

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Fraya, S.E.) ASBCA No. 52222
)
Under Contract No. N62470-98-C-7085)

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OPINION BY ADMINISTRATIVE JUDGE TING

The Navy entered into a contract with Fraya, S.E. (Fraya) to renovate the interior spaces of Building 85 at the United States Naval Security Group Activity (NAVSECGRUACT) in Sabana Seca, Puerto Rico. That contract was terminated for default. This appeal followed.

FINDINGS OF FACT

1. On 29 September 1998, the Navy awarded Contract No. N62470-98-C-7085 to Fraya. The contract, in the amount of \$1,378,600, was for the renovation of the interior spaces of Building 85 at Sabana Seca, Puerto Rico (the Building 85 contract) (R4, tab 1). The work under the contract included the replacement of the raised computer access flooring, new finishes, repair and replacement of the existing mechanical system, ductwork, and air control systems, upgrading the electrical system to include new electrical connections, lighting and a grounding system for the computer access flooring, and installation of a new elevator. (R4, tab 1, § 01110 at 1, § 14240)

2. Building 85 housed NAVSECGRUACT whose mission was to operate a high frequency direction finding facility and provide communications and related support to Navy and other Department of Defense elements within the area (tr. 29; R4, tab 198).

3. The contract incorporated by reference as Clause 1.46, FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which provides, in part:

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

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

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God

(R4, tab 1, Document 00721 at 12)

Phased Construction Requirements

4. Building 85 operated 24 hours a day and 365 days a year. Because of the classified nature of its mission, all visitors, including Navy contract personnel who did not work in the building, could not enter the building without escort (tr. 29). To "allow the missions within the building to remain up and operational," the Building 85 contract divides demolition/construction work into three distinct phases (tr. 316). Phasing the construction activities would allow NAVSECGRUACT to conduct its work without disrupting the work of the contractor, and vice versa (tr. 30).

5. Paragraph 1.2 of Section 01110 of the contract specification pertains to "PHASED CONSTRUCTION SCHEDULE." It requires that "[w]ithin the overall project schedule, commence and complete the work in phases. [C]omplete each phase of the work within the number of calendar days stated." Phase I was required to be completed 105 calendar days from the scheduled start day.¹ Phase II was required to commence 110 calendar days after scheduled start day and complete 200 calendar days after scheduled start day. Phase III was required to commence 205 calendar days after scheduled start day and complete 355 calendar days after scheduled start day. Paragraph 1.2d of § 01110 further provides that "[n]o work will be allowed on a subsequent phase until the preceding phase has been completed and accepted by the Contracting Officer." (R4, tab 1, § 01110 at 1-2; tr. 317) Because overlapping phases is not allowed, we find that any delay in completing the preceding phase would necessarily delay the follow-on phase or phases, and completion of the entire project.

6. The contract also included FAR 52.211-12, LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984) - ALTERNATE I (APR 1984) which provides that “[i]f the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages for each day of delays as follows” Each phase carries liquidated damages of \$200 per day. (R4, tab 1, Document 00720 at 1-2)

General Submittal Requirements

7. The contract requires numerous submittals including shop drawings, product data, samples and administrative submittals. Paragraph 1.1.2d, § 01330, defines administrative submittals to mean “Data presented for reviews and approval to ensure that the administrative requirements of the project are adequately met.” (R4, tab 1, § 01330 at 1) Since Fraya was not allowed to start demolition and construction work until many of the administrative submittals were approved, the timely preparation, submission and approval of the administrative submittals were crucial to the timely completion of Phase I and subsequent phases.

8. Paragraph 1.3, Section 01330, sets out the following requirements for the contractor’s Quality Control (QC) organization, QC Manager and scheduling submittals:

1.3.1 Reviewing, Certifying, Approving Authority

The QC organization shall be responsible for reviewing and certifying that submittals are in compliance with contract requirements. The approving authority on submittals is the QC Manager unless otherwise specified for the specific submittal. .

..

....

1.3.3 Scheduling

- a. Coordinate scheduling, sequencing, preparing and processing of submittals with performance of the work so that work will not be delayed by submittal processing. Allow for potential requirements to resubmit.
- b. Except as specified otherwise, allow a review period, beginning with receipt by the approving authority, that includes at least 15 working days for submittals for QC

Manager approval and 20 working days for submittals for Contracting Officer approval. The period of review for submittals with Contracting Officer approval begins when the Government receives the submittal from the QC organization. The period of review for each resubmittal is the same as for the initial submittal.

(R4, tab 1, § 01330 at 2-3)

Quality Control Requirements

9. The contractor was required to establish a QC program described in ¶ 1.4 of § 01450 of the specifications:

. . . The QC program consists of a QC Organization, a QC Plan, a Coordination and Mutual Understanding Meeting, QC meetings, three phases of control, submittal review and approval, testing, completion inspections, and QC certifications and documentation necessary to provide materials, equipment, workmanship, fabrication, construction and operations which comply with the requirements of this Contract. The QC Program shall cover on-site and off-site work and shall be keyed to the work sequence. No work or testing may be performed unless the QC Manager is on the work site. . . .

(R4, tab 1, § 01450 at 2) Paragraph 1.2.1a of § 01450 (QUALITY CONTROL) requires the submission of a QC Plan within 20 calendar days after receipt of Notice of Award (R4, tab 1, § 01450 at 1). We find the parties considered receipt of Notice of Award to have taken place on 29 September 1998. Consequently, we find that its QC Plan had to be submitted on or before 19 October 1998.

10. Paragraph 1.4.2 of § 01450 provides that “[a]pproval of the QC Plan is required prior to the start of construction.” As a part of the contractor’s QC organization, the contractor is required to appoint a QC Manager (¶ 1.5.1) whose duties include implementing and managing the QC program and “perform[ing] submittal review and approval” (¶ 1.5.1.1). The QC Manager’s qualifications and training requirements are set out as follows:

1.5.1.2 Qualifications

An individual with a minimum of 10 years experience as a superintendent, inspector, QC Manager, project manager, or construction manager on similar size and type construction contracts which included the major trades that are part of this Contract. The individual must be familiar with the requirements of COE EM-385-1-1, and have experience in the areas of hazard identification and safety compliance.

1.5.1.3 Construction Quality Management Training

In addition to the above experience and education requirements, the QC Manager shall have completed the course entitled “Construction Quality Management for Contractors.” This course is periodically offered by the Corps of Engineer in San Juan, Puerto Rico.

(R4, tab 1, § 01450 at 3-4) Section 01450 also requires as a part of the contractor’s QC organization an Alternate QC Manager. The qualifications of the Alternate QC Manager are the same as those of the QC Manager (§ 1.5.2) (R4, tab 1, § 01450 at 4).

11. Since Fraya’s QC Manager was charged with the responsibility of reviewing, approving and certifying that its submittals were in compliance with contract requirements, nominating a qualified QC Manager and having him approved quickly was absolutely essential to getting work started for Phase I. The longer it took for Fraya to have its QC Manager approved, the shorter time it would have to complete Phase I work.

Network Analysis Schedule

12. Paragraph 1.4, Section 01321 of the specification pertains to “NETWORK SYSTEM FORMAT.” It requires “time network scaled logic diagrams and accompanying mathematical analyses.” The completed network analysis, consisting of the network mathematical analysis and network diagram is required to be submitted “within 40 calendar days after contract award” (§ 1.5.2). (R4, tab 1, § 01321 at 1, 4) We find that Fraya was required to submit its Network Analysis Schedule no later than 8 November 1998.

