

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Ryan Company) ASBCA No. 48151
)
Under Contract No. F33601-93-C-W087)

APPEARANCE FOR THE APPELLANT: Leo S. McNamara, Esq.
McNamara & Flynn, P.A.
Boston, MA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Diana S. Dickinson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ELMORE

The Ryan Company (Ryan or appellant) has appealed the contracting officer's (CO) 1 September 1994 final decision terminating Ryan's contract, No. F33601-93-C-W087, for default (R4, tab 4).¹

FINDINGS OF FACT

1. On 30 September 1993 Ryan, having confirmed its bid price on 21 September 1993, was awarded Contract No. F33601-93-C-W087 (W087), a firm fixed-price construction contract to "FURNISH ALL LABOR, EQUIPMENT, MATERIAL AND PERFORM ALL NECESSARY OPERATIONS TO REPLACE THE MEDIUM VOLTAGE SWITCHGEAR AT SUBSTATIONS [hereinafter "sub" or "subs"] "A", "D", AND "E", WRIGHT-PATTERSON AFB [hereinafter WP], OHIO IN ACCORDANCE WITH PROJECT WP 920220 PLANS AND SPECIFICATIONS" at a total contract price of \$897,000. Contract work was to commence within 10 calendar days, and be completed no later than (NLT) 270 calendar days, after issuance of the notice to proceed. (R4, tabs 1, 104)

2. The contract incorporated by reference the following Federal Acquisition Regulation (FAR) clauses (*id.*): 52.212-3 COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984); 52.212-5 LIQUIDATED DAMAGES—CONSTRUCTION (APR 1984); 52.212-12 SUSPENSION OF WORK (APR 1984); 52.233-1 DISPUTES (DEC 1991); 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984); 52.249-2 TERMINATION FOR

CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) Alternate I (APR 1984); 52.249-10
DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984).

3. The DEFAULT clause provided in pertinent part (*id.*):

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

....

4. The LIQUIDATED DAMAGES (LDs) clause provided in pertinent part that if the contractor failed to complete the work within the contract performance period it was subject to an assessment of \$125.57 per day for each day of delay. If the Government terminated the contractor's right to proceed, the resulting damages would consist of LDs until such reasonable time as may be required for final completion of the work together with any increased cost the Government incurred in completing the work. (*Id.*)

5. The contract specifications provided in pertinent part as follows (R4, tab 2):

Section 01015, paragraph 1.02C:

C. The Engineering and Planning Division, Engineering and Services Group (645 CEG/CEC), . . . is hereby designated as the representative of the Contracting Officer and responsibilities include but are not necessarily limited to the following:

1. Technical review of shop drawings, catalog cuts, and technical data for all material and equipment requiring approval.
2. Periodic inspection and final acceptance of the work under the contract.
3. Verifying that progress is maintained in accordance with the contractor's approved progress schedule.

4. Verifying that contractor is accomplishing work in conformance with contract requirements.

Section 01015, paragraph 1.09, DEFINITIONS:

A. "Provide" is defined as "furnish new, install, and make operational".

B. "Replace" is defined as "remove existing and provide new in same location and make operational".

C. "Relocate" is defined as "remove existing, install existing in different location and make operational".

D. "Reinstall" is defined as "remove existing, install existing in same location and make operational".

E. "Extend" is defined as "provide new from existing to designated equipment or location and make operational".

F. "Reroute" is defined as "remove existing and provide new in the designated location and make operational".

Section 16010B, paragraph 1.02, DEFINITIONS:

A. Unacceptable work is that work that does not conform to the Specifications, Specified Codes, and Contract Drawings.

Section 16362A, paragraphs 2.01, ENCLOSURE and 2.08 BUS:

2.01 ENCLOSURE

A. Indoor switchgear shall consist of one or more vertical sections which are mounted side by side and connected electrically and mechanically to form complete switching equipment.

....

F. Each enclosure shall be top fed.

....

I. Each vertical section shall be weatherproof and include space heaters in each section. . . .

. . . .

K. Switchgear shall be bottom fed except for main breakers which shall be top fed by copper pipe.

. . . .

2.08 BUS

A. Bus joints shall be silver plated with at least 2 bolts per joint.

B. ¼ inch by 2 inch ground bus bar shall be furnished and secured to each vertical section. Ground bus shall extend full length of switchgear assembly.

C. Bus bars shall be braced to withstand the magnetic stresses developed by currents equal to the main power circuit breaker close, carry, and interrupt rating.

6. Section 01300, SUBMITTALS, in pertinent part, required the contractor “to use all items as herein specified, unless an ‘equal or better’ item is approved”; and that in order to use an “equal or better” item the contractor needed to submit all technical data to show the product to be “equal or better” (paragraph 1.02). Schematic diagrams were to be accurate non-scale drawings showing all components of a system and how they were interconnected. Schematics were to include a written sequence and detailed step by step explanation of the operation of the system (paragraph 1.07A3). Shop drawings were to be drawn to scale showing the size, type and arrangement of the particular equipment or system and all component connections and mountings, how the system would operate and the relationship of the new work to the existing construction (paragraph 1.07A4). (*Id.*)

7. Drawing E-1, GENERAL NOTES, provided in pertinent part (*id*):

7. Substation E shall only have power outages during the month of December.

. . . .

11. Only one substation shall have a power outage at a time.

8. Ms. Blanche Corbett, the Government's contract administrator/contracting officer's representative (CA/COR), reported in the Government's 15 November 1993² pre-construction (pre pre-con) meeting minutes that Ryan's notice to proceed (NTP) would be issued at the 16 November pre-construction (pre-con) meeting; that the Government intended to suspend the site work at sub E until December 1994; and that Mr. Ronald Lee, the project designer and project engineer, postulated the following: the majority of the 270 calendar day performance time was to accommodate the switchgear (S/G) submittal process and material delivery;³ the construction was minimal, 4 to 5 weeks per substation; subs A & D should be completed within the 270 day contract performance period; the facility serviced by sub E agreed to a December 1994 power outage to allow installation of the new S/G;⁴ and the contractor would be required to secure (remove visclean, level, and provide portable heaters if needed) and be permitted to store sub E's S/G in a Government provided storage area. (R4, tab 6; SR4, tab 16; tr. 1/129, 3/117-19, 158) Ms. Corbett relied exclusively on Mr. Pascal Van Horn, the Government's construction representative (con-rep), and Mr. Lee, when faced with technical questions regarding electrical aspects of the contract (tr. 2/37).

9. At the 16 November 1993 pre-con Mr. Michael Grady, Ryan's vice-president, was issued the NTP. Mr. Grady was informed that materials must be approved prior to use; the Government would pay part of the S/G cost provided the equipment was secured when it arrived but it would not pay for material stored on or off base; subs A and D were expected to be completed by 16 August 1994 the contract completion date; and failure to complete the work within the 270 calendar days called out in the contract may subject the contractor to assessment of LDs. The parties discussed Drawing E-1, Note 7, that sub E's power outage was scheduled for December 1994 and the Government would not commit to a different power outage date for sub E until Ryan submitted its schedule. Mr. Grady did not recall receiving a copy of the pre-con meeting minutes. (R4, tabs 2 (Drawing E-1), 6, 7; tr. 1/257-58, 2/73-74, 131-35, 8/12-15, 17-19)

10. On 23 November 1993 Ryan submitted a "Construction Schedule" the cover letter of which stated sub E's construction was suggested for June 1994 and if this time period was unacceptable Ryan would do the work in December 1994 (R4, tab 8; tr. 2/67, 8/19-20).

