

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Asia Commerce Network ) ASBCA No. 58623  
 )  
Under Contract No. SP0600-12-D-1010 )

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OPINION BY ADMINISTRATIVE JUDGE O’SULLIVAN

Asia Commerce Network (ACN) appeals from the termination for cause of a contract to supply jet fuel to Bagram Air Field, Afghanistan. We have jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. Only entitlement is before us. For the reasons stated, we sustain the appeal and convert the termination for cause to a termination for convenience.

FINDINGS OF FACT

Contract Award and Terms

1. Defense Logistics Agency Energy (DLA Energy) conducted a competitive procurement and awarded Contract No. SP0600-12-D-1010 (the contract) to ACN on 27 March 2012 (R4, tab 4; tr. 1/58-59). The solicitation sought a total of 186,150,000 gallons of TS-1 jet fuel to be supplied to Bagram Air Field (Bagram or BAF), Afghanistan, out of which 37,230,000 gallons (20 percent) was awarded to ACN (R4, tab 4 at 582, tab 6 at 657).<sup>1</sup> The remaining 80 percent was awarded to the incumbent supplier, Red Star Enterprises Ltd. (Red Star) (R4, tab 305; tr. 1/55). DLA Energy sought a second source of fuel to mitigate the risk of having only one supplier, and

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<sup>1</sup> All Rule 4 citations refer to the consecutively-numbered pages.

made a minority award in order to transition the second source into performance without undue risk to the warfighter (tr. 1/55-56).

2. The contract as awarded consisted of a commercial item supply type contract for the delivery of jet fuel from the contractor's facility to Bagram via contractor-owned and operated pipeline, 24 hours a day, 7 days a week, at a rate of 600 gallons per minute (R4, tab 4 at 583). Non-incumbents were given six months to achieve operational status and begin delivering fuel.<sup>2</sup> This meant that the non-incumbent contractor, ACN, had six months to build a fuel facility outside Bagram capable of receiving fuel deliveries, assuring the quality of the delivered fuel, storing the fuel (including a reserve quantity), and pumping the fuel through a pipeline to the transfer point on Bagram at the required rate. (*Id.*)

3. The government would not pay for this upfront investment except through a per-gallon price for delivered or reserve fuel (R4, tab 4 at 639-40). The delivery period under the contract was 1 June 2012 to 30 June 2014 (*id.* at 605), which meant that a non-incumbent contractor who availed itself of the full six months to become operational after award (27 March 2012) had approximately one year and nine months of deliveries over which to recoup its upfront costs, the cost of its fuel supply, and any profit.

4. The solicitation required delivery of a certain quality and quantity of fuel at a specified rate, but did not prescribe how this was to be done, other than to specify that the fuel was to be sourced from northern routes/sources and be delivered by contractor-owned, metered six-inch pipeline to the base. The solicitation also required a contractor-owned facility capable of storing both the operational quantity of fuel and a reserve supply. (R4, tab 6 at 657-59) How this was to be accomplished was left to the discretion of the contractor. Contractors specified in their technical proposals how they proposed to meet the government's requirements, and their proposals were subjected to a "best value" evaluation in which past performance was the most important factor, technical capability was the second most important factor, and price was the least important factor (*id.* at 716-18).

5. The contract contained Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) (TAILORED), of which the relevant portions are set forth below:

**(n) TERMINATION FOR THE GOVERNMENT'S CONVENIENCE.** The Government reserves the right to terminate this contract, or any part thereof, for its sole convenience. In the

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<sup>2</sup> A member of the government's technical evaluation team questioned whether six months was a realistic period of time to stand up operations because similar CONUS projects, in his experience, took six months to a year (tr. 1/102).

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

(o) **TERMINATION FOR CAUSE.** The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 4 at 640-41)

6. The contract, as awarded, incorporated by reference the solicitation and amendments thereto, ACN's offer dated 20 January 2011, ACN's final proposal revision dated 3 February 2012, and specified email correspondence sent from ACN to Energy prior to award (R4, tab 4 at 582).

#### Contract Performance and Administration

7. ACN is headquartered in Kabul, Afghanistan. In seeking award of this contract, it contracted with Trace Petro Consultants (TPC), which wrote ACN's technical proposal and its Quality Control Plan. (Tr. 1/236) After award, ACN and TPC entered into a contract under which TPC was to provide project management services, including communications with DLA, project scheduling, overseeing the construction, procuring the fuel, and running the operation for ACN (R4, tab 269;

tr. 1/240). The contract could be terminated by either party with three months' notice (R4, tab 269 at 404).

8. The DLA Energy contracting officer (CO) for ACN's contract was Ms. Aybike Arslan, and the contracting specialist reporting to her was Mr. Jamaal Rose. At all relevant times, both Ms. Arslan and Mr. Rose were located at DLA Energy Headquarters at Fort Belvoir, Virginia. In addition, there were DLA Energy contracting, quality assurance, and operations personnel resident in DLA's Middle East Office in Bahrain as well as liaison officers (active duty military) and a contracting officer's representative (civilian) on the ground at Bagram. (Tr. 1/61-63)

9. The contract's six-month period for ACN to be operational ended on 27 September 2012. At this point, ACN was making progress but was not ready to start delivering fuel. On 18 October 2012 DLA emailed ACN's project manager, Mr. Salem, with a cure notice requesting ACN's explanation for why the project was not fully operational. The cure notice also requested additional information regarding ACN's land lease, ACN's current plan to connect the pipeline on base, the progress of securing badging for ACN's workforce to be able to access the base, and updated milestones reflecting a firm date on which pipeline operations would begin. (R4, tab 82)

10. On 23 October 2012 ACN provided its response, dated 22 October 2012, to the cure notice, which summarized the major causes of delay as follows:

--A lengthy process under Afghan law of locating and negotiating a lease with multiple owners of the land in question (35 days).

--DLA's request to propose an alternative fuel storage option which necessitated submission of a proposal and delay while waiting for DLA to decide on a course of action (nine days).

--Sixty-six day delay in the badging process occasioned by receipt of notice that a SPOT account would be necessary to enroll employees, more than 2 months after names and equipment were submitted.

--A Taliban attack on a convoy destroying 3 trucks carrying steel plates for construction, necessitating a delay of 27 days until the supplier was able to deliver new stock.

--Two-day delay when armed villagers chased off the demining team.

--Six-day delay caused by Red Star's claim to have leased the same land that ACN had negotiated for, resolved when the owner finalized a lease with ACN.

(R4, tab 76)

11. CO Arslan responded on 23 October 2012, reiterating her request for a revised set of milestones for project completion, revised milestones/timetable for when DLA would be able to order fuel, and revised timetable for accounting for the coordination of fuel transit and the plan for flushing of pipes. She explained that her objective was to re-establish a map for progress that DLA Energy could track, and measures for performance metrics. (R4, tab 75) On 31 October 2012, Mr. Salem submitted on behalf of ACN a schedule bar chart showing all activities completed by 30 November 2012, with the exception of "Pipeline inside BAF" for which no dates were provided, just the annotation "Takes 10 days after getting permission to work inside" (R4, tab 71). There is no record of any contemporaneous response by DLA to this submission.