13. The approved Network Analysis Schedule is to be used by the contractor for “planning, organizing, and directing the work, reporting progress, and requesting payment for work accomplished” (§ 1.5.3). Changes whose cumulative effect could extend the contract completion date are considered major changes. For such changes, the contractor may be required to revise and submit for approval the network diagrams and required sorts

(¶ 1.5.4). Time extension requests are required to be submitted with a narrative report and “input data if a mathematical analysis is necessary to support the narrative report” (¶ 1.7). (R4, tab 1 § 01312 at 4, 6)

Safety Requirements

14. Section 01525 of the contract pertains to “SAFETY REQUIREMENTS.” Paragraph 1.4 of this section requires the submission of an accident prevention plan (APP). The APP has to be submitted at least 15 calendar days prior to start of work at the job-site. In addition, the APP has to be “site specific.” The Navy would give its Notice to Proceed after it found the APP acceptable (¶ 1.4.1.1). (R4, tab 1, § 01525 at 3)

Environmental Requirements

15. Section 01575 of the contract pertains to “TEMPORARY ENVIRONMENTAL CONTROLS.” The contractor is required to meet with the contracting officer five days after award of contract to discuss the proposed Environmental Protection Plan (¶ 1.8). Fourteen days after the environmental protection meeting, the contractor is required to propose an Environmental Protection Plan for further discussion, review, and approval. Work cannot begin until the Environmental Protection Plan has been approved (¶ 1.8.1). (R4, tab 1, § 01575 at 8, 10) The contract also requires the submission of an Erosion Control Plan a minimum of 30 days prior to the start of construction (§ 01561, ¶ 1.4) (R4, tab 1, § 01561 at 2).

Site Demolition Requirements

16. Section 02220 of the contract pertains to “SITE DEMOLITION.” It requires the submission of a demolition plan and notifications.² Paragraph 1.4.1 requires the contractor to “[s]ubmit proposed salvage, demolition and removal procedures to the Contracting Officer for approval before work is started.” Paragraph 1.2 cautions the contractor not to “begin demolition until authorization is received from the Contracting Officer.” (R4, tab 1, § 02220 at 1-2)

Schedule Of Prices

17. Section 01200 of the contract pertains to “PRICE AND PAYMENT PROCEDURES.” Paragraph 1.3.1 requires the contractor to “prepare and deliver to Contracting Officer a schedule of prices . . . on the forms furnished by the Government” within 15 calendar days of notice of award. (R4, tab 1, § 01200 at 1) Since Fraya received notice of award on 29 September 1998, we find that it had to submit its schedule of prices no later than 14 October 1998 (tr. 39).

Hurricane Georges

18. On 21 September 1998, eight days prior to award of the Building 85 contract, Hurricane Georges struck Puerto Rico (tr. 478, 482-83; R4, tab 197). It struck the island from the east, traversed through its middle, and left through the western part of the island (tr. 103). By 22 September 1998, the hurricane was over (tr. 484). Fraya's offices were located in Rio Piedras, San Juan, Puerto Rico (tr. 414). The hurricane left Fraya without power and water for "around two weeks" (tr. 419, 478). Fraya's offices had a concrete roof with a metal covering (tr. 480). The hurricane blew off the metal covering which ended up in the street (tr. 414, 480; R4, tab 191). Without protection from the metal roof, rainwater leaked into Fraya's offices through the pre-existing cracks in the concrete roof (tr. 480-81). After water and power were restored, Fraya had to wait another two weeks for the roof to dry before it could start repairing the roof and offices (tr. 413, 419). The forgoing evidence of how Fraya was affected by the hurricane came to light during discovery and at the hearing. Such evidence was never presented to the Navy prior to default termination of Fraya's contract.

19. A photograph in evidence verified that the metal roof at Fraya's offices was blown off by the hurricane (R4, tab 191; tr. 413). Another photograph shows wet books and papers scattered about the floor to be dried after the hurricane (R4, tabs 190, 195, 196; tr. 413). The photographs in the record were obtained during discovery and included in the Rule 4 file by the Navy (*see* R4, tabs 190 through 196). They had never been shown to the Navy to support Fraya's request for a time extension.

20. Francisco Jimenez Rosardo (Jimenez), Fraya's general manager (tr. 335), testified that the hurricane prevented him from doing "[a]ll of . . . the administrative submittals" (tr. 419). He testified that during the period of alleged delay caused by the hurricane, he was working on a draft of the schedule of prices (tr. 477, 493). When asked to identify other documents that were destroyed or became wet around the time of the hurricane, Jimenez testified they "could have been the safety plan, could have been the quality control [plan], list of employees, payroll, all of the documents that were in the file cabinets," and "all sorts of correspondence received by [sic] the Navy" (tr. 486). Other than the schedule of prices, there is no concrete evidence that Fraya even started on any administrative submittals until after its roof was fixed.

21. Fraya's answer to the Navy's interrogatory states that the metal roof (identified as the "built-up") was reinstalled three weeks after the hurricane (answer to Interrogatory No. 7a, R4, tab 185 at 10). Based on other evidence in the record, we find that the roof on Fraya's offices was fixed on or about 26 October 1998, roughly five weeks after the hurricane (tr. 413, 419). In discovery, Fraya claimed delay from 20 September to 20 October 1998 (*infra*, finding 30). Fraya, however, was not totally incapacitated between those dates. The evidence shows that between 20 September and 20 October 1998, Fraya

was able to conduct business such as receiving quotations, issuing purchase orders, and obtaining certificates of insurance, payment and performance bonds in connection with the Building 85 contract. (R4, tabs 37, 38, 39, 40; tr. 498-99, 501-02) Moreover, at the time the hurricane struck, Fraya was working on two other projects -- one for the Highway Authority and one for the Navy (the "Muniz Project"). The Muniz Project was substantially completed on 21 October 1998, when the delay to the Building 85 contract allegedly ended. Fraya did not ask for a time extension on the Muniz Project due to the hurricane. (R4, tab 201 at 7)

Performance

22. A pre-construction meeting was held on 14 October 1998, 15 days after contract award. The meeting was attended by representatives of the contracting parties including Jimenez and the Assistant Resident Officer in Charge of Construction, Lieutenant Juan Carlos Garcia (AROICC Garcia). The minutes show that 28 January 1999 was established as the completion date for Phase I, 2 May 1999 for Phase II, and 4 October 1999 for Phase III. We find the parties considered 14 October 1998 as the scheduled start day. The Navy went over a list of administrative submittals required to be furnished. The minutes show that Fraya did not have a schedule of prices which was due that day (14 October 1998). Fraya stated that the schedule would be submitted by the following Friday, 26 October 1998.³ (R4, tab 4)

23. Jimenez testified that he told AROICC Garcia at the meeting that a time extension would be needed because of the hurricane (tr. 433). The AROICC categorically denied that Jimenez mentioned needing a time extension due to the hurricane, and testified that Fraya stated that it would begin work in two weeks (tr. 36, 104).

24. In his letter to Fraya dated 14 October 1998, the same day the pre-construction meeting took place, AROICC Garcia reminded Fraya that the schedule of prices was due and had not been submitted. Garcia asked Fraya to provide any excusable causes for the delay, and to submit the schedule within five days. (R4, tab 5) Fraya did not reply to this letter and claims it was delayed by Hurricane Georges.

25. Six days after his letter, AROICC Garcia reminded Fraya by letter dated 20 October 1998 that the schedule of prices still had not been received as of 19 October 1998, and Fraya had also failed to submit the QC Plan required by § 01450, ¶ 1.2.1. The letter asked Fraya to furnish any excusable reasons for the delay and to submit the schedule of prices and the QC Plan within five days. (R4, tab 6) Again, Fraya did not reply to this letter and claims it was delayed by Hurricane Georges.