11. On 23 December 1993, one month after submittal, Ryan's contract performance schedule was disapproved, in part, because sub E was not scheduled for construction in December 1994. The CO orally informed Ryan the facility serviced by sub E agreed to the period "1600 22 Jul 94 to 0700 01 Aug 94" for outages necessary to allow replacing sub E's S/G. Ryan was requested to "consider this change and revise [its]

schedule accordingly.” Mr. Grady, willing to accept the July period for performing sub E work since it permitted total completion of the contract within 270 calendar days, changed the performance schedule for sub E to July 1994 and the schedule was subsequently approved. Neither Mr. Grady nor the Government considered this as the final agreement on the subject. (R4, tabs 9-10, 107-109; tr. 1/227, 2/69-72, 79-83, 3/163-65, 8/21, 120-23; findings 21, 27, *infra*)

12. On 11 February 1994 the CO informed Ryan its material submittals were 12 weeks late and should be submitted within 10 days or the Government may invoke its rights under the Default clause (R4, tab 14).

13. On 11 February 1994 Ryan submitted material Submittal Nos. 1-2, for the instrument transformer and solid state relays, and 1-3, for Westinghouse (WH) S/G, for subs A, D, and E. Attached to the transmittal cover letter was a letter from Timco Electric Power and Controls, Inc. (Timco), Ryan’s S/G and relay panel distributor/ subcontractor, requesting a variance to the specifications on three items, none of which are relevant to this appeal. (SR4, tab 17)

14. On 18 February 1994 Mr. Lee addressing Submittal No. 1-2 recommended the instrument transformer be approved and the solid state relays be disapproved stating in pertinent part (R4, tabs 15, 17, 113, 115; SR4, tab 17; tr. 3/166):

The relays themselves are acceptable. However, on Timco drawing 93200A1, on Relay Panel #A-1, Panel #D-4, and Panel #D-6 the relays shall be alphabetized from left to right, not right to left. I would also prefer that all relay panels have the relays alphabetized from left to right in rows . . . instead of top to bottom and then left to right as submitted. . . . Also, on Timco drawing 93200A1, Panel #D-6 shall be 32” wide to match existing. . . . Timco drawing 93200A2 indicates that the relay panels will be 12” deep which will not allow the existing steel trench covers to be removed. The existing relay panels are approximately 6” deep as shown. The new panels may be somewhat deeper, but not 12” deep as shown. Timco drawing 93200-E2 indicates all the feeders are 12470V which is not correct; some are 12470V and some are 6900V. . . . Also on Timco drawing 93200-E5, not all the feeders are 12470V; some are 12470V and others are 6900V. . . .

15. On 18 February 1994 Mr. Lee, addressing Submittal No. 1-3, recommended the WH S/G technical data, catalog cuts and shop drawing be disapproved stating in pertinent part (*id*; tr. 3/181, 193-95):

The Substation “A” tie breaker, vertical section 05, requires a 2000A ammeter and phase selector switch as required by the specifications. The Substation “E” potential transformer shall be 7200-120V (for 6900V). The Substation “E” lightning arresters shall be 6KV station class arresters (for 6900V). . . . Since the submitted switchgear for Substation “D” is not GE Powervac II, details must be submitted on how the contractor intends to interconnect the existing GE 2000A bus with the new Westinghouse 2000A bus. Cable ties between the bus bars will not be considered acceptable for a multitude of reasons, principally because they are inferior to a direct bus bar to bus bar connection. We direct your attention to Sheet E-5 of the drawings which specifically states that the new switchgear at Substation “D” shall be “compatible with the existing GE Powervac II switchgear.” The primary reason for that statement on the drawings was to ensure bus bar location compatibility between the existing and new switchgear. . . .

16. Mr. Lee at the hearing conceded his disapproval recommendation for sub A’s and E’s S/G was based on non-contractual defects, required only minimal corrections, or resulted from a drawing mistake regarding the depth of the relay panels.⁵ Mr. Lee further conceded that when he designed the project he had neither seen nor envisioned a cable to bus interconnection and he declared it unacceptable because no one at WP AFB viewed cable to rigid bus as reliable as a rigid bus to rigid bus interconnection;⁶ the specifications did not provide sufficient information to make a rigid bus to rigid bus interconnection; properly installed cable could be used safely; and “basically between the relay and switchgear submittals, everything was approvable except for some minor problems . . . and one bus connection.” It is undisputed that: (1) the lines on the plans when traced back to the transformers show there was a need for 6900 volt power at sub E and 6900 and 12470 volt power at subs A and D; (2) although it was the Government’s intent to have all branch breakers bottom fed this was not stated in the specifications; and (3) Mr. Lee did not seek the opinion of a S/G manufacturer regarding whether cable interconnection was acceptable until after the termination. Mr. Charles Emery, the Government’s expert witness, testified that he has seen cable used to interconnect S/G and it was acceptable in the industry if done properly.⁷ (Tr. 2/93-95, 3/166-181, 185-88, 192, 206-08, 212-17, 221-22, 226-28, 248-49, 7/62-63; R4, tab 20)

17. On 23 February 1994 the CO, Ms. Candice Thompkins, based on Mr. Lee’s recommendation/comments, returned Submittal No. 1-2, approved in part and disapproved in part, and Submittal No. 1-3 disapproved. The CO, addressing the relays,

stated in pertinent part that Ryan incorrectly showed all feeders as 12470 volts while the specifications and drawing indicate some were to be 6900. Addressing the S/G the CO stated cable to bus between the new and existing S/G at sub D was not acceptable because cable was inferior to a bus bar to bus bar tie-in; drawing E-5 stated sub D's new S/G was to be compatible with the existing GE S/G to ensure bus bar location compatibility between the existing and new S/G; sub A's S/G required a 2000A ammeter and phase selector switch; and subs A and E required the lightening arresters (LAs) to be 6KV station class arresters for its 6900 volt transformer. (R4, tab 17; tr. 3/168-172, 179-81)

18. Mr. Van Horn, in his 23 February 1994 memorandum to Ms. Corbett, recommended Ryan be issued a cure notice because he doubted the work could be done in the time remaining since the submittals had been disapproved and sub E had yet to be scheduled in the July time frame (R4, tab 16).

19. On 1 and 3 March 1994 Ryan responded to the Government's disapproval of Submittal Nos. 1-2 and 1-3 respectively. Responding to the relay panels' disapproval Ryan stated the resubmittal would address the comments and concerns raised but clarification was requested for some of the engineer's comments (R4, tab 18). Ryan's response to the disapproval of the S/G stated that neither the specifications nor the contract drawings required the new and the existing S/G to be connected with rigid bus and that WH was providing cable because they had insufficient information on the existing GE Powervac II S/G. Ryan requested the Government provide GE's S/G as-built drawings and/or any information, *i.e.*, shop order number, serial number, *etc.*, that could be used to get copies of the required drawings from GE for Timco to use to determine the feasibility of providing rigid bus to bus connections vice using a transition section. (R4, tab 19) Ryan requested the Government assist it to get GE to provide the S/G drawings (finding 28, *infra*). The "normal procedure" followed at WP AFB when responding to either a written or a verbal request for information (RFI) was to give a verbal response, seldom following up with a written response (tr. 3/226-28, 9/310-12). Mr. Lee conceded there was insufficient information in the specifications for Ryan to make a rigid bus to bus connection (finding 16, *supra*; tr. 3/226-28). Mr. Lee opined he considered the response both timely and satisfactory (tr. 3/225-26).

20. At a 3 March 1994 meeting with civil engineering (CE), Messrs. Lee, Van Horn, Calderone and Denny Ruschau (infrastructure team leader), the CO was requested to issue a cure notice and to terminate Ryan's contract. CE based the termination request on Ryan's failure to provide material submittals and other administrative items, *i.e.*, progress schedule; list of key personnel; unacceptable items included in Ryan's first S/G submittals; CE's belief Ryan could not complete the work by 16 August 1994, the contract completion date; and Ryan's propensity for litigation. Mr. Lee did inform the CO that Ryan's S/G submittals for subs A and D only needed minimal corrections. It was the CE's position that since Ryan would be a "problem" as exhibited by their prior

reputation, a cure notice was appropriate. The meeting adjourned with the CO agreeing to issue a cure notice. (R4, tab 20; tr. 3/17-19, 234-40) Because of the base lawyer's opposition the cure notice was not issued at this time (tr. 3/19-20, 242-43).

21. On 7 March 1994 Ryan submitted, and on 15 March 1994 the CO approved, the Contract Progress Schedule. The schedule showed sub E's construction being performed during the period 16-29 July 1994. The date for sub E's construction was never officially changed from December 1994 with a contract modification. (R4, tabs 24, 123; tr. 1/105-07, 2/24-26, 82-83; findings 27, 42, *infra*)

22. On 30 March 1994 Ryan resubmitted its S/G and relay panel submittals. Timco's 23 and 29 March 1994 letters, attachments to Ryan's transmittal letter, stated in pertinent part the submittals complied with the engineer's comments for the first S/G and relay panels submittal; the WH S/G was compatible with the existing GE S/G; rigid bus interconnection between the new and the existing S/G was not a contract requirement; and the originally submitted cable interconnection would be used unless the Government was willing, as a change, to pay \$19,584 for rigid bus connection. (R4, tabs 28, 124, 156; SR4, tabs 19-20; tr. 3/243-46, 259-61)

23. Requested by the CA to reply to Ryan's 30 March 1994 letter, Mr. Lee in a 2 April 1994 memorandum stated "[he would] continue to turn down switchgear submittals @ substation D until [Ryan] has met the project requirements." Mr. Lee, parroting his comments for Submittal No. 1-3 stated that Ryan's use of cable vice rigid bus bar to interconnect sub D's existing GE S/G and the new WH S/G was unacceptable because it did not meet the requirements of the contract and because of safety and liability concerns. Mr. Lee postulated that since drawing E-5 stated each new vertical section should be compatible with existing GE S/G, each new WH 15KV breaker and each GE 15KV breaker should be interchangeable, and sub D's new WH S/G should connect to the existing GE S/G by bolting the new bus bar to the existing bus bar as if both S/G were built at the same time. (R4, tabs 29, 30, 127; tr. 3/246, 258; finding 15, *supra*)

24. On 6 April 1994 the CO, based on Mr. Lee's 2 April 1994 memorandum, informed Ryan its 30 March 1994 WH S/G material submittal for sub A was approved subject to a requirement that both sets of LAs and potential transformers (PTs) be 1200 volts, as previously shown on the first submittal and that the "SCADA" connections include a connection to the "a/b contacts" in each breaker to indicate whether the breaker was open or closed. The sub E submittal was approved subject to the "SCADA" connections including a connection to the "a/b contacts" in each breaker to indicate whether the breaker was open or closed. The sub D submittal was disapproved because it failed to show: (1) the new breakers and the existing breakers to be interchangeable; (2) the new and existing bus interconnection could be made by bolting together; and (3) both

sets of LAs and PTs were 1200 volts as submitted in Submittal No. 1-3. (R4, tabs 38, 138, 156; SR4, tabs 19-20; tr. 3/252-56, 259-60, 270-72; findings 14-17, *supra*)

25. Mr. Lee's statement that breaker interchangeability between the existing and new S/G was a contract requirement was an intentional misrepresentation allegedly made "to grab [the contractor's] attention" and he conceded that the only way Ryan could comply was to provide GE Powervac II S/G (tr. 3/123-27, 249-54, 260-61, 275). Mr. Lee further conceded that although cable was not more dangerous he determined, based on his own preference, that the use of the bus bar was less difficult and safer to use and more reliable to meet the 500 million volt amps (MVA) rating called for under the contract (tr. 3/247-49, 256). Mr. Lee also testified, in contradiction to earlier testimony,⁸ that Ryan's completion of a particular substation by a certain date was not urgent since there was no other work dependent on Ryan's contract being completed (tr. 9/305-06, 309-10). Mr. Lee testified that the major problem from the beginning with sub D's S/G submittal was the interconnection and that he was not told until the third submission that WH would install rigid bus bar (tr. 4/179-80). Prior to the termination Ryan's sub D S/G submittal was approved except for the bus interconnection for the existing and new S/G which Mr. Lee had agreed to in principle and which was incorporated in submittal No. 15 (tr. 9/283-84; finding 46, 55 *infra*).

26. On 8 April 1994 the Government approved Ryan's 30 March 1994 solid state relays material submission (R4, tab 125; tr. 3/165).

27. On 14 April 1994 the CA, Ms. Corbett, requested Ryan submit a request for proposal (RFP), by no later than 25 April 1994, for Change Order No. 1, the installation power outage dates change for sub E's S/G from December 1994 to "1800 hours 22 July 1994 to 0600 hours 1 August 94." The CA's letter stated no price negotiations would be held until initiated by the CO, no funds were then available, and no legal liability on the part of the Government for payment of money would arise due to the request or the contractor's response. Ms. Corbett testified she believed the contract performance period for sub E was changed by appellant's approved schedule, but she wanted assurance there were no additional costs associated with the change. (R4, tabs 33, 128; tr. 2/81-83, 86)

