implied-in-law . . . and cannot be asserted against the government." *RGW Communications, Inc.*, ASBCA 54495, et al., 05-2 BCA ¶ 32,972, at 163,338 n.13; *see LaMirage, Inc. v. United States*, 44 Fed. Cl. 192, 199-201 (1999) (although the extent to which equitable estoppel may be applied against the government remains open, it is clear that the court lacks jurisdiction to entertain promissory estoppel claims because they are implied-in-law), *aff'd*, 232 F.3d 912 (Fed. Cir. 2000). Alternatively, to the extent that 1-A Construction is attempting to argue that the USFS improperly induced it to perform its existing contract through misrepresentations – an argument that could be construed as alleging a breach of contract, over which we would possess jurisdiction – we find that the facts of this case do not support that argument. Whatever 1-A Construction's intentions, the argument is meritless.[11]

IV. The Government's Request for Excess Reprocurement Costs

In its briefing, the Government has detailed the manner in which it attempted to have 1-A Construction's surety, Lexon Surety Group (Lexon), take over this contract following the default termination. It has also detailed how, after Lexon declined to complete the contract, it was forced to reprocure a new contractor to complete the necessary work and that the USFS incurred significant costs through substantial completion of the job on October 27, 2012 – 365 days after 1-A Construction was supposed to have completed the contract work. The Government has asked us to affirm 1-A Construction's liability for the costs that it has identified in its briefing.

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[11] 1-A Construction also argues that the Board should find that its contract is "void" because there was no "'meeting of the minds' on the subject matter of the contract." Appellant's Motion at 28; *see id.* at 32. Although we are uncertain as to the remedy that 1-A Construction believes it would receive through this legal theory, we reject its premise. Determining whether there was a meeting of the minds is an objective inquiry, based upon objective evidence, into "the existence of an offer and a reciprocal acceptance." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). There is no question that the offer and acceptance of this competitively bid contract, with its detailed statement of work, drawings, and performance specifications, objectively satisfy the requirements for formation of a contract.

There is, alas, one thing missing from the USFS's discussion of the excess costs that it allegedly had to incur because of 1-A Construction's default: a contracting officer's decision demanding payment of those costs. There is nothing in the record to indicate that, after the contracting officer issued his decision terminating the contract for default, he issued another decision imposing excess reprocurement costs in a sum certain.

As we recently explained in *U.S.I.A. Underwater Equipment Sales Corp. v. Department of Homeland Security*, CBCA 2579, 14-1 BCA ¶ 35,503, *aff'd*, No. 14-1498 (Fed. Cir. March 6, 2015), the Board lacks jurisdiction to entertain a government demand for excess reprocurement costs unless and until a contracting officer issues a decision, consistent with the requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), formally demanding payment of a sum certain from the contractor and notifying the contractor of its appeal rights:

> As noted above, the CDA requires each claim to be the subject of a written decision by the contracting officer. 41 U.S.C. § 7103(a)(3). The Court of Appeals for the Federal Circuit has held that "a final decision by the contracting officer on a claim . . . is a 'jurisdictional prerequisite' to further legal action thereon." *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) [en banc]; *see also England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004). Here, the contracting officer has not issued a final decision assessing excess reprocurement costs in a sum certain against the contractor. All that has occurred is that the Government mentioned the possibility of a future assessment of reprocurement costs of an undetermined amount. Until the Government issues a final decision assessing excess reprocurement costs, and [the contractor] appeals the final decision, we do not possess jurisdiction to entertain the Government's prospective claim.

Id. at 174,031; *see Diamante Contractors, Inc. v. Department of the Interior*, CBCA 2017, 11-1 BCA ¶ 34,679, at 170,821-22 (no jurisdiction over appeal of Government's demand for excess reprocurement costs without contracting officer's decision assessing them). Because there is no indication that the USFS contracting officer ever issued a decision to 1-A Construction demanding payment of the costs that it now seeks to recover, followed by 1-A Construction's appeal of that decision, the Board has no jurisdiction to entertain the USFS's request that we award it those costs.

V. 1-A Construction's Request for an Affirmative Monetary Recovery

For the very same reasons that we lack jurisdiction over the Government's excess reprocurement cost arguments, we have no jurisdiction to entertain 1-A Construction's compensation request for extra costs that it allegedly incurred during performance. When 1-A Construction filed this appeal, it challenged the contracting officer's final decision terminating 1-A Construction's contract for default. Nevertheless, in its notice of appeal, 1-A Construction indicated that it was seeking $8533.96 in damages for extra work that it allegedly performed under the contract, as well as "prompt payment of all future invoices." Yet, as of the filing of the notice of appeal, 1-A Construction had not submitted any claim pursuant to the CDA seeking those damages.

Before the Board can exercise jurisdiction over a contractor's request for monetary damages, the contractor must have submitted a written claim to the contracting officer for a decision. *Shaw Environmental, Inc. v. Department of Homeland Security*, CBCA 2177, et al., 13 BCA ¶ 35,188, at 172,667 (2012) (citing 41 U.S.C. §§ 7103(a), 7105(e)(1)(A)). There are three basic requirements for a valid CDA monetary claim: "(1) the contractor must submit the demand in writing to the contracting officer, (2) the contractor must submit the demand as a matter of right, and (3) the demand must include a sum certain." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). "The CDA also requires that a claim indicate to the contracting officer that the contractor is requesting a final decision," although this request need not be explicit. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). Because 1-A Construction had not submitted a written claim before it filed its appeal to this Board seeking payment of the monies it seeks, we lack jurisdiction to entertain 1-A Construction's monetary demand. To the extent that we were to provide 1-A Construction with any leniency because it is proceeding without an attorney, it could have no effect upon this jurisdictional defect, as "the leniency afforded *pro se* litigants with respect to mere formalities does not relieve them of jurisdictional requirements." *Demes v. United States*, 52 Fed. Cl. 365, 368 (2002) (citing *Kelley v. Secretary, United States Department of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987)).[12]

[12] Even if we were to view 1-A Construction's monetary request as a request for termination for convenience settlement costs that it could receive if the USFS's default termination were overturned, the mere conversion of the agency's default termination to a convenience termination would not automatically vest us with jurisdiction over 1-A Construction's request for such costs. *Swanson Group, Inc.*, ASBCA 52109, 04-1 BCA ¶ 32,603, at 161,324-25. Before we could consider any request for termination settlement costs, the contractor would still have to submit a termination settlement proposal to the agency, after which time the proposal would have to ripen into a claim. *James M. Ellett*

1-A Construction might argue that we could assume jurisdiction over its monetary request based upon a letter that it wrote to the USFS during this appeal. On September 23, 2013, 1-A Construction submitted a letter to four individuals – Secretary of Agriculture Thomas Vilsack, the Deputy Secretary of Agriculture, the Chief of the USFS, and the Associate Chief of the USFS – complaining about the "wrongful termination" of its contract and demanding payment of $318,660.73.[13] Although the original letter was uncertified, 1-A Construction resubmitted it on October 28, 2013, with a certification signed by one of 1-A Construction's senior partners using the language that the CDA requires for claims in excess of $100,000. *See* 41 U.S.C. § 7103(b)(1) (contractor must certify claim if it exceeds $100,000). That letter does not provide us with jurisdiction over 1-A Construction's monetary demand, for three reasons:

First, jurisdiction is established at the time that a notice of appeal is filed. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,972. "[P]ost-filing events cannot create jurisdiction." *Id.* (quoting *Tyler House Apartments, Ltd. v. United States*, 38 Fed. Cl. 1, 17 (1997)). When 1-A Construction filed its appeal of the contracting officer's default termination decision, there was no pending claim and no jurisdictional basis for seeking monetary relief before the Board. Any actions that 1-A Construction took after filing its case cannot cure that jurisdictional defect.

Second, the letter that 1-A Construction sent does not constitute a valid CDA claim. It is not directed to and did not seek a decision from the USFS contracting officer, and there is no evidence in the record showing that it was submitted to the contracting officer. Instead, the letter was submitted to the Secretary of Agriculture and three other high-level officials within the Department of Agriculture. The contracting officer not only was omitted from the addressees on the letter, but also was not one of the six individuals who were formally copied on the letter. Because it is the contracting officer who must issue the decision on a claim, the contractor is required to submit the written demand seeking a decision "to the contracting officer," *H.L. Smith*, 49 F.3d at 1565, and ask him to issue a decision. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327-28 (Fed. Cir. 2010); *see* 41 U.S.C. § 7103(a). A letter demanding payment of a sum certain that is submitted only to individuals other than the contracting officer, and does not indicate to the contracting officer that the

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Construction Co. v. United States, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996).

[13] The record contains no adequate explanation of how 1-A Construction's monetary claim increased from $8533.96 in its notice of appeal to over $300,000 eighteen months later, even though, while this appeal has been pending, 1-A Construction has not performed any work under the terminated contract.

contractor is seeking his decision, does not meet the claim submission requirements of the CDA.

Third, even if the October 23, 2013, letter could be viewed as a valid CDA claim, 1-A Construction never filed an appeal of the contracting officer's "deemed denial" of that claim, precluding us from exercising jurisdiction over it.

For these reasons, we lack jurisdiction to entertain 1-A Construction's monetary demands.

Decision

For the foregoing reasons, we sustain the USFS's termination of 1-A Construction's contract for default. Accordingly, we **DENY IN PART** 1-A Construction's appeal. 1-A Construction's request for monetary damages and the USFS's request for excess reprocurement costs are not properly before us, and they are **DISMISSED FOR LACK OF JURISDICTION**.

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HAROLD D. LESTER, JR.
Board Judge

We concur:

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ALLAN H. GOODMAN
Board Judge

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JEROME M. DRUMMOND
Board Judge