26. By letter dated 6 November 1998, 23 days into Phase I, C.C. Decker, Resident Officer in Charge of Construction (ROICC) of the Puerto Rico area (ROICC Decker),

advised Fraya that “the Government considers your failure to comply with the various administrative requirements needed prior to on site work commencing is endangering performance of the contract.” The letter stated that Fraya had ignored the Government’s direction to submit its schedule of prices (due 14 October 1998) and QC Plan (due 19 October 1998). The letter reminded Fraya that it had failed as well to submit the Submittal register (due 29 October 1998) and the Erosion Control Plan (approval required prior to start of construction). Fraya was told “unless this condition is cured within ten days after receipt of this notice, the government may terminate for default under the terms and conditions of the contract.” (R4, tab 7) According to AROICC Garcia, who drafted the letter, a cure notice was warranted at this point because Fraya had missed all of the interim deadlines, and unless the problems were fixed immediately, the entire project would be in jeopardy (tr. 47).

27. Fraya responded to the cure notice by letter dated 11 November 1998. The letter said that “[a]t the pre-construction meeting I mentioned to Eng. Juan C. Garcia that due to Hurricane Georges our office experienced several damages that caused delays in every administrative procedures [sic].” With respect to its schedule of prices, Fraya told the Navy that NTR Contractor Corporation was finishing its breakdown; Induchem Environmental Services, Inc., its asbestos and lead removal subcontractor, was working on the EQB permits; Charian Technical Corporation, its access floor subcontractor, would be submitting shop drawings on 13 November 1998; and Dover Elevator was working on the elevator shop drawings. Fraya stated that its QC Plan and Erosion Control Plan would be ready by 20 November 1998, and it was updating the delivery dates in its Submittal Register. Fraya ended its letter requesting a 30-day time extension “due to the hurricane.” (R4, tab 8)

28. According to AROICC Garcia, until Fraya responded to the cure notice, it had never mentioned that it was delayed by Hurricane Georges (tr. 105). In his letter dated 30 December 1998, AROICC Garcia raised the issue of whether he was told about the delays caused by Hurricane Georges at the 14 October 1998 pre-construction meeting:

Before we consider your request for a time extension please correct your statement in your letter that you informed LT Garcia that you where [sic] having delays caused by Hurricane George [sic]. I refer you to the Pre-construction conference minutes where you stated that you would have the overdue requirements ready by the following Friday, October 26, 1998 [sic]. If circumstances change after you made that statement I again urge, you are requested to provide the necessary documentation in accordance with the contract clause

(R4, tab 11)

29. Fraya never responded to this letter. That it switched from its position that it would start work in two weeks at the pre-construction meeting to the position of “oh, yeah, it was the hurricane,” coupled with its failure to respond to the Navy’s repeated requests for proof of impact led AROICC Garcia to conclude that “the effects [of the hurricane] are just not there” (tr. 56). We find that, up through December 1998, Fraya had been given three separate opportunities to demonstrate that the preparation of its administrative submittals had been delayed by the effects of Hurricane Georges, and it failed to do so.

30. Navy Interrogatory No. 6a asked Fraya to “[s]tate the number of days of delay caused by the ‘hurricane.’” Fraya’s answer stated “Thirty (30) days.” Navy Interrogatory No. 6b asked Fraya to “[i]dentify the date and time the delay began and the date and the time it ended.” Fraya’s answer stated that the delay “[b]egan one-day (1) before the hurricane (Sept. 20, 1998) and ended on October 20, 1998.” (R4, tabs 184, 185)

31. When asked at his deposition what happened on 20 October 1998 that caused him to believe the delay ended, Jimenez testified that “[i]t’s not a fixed date. That’s why I told you it could be more, it could be less, and that it depended on if the office could be used.” (Tr. 462) Jimenez acknowledged that Fraya never withdrew its bid or asked that award of the contract be delayed even though it knew that it would be unable to use its offices due to the hurricane damages (tr. 465-67). Nor did Fraya provide any schedule analysis to demonstrate that its administrative submittals were impacted by Hurricane Georges (tr. 50-51).

Approval of Fraya’s QC Plan, QC Manager and Alternate QC Manager

32. Since appointment of a qualified QC Manager and an Alternate QC Manager was a part of the QC Plan, Fraya had to have its QC Manager and Alternate QC Manager approved in order to have its QC Plan approved (tr. 298, 444). Fraya first submitted its QC Plan on 4 December 1998. As a part of its QC Plan, Fraya nominated Eliett Barreras (Barreras) as its QC Manager, and Jose Gonzalez Marrero (Gonzalez) as its Alternate QC Manager. (Tr. 155, 511; R4, tab 155)

33. Barreras’ resume shows she had worked for Fraya for less than a year. From 1971 to 1998, she was a contract representative, and then district manager for a fire protection company. During those years, she was in charge of sales and supervised ongoing projects. (R4, tab 155; tr. 156-57) In a memorandum dated 7 December 1998, three days after it received Fraya’s QC Plan, the Navy advised Fraya that Barreras did not meet the requirements of § 01450, ¶ 1.5.1.2, because her experience was more in sales and administration than in construction. Fraya was reminded that the QC Manager must also have completed the Corps of Engineers (COE) course entitled “Construction Quality Management for Contractors” which Barreres lacked. Fraya was told that while the

Alternate QC Manager proposed appeared qualified, he too, lacked the same COE course to be acceptable. (R4, tab 155)

34. On 15 December 1998, Jimenez faxed a handwritten memorandum to the Navy that said:

We proposed to use Mr. Jose Gonzalez Marrero as QC Manager for the project.

Mr. Gonzalez had worked as QC Manager at Building 1209 under contract 95-C-2807 from 1995-96 and had taken a QC seminar from the U.S. Navy.

Let me know if the Government accept [sic] Mr. Gonzalez as QC Manager.

(R4, tab 9)

35. AROICC Garcia advised Fraya by letter dated 28 December 1998 that it must propose a new QC Manager because the QC Manager proposed did not meet the contract requirements. The letter pointed out that neither Fraya's proposed QC Manger nor Alternate QC Manager had completed the required COE course. (R4, tab 10)

36. In a letter dated 4 January 1999, Fraya asked the contracting officer (CO) to reconsider his rejection of Gonzalez to serve as QC Manager. Fraya did not dispute the fact that Gonzalez had not taken the requisite COE course but argued that the Navy had previously accepted Gonzalez as QC Manager on another project. (R4, tab 12) The Navy ultimately agreed to "work with" Fraya (tr. 57). In a letter dated 28 January 1999, the Navy agreed to let Gonzalez serve as Fraya's interim QC Manager until 28 February 1999. It was expected that Gonzalez would have completed the COE course by that time. (R4, tab 129; tr. 297) Gonzalez and Barreras completed the COE course on 11 February 1999 (R4, tab 155), 14 days after the Phase I completion date. We find the time the Navy took to reconsider whether to waive contract requirements was reasonable.

37. Fraya did not resubmit its QC Plan until 19 February 1999, about three weeks after it was told that Gonzalez would be accepted as the QC Manager on an interim basis. The Navy received the QC Plan on 22 February 1999 and approved it in seven days on 1 March 1999 with the note: "Submit new alternate CQC manager w/ qualification as noted in § 1.5.1.2" (R4, tab 155; tr. 161, 529). By the time Fraya had its QC Plan approved, it was 32 days after the Phase I completion date (28 January 1999).

38. The selection of a qualified QC Manager and Alternate QC Manager should not have been delayed by the need to repair the roof. Under the contract, Fraya was required to submit its QC Plan, including its nominees for the QC Manager and Alternate QC Manager within 20 calendar days after receipt of notice of award or by 19 October 1998. Accepting the fact that Fraya could not begin the preparation of its QC Plan until after its roof was fixed (on or about 26 October 1998), and even if we were to assume that it took Fraya another week to get back to its normal routine, we find that Fraya should have started working on its QC Plan by 2 November 1998, and submitted it 20 calendar days later, on or about 22 November 1998. This would give Fraya a time extension of 34 days (from 29 September to 2 November 1998) to start working on its QC Plan. Fraya, however, did not submit its QC Plan until 4 December 1998. Because of the problems surrounding the qualifications of its nominees for QC Manager and Alternate QC Manager, Fraya did not resubmit its QC Plan until 19 February 1999, 89 days (from 22 November 1998 to 19 February 1999) after it initially submitted it. This 89-day delay in submitting its QC Plan was not excusable.

Safety Plan

39. Under the contract, Fraya was required to submit its APP 15 calendar days prior to start of work at the job site. Fraya's APP, bearing the date of 7 December 1998, was received by the Navy on 9 December 1998. (R4, tab 79; tr. 162) After its review, the Navy by letter dated 28 December 1998, asked Fraya to make the following corrections and to resubmit:

3. Safety Plan:
 - a. Include statement that the contractor assumes full responsibility for ensuring safe working conditions.
 - b. Include site layout showing all required information.
 - c. Include maps to the nearest hospital.
 - d. Submit qualifications for the safety supervisor.
 - e. The plan must be job specific not generic. Photocopies of a plan requiring a Florida driver's license are neither accurate nor acceptable.
 - f. Include requirement for GFCI protection on electrical equipment.

- g. Clarify HAZMAT procedures and include MSDS sheets for planned material.
- h. Clarify the need for Waterfront/Maritime operations.
- i. Include EM385-I-1 requirements for crane operations. These are more stringent than OSHA requirements and must be followed.

(R4, tab 10) Fraya did not take issue with the deficiencies in its APP identified by the Navy (tr. 163).

40. To help Fraya develop a useful APP, the Navy had given Fraya a sample safety plan from another project for guidance (tr. 167). As indicated in the Navy's comments, notwithstanding the admonition of § 01525, ¶ 1.4, for a "site specific" safety plan, Fraya submitted a safety plan that applied to a Florida site, not to Sabana Seca (tr. 164-65). Jimenez acknowledged that he failed to modify the sample safety plan to suit the Puerto Rico project (tr. 454).

41. Fraya resubmitted its APP on or about 14 January 1999. The Navy received the plan on 19 January 1999. (R4, tab 115) Of the nine deficiencies identified in the Navy's 28 December 1998 letter, Fraya corrected only three (¶¶ a, b, and g) and ignored the rest. (R4, tab 115; tr. 166) Fraya resubmitted its APP again on or about 4 February 1999. The Navy received Fraya's third submission the first week of February 1999, and approved it within a few days on 16 February 1999, noting that Fraya must still correct minor errors noted. (R4, tab 136; tr. 169) Thus, by the time Fraya had its APP approved, without which it could not start work, it was 19 days after the Phase I completion date. We find that Fraya was responsible for the 59-day delay (7 December 1998 to 4 February 1999) in having its APP approved.

42. When Fraya first requested permission to mobilize, the Navy denied that request on the ground that Fraya's APP had not been approved. To try to get Fraya going, the Navy allowed Fraya to deliver its trailers and materials to the site. No work was allowed to be performed, however. (Tr. 232-33)

Demolition Plan, Environmental Protection Plan and Erosion Control Plan

43. Fraya did not submit its Demolition Plan until 11 February 1999. It was approved as noted on 22 February 1999. (R4, tab 147) Fraya did not submit its Environmental Protection Plan to the Navy until 5 March 1999 (R4, tab 169). There is no evidence it was approved. Also, there is no record that Fraya submitted an Erosion Control Plan before its contract was terminated.

44. We find that as of 8 March 1999, when its contract was terminated, Fraya did not have all of the prerequisite submittals approved so that it could begin site work on Phase I.

Events Leading to Default Termination

45. As of 28 January 1999, when Phase I was supposed to be complete, Fraya had not even begun site work. At this point, the Navy's Puerto Rico contracting personnel believed that they had to "go up to our chain of command and raise the red flag and say, we may just never get this work. We may have to terminate for default and look for other alternatives." (Tr. 60-61)

46. David A. Lamoureux (Lamoureux) was the CO on the Building 85 contract (tr. 60, 256). He was located in Norfolk, Virginia, in Naval Facilities Engineering Command's (NAVFAC's) Atlantic Division. On 8 February 1999, during his trip to Puerto Rico, he was told at a briefing that the completion date for Phase I had passed and Fraya had performed no work at the site, that Fraya was into a period for which liquidated damages (for Phase I) would be assessed, and that Fraya's performance with respect to submitting administrative submittals was "woefully lacking." After the briefing, Lamoureux concluded that the Navy "ought to be looking at issuing a show cause and asking the contractor if there's any reason we should not default" (tr. 260).

47. On 16 February 1999, ROICC Decker issued a show-cause letter to Fraya. It stated in part:

Since you have failed to even commence on-site work within the time allotted, the Government is considering terminating said contract Pending a final decision on this matter, it will be necessary to determine whether your failure to perform arose out of causes beyond your control and without fault or negligence on your part. Accordingly, you are hereby afforded the opportunity to present, in writing, any facts bearing on the question to Resident Officer in Charge of Construction within ten (10) days after receipt of this notice.

(R4, tab 15)

48. Fraya received the show-cause letter by FAX on 16 February 1999. It responded by letter dated 17 February 1999, sent to the CO at Roosevelt Roads, Ceiba, Puerto Rico. The letter explained that it experienced delays due to "the hurricane . . . in the recruitment of certified QC personnel . . . [and] the corrections to the administrative

submittals.” Fraya stated that it expected to make corrections to the QC Plan by 18 February 1999 (the next day), and after it was approved, it would mobilize and begin construction. The letter said that Fraya had delivered to Sabana Seca a Network Analysis Schedule which had “taken in consideration the delay as of today and the recuperation is observed thru the graphs.” As for materials, the letter stated that it had in its warehouse “those that are needed for the first phase and those that have lead delivery.” (R4, tab 16) This statement was not true. As of 12 February 1999, Fraya had canceled the Atlantic Steel Access Floors it ordered from Charian Technical Corporation, and was seeking a quote from a different supplier to furnish a different product (tr. 342, 345). We find neither the delays due to Fraya’s failure to nominate a qualified QC Manager nor the delays due to its need to correct administrative submittals excusable.

49. Even though Fraya was supposed to submit its Network Analysis Schedule on 8 November 1998, Fraya did not submit the schedule until 16 February 1999 (tr. 187, 189). The Network Analysis Schedule was hand-delivered to Pedro Camacho (Camacho), the Navy’s construction representative, at Sabana Seca (tr. 72). The Network Analysis Schedule was delivered on the same day Fraya received the show-cause letter. There is no indication it was sent in response to the show-cause letter (tr. 188-89). We find that the schedule was sent to satisfy one of the contract’s submittal requirements. The schedule showed installation of access flooring to be a two-week event (R4, tab 26 at Enclosure 3).

50. Camacho reviewed Fraya’s Network Analysis Schedule and in a memorandum dated 19 February 1999 to AROICC Garcia, recommended disapproval and resubmission of the schedule. The memorandum identified 17 specific deficiencies. It indicated that Fraya had totally disregarded the phasing requirement of the contract. It also identified work (*e.g.*, mercury, asbestos and lead abatement, fire alarm, mechanical, lighting fixture, and electrical wiring) Fraya erroneously believed could be done in one continuous operation. The memorandum indicated that the schedule was not current -- showing work starting in October 1998, and finishing on 5 November 1999, one month past the contract completion date. Presumably, Fraya added 30 days to the project to account for the effects of the hurricane, but the schedule did not indicate what submittals were delayed by the hurricane and to what extent they were delayed. The schedule did not break out the activities into their submittal, procurement and work stages. (R4, tab 26, Enclosure 3, tab 154; tr. 70, 186, 194)

51. Fraya’s Network Analysis Schedule did not reflect the status of the work as of the date of submission (16 February 1999). It indicated mobilization to have taken place back on 14 October 1998. Except for the delivery of trailers to the site, however, no mobilization had actually taken place. The Network Analysis Schedule showed Fraya planned to take 387 days (from 14 October 1998 to 5 November 1999) to complete the contract. Even assuming that Fraya was entitled to the 30-day time extension it claimed, there were only 262 days (16 February 1999 to 5 November 1999) remaining on the

contract as of 16 February 1999. The schedule did not show how Fraya was going to “recuperate” to complete the contract within that time. (*See* R4, tab 26, Enclosure 3; tr. 232-33)

52. AROICC Garcia testified that after he reviewed Fraya’s Network Analysis Schedule, he was certain that Fraya would not be able to finish the project on time because Fraya had shown “an obvious failure to understand the work, itself, because the phasing is inherent to the work.” Moreover, he believed that since the project was already five months late, the project would be at least five months late if it had to be properly phased. (Tr. 74)

53. In a memorandum of findings and recommendations dated 24 February 1999, addressed to the CO, the ROICC found that (1) “[a]t this time the contract is 0% complete since the contractor has not been able to complete the administrative requirements necessary to begin on-site work,” (2) that all required submittals were late, and Fraya provided most of the submittals only after the Navy issued a cure notice, (3) that Fraya failed to meet contract requirements on the submittals it did provide, and on resubmission, failed to address the deficiencies identified. The memorandum found that since no work had been done, the estimated time to complete remained at 355 days, and the estimated cost to complete remained at \$1,378,600. The memorandum recommended that the CO terminate Fraya’s contract for default, and repro cure through a takeover agreement with the surety. Among the other factors the ROICC considered in recommending termination were:

a. The terms of the contract where [sic] not met by the contractor. Liquidated damages have begun to accrue even before the contractor was able to begin on-site work. The contractor is behind schedule. He has already missed a deadline for a phase completion and does not have an approved schedule of work to track how far behind his efforts are.

b. The construction requirements can be obtained from many other sources.

c. The contractor’s inability to comply with administrative requirements is clear evidence of his lack of commitment to completing this work. . . . On two occasions he has been asked to provide evidence of this change of circumstance [*i.e.*, to support the alleged hurricane delay], the last being a show cause notice and has yet to do so. . . .

d. Obtaining a quality product as close to the original schedule is essential. Even if allowed to continue with the

contract it is doubtful that the contractor would be able to complete the work faster than a new contractor hired by the surety.

(R4, tab 156)

54. By 4 March 1999, the Memorandum of Findings and Recommendations had reached NAVFAC's Atlantic Division. There, it was reviewed by a contract specialist and NAVFAC counsel. (R4, tab 168; tr. 85) After their review, the contract specialist prepared a "first endorsement" of the findings and recommendations summarizing the information received, and analyzing if the recommendation was in the best interest of the Navy. (Tr. 263) Based on Fraya's past performance, and based on the lack of indication in its response to the show-cause letter that it was bringing in new personnel and adding shifts, CO Lamoureux concluded that Fraya could not complete the contract within the time remaining on the contract (tr. 270-71). Based on the project architect/engineer's (A/E) original projection, CO Lamoureux concluded that it would take a contractor "who was capable and willing and performed well to complete the job" in 355 days (tr. 273). He testified that based on what Fraya had shown him, he had no reason to believe that it could or would perform the contract in 355 days from when it started to work. He testified that even when Fraya was on notice that its contract might be terminated, he was not given confidence either by way of a plan or assurance that its performance would improve. (Tr. 273-74)

55. CO Lamoureux also considered whether Fraya was entitled to any delay days. He concluded that Fraya's delay in getting its QC Manager approved was not excusable because it was "well within their jurisdiction to have managed from the beginning" (tr. 275). Nor did CO Lamoureux consider Fraya to be entitled to any delay days for Hurricane Georges. He found that Fraya had repeatedly failed to substantiate any impact of the hurricane on the project critical path, and seeing no response to the AROICC's request, he concluded "there was probably none, and there was no basis to conclude he was entitled to time" (tr. 268-69). He also concluded that Fraya had been put on notice of the Navy's "clear intention" to terminate its contract, and even then, it had failed to provide the necessary proof to support its claim of hurricane-caused delay. (Tr. 275)

56. Based on his review of the ROICC's findings and recommendations, and of the contract specialist's first endorsement, CO Lamoureux concluded that Fraya's contract should be terminated for default (tr. 264). He testified that he reviewed the ROICC's recommendations which contained a discussion of the FAR 49.402-3(f)⁴ factors (*see* R4, tab 156), and he considered those factors in reaching his decision to terminate Fraya's contract for default (tr. 262). While the CO reviewed the recommendations of those in Puerto Rico and NAVFAC's Atlantic Division, he testified, and we find, that he independently determined whether to terminate Fraya's contract (tr. 279).

57. After receiving the Navy's comments and the marked-up Network Analysis Schedule, Fraya revised and resubmitted the schedule on 3 March 1999. The ROICC received the revised schedule on 4 March 1999. (R4, tab 163; tr. 543-44) Jimenez admitted that the revised Network Analysis Schedule did not correct the deficiencies the Navy identified. He blamed his scheduler for not following his instructions. (Tr. 545)

58. In reviewing Fraya's revised Network Analysis Schedule, the Navy's scheduling expert (Greg D. Crider) found numerous flaws. The schedule omitted key submittals that must be approved prior to the start of demolition activities such as the APP, the QC Plan, and the Environment Protect Plan. The revised schedule also omitted other critical submittals required for construction to begin such as pavement removal (§ 02951), rebar (§ 03200), roof insulation (§ 07220), membrane roofing (§ 07550), firestopping (§ 07840), wall covering (§ 09721), fire alarm system (§ 13852) and air balancing (§ 15950). In addition, the procurement activities in the revised schedule did not show any fabrication or delivery lead time after approval of submittals. The revised schedule did not provide for a five-day acceptance period between each phase of the project, contrary to the requirement of § 01110, ¶ 1.2. It also did not identify the duration of each activity in work days (§ 01321, ¶ 1.4.3), or the manpower required for each activity (§ 01321, ¶ 1.4.3). Electrical work was not broken down into phases, and Fraya included numerous work elements in the wrong phases thereby overlapping the phases contrary to the specific prohibition of § 01110, ¶ 1.2d. (R4, tab 201 at 11-14)

59. According to Crider, Fraya's 3 March 1999 Network Analysis Schedule called for it to start demolition on 3 November 1998. Thus, updating the schedule to reflect start of demolition on the day the contract was terminated would result "in a slip of four months in the project completion date" to "at least February 2000." (R4, tab 201 at 14, ¶¶ A39 and A40) He pointed out that there were several submittals that had the potential of further delaying the project: Changing its supplier as late as 2 March 1999 would delay the submittal approval and delivery of the access flooring required for Phase I work.⁵ Also, Fraya had not resubmitted the elevator clearance information as of the time its contract was terminated, and since the elevator is a long-lead time item (12 to 14 weeks), it could delay completion of the project. (R4, tabs 178, 201 at 15, ¶ 3)

60. Based on his review of the record, the Navy expert opined that "there was not a reasonable likelihood at the time of the default termination that Fraya could have completed the contract effort within any of the milestone dates established in the contract (*i.e.*, specified completion dates for Phase 1, Phase2 [sic] and Phase 3)" and "there was not a reasonable likelihood at the time of default termination that Fraya could have completed the contract effort within any of the milestone dates, even if the milestone dates had been extended by 30 days." (R4, tab 201 at 19)

61. On 5 March 1999, CO Lamoureux issued Modification No. P00001 terminating Fraya's right to proceed under the contract for two reasons: "failure to make progress to ensure completion of the contract and to perform the contract within the specified time" (R4, tab 2). He terminated the contract for failure to perform within the specified time because the completion date for Phase I, 28 January 1999 had passed, and "the work had not been completed," and "the site work had . . . not started" (tr. 266). He terminated Fraya's contract for failure to make progress because 40 percent of the contract time had expired and no work had been done on any phase, and Fraya still had not received approval of all the submittals necessary to start work (tr. 270, 272). This notice of termination was faxed to Fraya on 8 March 1999. It was also sent to Fraya by certified mail on the same day. The termination was effective "immediately upon receipt of this modification." (R4, tab 2) Fraya timely appealed the termination by notice dated 10 May 1999.

62. At the hearing, Fraya alleged for the first time that the termination was motivated by the Navy's desire to punish it for past performances. In support of this allegation, Fraya pointed to a 1996 performance evaluation of Fraya on a contract involving Building 386 at Roosevelt Roads. Someone unconnected with the Building 85 contract checked "No" in answer to the question "Will Employ Contractor Again?" and gave Fraya an overall performance rating of "MARGINAL." (Ex. A-2) With regard to this document, we have no evidence to indicate that it was anything other than an honest appraisal of the quality of Fraya's work on another project. It apparently did not prevent the Navy from awarding the Building 85 contract to Fraya. Fraya also pointed to a second document as evidence of impropriety in the award of the Building 85 contract. This document is a handwritten note ROICC Decker kept of a telephone conversation with AROICC Garcia on 22 January 1999. The note included the statement "AWARD NOT CLEAN - WE OPPOSED IT." (Ex. A-1) With regard to this document, the AROICC explained that the contracting personnel at Roosevelt Roads had "technical problems" relating to the responsiveness of Fraya's bid (tr. 130-31). Fraya did not dispute this testimony. Without more, we are unable to find that these documents show any culpable intent on the part of the Navy in terminating Fraya's contract.

63. On 8 March 1999, the ROICC notified Fraya's surety, Reliance Insurance Company (Reliance) that Fraya's contract had been terminated, and the defaulted work might be completed by a takeover agreement with the surety (R4, tab 18). By letter dated 11 March 1999, Fraya's counsel sought to have the CO reinstate the contract. The letter mentioned that Fraya had submitted a construction chart showing that "regardless of any delays heretofore encountered, that work would be completed in accordance with the initial required delivery date." Counsel's letter contended that "the CPM chart submitted clearly indicates that the Government's actions were premature in this regard. . . ." (R4, tab 19) The construction or CPM chart referred to was the Network Analysis Schedule Fraya submitted on 16 February 1999.

64. CO Lamoureux's 17 March 1999 reply pointed out that the contract required Fraya to commence and complete the work in phases, to complete each phase of the work within the number of days stated, and that no work would be allowed on a subsequent phase until the preceding phase had been completed. The letter maintained that the termination was appropriate because:

Fraya did not meet the initial required delivery date of 28 January 1999 for Phase I of the contract. At the time of the termination for default, no work had been accomplished on Phases I or II. The assessment of liquidated damages for each day of delay at the rate of \$200.00 began on 29 January for Phase I.

(R4, tab 20)

65. CO Lamoureux acknowledged that prior to issuing the termination letter, he did not review the Network Analysis Schedule Fraya submitted to Sabana Seca on 16 February 1999. CO Lamoureux testified that he had since reviewed the Network Analysis Schedule, and that he would not have altered his decision to terminate Fraya's contract for default, because:

. . . It would have convinced me that the contractor either didn't understand the project, wasn't paying attention to -- to working the project, or unwilling to do it, but in either case, it would have convinced me that we were -- that the contractor was not gearing up to try to prosecute this work properly.

(Tr. 275-76) He found Fraya's Network Analysis Schedule outdated when proposed, and even if Fraya was entitled to a 30-day time extension for the hurricane, completion of the project, in the phases required by the contract, would have had to be projected from 16 February 1999 forward, and not from the original scheduled start date of 14 October 1998 (tr. 277). At the time he terminated Fraya's contract, PCO Lamoureux did not know that Fraya did not have the access flooring to finish Phase I (tr. 278).

66. Reliance advised CO Lamoureux by letter dated 4 June 1999 that it was preparing a bid package to complete the defaulted contract work. It furnished a list of 11 potential bidders and asked the CO if he would like to add any other contractors. (R4, tab 31) Pursuant to an agreement with Reliance and under the terms negotiated by Reliance, the Navy entered into a completion contract with Francisco Levy Hijo, Inc. (Francisco Levy) (tr. 673). Since Reliance had agreed to pay any additional costs incurred in completing the contract, the CO testified that he "had no intention to pursue . . . procurement costs" (tr. 251).

67. After its contract was terminated, Fraya engaged the services of Angel Luis Echevarria (Echevarria) to prepare a schedule to convince Reliance that Fraya could finish the contract on time if hired as a takeover contractor (tr. 449, 546-47). Like the Network Analysis Schedule Fraya submitted in February 1999, Echevarria's schedule "did not take into consideration . . . the days that had gone by already," and did not divide "the network analysis into the different phases" (tr. 450; ex. G-1 at 57-59; R4, tab 26, Enclosure 1). According to the Echevarria Schedule, if the project started on 14 February 1999, it would complete 123 days later, on time, on 4 October 1999 (ex. G-1 at 69). To attain this schedule, Echevarria would have had to overlap Phase II and Phase III (ex. G-1 at 73-74). Echevarria acknowledged that, without overlapping Phases II and III, the project would not finish until four months beyond the original contract completion date, on 4 February 2000 (ex. G-1 at 75). The Government's scheduling expert reviewed the Echevarria schedule. He found that that schedule called for Fraya and its subcontractors to work on Phases II and III concurrently, and would not allow continuous operations by the Navy in Building 85, in violation of the phasing requirements of the contract. (R4, tab 201 at 16)

68. At the hearing, Fraya called as its scheduling expert, Rogue Perez-Frangie (Perez). Jimenez acknowledged that he hired Perez after Government counsel exposed the errors that Echevarria made in his schedule at his deposition (tr. 358). Using a computer application known as "Primavera," Perez prepared a Critical Path Method (CPM) Target Plan that showed that the project could be completed in 181 days (8.33 months) without working weekends. According to Perez, excluding the time required for the Navy to approve submittals, "pure construction work would last 6.33 months." Perez testified that weekends and acceleration could be used in case Fraya encountered unforeseen delays. (Ex. A-6 at 29, 32-33). He testified that he would use four crews to install the access flooring during Phase I and finish it in one day (tr. 624, 629). According to Perez's CPM Target Plan, Phase I could be completed in 56 working days, Phase II in 50 working days, and Phase III in 58 working days (tr. 649-50; ex. A-6 at 31). Perez did not use any recognized industry estimating guides. In preparing the CPM Target Plan, he used what he referred to as the "ways and means" of construction. These "ways and means" turned out to be what Jimenez orally told Perez would be possible. (R4, tab 201 at sub-tabs O, Q).

69. The Navy's scheduling expert found that the Perez plan was based on a 42 percent reduction in the duration of the work. He opined that Fraya had not demonstrated that the Perez plan was achievable because it was not "resource-loaded" as required by the specification (*see* § 01321, ¶ 1.4.3m). (R4, tab 201 at 18) According to the A/E whose firm designed the project, the 355-day completion date was based on 15 to 20 years of doing work in Puerto Rico. Among the factors considered were the limited access to the building because of security reasons, weather conditions during the period of construction, and the month-long holiday in December and January each year when "construction shuts down." The A/E testified that while 355 days to complete was reasonable, "it was a little

tight.” (Tr. 688-90) Weighing the experts’ opinions, and given that Fraya was not in a position to start work even as late as the time its contract was terminated (all administrative submittals not approved, no approved schedule), we find that Fraya could not have completed the project even if it were given a 34-day time extension for the hurricane.

DECISION

A default termination is a drastic sanction which should be imposed “only for good grounds and on solid evidence.” *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government bears the burden of proof with respect to whether termination for default was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Once the Government has made a *prima facie* case justifying the default termination, the burden shifts to the contractor to prove that its failure to perform was excusable. *Nagy Enterprises*, ASBCA Nos. 48815 *et al.*, 98-1 BCA ¶ 29,695 at 147,204.

In this case, renovation of Building 85 was required to be performed in three phases. Phase I was required to be completed by 28 January 1999, and Phase II and Phase III were required to follow sequentially. To enable NAVSECGRUACT to continue to operate, overlapping the phases was not allowed. The contract required Fraya to have numerous administrative submittals approved before it could start work. While the 355 days to complete the project was reasonable, it was “a little tight” (finding 69). We have found that the timely submission and approval of the administrative submittals were crucial to the timely completion of Phase I and the subsequent phases (finding 7).

Of all of the administrative submittals, the appointment of a qualified QC Manager and approval of the QC Plan were crucial because the QC Manager was charged with the responsibility of reviewing, approving and certifying that all of Fraya’s submittals were in compliance with the contract requirements. Therefore, without a qualified QC Manager, approved by the Navy, all of Fraya’s other submittals would simply languish. (Findings 10, 11)

In this case, notwithstanding the clear requirement that the QC Manager must have completed a COE course entitled “Construction Quality Management for Contractors,” Fraya nominated a clearly unqualified candidate for the position. Because the Navy rejected Fraya’s initial nominee (the parties did not work out an interim solution until 28 January 1999), and Fraya did not resubmit its QC Plan until 19 February 1999, the Navy did not approve it until 1 March 1999. By then, it was 32 days after the Phase I completion date. (Findings 32-37)

Not only was Fraya late in obtaining approval of its QC Plan, it was late in submitting other administrative submittals as well. Its APP was not approved until 16 February 1999

after three submissions (finding 41). Its Demolition Plan was not approved until 22 February 1999 (finding 43). Its Environmental Protection Plan was not submitted until 5 March 1999. There is no record that Fraya submitted an Erosion Control Plan. (Finding 43) We have found that as of 8 March 1999, the effective date of the termination for default, Fraya did not have all of the prerequisite submittals approved so that it could begin site work on Phase I (finding 44).

Despite the Navy's repeated requests for excusable causes for the delay in its administrative submittals, Fraya either ignored the Navy's requests (findings 24, 25, 29) or did not provide sufficient details for the Navy to evaluate its claim (finding 48). The information relating to the roof leaks of its offices and the extent of the delay caused by the hurricane was dug up by the Navy during discovery and was included in the Rule 4 file by the Navy (findings 18, 19, 30, 31). Consequently, although we allow for possible delay related to the hurricane in our analysis below, we cannot fault the CO for concluding, as he did, that Fraya was not entitled to a time extension because of the hurricane (finding 55).

We have upheld the default termination of a contract where the contractor, among other things, failed to submit the required administrative submittals and never performed any work on site. *See Good Construction Company*, ASBCA No. 30387, 86-2 BCA ¶ 18,912; *Arlo General Contractors, Inc.*, ASBCA No. 26195, 84-2 BCA ¶ 17,470 (three months after scheduled completion date, the contractor had not begun work on the job site; contract properly terminated for default for failure to make progress); *Dimarco Construction*, ASBCA Nos. 28259 *et al.*, 85-2 BCA ¶ 18,002 (a contract was properly terminated for default after its scheduled completion date had passed and the contractor had completed only 55 percent of the work). Here, at the time its contract was terminated for default, 40 percent of the total contract time had elapsed, and Fraya had completed 0 percent of the work.

Phasing without overlapping was a key ingredient of the contract. Fraya's inability to perform in accordance with this requirement was made clear when it submitted its Network Analysis Schedule which totally ignored the phasing requirement (finding 50). Ignoring this plain requirement was indicative of Fraya's lack of diligence in performing its contract. Without an approved schedule, we agree with the Navy expert's assessment that "there was not a reasonable likelihood at the time of the default termination that Fraya could have completed the contract effort within any of the milestone dates . . . even if the milestone dates had been extended by 30 days" (*see* finding 60). *See Discount Co., Inc. v. United States*, 554 F.2d 435 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 938 (1977) (the default clause did not require a finding that completion within the contract's time limitations was impossible, but only that the Government could not be assured of timely completion).

We conclude that the Navy has made out a *prima facie* case that termination of Fraya's contract for failure to make progress and for failure to perform within the specified time was justified.

Fraya contends in rebuttal that its failure to get its submittals approved and to begin work were due to delays caused by the hurricane. Hurricane Georges struck Puerto Rico on 21 September 1998. It blew off the metal covering on the roof of Fraya's offices and allowed rainwater to leak into the offices. Jimenez alleges that Fraya was prevented from doing all of the administrative submittals.

A hurricane is considered an act of God. *See Trataros Construction, Inc. v. General Services Administration*, GSBCA No. 15081, 01-1 BCA ¶ 31,310 (Hurricane Georges found to be an act of God). While the Government is not liable for damages caused by an act of God in the absence of a risk-shifting clause, an act of God is an excusable cause for failure to perform. *See e.g., The Arundel Corp. v. United States*, 103 Ct. Cl. 688, 711-712 (1945), *cert. denied*, 326 U.S. 752, *reh. denied*, 326 U.S. 808 (1945); *Nogler Tree Farm*, AGBCA No. 81-104-1, 81-2 BCA ¶ 15,315 (contractor entitled to a time extension due to eruption of Mt. St. Helens which was an act of God); *James L. Ferry & Son, Inc.*, ENG BCA No. 3996, 81-2 BCA ¶ 15,330 (drought was an act of God which entitled a contractor to a time extension but not to a price increase); FAR 52.249-10(b)(1)(i). To be entitled to a time extension due to excusable cause, a contractor has to show the individual alleged causes of delay were of an excusable nature and had increased the time for performance of the contract as a whole. *Standard Coating Service, Inc.*, ASBCA Nos. 48611, 49201, 00-1 BCA ¶ 30,725 at 151,775-776, *citing Essential Construction Co. & Himount Constructors, A Joint Venture*, ASBCA Nos. 18491 *et al.*, 78-2 BCA ¶ 13,314.

Fraya has been unable to establish with any degree of precision what administrative submittals were impacted by Hurricane Georges and for how long (findings 20, 31). Because the contract required some of the administrative submittals to be submitted within a specified number of days after award or receipt of notice of award (*e.g.*, Network Analysis Schedule -- 40 calendar days after award; QC Plan -- 20 calendar days after receipt of Notice of Award; Schedule of Prices -- within 15 calendar days of notice of award), we concluded that the hurricane had the effect at most of delaying Fraya 34 days (from 29 September 1998 to 2 November 1998) in starting the preparation of those submittals tied to the contract award date (finding 38).

Accepting the fact that Fraya could not begin the preparation of its QC Plan until after its roof was fixed (on or about 26 October 1998), and assuming that it took Fraya another week to get back to its normal routine, we found that Fraya should have started working on its QC Plan by 2 November 1998, and submitted it 20 calendar days later, on or about 22 November 1998. Fraya first submitted its QC Plan on 4 December 1998.

Because of the problems surrounding the qualifications of its nominees for QC Manager and Alternate QC Manager, Fraya did not resubmit its QC Plan until 19 February 1999, 89 days (from 22 November 1998 to 19 February 1999) after it initially should have submitted it. This 89-day delay in submitting its QC Plan was not excusable. (Finding 38)

Under the contract, the APP had to be submitted at least 15 calendar days prior to start of work at the job site (finding 14). Work could not begin until the Environmental Protection Plan had been approved (finding 15). The contract required the submission of an Erosion Control Plan a minimum of 30 days prior to the start of construction (finding 15). The contract required approval of a Demolition Plan before work could start (finding 16).

While the submissions of these submittals was not tied to the contract award date, they inevitably become critical at some point because Fraya only had 105 days to complete Phase I. The longer Fraya took to have its administrative submittals approved, the shorter its time within which to complete Phase I. In this regard, the contract assigned to Fraya the task of coordinating the scheduling, sequencing, preparing and processing of submittals with the performance of the work so that work would not be delayed by submittal processing (*see* finding 8). Fraya has provided no analysis of any kind to demonstrate that the submission of its Environmental Protection Plan, Erosion Control Plan and Demolition Plan was delayed by Hurricane Georges. If Fraya was given a 34-day time extension, Phase I should have been completed on 3 March 1999 (28 January 1999 plus 34 days). Fraya has not explained why no work had even been started when its contract was terminated on 8 March 1999.

Based on the foregoing, we conclude that Fraya has not shown that its failure to make progress was excused by the hurricane.

Fraya argues that the Navy could have prevented further delays to its administrative submittal process by waiving the COE course requirement of the QC Manager. It argues that even though Gonzalez had previously been approved as a QC Manager on another Navy job, it took six weeks for AROICC Garcia “to waive that requirement.” Fraya argues that had the Navy “granted the waiver six weeks earlier, this person could have expedited and assisted in all the other submittals and requirements and the Navy’s failure to approve him for a period of six weeks violated applicable case law of a duty to cooperate.” (App. br. at 21)

There is no merit to this argument. First, although Gonzalez might have been acceptable under the terms of some other contract, his qualifications must be measured against the requirements of the Building 85 contract. Under the Building 85 contract, the Navy had the right to insist upon compliance with the terms of the contract. *H.L.C. & Associates Constr. Co. v. United States*, 367 F.2d 586, 598 (Ct. Cl. 1966); *Maxwell Dynamometer Co. v. United States*, 386 F.2d 855, 868 (Ct. Cl. 1967). Second, Fraya, and

not the Navy, was the one that could have prevented the delay. Fraya could have nominated a QC Manager whose qualifications met the requirements of the contract. Third, Fraya did not ask the Navy to reconsider the rejection of Gonzalez until 4 January 1999. The Navy agreed to accept Gonzalez on an interim basis on 28 January 1999. We have found that the time the Navy took to reconsider was reasonable.

As for Fraya's allegation that the Navy breached its implied duty of cooperation, the Navy has amply demonstrated that it cooperated by "working with" Fraya in expediting approval of submittals on numerous occasions (*see* findings 37, 40, 41), and in accepting Gonzalez on an interim basis until he fulfilled the contract requirements. The duty to cooperate is a duty not to hinder or interfere with a contractor's performance. It "is not a duty to do whatever a contractor demands." *Tri-Industries, Inc.*, ASBCA Nos. 47880 *et al.*, 99-2 BCA ¶ 30,529 at 150,765.

Fraya contends that the default termination should be overturned because the CO adopted a template recommendation to terminate without an independent assessment of "whether in fact the Darwin factors were established." Fraya contends in particular that the CO did not consider whether a reprocurement contract would complete the project sooner. (App. br. at 21)

Procurement officials must use judgment in deciding whether to terminate a contract for default; they cannot act as "automatons." *Schlesinger v. United States*, 390 F.2d 702, 708 (Ct. Cl. 1968); *Fairfield Scientific Corp. v. United States*, 611 F.2d 854 (Ct. Cl. 1979). It is an abdication of responsibility for the Government to use the default clause as a "pretext" to avoid its contractual responsibility. *Darwin Constr. Co., Inc. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987); *Schlesinger*, 390 F.2d at 709.

Fraya contends that the termination was motivated by the Navy's desire to punish it for its past performances and award of the contract was "not clean." Based on our review of the two documents Fraya introduced, we have found that this allegation is unsupported (finding 62).

Relying on input of others does not automatically mean that the CO was improperly influenced or failed to exercise his independent judgment in deciding whether to terminate a contract for default. In this case, CO Lamoureux was located in Norfolk, Virginia. Being away from the project site, he must rely on his "eyes and ears" in Puerto Rico. The facts show that he was briefed on the status of the project when he was in Puerto Rico in February 1999, and he initiated the show-cause letter (finding 46). The facts show that he considered whether Fraya's delay in getting its QC Manager approved was excusable and found it was not. He also considered whether Fraya's failure to perform was excused by the hurricane, and found no basis to grant an extension due to Fraya's repeated failure to substantiate its claim. (Finding 55)

The so-called “Darwin factors” refer to those factors the CO should consider in determining whether to terminate a contract for default. *See* FAR 49.402-3(f). While these factors may aid the Board in determining whether a CO has abused his discretion in terminating a contract for default, failure to consider one or more of the FAR 49.402-3(f) factors does not require that a default termination be overturned. The regulation also does not confer rights on a defaulting contractor. *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996). In this case, the ROICC’s findings and recommendations included a discussion of the FAR 49.402-3(f) factors. The CO testified that he considered the FAR 49.402-3(f) factors in reaching his decision to terminate Fraya’s contract for default. (Finding 56) With regard to whether another contractor could have finished the job sooner, we observe that the ROICC’s memorandum of findings and recommendations dated 24 February 1999, which the CO reviewed and considered, found that because Fraya lacked commitment to complete the work and did not have an approved schedule, “[e]ven if allowed to continue with the contract it is doubtful that the contractor would be able to complete the work faster than a new contractor hired by the surety” (finding 53).

Fraya argues that the Board should view this appeal as an excess reprocurement case because the Navy called Fraya’s bond, and Fraya would be liable to Reliance for approximately \$200,000 (app. br. at 26). The Navy has not assessed and has indicated that it will not assess Fraya excess reprocurement costs. Absent such an assessment, we see no reason to address an issue (presumably whether Reliance should have agreed and paid the Navy to enter into the completion contract directly with Francisco Levy, finding 66) which is strictly between Fraya and its surety.

CONCLUSION

Because Fraya’s failure to make progress and to complete Phase I within the time specified in the contract as extended to allow for possible impact of the hurricane (3 March 1999) were the result of its own failure to obtain timely approval of the administrative submittals despite the hurricane, and because the CO did not abuse his discretion in considering whether to terminate, we hold that the CO properly terminated Fraya’s contract for default.

Dated: 3 September 2002

PETER D. TING

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 Section 01110, ¶ 1.2a defines the “[s]cheduled start day,” as “[t]he day designated as the beginning of a particular phase” (R4, tab 1, § 01110 at 1).
- ² This refers to the submission of notification of Demolition and Renovation forms to Federal, State, regional and local authorities in accordance with 40 CFR 61-SUBPART M 10 working days prior to commencement of work (R4, tab 1, § 02220 at 2, ¶ 1.5.1).
- ³ The 1998 calendar shows the following Friday to be 23 October, not 26 October.
- ⁴ FAR 49.402-3(f) sets out the factors the CO should consider in determining whether to terminate a contract for default.

5

After the A/E approved its Atlantic Steel Access Floors, Fraya canceled its order with Charian Technical Corporation on 12 February 1999 (tr. 342). Thereafter, Fraya issued three purchase orders to Acme Supply, Inc., for the "TATE" access flooring on 2 March 1999 (R4, tab 159, 160, 161). The "TATE" access flooring had neither been submitted to nor approved by the A/E. Thus, as of the time its contract was terminated (effective 8 March 1999), Fraya did not have this long-lead item (tr. 339-40) required for Phase I work.

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. 52222, Appeal of Fraya, S.E., rendered in conformance with the Board's Charter.

Dated:

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