28. On 20 May 1994 Ryan, responding to the 6 April 1994 disapproval in part, of its 30 March 1994 S/G submittals, stated the Government's recommendations/comments resulted in "changes to the contract." Ryan, based on Timco's 18 May 1994 letter accompanying the response, contended sub A's and D's original submittal indicated all LAs and PTs would be 12KV; the Government's first set of comments resulted in the current submittal reflecting one 6KV and one 12KV set of LAs and PTs; and to meet the Government's request to now supply the originally submitted two sets of 12KV LAs and PTs would require change orders of \$4,500 and \$6,250 respectively. Addressing sub D, Ryan argued there was no contract requirement for breaker interchangeability; the method

of interconnection of the bus was shown on the submittal through the use of a cable transaction section; to provide a bus throat would require a change order of \$15,240; and rigid bus in lieu of cable would require a \$17,475 change order and the Government would have to comply with Ryan's 3 March request and provide detailed drawings for the existing GE S/G main bus which GE had refused to provide. Mr. Lee provided Ryan with the drawings and other documentation for the GE S/G at sub D in the Government's possession and, conceding this did not alleviate the need for additional information from GE, suggested Ryan and WH field measure the existing GE S/G to accomplish the rigid bus to rigid bus interconnection. (R4, tab 38, 138, 139; tr. 3/226-32, 259-60, 270-71; findings 19, 24, *supra*)

29. Mr. Lee, at the request of Ms. Corbett, on 23 May 1994 responded to Ryan's 20 May letter stating in pertinent part that although sub A's S/G was originally disapproved no change was made to the PT's and LA's as originally submitted; that sub D's submitted WH S/G was acceptable if Ryan provided the proper interconnection, that cable connections did not meet the contract requirements, that the onus was on Ryan to figure out how to make the connection, and no change was made to the PT's and LA's as originally submitted (R4, tab 39; tr. 3/272-80; finding 24, *supra*).

30. Ryan, on 25 May 1994, informed Timco that the Government's project engineer, Mr. Lee, denied responsibility for any extra charges, as Timco alleged in its 18 May letter, and the extra work would be treated as a claim. Timco was requested to provide an acceptable rigid bus interconnection for sub D (R4, tab 144).

31. The CO's 1 June 1994 response to Ryan's 20 May 1994 letter parroted Mr. Lee's 23 May 1994 memorandum stating in pertinent part the Government's comments to Ryan's first submittal for subs A and D did not change the two sets of 12KV PT's and LA's submitted; in the second submittal one set of LAs and PTs was changed to 6KV, and the second submittal for sub A was approved except for the changed PT's and LA's which she disapproved. The CO, addressing sub D, further stated the WH S/G submitted was not "completely compatible" with existing GE S/G in that the cable interconnection was not in compliance with the contract requirements; that had the interconnection been proper the S/G submitted would have been approved; and since Ryan chose to submit WH vice GE S/G, the onus was on Ryan to provide an interconnection that met the contract requirements. Mr. Lee acknowledged that the fabrication of a rigid bus was a "pretty simple thing" to accomplish. (R4, tab 41; tr. 3/280-81)

32. The S/G for subs A and E, both of which had been approved, were delivered to WP AFB on 10 June 1994. Sub A's installation commenced immediately. Sub E, costing "something on the order of \$100,000," was stored at the site where it remained until the default termination. (R4, tab 185; tr. 2/84-85, 130-31, 4/125, 132-33)

33. On 22 June 1994 the CO stated to Ryan that because only 0.74 percent of the contract work had been completed, while the Progress Schedule showed Ryan at 41.52 percent complete, and all material submittals had yet to be submitted, Ryan had ten days to “show how [it] intend[ed] to complete all work under [the] contract by the completion date of 16 August 1994.” The CO further stated that although Ryan’s Progress schedule showed the work for sub E as starting 22 July 1994 vice December 1994 the Government required a written response to Change Order No. 1 that no additional cost would be incurred due to the change. The Government’s progress schedule (Progress Report No. 1) did not include in its completion percentage the manufacture and delivery of the S/G which Mr. Lee acknowledged took up the majority of the performance time. (R4, tabs 48-50; finding 8 *supra*)

34. Ryan considered the CO’s 22 June 1994 letter to be “ridiculous” since all the material submittals had been submitted; both subs A and E were at the site; construction at sub A had started; and the only real problem encountered was the bus interconnection at sub D. On 22 June 1994 Ryan reported in two certified Contract Progress Reports that 56.43 percent of the work had been accomplished. (R4, tabs 47, 151; tr. 8/38-41) Ryan’s calculations of work completed included a percentage attributable to the manufacture of the S/G.

35. The CO in a 23 June 1994 memorandum informed Ryan that, as discussed at the pre-con, no payment would be made for material stored on or off base and payment for S/G would be made only after it was installed, inspected and accepted. The Government conceded, and we so find, that at the pre-con the Government agreed to pay part of the S/G cost upon its arrival at the site. Ryan’s progress reports supported its computation for subs A and E, including relays, in accordance with the pre-con agreement. (Tr. 2/129-31, 133-35, 170-72; R4; tabs 47, 49, 151; finding 9, *supra*)

36. On 24 June 1994 Ryan tendered Submittal No. 12, S/G shop drawings for a rigid bus bar interconnections for sub D (SR4, tab 23; tr. 3/281).

37. On 1 July 1994 Mr. Ruschau inscribed on the bottom of the Government’s Progress Report No. 2, “we are ready to terminate.” Mr. Ruschau did not testify at the hearing. Mr. Van Horn testified Mr. Ruschau had decided to terminate Ryan’s contract by July 1997 and during the month of July in preparation for termination he, Mr. Van Horn, was instructed to take pictures and have a safety inspection conducted. (R4, tab 51; tr. 3/8, 15-17, 9/283-84)

38. On 5 July 1994 Mr. Lee recommended disapproving Submittal No. 12 stating, in part, that the proposed interconnection between the WH and GE S/G “is not a standard manufactured item and has not undergone any testing to ensure the required ratings are

met.” Mr. Lee, allegedly looking for a lot of precise information to ensure that the power outage at sub D would be short, directed Ryan to provide an isometric drawing of the transition bus showing how the bus interconnections would be accomplished, and shop drawings showing where bus supports would be installed. Mr. Lee admitted the following points upon which he recommended Submittal No. 12 be disapproved were not contract requirements but rather his determination of what he wanted Ryan to provide: isometric drawing; the need to show where the bus bar bends were to be made; and where and how the bus supports were going to be installed. (SR4, tabs 23-24; tr. 3/195, 281-85, 287-90, 4/7-12, 16-18, 191-93)

39. On 7 July 1994 Ms. Corbett, in a memorandum to Mr. Ruschau, stated that although she shared his concern that Ryan was only 1.94 percent complete as of 1 July 1994, a review of the percentages completed failed to include the high dollar values for the S/G and relay panels for each of the substations which the contractor was not given credit for until such time as this equipment was installed and operational. Ms. Corbett opined that by 7 July Ryan had completed 39.46 percent of the work while the approved progress schedule showed the work to be 85.51 percent complete. Ms. Corbett stated the equipment amounted to 87.03 percent of the project and the difference in the percentages resulted from a minimal amount of excavation, concrete work, splices and termination. In lieu of default, Ms. Corbett suggested Ryan be sent a letter requesting a plan scheduling the outages and the anticipated dates for switch over. (SR4, tab 25; tr. 2/172-75)

40. On 14 July 1994 the CO, Ms. Thompkins, informed Ryan that the use of XLPE 15KV cable did not comply with the specification’s requirement for TRXLP or EPR 15KV cable and was unacceptable; that since Ryan was installing both control and 15KV cable in the new S/G some type of listed bushing must be provided; and because two structural steel beams on the new WH S/G had been cut, WH would have to verify the integrity of the S/G before the Government would accept it. Ryan was told it had ten days to provide a written response. (R4, tabs 54, 161)

41. Between 21 and 28 July 1994 WH was at sub D to measure bus for the interconnection of the new WH S/G with the GE S/G. Present at the time of the visit were Messrs. Lee, Calderone, Cecil Entler (Exterior Electric) and Ryan personnel. Mr. Lee acknowledged the interconnection was the critical and only hold-up for acceptance of sub D’s S/G submittal. (Tr. 4/71-73; R4, tab 87 (Report No. 3))

42. Mr. Lee’s 22 and 25 July 1994 memoranda requested Ms. Corbett issue a cure notice to Ryan for the following reasons: Ryan was approximately 80 percent behind schedule and could not meet the scheduled contract completion date of 16 August 1994; Ryan did not have an approved sub D S/G submittal; Ryan never responded to Change Order No. 1; Ryan’s 9-week outage at sub A was unacceptable and could not be tolerated at subs D and E; Ryan compromised the structural integrity of the new WH S/G at sub A

by cutting the structural beams; because sub A had yet to be finished Ryan allowed the window of opportunity for the outage at sub E, 22 July through 1 August 1994, to “slide by”; and Ryan had “consistently displayed a lack of planning and attention to detail throughout the duration of the contract.” (R4, tabs 59, 60; tr. 4/64-65)

43. Ms. Susan Fenske, the termination contracting officer (TCO), having been notified of trouble on the contract and advised that the cure notice was imminent, became involved for the first time in mid July 1994 “approximately [at] the time of the cure notice” (tr. 1/65-66). Ms. Fenske testified that she relied on Messrs. Lee and Van Horn when faced with technical questions regarding construction or electrical matters (tr. 1/128-29, 153). At the outset Ms. Fenske determined that “substantial work” remained to be completed at sub A and that no work had been performed at subs D and E (tr. 1/65-68).

44. On 29 July 1994 WH informed Timco the cut runners on sub A’s S/G for conduit access were “OK” but recommended the use of shim supports. The Government, unwilling to accept Timco’s letter that the integrity of the S/G was not jeopardized, stated a WH letter was required. (R4, tabs 61, 168; SR4, tab 32)

45. On 29 July 1994 the CO, parroting Mr. Lee’s 22 and 25 July 1994 cure notice request memoranda (finding 42, *supra*), issued a cure notice to Ryan wherein she stated contract performance was behind schedule by 83.57 percent as of 15 July 1994; all submittals had not been received; Ryan failed to respond to the request for proposal for Change Order No. 1 to change the performance date for sub E, thereby, thwarting the chance to accomplish the work before December 1994; Ryan compromised the structural integrity of the new S/G when it cut two of the structural beams; Ryan failed to perform work in accordance with the contract specifications; and Ryan had been cited for several safety violations. The CO directed Ryan to provide within 10 days a summary of how it intended to complete subs A and D by 16 August 1994 and sub E within the month of December 1994. Ryan was to include in the summary a revised schedule, the size of crews it intended to use, the date when required equipment would be delivered and the correction of safety issues. Ryan was advised that “[u]nless these conditions are cured within 10 days from receipt of the facsimile transmission, the Government will consider terminating for default” Ms. Fenske coordinated with the contracting office on the wording of the cure notice. (R4, tab 63; tr. 1/68)

46. On 5 August 1994 Ryan submitted to Mr. Lee, in the field, Submittal No. 15, sub D’s WH S/G shop drawing with Timco’s 5 August 1994 letter attached. Timco’s letter memorialized the conversation between Mr. Lee and Timco’s Mr. Huebel where Mr. Lee indicated amenability to the following steps to finalize the bus interconnection, installation and acceptance of sub D’s WH S/G: the S/G with transition sections would be shipped 8 August 1994; Ryan would provide engineering field services for onsite field fabrication of the bus splices to tie in the WH and GE S/G; and field measure and shop

fabrication of new rain caps and flashing to make the assembly rain tight. Mr. Lee accepted Mr. Huebel's suggestion that WH field fabricate and field bend the bus bar and Mr. Lee acknowledged observing WH field measuring for the bus interconnection (R4, tab 87 (Report No. 3); tr. 4/87-88). Ms. Corbett conceded that Mr. Lee had a copy of Submittal No. 15 prior to 8 August and the contracting section had received Submittal No. 15 from Ryan on 8 August 1994 but never sent it through normal channels. Mr. Lee testified that after he returned to his office he threw away the submittal handed to him in the field. (R4, tabs 65, 170; tr. 2/162-65, 4/76-80, 88-89, 194-96)

47. Mr. Emery testified that Ryan's submittal Nos. 12 and 15 were for rigid bus interconnection and, provided they showed how the connection to GE's S/G would be made and provided they showed the specific placement of bus supports, would have met Mr. Lee's bus bar requirement (tr. 7/236-37; note 7 *supra*). We find that Mr. Lee's acceptance of Ryan's proposal to have WH field fabricate and field bend the bus bar met the requirement of showing how the connection would be made.

48. Ryan, in its 9 August 1994 response to the Government's 29 July 1994 cure notice, stated all submittals had been made; that sub D would be completed on 27 August 1994; that sub E could only be done in December 1994; the use of XLPE cable at sub A was an oversight and the required cable would be used in subs D and E; all safety concerns had been addressed and satisfied; and a new revised schedule was attached with the information regarding size of crew, and date the equipment would be delivered. (R4, tab 71; finding 45, *supra*)

49. On 9 August 1994 the CO, Ms. Thompkins, issued unilateral contract Modification No. P00001 suspending Ryan from performing contract work due to "nonresponsiveness [sic], poor workmanship, unsafe practices, work incorrectly done, and being behind schedule." The minutes of the Government's meeting, held just prior to the CO's issuance of the 9 August suspension notice, stated in pertinent part that it was the consensus of the attendees that the suspension order should be issued that day and should indicate that the Government was "contemplating default." (R4, tabs 3, 177; SR4, tab 37) Ms. Fenske was not in attendance at the 9 August 1994 pre-suspension meeting but read the minutes and was aware that Ryan was suspended from 9 to 18 August 1994 during which time she spoke to CE and contracting personnel regarding the contract's status and Ryan's performance (tr. 9/140, 143-44).

50. On 9 August 1994 the CO, in response to Ryan's 9 August notice that sub D's S/G would arrive at WP on 10 August, informed Ryan that since the S/G's submittal had not been approved, its delivery to WP was prohibited. Mr. Lee testified that sub D's S/G, manufactured at a cost of \$250,000, met the specifications requirements except for the bus interconnection which required a simple correction. The CO's response did not acknowledge Mr. Lee's interaction with Mr. Huebel in working out the acceptable bus

interconnection for sub D's old and new S/G or the receipt of Submittal No. 15 by either Mr. Lee or contracting which memorialized the agreed-to steps for the installation and acceptance of the WH S/G at sub D. On 10 August 1994 sub D's S/G was delivered to Orbit Storage in Dayton, Ohio where it was stored at the time of the termination. (R4, tab 70; tr. 4/125-32, 5/252; finding 46, *supra*)

51. The CO's undated Statement of Fact memorialized the following: the contract was awarded 30 September and the NTP was issued 16 November 1993; Ryan failed to adhere to the approved 15 March 1994 progress schedule; Ryan, sent a request for proposal (RFP) on 14 April 1994 to change the power outage for sub E from December 1994 to 22 July - 1 August 1994, never responded and the opportunity to have the work accomplished prior to December 1994 expired; on 22 June 1994 the contractor was given a letter of concern because he had fallen behind schedule by 40.78 percent; on 19 July 1994 the base Safety Office issued Ryan a letter noting several safety violations;⁹ on 29 July 1994 a cure notice was issued which Ryan responded to on 9 August 1994; on 9 August 1994 Government personnel met and the CO agreed to suspend all contract work until further notice and to proceed with the default termination of Ryan's contract. The CO's Statement of Fact did not mention the Government's receipt of Submittal No. 15 by either Mr. Lee or the contracting office or that the construction of sub A, stopped by the suspension, only required an additional 2 to 4 days for completion and could have been completed prior to the 16 August 1994 contract completion date. (R4, tab 173)

52. On 9 August 1994 Mr. Ruschau signed and forwarded to contracting "AF FORM 3056, TERMINATION AUTHORITY," with the CO's undated STATEMENT OF FACT attached, stating default termination was justified because (R4, tab 172-173; SR4, tab 36):

Contractor is less than 30 percent complete with a completion date of 16 Aug 94, 1 week away. Contractor is behind schedule principally because of a slow start and a failure to perform work in accordance with the contract requirements which has resulted in a lot of corrective work. Contractor response to several safety violations has been much less than adequate. Contractor is not following manufacturer's recommendations for storage or installation of equipment.^[10]

53. On 16 August 1994 the TCO, Ms. Fenske, acknowledged receipt of Mr. Ruschau's Form 3056. Ms. Fenske, from 16 to 18 August 1994,¹¹ conducted a review of the contract file, considered the seven factors included in FAR 49.402-3(f), spoke to Messrs. Lee and Van Horn and the contracting office personnel and concluded that default termination was justified. Ms. Fenske testified the major issues for her consideration were: sub A's S/G was approved and being installed; sub E's S/G was

approved and stored on base but no construction work had been performed; sub D's S/G was approved except for the interconnection which she understood was a simple problem to resolve; Ryan's work performance was often disapproved and had to be redone; Ryan's failure to sign Change Order No. 1 resulted in the Government missing the window of opportunity to install sub D's S/G in July 1994; and she was satisfied the Government had not delayed Ryan's progress. Ms. Fenske determined that the S/G was "expensive [costing] in excess of \$100,000" for each substation and although Ryan was financially burdened by the substantial amount of money invested in subs D and E, \$250,000, it was not "a severe enough financial burden . . . as to impact the company's ability to operate from that point on, as in bankruptcy." Ms. Fenske determined that 16 August 1994 was the completion date for the three substations. She was unable to explain why the cure notice stated that Ryan had ten days to provide a complete summary of how it intended to complete "all work in substations A and D by the completion date of 16 Aug 94 and substation E within the month of Dec 94" (tr. 9/102-03; finding 45, *supra*). Ms. Fenske concluded Ryan could not complete substations A, D and E by 16 August 1994 and termination was justified.¹² (Tr. 1/69-72, 9/7-9, 11-14, 21, 29-36, 44, 46-51, 63, 102-04, 106-110, 112-13; SR4, tab 36) Ms. Fenske understood the CO's statement of facts together with her default termination notice satisfied the FAR 49.402-5 requirement for a memorandum explaining the reasons for the action taken so she did not memorialize what she reviewed prior to reaching the decision to terminate.¹³ (Tr. 1/277, 3/111-14, 9/7-8, 53-54, 132-33)

54. On 18 August Ms. Fenske appended the following to the Form 3056¹⁴ (SR4, tab 36):

In my opinion, default of this contract is clearly justified and is in the best interests of the Government. I have reviewed the basic file and the CE Inspector's log books and find the Contractor to be in non-compliance with the contract and the specifications.

[signed] Susan Fenske
Termination Contracting Officer
16/17/18 August 1994

55. Mr. Lee testified that between Ryan's suspension on 9 August 1994 and the decision to terminate on 18 August 1994 he did not discuss with Ms. Fenske his agreement with Mr. Huebel regarding the acceptance of the interconnection for sub D's old and new S/G; that sub D, with his acceptance of the proposed interconnection, was acceptable; his receipt and discarding of Submittal No. 15 without bringing it to the attention of the CO or contracting; that sub A could be made fully operational within two

to four days;¹⁵ and that Ryan had problems getting GE to provide the drawings for the existing GE Powervac II S/G. (Tr. 4/77-79, 86-87, 9/65-68, 71-73, 121-22, 242-46, 313; finding 46 *supra*) Mr. Lee testified that when responding to Ms. Fenske's request for information he "gave her all the information that [he] thought she needed" (tr. 9/314-15).

56. Ms. Fenske testified she relied upon the CO's cure notice statement that "all of the submittals had not been received" as a factor in deciding Ryan's contract should be terminated for default although she, Ms. Fenske, should have been aware from her record review and Ryan's response to the cure notice that all submittals had been made (tr. 1/161-62; findings 45, 48, *supra*). Ms. Fenske testified she was neither informed nor did she discuss with Mr. Lee, Mr. Ruschau, Ms. Thompkins, or Ms. Corbett that it would take two to four days to get sub A fully operational; that Mr. Lee and Mr. Huebel of Timco had worked out the problems with sub D's S/G interconnection; that Submittal No. 15, accompanied by Timco's 5 August 1994 letter memorializing Mr. Lee's agreement for the work necessary to have the interconnection between the old and new S/G at sub D accepted, had been hand delivered to Mr. Lee on 5 August 1994 and delivered to the contracting office on 8 August;¹⁶ or that Mr. Lee threw submittal No 15 away without informing the contracting office he had received it. Ms. Fenske testified that during her conversations with Mr. Lee, prior to issuing the termination notice, she was told that "Ryan Company had not provided adequate enough details for him [Mr. Lee] to make a determination if the connector was adequate [and] that an agreement had not been arrived at." (Tr. 9/55-56, 58-59, 63, 65-68, 71-72, 83-85, 100-05, 114-15; R4, tab 63, 65) Ms. Fenske testified that had she been aware of the Government's receipt of Submittal No. 15 she may have changed her decision to terminate Ryan's contract for default (tr. 9/121-23).¹⁷

57. On 1 September 1994, Mr. D.F. Whealdon, in Ms. Fenske's absence, issued a "Letter Notice of Termination For Default," subsequently reissued as unilateral contract Modification No. P00002 on 14 October 1994, terminating Ryan's contract W087 for default. The CO's letter stated Ryan's response to the Government's 29 July 1994 cure notice was inadequate, that Ryan failed to perform in accordance with the terms and conditions set forth in the contract and that such failure did not arise out of causes beyond the control and without the fault of Ryan. (R4, tabs 4, 78; tr. 1/121-22, 129-30) Mr. Whealdon did not testify at the hearing.

58. On 28 November 1994 Ryan appealed the CO's 1 September 1994 final decision to terminate Ryan's contract for default (R4, tab 85; finding 57, *supra*).

DECISION

In portions of the record we are faced with conflicting testimony. Accordingly, our decision relies, in part, upon the hearing judge's assessment of the credibility of the witnesses and the consistency of the witness's testimony with the documentary record and the testimony of other witnesses.

A termination for default is a drastic adjustment of the contractual relationship and must result from a proper exercise of discretion. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424 (Ct. Cl. 1969); *Schlesinger v. United States*, 390 F.2d 702, 709 (Ct. Cl. 1968). The Government bears the burden of justifying, and will be held to strict accountability for, its decision to terminate a contract for default. *Id.*; *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987).

The Government contends that default termination was justified because: (1) Ryan failed to prosecute the work diligently, thus placing timely completion of the contract beyond its reach; and for the first time in its brief (2) Ryan intentionally misrepresented in its Representations and Certifications that it had not been terminated for default in the three years prior to the submission of its bid¹⁸ or in the alternative the contract was void *ab initio*.

Intentional Erroneous Certification

The Government contends that Ryan "misrepresented" that it had not been terminated for default in the three years prior to the submission of its bid (Gov't br. at 56-57, Gov't proposed findings of fact 2 (PFF)). It is black letter law that unsupported allegations do not constitute proof or evidence. *Harvey Honore Construction Co., Inc.*, ASBCA No. 47087, 94-3 BCA ¶ 27,190 at 135,509. The Government neither presented direct testimony on this issue¹⁹ at the hearing nor were the Representations and Certifications, which it relies as the support for the contention, made a part of the record.

Neither has the Government addressed or established that it was fraudulently induced to award the contract to appellant to prevail on its contention the contract is void *ab initio*. See *J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,569, *aff'd sub nom. J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988), *cert. denied*, 486 U.S. 1057 (1988).

The Government's contention Ryan made an intentional misrepresentation fails for lack of proof.

Decision of the TCO was an abuse of discretion

In *Darwin Construction Co., Inc. v. United States*, 811 F.2d 593, 598 (Fed. Cir. 1987), the court held:

In innumerable cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and that if it is arbitrary or capricious, or rendered in bad faith, the courts have the power to review it and set it aside. This court has this question presented to it constantly in cases arising under Government contracts, where the contracting officer and the head of the department are given the power to render final decisions on questions of fact. Both this Court and the Supreme Court have many times held that if the decision is arbitrary or capricious or so grossly erroneous as to imply bad faith, it will be set aside. [Citations omitted]

The law is now settled that it is sufficient for the Board to set aside a contracting officer's decision to terminate a contract for default on the grounds that the decision was "arbitrary or capricious, or that it represents an abuse of his discretion." *Quality Environment Systems, Inc.*, ASBCA No. 22178, 87-3 BCA ¶ 20,060 at 101,569, *citing Darwin, supra; Balboa Insurance Company v. United States*, 775 F.2d 1158 (Fed. Cir. 1985). The Courts have said that where there is no nexus between the decision to terminate for default and contract performance, the termination for default may be arbitrary and capricious and set aside in favor of a termination for convenience. *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1831 (2000), *citing Schlesinger v. United States*, 390 F.2d 702 (Cl. Ct. 1968); *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645 (1955); *Darwin Construction Co., supra*. Because the default clause does not require the Government to terminate on a finding of a bare default but merely gives the agency the discretion to do so, we give specific consideration to the TCO's decision to ascertain if it represented her informed judgment as to the merits of the case. *Quality Environment Systems, Inc., v. United States*, 7 Cl. Ct. 428 (1985); *Johnson A. Johnson, supra*.

The Board, in the first instance, focuses on any indication of animosity or ill-will by Government representatives and, if found, its potential impact on the TCO's decision to terminate the contract for default. The TCO, in reliance upon Mr. Ruschau's Form 3056 and her conversations with the engineers, Messrs. Lee and Van Horn, and the contracting office, Ms. Thompkins and Cobertt, and her review of the contract file, determined that the Government had not delayed Ryan and a default termination was justified due to Ryan's failure to complete the S/G installation at subs A, D and E; Ryan's work performance was often disapproved and had to be redone; and Ryan's failure to sign

Change Order No. 1 resulted in the Government missing the opportunity to install sub E's S/G in July vice December 1994 (finding 53).

We have made extensive findings delineating Ryan's association with Mr. Lee and base contracting personnel, and Mr. Lee's, CE's and base contracting personnel's association with the TCO and find sufficient probative evidence exists that Mr. Lee, and in at least one occasion the contracting office, withheld information from, and/or provided incorrect, false, and/or misleading advice and information to, the TCO with the intended purpose of getting Ryan's contract terminated. Examples of Government personnel's egregious actions detrimental to Ryan: Mr. Lee and Ryan had worked out a solution for the finalizing of the bus interconnection installation for sub D's S/G; Submittal No. 15, embodying the agreed-to solution for the interconnection between the old and new S/G at sub D, was delivered on 5 and 8 August 1994 to Mr. Lee and the base contracting office respectively; Submittal No. 15 cleared up any Government concerns regarding sub D's S/G interconnection and sub D's S/G was completely acceptable; base contracting did not put Submittal No. 15 into the contract file (Ms. Fenske testified it was not in the contract file when she reviewed it (note 16 *supra*); both base contracting and Mr. Lee failed to inform the TCO of the existence of Submittal No. 15 or that Mr. Lee threw the submittal away; and no official action was taken after Submittal No. 15 was received. (Findings 46, 48, 55-56) Further, Mr. Lee failed to inform the TCO sub A's S/G could be made fully operational within two to four days of the suspension; that his refusal to accept cable to bus interconnection was based on his own preferences and his own lack of information; that he did not envision the use of cable when he designed the project; that the specifications did not provide sufficient information to make a rigid bus to rigid bus connection at sub D; and that Ryan had problems getting GE to provide the drawings for the existing GE Powervac II S/G at sub D to use to determine the feasibility of providing rigid bus to bus interconnection (findings 16, 19-20, 25, 37, 55-56). Mr. Lee's decision to provide the TCO with only "the information that [he] thought she needed" is construed as a conscious, and deliberate election to withhold information favorable to Ryan (finding 55).

Regardless of the reason or reasons for Government personnel to withhold information from, or provide incomplete information to, the TCO, it is settled that the Government owes the contractor no less than an assessment of all the relevant circumstances when it exercises its discretion under the default clause. *L & H Construction Co., Inc.*, ASBCA No. 43833, 97-1 BCA ¶ 28,766 at 143,556, *citing Walsky Construction Company*, ASBCA No. 41541, 94-2 BCA ¶ 26,698 at 132,785, *affirming on recon.*, 94-1 BCA ¶ 26,264. In *L & H Construction*, *supra* the Board held:

Decisions to terminate a contract for default, which are based, like the decision in this case, on materially erroneous information as to appellant's culpability for the delay, and

materially erroneous information as to the labor and time required to complete the work, cannot be said to be a reasonable exercise of discretion. To hold otherwise would be to reward ignorance and encourage deception. Given the accurate, complete, and true information about the appellant's efforts to proceed with the work on this contract, a reasonable contracting officer might well have decided, even after a finding of default, not to terminate for default. Under such circumstances the default termination must be converted to a termination for convenience. *Schlesinger v. United States, supra*; *Darwin Construction Co., Inc. v. United States, supra*. . . .

In applying the facts from the instant appeal to our holding rendered in *L & H Construction, supra* we have no alternative but to conclude that Ms. Fenske's decision to terminate Ryan's contract for default was based on materially erroneous information as to the merits of the case and, accordingly, the decision must be considered an abuse of discretion. *Darwin Construction Co., supra*; *John A. Johnson Contracting, supra*. The wisdom of the decision rendered in *L & H Construction, supra*, is borne out by the TCO who testified that had she known about Submittal No. 15 or that a decision was on the horizon as to resolving the interconnection for sub D she "may very well" have changed her decision to terminate Ryan's contract for default (finding 56; note 17, *supra*).

Based on the discussion above we see no reason to address the remaining arguments and defenses raised by Ryan.

The appeal is sustained. The termination for default is converted to one for convenience, in accordance with the terms of the Default clause.

Dated: 15 August 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ References to the record will be as follows: appeal (R4) file; appellant's supplemental (SR4) file; Government (ex. G-) and appellant (ex. A-) exhibits; Board's correspondence file (Bd. corr. file); transcript (tr.) Government's brief (Gov't br.) and reply brief (Gov't reply br.); appellant's brief (app. br.) and reply brief (app. reply br.).

² The Board views the date of the memorandum, "15 NOV 1995," as a typo and has corrected the date to read "15 November 1993" (R4, tab 6; SR4, tab 16).

³ Mr. Lee testified the biggest part of the project in terms of cost was the manufacture of the S/G (tr. 3/133).

⁴ Sub E provided power to only one building at WP (tr. 1/105).

⁵ Mr. Lee conceded the contract documents contained minor errors (tr. 3/130-31).

6 Mr. Lee identified Mr. Tom Calderone, chief of the exterior electric shop, and Mr. Van Horn, the project inspector, as the people he spoke with. Mr. Van Horn was not an electrician. (Tr. 3/215-16, 218-19)

7 Mr. Emery was received as a expert in the area of testing of electrical systems and distribution systems operations (tr. 6/283, 303).

8 Mr. Lee in earlier testimony implied the objective for getting subs A and D completed was to avoid conflicts with follow-on contracts (tr. 3/152).

9 The safety violations noted were: use of a metal ladder in substation, failure to cover the open pits around substation building; containers not properly labeled; trash/debris observed inside and outside of building; and orange safety fence was hanging down permitting inadvertent entrance by unauthorized personnel.

10 We do not attempt to reconcile Mr. Ruscheau's contention Ryan was "less than 30 percent complete" with the CO's Statement of Fact that Ryan had fallen behind schedule by 40.78 percent (finding 51, *supra*). For continuity we simply repeat what the documents say.

11 Ms. Fenske testified that approximately 50 percent of her time from 16 through 18 August was devoted to her investigation (tr. 9/8; SR4, tab 36).

12 Ms. Fenske during rebuttal, and in reliance on ex. A-1, testified that on 18 August 1994 she had determined that only subs A and D were to be completed 16 August 1994 and sub E was to be completed in December 1994 (tr. 9/158-59, 168-75). We find Ms. Fenske's testimony to be of little probative value since ex. A-1, prepared as a demonstrative exhibit for the hearing, is not relevant as proof of what she, Ms. Fenske, was aware of at the time of the termination (tr. 1/100).

13 Ms. Fenske did not generate a memorandum of what she reviewed (tr. 9/52-53). Ms. Fenske testified that she did not rely on every stated reason in the CO's cure notice and statement of facts as a basis for defaulting Ryan's contract (tr. 1/163, 168-69). The Government provided as enclosure A to its Post-Hearing Brief a two-page document entitled "AFMC SUPPLEMENT" dated 1 July 1992, section 5349.401-91 wherein it was stated "(4) The TCO is not required to prepare a separate memorandum, if the Contracting Officer's statement of fact fully documents events, and the notice of termination explains the rationale for the TCO's actions in the matter."

14 We find the TCO's testimony regarding her decision to terminate Ryan's contract inconsistent. The TCO acknowledge receiving the Form 3056 on 16 August and decided to terminate on 18 August 1994 (SR4, tab 36). She also testified receiving the Form 3056 in late July 1994 and drafting the termination before leaving for classes at the Air Force Institute of Technology in early August (tr. 1/68-69); that she spent "approximately two weeks" prior to 18 August reviewing and preparing the termination notice (tr. 9/8, 44-51, 139-41); and lastly the two week review was done after she received the Form 3056 on 16 August 1994 (tr. 9/8-11). We do not attempt to reconcile the discrepancies in the TCO's testimony but consider them when evaluating her creditability.

15 Mr. Lee also testified he told Ms. Fenske that only a couple of days were necessary to get sub A fully operational (tr. 4/244-45).

16 Ms. Fenske testified she did not find Submittal No. 15 in the contract files (tr. 9/72).

17 Ms. Fenske testified as follows (tr. 9/122-23):

The Witness: It was my opinion that it was in the Government's best interest to do this because the big factor there, that we [sic] did not seem to be a point of resolution of substation D. That was a major factor in my thinking, that no adequate documentation had yet been provided to the Government to prove - - to show the Government what kind of interconnection was to be made between the existing gear and the new gear.
I had no indication that that - - that there was a decision on the horizon as to resolving that issue.

Judge Elmore: Well, had you been given that information, would that have changed your decision to terminate?

The Witness: Yes, it may very well have.

Judge Elmore: The fact that Mr. Lee or Mr. Van Horn or Mr. Ruschau or somebody else from the Government didn't give you that information, if they had it, Ms. Corbett, whoever, or the fact that it was in an envelope, as you've indicated, a brown envelope with loose correspondence which should have been in the file but was

not, does that in essence excuse your failure to have knowledge about it?

The Witness: In hindsight, no, it doesn't, Your Honor.

18 The Board takes judicial notice that on 29 March 1991 Ryan's Contract No. N62470-83-C-3012 was partially terminated for default (*The Ryan Company*, ASBCA Nos. 42774, 42776, 92-3 BCA ¶ 25,138).

19 We have reviewed the Government's cross-examination of Mr. Grady (tr. 8/197-200, 206-07) and find it insufficient to support a finding that appellant knowingly misrepresented any prior termination for default. There is no definite statement in this testimony that appellant did in fact represent to the Government that no defaults had occurred. The speculation that is present is too slender a reed to support a termination for default for misrepresentation.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48151, Appeal of The Ryan Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals