

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Donald L. Mooney Enterprises, LLC ) ASBCA No. 60574  
dba Nurses Etc. Staffing )  
)  
Under Contract No. FA8053-12-D-0025 )

APPEARANCES FOR THE APPELLANT:

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Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Jeffrey P. Hildebrant, Esq.  
Air Force Deputy Chief Trial Attorney  
Christopher S. Cole, Esq.  
Kyle E. Gilbertson, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's (CO's) final decision terminating appellant Donald L. Mooney Enterprises, LLC dba Nurses Etc. Staffings' (Mooney), services contract for default. A hearing was held at the Board's offices. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, is applicable. We deny the appeal.

FINDINGS OF FACT

1. On 8 April 2011, the Air Force Medical Service (AFMS) awarded basic Clinical Acquisition for Support Services Contract No. FA8053-12-D-0025 (CLASS contract) to Mooney in order to obtain qualified health care workers (HCWs) to perform various medical services at military treatment facilities (MTFs) within the 50 United States and Guam. The CLASS contract was designed to supplement the medical staff at Air Force MTFs with a wide range of qualified clinical HCWs on a nationwide basis. The CLASS contract consisted of a four-year ordering period with no option periods. (R4, tab 1 at 1, 7)

2. The CLASS contract's "Performance Statement of Work" (PSW) also provided, in pertinent part:

The CLASS contract uses task order competition and a two-step task order process. The task order proposal competition process includes the issuance of a task order proposal request (TOPR), receipt of proposals, proposal evaluation, legal review, and

contract clearance. The task order competition process is outlined in Section H.3 for “Subsequent Task Orders”. The task order process includes a candidate approval component and a task order award component. The candidate approval component of the task order process starts with a Letter of Intent to Award (LOIA) and ends with the Government’s approval of candidates. The task order award component starts with task order award and ends when contractor performance is completed for each individual task order. Ordering Contracting Officers shall not deviate from this two-step task order process for subsequent task orders without prior written approval from the Contracting Officer (CO) at the Program Management Office (PMO).

During the two-step task order process, the CLASS contract requires the Contractor to accomplish the following activities from issuance of a Letter of Intent to Award (LOIA) through contractor performance: recruit, place and manage HCWs as well as resolve HCW performance issues as follows:

Recruit: In response to an LOIA, or during contractor performance when replacing and substituting HCWs, the Contractor shall recruit qualified HCWs from outside of the Government to fulfill the duties, qualifications, and requirements in the performance work statement, appropriate position description, and addendum (when provided). The Contractor shall find, conduct competency-based screening against preliminary Government minimum requirements, obtain initial background checks and submit qualifying documentation on HCWs as part of the recruiting requirement.

(R4, tab 1 at 7-8) (Citations and emphasis omitted)

3. In addition, the PSW required, *inter alia*:

After task order award, the Contractor shall submit qualifying documentation for the Government to validate against subsequent Government minimum requirements outlined in the Section C and Section J, Attachment 4 of the contract. Subsequent Government minimum requirements include health, immunization, drug screening, complete background checks, credentials packages for credentialed HCWs, and additional requirements (if any) established in the task order. Qualifying documentation shall be submitted to the Government before placement of the HCW in accordance with

the terms and conditions of the contract. For example, credentials packages for credentialed HCWs must be submitted NLT 30 calendar days before the required start date.

**Contractor Performance.** The Contractor agrees to initiate performance on all awarded task orders using only HCW(s) whose professional qualifications have been determined acceptable by the Government as part of the candidate approval component in the task order process.

When the Contractor experiences any delays in accomplishing the specific tasks identified in the contract and task order, the Contractor shall notify the ordering CO immediately. The ordering CO will evaluate the situation to determine if an extension of the required date is appropriate due to Government delay. If an extension is not approved, the Government may terminate the task order for default or seek other remedies as appropriate. The ordering CO may re-solicit the task order or send an LOIA to the Contractor whose proposal provides the next best advantage to the Government as outlined in Section H.3 if the LOIA date is within 90 calendar days of the original proposal submission date. Non-performing Contractors may receive a negative past performance report which may impact the Contractor's ability to compete for future task orders on this contract and other Government contracts.

Upon award, the Government will transmit the task order to the Contractor on a DD Form 1155. The contracted HCW shall physically begin performance no later than 30 calendar days from the initial date on the period of performance in the task order for non-credentialed HCWs, unless a later date is specified in the task order, and no later than 60 calendar days from the initial date on the period of performance in the task order for credentialed HCWs, unless a later date is specified in the task order. Performance earlier than the 30 or 60 calendar days may occur if an earlier date is mutually agreed upon between the ordering CO and the Contractor. The ordering CO will accomplish a bilateral modification on the task order to adjust the date performance begins for HCWs.

(R4, tab 1 at 51) (Citations omitted)

4. The CLASS contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), which stated:

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to –

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) of this clause).

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

....

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(R4, tab 1 at 70)

5. On 14 July 2015, the CO of the 375<sup>th</sup> Contracting Squadron, Mr. Darryl Weaver, issued amended TOPR CL 15-09-0001 to provide a certified nurse midwife at Scott Air Force Base, Illinois. The TOPR provided:

1. An official revised proposal is hereby requested for one (1) Certified Nurse Midwife to support the Medical Treatment Facility at Scott AFB, IL and/or St. Elizabeth's Hospital as outlined in your Air Force Medical Service Commodity Council Clinical Acquisition for Support Services (CLASS) contract. Please reference the requirement title and your contract number in any proposal response.
  
2. The Government estimates the period of performance for this requirement to be 1 August 2015 through 31 July 2016. Should your organization be selected to fill this task order, you will be issued a Letter of Intent to Award [LOIA] contingent on providing qualifying documentation. Should your company subsequently provide qualifying documentation and receive candidate approval, your company then will be provided a unique task order number specific to our contracting office and medical treatment facility that will be indicated on the specific task order at that time. You also will be required to submit electronic invoices through Wide Area Workflow (WAWF) to the DFAS-Limestone payment office IAW DFARS 252.232-7003.
  
3. The Certified Nurse Midwife should, at a minimum, meet the requirements stated in Attachments 1 and 5 of this Task Order Proposal Request.
  
4. The basic task order summary information in terms of the work schedule/duty hours, for the Certified Nurse Midwife is provided in Attachment 2 to this Task Order Proposal Request.
  
5. The evaluation criteria are past performance and price. Past performance will be evaluated on a basis significantly more important than price. An assessment will be made to determine the best-value to the Government. IAW Sec H-3, paragraph (c)(3)(a) of your contract, past performance will be evaluated based on the monthly dashboard created by the AMFCC PMO and known performance at Scott AFB. The pricing worksheet in Attachment 3 shall be completed to satisfy the price section of your proposal. The pricing worksheet must clearly show the burdened hourly rates for duty hours; burdened hourly rates for overage and on-call hours; and, total cost by position description.
  
6. **This is a new requirement and there are no current full time incumbents in place.**

7. The Government reserves the right to award without discussion and to issue a LOIA for all, some, or none of these requirements. If the Government decides to issue a LOIA with discussions, you will be notified as soon as possible.

8. You have 2 calendar days to respond with a revised proposal that conforms to the requirements in section H.3 of your contract. **Revised proposals will be good for 90 days.** Revised proposals are due no later than 3:00 P.M. (CST) on **16 July 2015**. If you have any questions, please contact AIC Steven Ambrosini....

(R4. tab 10)<sup>1</sup>

6. The CO received responses to the revised TOPR from all 22 CLASS contracting entities (tr. 27-31). Citing price and past performance, the CO selected Mooney as providing the most advantageous offer to the Air Force (tr. 28-30). On 17 July 2015, the CO forwarded to Mooney an LOIA and a task order (TO) with respect to the clinical nurse midwife position. Mr. Weaver, wrote, in pertinent part:

We are pleased to inform you that you have been selected to provide services for one (1) Clinical Nurse Midwife at Scott Air Force Base (Scott AFB). This notice of intent to award a task order against your Indefinite Delivery, Indefinite Quantity (IDIQ) contract, is however, subject to your successful completion of the requirements contained in section H.3 of your contract regarding candidate approval. Specifically; within 20 calendar days of this notice, which is no later than **(6 August 2015, 3:00pm CST)** you are required to provide the following:

1. Qualifying documentation on candidates against preliminary Government minimum requirements at Scott AFB.
2. Valid contact telephone numbers on each candidate for Government review and approval.

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<sup>1</sup> The government revised the TOPR to establish an experience requirement of “at least 24 months...working/performing as [a] Certified Nurse Midwife within the last 48 months” (R4, tab 15). The CO’s testimony notwithstanding, the Board was unable to locate such an experience requirement in the PSW (tr. 57-58; R4, tab 1 at 266-67).

Should the Government approve your candidate, or you fail to receive information on candidate approval within 7 business days, you shall proceed with the hiring process for the candidate.

(R4, tab 16) Later, that same day, Mooney forwarded to the CO, the required documentation for Ms. Linda Beltsen (supp. R4, tab 40). On 20 July 2015, Ms. Beltsen's qualifications were accepted by the Air Force (supp. R4, tab 43 at 1).

7. On 23 July 2015, the Air Force awarded TO 6C08 to Mooney. The TO stated a fixed-price amount and required Mooney to provide one full-time Certified Nurse Midwife for a performance period extending from 23 July 2015 to 22 July 2016. (R4, tab 17 at 2)

8. The CLASS contract defined the nurse midwife as a credentialed position (R4, tab 1 at 98; *see* finding 3). Accordingly, Mooney was required to submit a credentialing package no later than 30 days before the required start date (R4, tab 1 at 51). Pursuant to the TO, the credentialing package had to be submitted by 22 August 2015 (R4, tab 17 at 2).

9. Also, because the nurse midwife position was credentialed, an approved midwife had to "physically start work no later than *60 calendar days from the initial date on the period of performance in the task order*" (R4, tab 1 at 52). Thus, pursuant to 6C08, the midwife was required to report for duty on or before 21 September 2015 (R4, tab 17 at 2). However, Ms. Beltsen withdrew from consideration in the late July 2015 timeframe (tr. 135-36).

10. On 4 August 2015 Mooney proposed Ms. Laura Redden as a substitute for Ms. Beltsen (supp. R4, tab 39). Under the original TOPR which was issued on 11 June 2015, the Air Force had provided Mooney with an LOIA on 30 June 2015, and Mooney had offered the midwife position to Ms. Redden. But she had declined the position. (R4, tabs 3, 8; *see* finding 5; tr. 158, 189) Thus, through its proposal of 4 August 2015, Mooney was offering the position to Ms. Redden for a second time.

11. On 12 August 2015, the Air Force informed Mooney that Ms. Redden was an "acceptable candidate," and Mooney's personnel began to undertake the credentialing process (supp. R4, tab 41 at 1-2). Around this time, Mooney's personnel began to have "difficulties" with Ms. Redden (tr. 136). She did not return credentialing documents in a timely manner and was generally "non-responsive" (supp. R4, tab 46; tr. 136-38, 162, 190).

12. On 4 September 2015, Ms. Redden withdrew as a candidate for the nurse midwife position for the second time. This led Mr. Elliot Clark, one of Mooney's chief recruiters, to write, in part on 7 October 2015: "Laura Redden was previously worked by our recruiter on two separate occasions...both times she flaked out. We will not consider [her] as a viable candidate." (Supp. R4, tab 46, emphasis added) After, Ms. Redden withdrew, Mooney began, once again, to recruit for the nurse midwife position (tr. 163).

13. As a result of these developments, Mooney had not submitted the required credentialing package by 22 August 2015; moreover, as of the required date of 21 September 2015, Mooney had not provided a nurse midwife to report for duty (findings 8, 9; tr. 33). The contractual requirements notwithstanding, Mooney had not informed the CO in writing of these delays (tr. 34; finding 3).

14. Accordingly, on 22 September 2015, the CO forwarded a cure notice. Mr. Weaver wrote, in pertinent part:

(a) Performance Work Statement (PWS), paragraphs 1.1.5.2 and 2.3.2.2.2, requires the Contractor to place fully qualified credentialed and non-credentialed healthcare workers (HCWs) within the timeframes in Section H.3 (i) of the contract. This is in accordance with Table C-1, Services Summary, performance objective “**Places**” manages the placement HCWs such that vacancies do not exceed 30 consecutive calendar days.

(b) Paragraph H.3(f) requires the contractor to notify the Contracting Officer immediately of any delays in accomplishing any of the tasks identified on the contract.

1. The purpose of this letter is to express my concern regarding the placement of a Certified Nurse-Midwife, a credentialed HCW on Task Order No. FA8053-12-D-0025-6C08 at the 375th Medical Group Clinics on Scott AFB and its Family Practice Clinic in Belleville, Illinois.

2. This position had a required start date of no later than 21 September 2015, as outlined in Paragraph H.3(g) of your contract. To date, this position remains unfilled.

3. You are hereby notified that the Government considers your failure to meet the placement requirements for the above task order (6C08) of federal contract FA8053-12-D-0025 as a condition which is endangering performance on this task order. Your failure to meet the required placement time of 60 days after award as required by section H.3(g) has caused a hardship for the effected [sic] military treatment facility. The Government expects you to comply with the terms of the contract as it relates to the placement of credentialed healthcare workers. Therefore, unless an acceptable candidate is submitted within 10 calendar days from the receipt of this cure notice the Government may terminate this task order for default

under the terms and conditions of FAR 52.249-8 Default (Fixed-Price Supply & Service) clause of your contract.

4. The Government expects you to comply with the terms of the contract as it relates to the placement of credentialed HCWs. Unless an acceptable HCW candidate is submitted within 10 calendar days from the receipt of this Cure Notice, the Government may terminate this Task Order for default under the terms and conditions of FAR Clause 52.249-8 Default (Fixed-Price Supply & Service) within your contract.

5. Please submit your formal response to the undersigned at 375th Contracting Squadron, 201 East Winters Street Building 50, Scott AFB, IL, 62225-5015.

(R4, tab 18; tr. 33-34)

15. Instead of a “formal response,” Mooney forwarded an email to the CO on 29 September 2015, in which it stated:

We acknowledge your concern of the failure to provide a Certified Nurse-Midwife for the Scott AFB Family Practice Clinic. Our recruiting efforts have resulted in a series [sic] candidates accepting and later declining the position. We have all recruiters aggressively recruiting to find a candidate that is qualified, sold, [sic] and committed to filling this critical position. We are aware of the October 2, 2015 suspense date to prove a candidate to fill this position. We will do our best to fill this position.

(R4, tabs 19, 20; tr. 34)

16. Despite Mooney’s assurances, the CO testified that “when the 2<sup>nd</sup> came there was no candidate” (tr. 35). Accordingly, on 6 October 2015, the CO issued a show cause notice, in which he wrote:

1. Since you have failed to cure the conditions endangering performance under your Task order as described to you in the Governments [sic] letter of 22 September 2015, the Government is considering terminating the task order FA8053-12-D-0025-6C08 dated 23 July 2015 for default. In accordance with Federal Acquisition Regulations (FAR) clause 52.249-8, Default (Fixed-Price Supply and Service). Pending a final decision in this matter, it will be necessary to determine

whether your failure to perform arose from causes beyond your control and without fault or negligence on your part.

Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to the contracting officer, Darryl E. D. Weaver, within 10 days after receipt of this notice. Your failure to present any and all issues within this time may be considered as an admission that none exist. Your attention is invited to FAR 52.249-8(b) to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default. Any assistance given to you on this contract or any acceptance by the Government of delinquent services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

2. The terms of the task order required that a Certified Nurse - Midwife be performing at Scott AFB, Illinois not later than 22 Sep 2015. You have failed to meet this.

3. You may direct any questions regarding this matter and any response to the default determination to the undersigned at 375 Contracting Squadron, 201 East Winters Street, Bldg. 50, Scott AFB, Illinois 62225-5015.

(R4, tab 21; tr. 35-36)

17. On 16 October 2015, Mooney forwarded a formal response to the CO's show cause notice. It contended that its noncompliance was due, largely, to "factors that were beyond [its] fault or negligence." Mooney explained, without any substantiation, that there was a "shortage in the marketplace for qualified Certified Nurse-Midwife practitioners [sic]." It also stated that "[p]revious candidates accepted the position and then declined...due to no fault" on Mooney's part. Mooney also wrote:

In response to the Show Cause Notice for Task Order FA8053-12-D-0025-6C08; we are pleased to inform you that the previous approved candidate Laura Redden has agreed to our renegotiation with her compensation package. We are back on track with the goal to have her credentialed package to the installation NLT October 23, 2015. As an added measure our recruiters will continue recruiting a back-up candidate however, I am confident Ms. Redden is 100% percent committed to securing this position.

(R4, tab 22) Thus, Mooney, once again, proffered Ms. Redden as a candidate for the nurse midwife position despite the fact that, in the words of one of its chief recruiters, she “was previously worked by our recruiter on two separate occasions...both times she flaked out. We will not consider [her] as a viable candidate. (Finding 12; R4, tab 22; tr. 36-37)

18. Mr. Weaver replied to Mooney’s response on 21 October 2015, in which he wrote in part:

1. The Government acknowledges receipt of your letter dated 16 October 2015 in response to the Show Cause Notice dated 6 October 2015.
2. The Government will suspend the Termination process pending receipt of the Credentialing Package as stated in paragraph 2 of your letter. If the Credentialing Package is not received “NLT 23 October 2015” the Government will re-evaluate whether to proceed with the Termination process.

(R4, tab 23; tr. 37-38)

19. Mooney did not forward the credentialing package to the Air Force by 23 October 2015, as directed by the CO. On 27 October 2015, Mr. Murphy, the Air Force’s contracting officer’s representative, informed the CO that the package was incomplete and that several items were still needed (R4, tab 25). As the CO testified, there is a “[b]ig difference between” a credentialed package and a non-credentialed one (tr. 39). In an email of 27 October 2015, Mooney offered its “sincerest apology” for its “oversight.” It then offered a timeline for completion of the package. (R4, tab 26 at 1-2)

20. The Air Force received Ms. Redden’s package on 13 November 2015; and her privileges were approved by the credentials manager on 30 November 2015 (supp. R4, tabs 4, 5).

21. On 3 December 2015, Mooney proposed 18 January 2016, as a start date for Ms. Redden, “primarily to give her current employer a reasonable notice of resignation and arrange for her household goods and pets” (R4, tab 28 at 1). On 8 December 2015, the CO forwarded an email to Mooney in which he stated:

The Medical Group Commanders have agreed to a 19 January 2016 start date, but are not pleased with the performance of this requirement by your company to date. The Contracting Officers Representative will be sending the welcoming letter to your Health Care Worker shortly.

In addition, a modification reducing the estimated funding on this Task Order through the middle of December 2015 will be forthcoming.

(R4, tab 29 at 1)<sup>2</sup>

22. Although, Mooney had proffered Ms. Redden as a nurse midwife in August 2015 (finding 10; tr. 190), it was not until December 2015 that it began to inquire as to her relocation efforts (tr. 181-82).

23. On 14 January 2016, Mooney informed the CO that Ms. Redden would “not proceed with the position due to relocation issues” (R4, tab 30 at 1). Based upon the testimony of Ms. Walker, Mooney’s recruiter, these issues revolved around Ms. Redden’s dogs, cats, and a noisy macaw (tr. 185-86). In its notification of 14 January 2016, Mooney identified, for the first time, another potential candidate named Linda Kelleher (R4, tab 30 at 1).<sup>3</sup>

24. Mooney did not proffer a Certified Nurse Midwife at Scott Air Force Base on or prior to 19 January 2016 (tr. 8, 139, 194).

25. The CO, once again, discussed the matter with the Medical Group at Scott Air Force Base and ultimately decided to process the requirement “as a termination for default” (R4, tab 32 at 2).

26. In a “MEMORANDUM FOR RECORD” dated 19 January 2016, the CO traced the contract’s history and concluded:

After due consideration of all the pertinent facts, the undersigned Contracting Officer hereby finds and determines that NES has failed to meet the performance requirements of the subject task order within the time required by the terms and conditions of the contract. That failure did not arise out of causes beyond their control or without fault or negligence on their part. Therefore, this Task Order will be Terminated for Default in accordance with Federal Acquisition Regulation 52.249-8 “Default (Fixed

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<sup>2</sup> The date of 18 January 2016 was a federal holiday (tr. 80-81). At the hearing, none of Mooney’s witnesses disputed that this revised date was agreed to by both parties.

<sup>3</sup> Mooney’s counsel admitted at the hearing that his client “didn’t meet” the revised performance date (tr. 8). Ms. Kelleher was proffered as a candidate by the follow-on contractor but she was deemed unacceptable by the government because there was an alleged adjudication from the State of Georgia that she had previously practiced without a license (tr. 51-52).

Price Supply and Services)” April 1984, effective upon receipt of this notice.

(R4, tab 31 at 2)

27. On 7 April 2016, Mr. Weaver forwarded to Mooney a final decision in which he wrote, in part:

1. You are hereby notified that your right to proceed under this contract and task order is hereby terminated in its entirety pursuant to FAR 52.249-8, Default (Fixed Price Supply and Services). Termination is effective immediately upon receipt of this notice. This action is a result of your failure to perform services in accordance with the contract terms and conditions and the task order.

2. This is the final decision of the Contracting Officer. Attached to this letter is Modification 01 to the above referenced task order which terminates CLINS 0001, 0002 and 0003 for default. Nurses Etc. Staffing (NES) may be liable for any excess costs per FAR 49.402-3(g)(4). The terms and conditions of other existing task orders remain in effect until completion.

(R4, tab 33) This appeal followed.

### DECISION

It is axiomatic that the government bears the burden of proving that a default termination was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763 (Fed. Cir. 1987). Moreover, it is settled law that a default termination is a drastic sanction which should be sustained only for good grounds and on solid guidance. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). If the government establishes a prima facie case that the termination was proper, the burden of production, on going forward with the evidence, shifts to the contractor. *Benju Corp.*, ASBCA No. 43648 *et al.*, 97-2 BCA ¶ 29,274 at 145,654; *Lean Construction and Engineering Co.*, ASBCA No. 59016, 16-1 BCA ¶ 36,375 at 177,375.

The default clause which is applicable to this appeal is FAR clause 52.249-8(a)(1)(i), DEFAULT (FIXED-PRICE SUPPLY & SERVICE (APR 1984), which provides:

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to –

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension....

(Finding 4)

After having previously failed to perform, Mooney itself suggested a revised start date of 18 January 2016, which was later adjusted to 19 January 2016 because of a federal holiday. The government acquiesced in this performance date. (Finding 21) At the hearing, none of Mooney's witnesses disputed that there was an agreement between the parties as to the new performance date (*id.*).

It is also beyond dispute, as conceded by Mooney's counsel at the hearing, that it did not meet the revised performance date of 19 January 2016 (finding 23). Accordingly, the government has established a prima facie case that Mooney had failed "to perform the services within the time specified in this contract or any extension" (finding 4).

Therefore, the burden of production, or going forward with the evidence, shifts to Mooney. In order to prevail it must produce evidence showing that its failure to perform the contract "arises from causes beyond [its] control and without [its] fault or negligence" (finding 4). Citing the various excusable causes contained in FAR 52.249-8(c), Mooney contends that the labor shortage which it experienced can be analogized as a "strike" (app. br. at 22-29; findings 4, 17). However, Mooney's allegation that there was a shortage of Certified Midwife Nurses derives no support from the record (finding 17). Moreover, it has not identified any circumstance which could constitute an organized labor action such as a "strike" (app. br., *passim*). *Hydro Fitting Mfg. Corp.*, ASBCA Nos. 11768, 13077, 70-1 BCA ¶ 8211 at 38,183. Thus, its argument must fail.

Mooney also contends that the "termination was procedurally defective" because the CO failed to issue a second cure notice pursuant to FAR 52.249-8(a)(2) (app. br. at 25-26). Mooney is mistaken. Through its plain language, this default clause only requires the issuance of cure notices for terminations undertaken pursuant to FAR 52.249-8(a)(ii) and (iii). Here, the CO terminated Mooney's contract under FAR 52.249-8(a)(1)(i) which relates to, in pertinent part failure to "perform the services within the time specified in this contract or any extension" (findings 4, 27). Hence, no cure notices were ever required. The fact that the CO, apparently acting out of an abundance of caution issued both a show cause order and a cure notice is legally irrelevant (findings 14, 16). *AEON Group, LLC*, ASBCA Nos. 56142, 56251, 14-1 BCA ¶ 35,692 at 174,753.

Finally, Mooney argues that the government somehow surrendered its right to terminate the contract for default because it did not act within a reasonable time after the original performance date of 21 September 2016 (app. br. at 23-25). In formulating this contention Mooney ignores the fact that the revised performance date of 19 January 2016

was agreed to by both parties, and, indeed, was suggested by Mooney's representations (finding 21). It is, thus, undisputed that Mooney acquiesced in the revised performance date.

CONCLUSION

The appeal is denied.

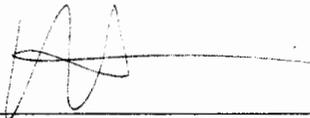
Dated: 7 December 2017



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MICHAEL T. PAUL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

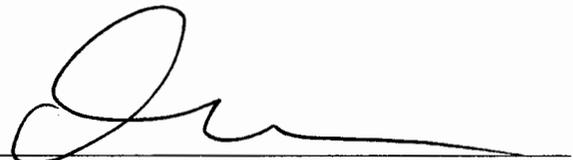
I concur



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

I concur



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OWEN C. WILSON  
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. 60574, Appeal of Donald L. Mooney Enterprises, LLC dba Nurses Etc. Staffing, rendered in conformance with the Board's Charter.

Dated:

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