12. On 25 November 2012, liaison officer Capt Carissa Deeney, USAF, and contracting officer's representative George Wilson visited ACN's facility outside the base to view ACN's progress on the project. In his report to CO Arslan on the visit, Mr. Wilson noted "a great deal of progress at the facility since our last visit." Among his observations were the following:

--Security wall gate has been completed, road leading to weight scales has been paved, scales are being finished and will be calibrated.

--Paved road continues to four download points. Filters and meters are in place, strainers not yet installed.

--The lab has received most of the furniture and equipment, and lab equipment is being set up and calibrated. Electrical work appears to be completed and fans are installed. Exhaust system is yet to be installed; none of the chemicals for the lab have arrived yet.

--Considerable progress in pump room and compressor building; some work yet to be completed in both locations.

--Fuel tank exteriors have been painted and interiors have epoxy coating; piping is largely complete. Work is continuing on various items associated with the tanks.

--ACN estimates the terminal will be complete and ready to receive fuel in two weeks.

Mr. Wilson further noted that to speed up pipeline construction on base, he and Capt Deeney had offered to act as escorts for ACN workers. (R4, tab 65)

13. Mr. Wilson testified at trial that he was "very pleased" with the progress being made, that ACN had clearly put money into top-notch equipment in the lab, and had installed a thermal stability machine which was a very expensive piece of equipment that many American labs did not have. The quality of the lab equipment was important because it was essential that the fuel be tested prior to pumping it to the base to ensure its suitability for military jet engines. (Tr. 2/163-66)

14. Just three days later, on 28 November 2012, Capt Deeney was able to escort ACN workers on base to begin construction for completion of the pipeline. Construction continued until 3 December 2012 when excavation hit a power cord and was temporarily halted. Mr. Wilson reported to CO Arslan:

Aybike,

Yesterday we were making good progress with the pipeline until we hit a power cord, that was not suppose to be in our work area. The line was running parallel to our ditch, but one section of wire had shifted into the work area. We moved slightly further away from the line, and continued digging. However after digging about 20 more feet, we ran into a telephone line crossing our path. CPT Deeney suspended the work until we could talk to the Public Works folks to resolve the problem. Public Works had approved our dig permit over two months ago, but evidently some work had been performed in the ECP3 [entry control point] area that was not recorded by that office.

CPT Deeney and TSgt Brinkman our [sic] working with the Public Works to resolve the issue. We will resume operations as soon as possible.

(R4, tab 364)

15. An email from Mr. Wilson to ACN dated 5 December 2012 reports that “[w]e cannot dig tomorrow” because “[t]he power folks finally showed up this afternoon, and we have multiple power and communication lines in the path of the dig.” Mr. Wilson requested that ACN project management come to the base the next day to discuss detouring the path of the pipeline. (R4, tab 182) On 9 December 2012, Capt Deeney informed ACN that a helium shipment was coming to the base the next day, meaning that she and TSgt Brinkman would not be able to escort ACN and its workers on base to resume pipeline work. She indicated that digging could resume the next day, 11 December 2012. (R4, tab 183)

16. A 12 December 2012 daily report from ACN documents that TS-1 fuel from 8 trucks was being downloaded into Tanks 4, 5, and 6, that work was still being performed on base to complete the pipeline, that finishing work was being done throughout the facility, that the fuel would be tested by an outside certified source, and that a total of 153 truckloads of fuel (1,108,869 gallons) had been received and stored at ACN’s facility from 2 December to 8 December 2012 (R4, tab 63).<sup>3</sup>

17. A 13 December 2012 email from Capt Deeney to ACN notes good progress had been made “despite the terrible weather.” She informed ACN that they would be unable to escort ACN’s team on base for the next two days due to other missions, but construction could resume on Sunday, 16 December 2012. (R4, tab 184)

18. Meanwhile, on 3 December 2012, CO Arslan received a communication from the CEO of the incumbent contractor Red Star’s parent company, Mina Group, expressing concerns about ACN’s pipeline construction and enclosing pictures (R4, tab 371). The overall concern expressed was that the pipeline construction did not adhere to American Petroleum Institute (API) standards or any other international standards and posed “substantial risks” in terms of potential future environmental damage. In support of this concern specific allegations were set forth:

--The pipeline was laid directly into a trench without compaction at the bottom or fine sand as protection against sharp object or rocks on top of the pipeline, which may lead to sagging and potential leaking later.

--Pipeline has no cradles or supports along the length of the pipe and no cement blockers at corners to prevent pipeline movement during operation, which could cause welds to crack or break over time.

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<sup>3</sup> In the Board’s version of the Rule 4 file, tabs 63 and 64 contain 10 December 2012 and 6 December 2012 emails, respectively, both with a 12 December 2012 daily report attached.

--Pipeline was wrapped in "insulation tape" before a hydrostatic pressure test was performed, making it "impossible" to detect any leakage at the welds. A hydrostatic test should have been performed every 100 meters during installation. Lacking a cathodic protection plan or a concrete channel with inspection covers, once the pipeline is buried there will be no way to monitor corrosion or detect leaks.

The letter expanded on Red Star's environmental concerns, explaining that the pathway of ACN's pipeline ran through a main village irrigation stream and that the entire surrounding area floods each spring, meaning that any leaks would endanger the village's irrigation water supply. Red Star stated that it had safeguarded against such an eventuality by enclosing its pipeline within a sealed concrete channel that would contain leaks, with hatches to allow for regular inspections. (R4, tab 371)

19. On 14 December 2012, CO Arslan forwarded the Red Star email and photographs to her team on the ground at BAF and in DLA's Middle East Office requesting their input:

Team—

We received this email and attachments from RS. It outlines a series of concerns RS has about AC's construction activities. Please ensure this stays FOUO. From a contracting perspective it is important to remember this is a fuel/supply contract, not service/facility. We do not tell the contractor how to build, what materials to use etc...we define fuel specification and throughput rate. Further, anything outside the Base wall falls outside our jurisdiction. That said we have an inherent responsibility to do the right thing. Please read through this information and let me know if there are critical issues that we need to address with AC.

If there are, I suggest we go out, inspect and "self-discover" the issues and guide them to correction.

(R4, tab 56 at 1348; tr. 1/113-14)

20. On 16 December 2012, ACN submitted a daily report noting that work had resumed on the portion of the pipeline on the base and that substantial progress had been made. The report estimated that the completed pipeline would be ready for flushing on 22 December 2012. (R4, tab 62) On Monday, 17 December 2012, ACN

informed Capt Deeney and Mr. Wilson via email that it would conduct hydrostatic testing of the pipeline the next day, 18 December 2012 (R4, tab 372; tr. 3/96-97).

21. On 17 December 2012, CO Arslan forwarded the Red Star email and photos to personnel at DLA Energy Headquarters with the following message:

Joe/Billy/Mike—

Forwarding this email, initially sent to the Region. Kari has already done a survey of our contract to see if there is anything enforceable however, given that our contract is a supply contract, most of the requirements are fuels spec centric. Believe Army Corps of Engineers would enforce infrastructure inside the baseline, but not out. Environmental clause should be present, Kari is confirming. Please let me know your thoughts on what if anything we can/should do given what we see in these photos.

(R4, tab 56 at 1347) Shortly thereafter, she sent an email to ACN stopping work on the pipeline:

I hereby request you stop work on the AC pipeline until further notice. I have engaged DLA Energy Regional Representatives and DLA Energy Engineers to review Asia Commerce's compliance to standards outlined in their offer, incorporated into our contract. Based on the outcome of this review, I will issue further guidance.

(R4, tab 60)

22. The next day, 18 December 2012, a team consisting of Capt Deeney, Mr. Wilson, and Clay Bolton, a U.S. Army Corps of Engineers fuels engineer, inspected the portion of ACN's pipeline within the base. Capt Deeney reported to CO Arslan that the purpose of the inspection was to determine whether there were any base standards of construction that were not being met, but that Mr. Bolton informed that because the line was a "courtesy line" to transfer fuel from a non-DoD entity, it did not have to meet U.S. Government standards. Capt Deeney recommended resumption of the tie-in at the earliest opportunity. (R4, tab 58)

23. Also on 18 December 2012, Michael Landry responded to CO Arslan's request for input on the Red Star photos with (1) his concern that ACN's pipeline as shown in the photos was not being constructed as proposed; and (2) additional concerns over whether the pipeline conformed to API standards as proposed by ACN (R4, tab 56). Specifically, Mr. Landry, who had chaired the technical evaluation

committee for this procurement, stated that ACN had proposed to encapsulate the entire pipeline in concrete and, in addition, to encase it in 100mm PVC conduit, but had done neither. Mr. Landry also provided CO Arslan with questions, based on the input of David Householder, another DLA engineer, to be posed to ACN to determine if the pipeline met API standards as proposed by ACN. (*Id.*)

24. CO Arslan responded to Capt Deeney's email with the following:

Thank you for the email, understand and it was our line of thinking initially, as well. However, what they offered does not match what they are giving us. We are in the process of laying it all out, their offer is incorporated into their contract.

They offered us a Cadillac, they didn't need to, but they did and now they're giving us a Fiat. I evaluated them in the context of a best value source selection strategy. Relative to others, they were the most attractive offer, looks to be a bit of a bait and switch. I think when I send you relevant portions of their offer, which was the basis for their award, you will see that we're getting significantly less than what they promised us.

(R4, tab 52 at 1263)

25. Later the same day, 18 December 2012, CO Arslan forwarded the concerns laid out in Mr. Landry's email to Mr. Wilson at Bagram Air Field (R4, tab 52 at 1261-62). Relevant excerpts are set forth below:

[P]age 208 of their submitted proposal shows a diagram of the intended laydown of the pipeline leading to Bagram AB. The schematic clearly shows the piping being encased in 100mm PVP [sic] Conduit. In typical installations the carrier pipe is encased in a steel pipe with link seals to center the pipe and closure boots at each end to prevent water from entering around the carrier pipe and to prevent fuel from leaking into the sub-soil.

....

[ACN proposed] the pipeline will be constructed according to API 5L standards, encapsulated inside a concrete culvert and interred adjacent to the road that leads to ECP #3....



We have seen direct evidence that the pipeline is not being constructed as they proposed.... In light of them stating the pipeline will be constructed to [API] standards, the following questions also need to be addressed.

- a. What type of wrap is used? Is it only on the welded joints?
- b. What type of coating is on the pipe?
- c. What is the pipe type and wall thickness?
- d. What will [be] the Maximum Allowable Working Pressure (MAWP) of the pipeline?
- e. What test procedures are to be used to certify the pipe installation?
- f. What type of medium will be used to pressure test?
- g. How long will the pressure test be run?
- h. What size and number of galvanic anodes are to be used for the cathodic protection?
- i. How many CP test stations will be installed?
- j. Were the personnel performing the welding procedures qualified?
- k. Were records made and recorded of the weld locations?
- l. Were the welds x-rayed for quality checks?
- m. There are rocks and stones in the trench; this is not acceptable practice, there should not be any objects around the pipe that can damage to [sic] the coating or pipe wrap.

CO Arslan also added the gist of two comments from Mr. Householder that were incorporated in Mr. Landry's email. The first was to the effect that ACN had promised via email following award to install a cathodic protection system, but that later emails from ACN were to the contrary. The second was that ACN had proposed to construct its operational facilities in accordance with API 650 standards, and "[i]f the pipeline is any indication of their intended practices, I would question the integrity of those statements as well." (R4, tab 52 at 1262-63)

26. Mr. Wilson provided a partial response to CO Arslan's questions via email on 19 December 2012, and stated he would need to ask ACN for the remainder of the information (R4, tab 50 at 1249-50). The next day, CO Arslan issued a show cause notice to ACN which stated, in relevant part:

You are notified that the Government considers Asia Commerce's failure to construct a pipeline facility within the required six-month time frame under Contract

SP0600-12-D-1010 a condition that is endangering performance of the contract. The subject contract required mobilization of the pipeline facility by September 27, 2012. In addition to explaining why the pipeline is not yet operating, Asia Commerce is also required to address the following deficiencies in pipeline construction:

The Quality Control Plan submitted by Asia Commerce stated that the piping will be encased in a 100mm [PVC] conduit and the pipeline being [sic] encapsulated inside a concrete culvert. Upon inspection of the current piping layout, it was found that Asia Commerce is neither encasing the pipeline in the 100mm [PVC] conduit, nor encapsulating the pipeline inside a concrete culvert to prevent water from entering around the carrier pipe and to prevent fuel from leaking into the sub-soil.

...The proposal also stipulated that the pipeline will be constructed in accordance with API standards. Therefore, Asia Commerce is requested to address the following questions: [whereupon the show cause notice reproduced questions (a) through (m) from finding 25 above].

With regard to the required cathodic protection, Asia Commerce proposed to construct the facility in accordance with API 650,<sup>[4]</sup> which requires the use of cathodic protection. DLA Energy has received information from Mr. Karim Salem stating that Asia Commerce will not use cathodic protection on the pipeline. Please provide Asia Commerce's plan for cathodic protection on the pipeline.

(R4, tab 3)

27. On 29 December 2012, ACN responded to the show cause notice with a five-page letter and attachments, from which the following information is extracted:

- In response to the request to explain why the pipeline was not yet operating, ACN attached its response to the CO's 22 October 2012 cure notice which detailed the causes of

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<sup>4</sup> API 650 applies to operational facilities, not to pipelines as Mr. Householder had observed in his comments earlier (finding 25). CO Arslan appears to have confused the facilities standard with API standard 5L applicable to pipelines.

delay to that date (to include land ownership complications, badging issues, and attacks/threats). ACN stated that it did not disclaim all liability for delay, but that the delays accounted for in its response to the cure notice accounted for approximately three months of delay. ACN also asked that the 17 December 2012 stop work order be lifted in order for ACN to be able to complete the pipeline construction on base, and stated it could mobilize and be back at work on base with 24 hours' notice.

- With respect to the PVC conduit, ACN stated that the reference to 100mm PVC in its QCP was a typographical error and that 10mm PVC was intended, and requested permission to correct the error. ACN attached corrected drawings, and noted that the PVC would not in any event have been installed until after all testing of the pipeline had been completed and certified by its quality control firm, SGS.<sup>[5]</sup>
- ACN stated that the pipeline was “scheduled to be encapsulated inside a concrete culvert and is a revision from interred adjacent to the road leading to ECP #3 and the current layout has been discussed and agreed[.]”
- ACN provided the following information in response to the CO's questions regarding compliance with API standards: (1) the pipeline is steel piping, 6 inches in diameter, API 5L Gr. B, ASTM A106 Gr. B, ASTM A53 Gr. B, within the requirement for a fuel delivery rate of 36,000 USG per hour.

(R4, tab 2 at 565-66)

28. In addition, ACN's response to the remainder of the specific questions in the show cause notice included the following information:

- The wrap used on the pipe is anti-corrosion wrap. The whole pipe is wrapped.
- A carbon coating is used on the pipe itself.

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<sup>5</sup> SGS is a worldwide company known for quality inspections and testing (tr. 2/17-18).

- Pipe type and wall thickness—API-compliant seamless 6 inch pipe, 8" wall thickness.<sup>[6]</sup>
- Maximum Allowable Working Pressure (MAWP) of the pipeline is 150 psi.
- The pipe will be subjected to pneumatic (air) testing to avoid potential freezing issues with water testing. Maximum air pressure used will be 150 psi; initial pressure applied will be 125 psi, held for 10 minutes to allow for location of any leaks, which will be repaired before testing is resumed. Test will be run for 24 hours and all connected fittings and welded joints will be examined to ensure they are rated for maximum test pressure.
- Cathodic protection is not identified to be used in the proposal, QCP, or contract. ACN consulted with SGS and Bellatrix West, LLC, who asked why cathodic protection would be required for such a short length of pipeline (750 meters) with a thickness of 8mm and wrapping with primer bar—previous failures, authority requirement, aggressive soil?
- The personnel performing the welding on the pipeline are employees of Behsazan Industrial Company (BIC), which is qualified. Each welder has a minimum of four years' experience, and among past projects built by BIC welders are the 2008 facility for the Red Star DLA Energy project and a number of other storage and download facilities in the 2008-2012 period.
- Records were made of the welds and the locations are marked on a separate pipeline map. The pipeline will be radiographed by SGS, who will apply API standard procedures and provide a certification. SGS has observed pipeline construction, to include visual inspection of joint fit-up and welding, lowering of pipeline segments into trench, and backfilling. SGS will witness hydrostatic test, depressurization and decanting of pipeline, and hook up and commissioning of pipeline.

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<sup>6</sup> ACN probably meant 8mm, given references in the attachments to 8mm pipeline thickness (R4, tab 2 at 573).

- As soon as ACN is allowed to resume work, it will conduct an inspection of the trench to ensure it is free of obstructions that would compromise the integrity of the pipeline.

(R4, tab 2 at 566-68, 573)

29. On 31 December 2012, CO Arslan acknowledged receipt of ACN's response and stated that "[m]ore instruction is to follow, once review, fact checking and way ahead is drafted and approved" (R4, tab 36). In a second email also dated 31 December 2012, CO Arslan addressed a few of the questions posed by ACN in its response:

To follow up, I can address a few of your questions upfront. As you are aware, there are variable unknowns inserted into every function of our operations in Afghanistan. We expect our Contractors, as industry experts to rise to the challenge. The stop work order remains in effect until I am convinced that what you have done up to this point, is congruent with what your contract states or we come to a mutual agreement and plan for a way ahead. I forwarded your response for review by our DLA Energy Engineers for context. More to come after the new year.

Regarding your request for extension, you have extended yourselves 3 months since September 2012, (expected date of completion). Based on what I've seen, the work/pipe laid, is disturbing and deeply below our expectation. I expect you will continue to extend yourself until the work is done, with noted negative past performance; but I cannot approve an extension contractually, as it would mean unfairly changing the terms under which the requirement was competed. I would like to highlight that you are cutting into your awarded contract performance period. Please note I will not be able to add more time to your contract performance period in order to host performance if/when your facility is functional.

....

More to come regarding the Engineering details after the New Year, this is clearly a challenge for you. We will

work with you to the maximum extent it is in the U.S. Government's interest to do so.

(R4, tab 35)

30. On 31 December 2012 CO Arslan forwarded ACN's response to the DLA engineers for feedback (R4, tab 383 at 873). Mr. Landry provided his feedback, which consisted of follow-up questions and a few observations (the trench should have concrete installed to prevent issues with rocks and debris; he had no evidence that SGS had observed installation of the pipeline section on base; ACN's general manager had stated in an email that cathodic protection would be provided), on 2 January 2013 (*id.* at 872). Confusingly, Mr. Landry testified that neither he nor Mr. Householder evaluated ACN's answers or provided feedback to the CO on those answers (tr. 3/205). Mr. Householder also testified that he was never asked by the CO to evaluate ACN's responses to the questions he had posed (tr. 3/277). Fortunately, it is not necessary to our decision to resolve this contradiction in the record.

31. On 2 January 2013, CO Arslan requested that Mr. Javed, the owner of ACN, attend a video conference scheduled for 7 January 2013, the purpose of which was "to discuss details associated with my recent show cause notice and your firm's response. I plan on having DLA Energy Engineers and Quality experts present." (R4, tab 32) ACN confirmed its participation in the video conference by email dated 3 January 2013, in which it reiterated that it was continuing to ready its off-site facility and prepare itself to hit the ground running on the remainder of the pipeline work once the stop work order was lifted (R4, tab 30). Because the CO's stop work order applied only to the portion of the pipeline being constructed on base, work continued on ACN's off-base facility (tr. 3/130-31).

32. On Friday, 4 January 2013, the CO emailed Mr. Rose, stating:

Given that decision has been made between Kathryn<sup>7</sup> and I to terminate AC for default, please proceed to draw up the paper work. Following the VTC on Monday, we can issue our decision.

(R4, tab 385) CO Arslan testified that when the show cause letter issued, she was well on her way to making the decision to terminate because she had lost trust in ACN, and that the response to her show cause letter demonstrated to the DLA team that "they didn't really have an understanding of how to execute a project of this size"

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<sup>7</sup> Kathryn Fantasia was the Director of DLA Energy's Direct Delivery Business Unit (tr. 1/95).

(tr. 1/92-93). She viewed the video conference as a “courtesy,” to give ACN one last chance to say something that would change her mind (tr. 1/94-95).

33. The record contains a short partial audio file (R4, tab 399) but does not contain a transcript or minutes or notes of the video conference held 7 January 2013.

34. On 17 January 2013, DLA transmitted CO Arslan’s termination of ACN’s contract for cause (R4, tabs 1, 22). The termination notice set forth the following reasons for the termination:

a. Extension of the Delivery Schedule

The Contracting Officer notes that all of the alleged delays occurred before the October cure notice and that Asia Commerce itself proposed a delivery date of November 30, 2012. Additionally, Asia Commerce stated that these delays only set its performance back roughly three months. However, as of December 18, 2012, the date of the Stop Work Order, Asia Commerce has not completed the pipeline or made delivery of the fuel. The Stop Wor[k] Order was issued four months after Asia Commerce missed the first delivery deadline and roughly a month after it missed the extended deadline. Asia Commerce has not identified any new conditions that prevented it from meetings [sic] its delivery schedule.

b. The Failure to Provide Cathodic Protection

The Contract required that the pipeline be constructed in accordance with API standards which included cathodic protection of the pipeline. A fact that Asia Commerce admitted to on August 18, 2012 in email correspondence received from Mr. Karim Salem...which stated that [Asia Commerce would deploy a cathodic protection system].

Asia Commerce later submitted email correspondence dated September 21, 2012 stating there was no need for cathodic protection because current soil conditions did not warrant the installation of cathodic protection and the length of the pipeline was very short. However, the Contracting Officer cannot consider Asia Commerce’s allegation...because Asia Commerce failed to provide [a] soil resistivity test....

Asia Commerce reversed this position during the teleconference held on January 9 [sic], 2013, where Asia Commerce stated that it would install cathodic protection on the pipeline. This fails to remedy the deficiency because to install this protection, the wrap on portions of the pipeline will need to be removed for the placement of the anodes. If the pipe is not again properly wrapped, concerns are that these areas of the pipeline would be overly exposed to corrosion.

c. The Failure to Encase the Pipeline in a Concrete Vault

The Contract requires that the entire length of the pipeline would be encased in a concrete vault. Asia Commerce has failed to comply with this requirement. A problem that is compounded by the fact that lengths of the pipeline had already been buried in preparation for pressure testing and commissioning.

To remedy this deficiency, Asia Commerce stated that it planned to excavate the entire pipeline and raise sections with cranes so that it could install pre-fabricated concrete encasements around the pipeline. This proposed plan fails to remedy the deficiency because it risks damaging the integrity of the already welded pipeline joints.

d. Request for a Modification of the Contract

After reviewing the information provided regarding the PVC encasement size typ[e], the Contracting Officer denies the request for a modification changing the proposed encasement PVC from 100mm PVC to 10mm PVC. The proposed modification would have no impact on the performance delays that Asia Commerce has already experienced.

5. Contracting Officer's Decision

The Contracting Officer has reviewed Asia Commerce's response to the Show Cause Notice and after due consideration of all of the pertinent facts, the Contracting Officer hereby determines that Asia

Commerce has failed to meet the contractual specifications for the construction of the pipeline. Additionally Asia Commerce failed to complete the requirements of the subject contract within the time required by the terms and conditions of the Contract. These failures did not arise out of causes beyond your control or without fault or negligence on your part. Therefore, Asia Commerce is hereby notified that the Government, by this written notice, terminates the subject contract, including your right to proceed with performance thereunder, in its entirety for cause in accordance with FAR 52.212-4(m), effective upon receipt of this notice.

(R4, tab 1 at 562-64)

35. CO Arslan acknowledged at the hearing that until she received the letter from Red Star, forwarded the photos accompanying it to DLA engineers on 14 December 2012, and received their feedback on the photos, she had not received any information that caused her serious concern regarding ACN's contract performance (tr. 1/211-12). ACN's pipeline was to have been tested the very next day following the CO's issuance of the stop work order on 17 December 2012 (R4, tab 60), and ACN was within a few days of completing pipeline construction on BAF (R4, tab 383 at 873). Its off-base fuel testing and storage facility was substantially complete by the end of November 2012 (ex. A-2 at 21), and 1.2 million gallons of TS-1 fuel had been downloaded to ACN's storage tanks in December 2012 in preparation to start pumping fuel to the base (R4, tabs 41-43, 63, 399).

Government Waiver of the September 2012 Delivery Date and Failure to Establish New Delivery Date

36. The government does not contest that it waived the contract's initial 27 September 2012 delivery date for fuel. Instead, it contends that ACN unilaterally re-established a firm delivery date of 30 November 2012. (Gov't br. at 74)

37. On 18 October 2012, CO Arslan issued a cure notice to ACN, asking for information bearing on why they had not completed and mobilized the pipeline facility within the contractually allotted time, and requesting revised milestones reflecting a firm date on which pipeline operations would begin. ACN responded on 22 October 2012, summarizing the major causes of delay, including lengthy lease negotiations and a lease dispute with Red Star, delays in badging for access to the base, and Taliban attacks. The CO wrote back reiterating her request for milestones. On 31 October 2012, ACN responded with the requested milestones showing all work completed by 30 November 2012, with the exception of the pipeline work within the

base, for which ACN noted, “Takes 10 days after getting permission to work inside.” (Findings 10-11) The CO did not respond to this submission and did not unilaterally establish a new delivery date.

38. In subsequent communications, including her 17 December 2012 stop work order and her 20 December 2012 show cause notice, the CO did not reference any new delivery date. Moreover, she testified at trial that the contract termination was not really about the time that ACN had taken to get ready to perform but about the fact that she had lost confidence in their technical ability to do the work (tr. 1/100). We find that ACN never proposed a firm delivery date and that a firm delivery date for fuel was never re-established following the government’s waiver of the 27 September delivery date.

#### Did ACN’s Performance Comply with the Technical Requirements of the Contract?

39. The first “contract requirement” cited in CO Arslan’s termination notice with which ACN allegedly failed to comply was cathodic protection. The issue of cathodic protection was raised in mid-August 2012 via email correspondence from Mr. Rose, the DLA contract specialist, to ACN raising some technical questions, among which was “3. Please provide Asia Commerce’s plan for Cathodic Protection” (R4, tab 254 at 347). Cathodic protection was not required by the contract specifications and was not included in ACN’s proposal. Nevertheless, Mr. Clark of Trace Petro Consultants (TPC), which was working for ACN on a contract basis as project manager, forwarded Mr. Rose’s email to Mr. Salem, ACN’s general manager, with the notation “Pay attention to Number 3 as it will require the pipeline contractor to install a cathodic protection system.”<sup>8</sup> He proposed that ACN send to DLA Energy this response: “We will be utilizing a galvanic anode protection system with buried (subsurface) anodes (preferably magnesium). Test stations will be located along the pipeline. The same type of system will be utilized for the tank farm.” Mr. Clark further stated that his firm would draw the design and manage the pipeline contractor’s work. (R4, tab 252) At this time, ACN had not yet awarded a subcontract for the pipeline work (R4, tab 268).

40. On 18 August 2012, ACN emailed Mr. Rose its response to the technical questions posed by DLA, faithfully reproducing Mr. Clark’s suggested answers (R4, tab 318). The relationship between TPC and ACN deteriorated over the next two months. On 2 October 2012, ACN complained to TPC about the way it changed project managers without consulting with ACN and about TPC’s frequent deployment of its project managers to work on other projects without notice to ACN.

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<sup>8</sup> Mr. Clark testified at the hearing to his opinion that “If there are any times that the pipeline touched the dirt, you need cathodic protection” and that “it’s common practice in pipeline construction” (tr. 1/284-85).

TPC responded to the effect that ACN should not try to tell it how to run its business and that everything was going well. (R4, tab 328 at 616, 619) ACN terminated TPC's services on 22 October 2012 (R4, tab 205).

41. In late August/early September 2012, ACN corresponded with a firm (Bellatrix West LLC) identified by SGS as a potential source of the cathodic protection array. On 21 September 2012, ACN emailed Mr. Rose of DLA explaining that ACN had been in touch with Bellatrix West LLC who had inquired "What is the reason for Cathodic Protection for such a short section of pipe (750m??), maybe previous failures, authority requirement, aggressive soil?" In light of this question and the fact that the pipe was 8mm thick and wrapped with primer bar, prevalent in Afghanistan, and the soil "is not aggressive," ACN wondered if DLA still insisted on cathodic protection. (R4, tab 100 at 1536) Mr. Rose forwarded this question to a DLA program manager who in turn forwarded it to a Naval Facilities Engineering Command subject matter expert for an answer (*id.* at 1535). The answer ultimately received was that "Per US standards, all piping routed underground requires cathodic protection regardless of the length" (R4, tab 94).

42. However, as CO Arslan was aware, the solicitation for the contract contained no specifications for pipeline construction, leaving the offerors to propose their own approaches to building the pipeline (finding 4). While the CO was within her rights in holding ACN to the standards it proposed, since its proposal was incorporated into the resulting contract (finding 6), ACN did not propose to provide cathodic protection. ACN did propose to meet API 5L standards for the pipeline, and CO Arslan testified at trial that she believed her "technical experts" had told her that API standards required cathodic protection of the pipeline (tr. 1/120). Indeed, her termination notice stated that API standards included cathodic protection (R4, tab 1). However, DLA engineer Mr. Householder, who had advised the CO on API standards, testified that cathodic protection is not required under the API 5L standard (tr. 3/259). Furthermore, he testified that cathodic protection is not indicated for all buried pipelines and that the determination is made after soils analysis depending on the degree of soils resistivity (tr. 3/260).

43. ACN's expert, Mr. Daniel Driscoll,<sup>9</sup> agreed with Mr. Householder that API 5L does not contain any standards for cathodic protection nor address when such protection would be required (ex. A-2 at 17). He agreed with Mr. Householder that cathodic protection is covered under NACE (National Association of Corrosion Engineers) codes, but explained further that API 5L does not reference or incorporate

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<sup>9</sup> Mr. Driscoll is a professional engineer with the firm of J.F. Kiely Service Co., LLC. He has 39 years of professional design and construction experience in the pipeline industry, including pipelines, pump stations, compressor stations, delivery terminals, and truck terminals.

the NACE standards (tr. 4/18). He also saw little need for cathodic protection as a practical matter, testifying that the quality of pipe used by ACN would have taken 30-50 years, without cathodic protection, to corrode to the point that a leak might occur (tr. 4/25). By contrast, the term of ACN's contract was only two years from the date of award.

44. Although ACN, relying on the advice of TPC, initially responded to Mr. Rose's technical inquiry with a brief description of a cathodic protection plan, it soon backed away and made it clear in a 21 September 2012 email that it did not agree with the CO that cathodic protection was required by the contract (findings 40, 41). Cathodic protection was never added to the contract as a requirement by a legally binding modification, and there was never at any point a mutual agreement reached between DLA and ACN representatives with contracting authority to include cathodic protection as a contract requirement. We find that ACN was not required by the contract to install cathodic protection on the pipeline.

45. Although ACN apparently abandoned its resistance to DLA's insistence on the installation of cathodic protection during the 7 January 2013 video conference preceding DLA's issuance of the termination decision, in that decision CO Arslan rejected ACN's attempted accommodation, stating that the wrap on the pipeline would have to be removed to install the cathodic protection and "[i]f the pipe is not again properly wrapped, concerns are that these areas of the pipeline would be overly exposed to corrosion." (Finding 34)

46. The second "contract requirement" cited in CO Arslan's termination notice as not being met by ACN was encapsulation of the entire pipeline in a concrete culvert. Mr. Landry testified that after he received CO Arslan's request to review the photos accompanying the Red Star letter, he reviewed ACN's final proposal (R4, tab 21) and determined that the pipeline was not being encapsulated in a concrete culvert as ACN had proposed (tr. 3/153, 162). He stated that, while the solicitation did not require encapsulation of the pipeline, and no other offeror had proposed to do so, this feature of ACN's proposal was superior to the others since it lessened the risk of a rupture to the pipeline and would contain the fuel if there were a leak in the pipe (tr. 3/153-54). Coincidentally, Red Star in its letter to the CO had stated that its own pipeline was enclosed in a "sealed concrete channel" to safeguard against leaks (R4, tab 371).

47. ACN's final proposal revision (R4, tab 21) states, at page 956, that:

The pipeline will be constructed according to API 5L standards, encapsulated inside a concrete culvert and interred adjacent to the road that leads to ECP #3.

In the attached Quality Control Plan at page 1107 there is a schematic showing fuel line trench detail that is in essence a cross-section of the proposed pipeline. This drawing shows the pipeline encased in PVC conduit and resting on top of a concrete culvert. However, underneath one of two essentially identical cross-section drawings is the notation: “REPEAT CONSTRUCTION SHOWN IN THIS DETAIL IN LOCATION WHERE VEHICLE IS PASSING.” Tracy Clark of TPC, who prepared ACN’s technical proposal, testified that because the likely pipeline route would cross a low-lying area where “there is always water” to get to the base tie-in point, the intent was to put in a concrete culvert to keep the pipeline out of the water and its elevation level. This low-lying area was near the BAF gate at ECP #3. (Tr. 1/242-44) Mr. Clark also testified that the concrete culvert had no utility as a secondary containment (tr. 2/42).

48. Mr. Landry testified from his 20 years of experience in the military and around pipelines that it is not industry practice to encapsulate a pipeline in a concrete culvert (tr. 3/218). Mr. Householder testified that a pipe laid on concrete could corrode faster which could counter the effects of cathodic protection (tr. 3/269). He stated that it would be normal to lay a pipe without concrete and use concrete where the pipe needs extra protection, such as for a culvert under a road (tr. 3/270-71). A concrete culvert would not provide protection from a spill because any containment should be at least 10 percent larger than the likely size of the spill—for instance for a spill of 1,000 gallons, the containment device would need a capacity of 1,000 gallons plus 10 percent (tr. 3/270).

49. Appellant’s expert, Mr. Driscoll, stated that he has never encased a pipeline in concrete in his 39 years of pipeline experience, but that in a circumstance where extra protection from heavy loads is advisable, say under heavy truck traffic or at a railroad crossing, one way to provide that protection would be to pour a cylindrical concrete shape over the pipeline within the right of way (tr. 4/28-30). Mr. Driscoll also testified that encasing any part of a pipeline with concrete isolates the encased section and breaks up the electrical circuit on which cathodic protection relies (tr. 4/30-32). In addition, Mr. Driscoll stated that he would not use concrete for the purpose of containment or mitigation of the release of product from a carrier pipe into the environment (tr. 4/33).

50. Our reading of ACN’s proposal compels the conclusion that ACN proposed concrete culvert only for that portion of the pipeline that ran under the road leading to ECP #3. In fact, Mr. Landry conceded that this would be a fair reading of ACN’s proposal (tr. 3/219).<sup>10</sup> The weight of the evidence, including the testimony of

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<sup>10</sup> Mr. Clark confirmed it was never ACN’s intent to encapsulate the entire pipeline (finding 47). The Board notes that Mr. Clark and ACN had a falling out during

two of the three engineers (one of whom was a government witness) who testified, also compels the conclusion that it is not accepted industry practice to encase an entire pipeline in concrete; to do so would not only defeat cathodic protection, but also be of doubtful environmental benefit in containing accidental releases.

51. In its response to the show cause notice, ACN attempted to accommodate DLA's insistence on concrete for the entire pipeline, stating that the pipeline was "scheduled to be encapsulated inside a concrete culvert *and is a revision from interred adjacent to the road leading to ECP #3*" (finding 27, emphasis supplied). CO Arslan rejected this attempt at accommodation in her termination decision, stating that raising the pipeline to install the concrete culvert "risks damaging the integrity of the already welded pipeline joints" (finding 34). Mr. Driscoll testified that lifting an in-service pipeline containing product can be safely done pursuant to API standard 1117. ACN's proposal was to lift the pipeline to install the concrete culvert prior to placing it in service. Mr. Driscoll also testified that lifting the pipeline to install prefabricated concrete culverts would add approximately a week to the estimated ten days that it would have taken ACN to complete the pipeline work without the culverts. (Tr. 4/54-56)

52. The final matter addressed in CO Arslan's termination decision was ACN's request to modify the contract to substitute 10mm PVC conduit for the erroneously specified 100mm conduit in its proposal. She denied this request not on the merits, but because the proposed modification "would have no impact on the delays that Asia Commerce has already experienced." (Finding 34)

53. Mr. Clark testified that the PVC pipe was proposed only for the section of pipe running underneath the road leading to ECP #3. The purpose of the PVC pipe was to allow water to pass through to alleviate the drainage problem at that location. (Tr. 2/34) As to whether the PVC conduit was supposed to be 100mm or 10mm, Mr. Clark seemed unsure whether the measurement referred to thickness or diameter, and added that the PVC pipe was proposed not for purposes of containment (the fact that the carrier pipe met API standards was sufficient for that purpose) but was instead for the purpose of diverting water (tr. 2/35, 40-41). Mr. Driscoll testified that a 100mm diameter pipe would equate to a four-inch pipe which clearly would not fit around a six-inch carrier pipe (tr. 4/17). He elaborated that he would read a designation of 100mm, since it equates to four inches, to refer to diameter rather than wall thickness; whereas a 10mm designation is more likely to refer to wall thickness. However, 10mm wall thickness is still pretty thick (about 4/10 of an inch) and for encasing a carrier pipe a wall thickness of 2/10 to 1/4 of an inch would be a more standard manufacturing thickness. (Tr. 4/69-72)

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contract performance (finding 39). In addition, he was called as a witness by the government, not by ACN.

54. CO Arslan's termination decision implies that ACN's request to change from 100mm PVC conduit to 10mm PVC conduit was not so much a reason for her decision to terminate, as a casualty thereof. DLA in its briefs does not make any argument about why ACN should be held to an error in specifying the PVC conduit to be used, or attempt to explain how a 100mm PVC pipe, approximately four inches in diameter, could be used to surround a six-inch carrier pipe. Moreover, DLA has failed to establish that ACN failed to provide PVC conduit as proposed. Aside from ACN's response to the CO's show cause notice, which stated that PVC could not be installed until after the pipeline was tested (which DLA has not addressed), Mr. Clark testified that the conduit was proposed only for use under the road leading to ECP #3, partly as a "sleeve" for the pipeline and partly to help in diverting water. DLA has proffered no evidence that the conduit was not used in this area. The concerns about a missing conduit raised by DLA's Mr. Landry were based solely on his review of the three Red Star pictures sent to the CO (tr. 3/175; R4, tab 371), which do not depict the section of pipeline running under the road.

55. Appellant's pipeline expert, Mr. Driscoll, stated his opinion that ACN constructed its fuel facility and pipeline according to API and industry standards. In his opinion, the three alleged contract noncompliances on which DLA relied in terminating the contract are not supported by the contract, API standards, or industry customs. (Ex. A-2 at 21)

#### The Percentage of Work Completed at Termination

56. At the time the CO issued the stop work order on the pipeline (17 December 2012), ACN was within a few days of completing the pipeline work on Bagram. Following the stop work order, ACN continued to put the finishing touches on its fuel testing and storage facility, and had downloaded 1.2 million gallons of jet fuel to its tanks in preparation for the start of delivery to the base. (Finding 35)

57. Appellant called an expert, James McGovern,<sup>11</sup> to testify to the amount of money spent by ACN in construction of the facility and pipeline needed to perform the contract. Mr. McGovern testified that ACN expended approximately 6.3 million dollars preparing to perform the contract, exclusive of expenditures on items such as vehicles and fuel that could potentially be re-sold to mitigate the loss (tr. 4/9). In his

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<sup>11</sup> Mr. McGovern is a certified public accountant (CPA) and a partner in the firm of McGovern & Greene, LLP. He is certified in financial forensics analysis as well as an evaluation analyst. He holds memberships in several professional associations, and served as president of the National Contract Management Association. He advises both contractor and government clients on cost allowability, cost accounting, and cost recovery matters, including with respect to some 200 government contract terminations. (Tr. 4/7)

expert report, Mr. McGovern noted that the contract required significant upfront expenditures including construction of the facility and pipeline, equipment and furnishings for the facility, and lease payments for land rights. He calculated the expenditure by reviewing the solicitation and contract documents, ACN's proposals, project budgets, job cost ledgers, supporting documentation for costs incurred, bank statements, financial statements, and project correspondence. (Ex. A-1 at 9)

58. Appellant's pipeline construction expert, Mr. Driscoll, testified that ACN's facility and pipeline were approximately 95 percent complete at the time the contract was terminated (ex. A-2 at 21). The pipeline was roughly half a mile long, with only about 100 meters on BAF, and was a relatively small part of the overall project—less than 10 percent (tr. 4/40-41). The facility that had to be constructed was the major portion, including the tank farm, filtration, pumps, laboratory equipment, meters, and strainers (tr. 4/40, 42).

### DECISION

The government contends that its termination for cause was justified because ACN failed to deliver fuel to BAF by the promised delivery date and failed to comply with contract requirements by not constructing its pipeline to API standard 5L, not providing cathodic protection for the pipeline, and not encapsulating the entire pipeline in a concrete culvert. ACN contends that the government, after waiving the original delivery date, never re-established a delivery date. ACN also disputes that its performance was noncompliant with the contract terms.

The “principles that apply under the FAR clauses that govern termination for default apply with equal force under the termination for cause provision of the commercial items clause.” *Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719 at 170,952 (citing *General Injectables & Vaccines, Inc.*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,593, *aff'd*, 519 F.3d 1360 (Fed. Cir. 2006), *reh'g denied*, 527 F.3d 1375 (Fed. Cir. 2008)).

A termination for default is a drastic sanction that should be imposed “only for good grounds and on solid evidence.” *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The government bears the burden of proving that the termination was justified, “regardless of whose ‘claim’ is being asserted.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If the government establishes a prima facie case of the contractor's default, then the contractor must show that the default was excusable within the meaning of the Default clause or was caused by the government's material breach. *Military Aircraft Parts*, ASBCA No. 59978, 15-1 BCA ¶ 36,101 at 176,256.

There is no dispute that ACN was not ready to start delivering fuel by the contract's original six-month mark. However, under *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969), the government will be deemed to have waived default in delivery if it (1) fails to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) the contractor relies on the government's failure to terminate and continues to perform under the contract, with government knowledge and implied or express consent. In this appeal, the government does not contest that it waived the original 27 September 2012 delivery date, but contends a new delivery date of 30 November 2012 was established, which ACN failed to meet (finding 36).

ACN's 31 October 2012 response to the CO's 22 October 2012 cure notice did not promise that all work would be complete by 30 November 2012. It specifically reserved the pipeline work within the base, which it stated "Takes 10 days after getting permission to work inside." (Finding 37) Moreover, while the government argues that "DLA personnel" intended 30 November 2012 to be the new delivery date (gov't reply br. at 33-35), it has pointed us to no evidence that the CO ever responded to ACN's proposed milestones or otherwise established a new delivery date prior to the 17 January 2013 termination. The CO herself testified at the hearing that the termination was driven by her concern about ACN's technical capabilities and that the termination "wasn't about time any more." (Finding 38; tr. 1/100-02)

The record is also clear that ACN relied on the government's failure to terminate and continued to perform the contract (to the extent it had not been prevented from doing so by the CO's 17 December 2012 stop work order) up until the day it received the termination notice, with the government's express knowledge and consent. On 25 November 2012 Mr. Wilson and Capt Deeney visited ACN's facility and noted a "great deal of progress at the facility since our last visit," including furnishings and equipment in the laboratory, painting of fuel tank exteriors and epoxy coating of interiors, completion of electrical work, paving of roads, and considerable progress in the pump room and compressor building. (Finding 12) On 28 November 2012, ACN gained access to the base and began work on the pipeline section inside the base (finding 14). A total of 153 truckloads of fuel (1,108,869 gallons) was received and downloaded at ACN's facility between 2 December and 8 December 2012 (finding 16). On 13 December 2012, Capt Deeney noted good progress had been made "despite the terrible weather" (finding 17).

We conclude that the government has failed to carry its burden to prove that it was justified in terminating the contract for cause due to delay.

Nor has the government met its burden to prove that it justifiably terminated the contract due to noncompliance with any other contract term or condition. No evidence was offered by the government to show any noncompliance other than two of

the noncompliances alleged in the termination notice; namely, the failure to provide cathodic protection and the failure to encapsulate the pipeline in concrete.<sup>12</sup>

CO Arslan was under the mistaken impression that cathodic protection was required by the API 5L standard which ACN had proposed to meet (finding 42), but the evidence shows that this is not the case (finding 43). Nor, despite TPC's inducement of ACN to propose a cathodic protection plan in response to DLA's technical inquiry, did the contract ever require ACN (either originally or by modification) to provide cathodic protection (finding 44).

With respect to concrete encapsulation, the government's own witness, Mr. Clark, testified that it was proposed only for (1) the section of pipe running under the road, to protect the pipeline from heavy traffic, and for (2) a section of pipe running through low-lying land adjacent to the road, to keep it elevated and out of the water (finding 47). Mr. Landry, the DLA engineer who raised the issue of concrete encapsulation to the CO, testified that using concrete to enclose the entire length of a pipeline is not industry practice, and that it would be a fair reading of ACN's proposal that the concrete culvert was to be used only under the road and in the adjacent low-lying area (findings 48, 50). Mr. Clark, Mr. Householder, and Mr. Driscoll all testified that a concrete culvert would not be an effective means of containing spills (findings 47-49).

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<sup>12</sup> As found previously, while the termination notice denies ACN's request to correct its typographical error with respect to the PVC conduit, neither the termination notice nor the government's proof addresses or establishes any actual noncompliance relating to PVC conduit (findings 52-54).

CONCLUSION

The government has not met its initial burden to demonstrate a prima facie case of the contractor's default. The appeal is sustained, and the termination for cause is converted to a termination for convenience pursuant to FAR 52.212-4(o). The appeal is returned to the parties to negotiate a termination settlement.

Dated: 4 October 2017



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LYNDA T. O'SULLIVAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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J. REID PROUTY  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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. 58623, Appeal of Asia Commerce Network, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals