

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
J.A.M. Construction Services, Inc.	)	ASBCA Nos. 63378, 64226, 64439
	)	
Under Contract No. N69450-16-D-0605	)	
Task Order No. N69450-20-F-1531	)	

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OPINION BY ADMINISTRATIVE JUDGE STINSON ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

J.A.M. Construction Services, Inc. (JAM) challenges the government's termination of its contract for cause and subsequent assessment of liquidated damages. In addition to challenging the government's stated basis for termination of the contract, JAM also asserts excusable delays (including government caused delay) as an excuse for its failure to timely perform. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§7101-7109. The government previously filed two motions requesting that the Board either dismiss or strike those portions of the three consolidated appeals wherein JAM alleges government caused delay as an excuse or affirmative defense to the government's default termination and assessment of liquidated damages. By decision dated June 2, 2026, we held that JAM had "failed to state a claim for government caused delay monetary damages, but that we may consider JAM's non-monetary claim of alleged government caused delay, asserted as an excuse to its termination for cause" *J.A.M. Construction Services, Inc.*, ASBCA No. 63378 *et al.*, 26-1 BCA ¶ 39,066 at 190,305 (*J.A.M. I*). Accordingly, JAM's non-monetary claim for excusable, government-caused delay as an affirmative defense remains pending before the Board. On May 8, 2026, the government filed its motion for summary judgment. Briefing is complete and, at the request of the parties, the Board held a telephonic oral argument on the government's motion for summary judgment on June 30, 2026 (tr. at 1-111). As discussed below, we grant in part, and deny it in part, the government's motion for summary judgment.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

Award of Contract and Task Order

1. These appeals arise under a Design-Bid-Build, Firm-Fixed Price, Indefinite Delivery/Indefinite Quantity, Multiple Award Construction Contract No. N69450-16-D-0605 (the contract), between JAM and the Naval Facilities Command (NAVFAC) Southeast, awarded on October 30, 2015 (R4, tab 1 at 1-2). On March 6, 2020, NAVFAC Southeast issued to JAM Task Order No. N69450-20-F-1531 (the task order) under the contract, in the amount of \$2,087,844, for construction of an elevator lobby addition to Building 2945 at Naval Air Station (NAS) Whiting Field located near Milton, Florida (R4, tab 2 at 45-49).¹ The task order was signed on behalf of JAM by Mr. Jose A. Mantilla, President (*id.* at 46). The task order performance period was 275 calendar days (*id.* at 49).

Contractual and Task Order Provisions

2. The contract incorporated by reference Federal Acquisition Regulation (FAR) 52.233-1, DISPUTES (MAY 2014) (R4, tab 1 at 15), which provided, in part, “[t]he Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer (CO).” 48 C.F.R. § 52.233-1(i).

3. The contract incorporated by reference FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1 at 16).

4. The task order specifications identified 12 submittals “required prior to commencing work on site,” including (1) certificates of insurance, (2) surety bonds, (3) list of proposed subcontractors, (4) list of proposed products, (5) construction progress schedule, (6) network analysis schedule, (7) submittal register, (8) earned value report, (9) health and safety plan, (10) work plan, (11) quality control (QC) plan, and (12) environmental protection plan (R4, tab 22 at 234).

5. The contractor was required “[a]s soon as practicable after award of contract, and before procurement of fabrication,” to forward to the government for approval the “submittals required in the technical sections of this specification, including shop drawings, product data, and samples” (*id.* at 237). Submittals were required to be submitted “with [the] transmittal form prescribed by CO and standard for project” (*id.*

¹ Rule 4 documents are stamped “GOV” followed by Bates numbers beginning with zeros. We cite to these Bates numbers, omitting “GOV” and unnecessary zeros.

at 238). Each submittal was required to be complete “for each definable feature of work” (*id.* at 247).

Task Order Performance

6. In an email dated March 19, 2020, with a subject matter line of “Submittals for Construction Contracts at Whiting Field,” Mr. Brent Pittman, Project Management & Engineering Branch Head, Public Works Department (PWD), NAS Whiting Field, informed Mr. William Hilliard, CO, PWD, NAS Whiting Field, and other NAVFAC Southeast employees:

To the maximum extent possible, transmittals should be provided in full via electronic means. The transmittal should include the entire submittal including the ENG 4025 transmittal form. Email submission is preferred with each transmittal being a separate email.

(R4, tabs 27 at 1352, 121 at 1364).² The email salutation was to “ALCON” (All Concerned) (*id.*). As to additional recipients of the email, Mr. Pittman states “I have blind copied all contractors with active construction contracts at NAS Whiting Field” (*id.*). By email dated March 25, 2020, with the same subject matter line, “RE: Submittals for Construction Contracts at Whiting Field,” also addressed to “ALCON,” Mr. Pittman transmitted additional documents regarding COVID-19 to Mr. Hilliard and other NAVFAC Southeast employees (*id.* at 1363). By email to Mr. Pittman also dated March 25, 2020, with the same subject matter line, “RE: Submittals for Construction Contracts at Whiting Field,” Mr. Mantilla replied, “Got it thanks” (*id.*).

7. A Preconstruction Meeting agenda dated May 4, 2020, under the heading “Submittals,” informs the contractor: “Transmit each submittal using a single copy of a transmittal cover sheet (Form ENG 4025) with an original or digital signature” (R4, tab 134 at 27031, 27039).

8. By email dated August 11, 2020, Mr. Pittman notified appellant that:

the inability of JAM Construction to provide acceptable submittals is incurring a significant delay on JAM’s part and will result in Liquidated Damages being assessed if the

² ENG Form 4025 is a document titled “Transmittal Of Shop Drawings, Equipment Data, Material Samples, Or Manufacturer’s Certificate Of Compliance” (R4, tab 24 at 1348,). ENG Form 4025-R is a separate document also titled “Transmittal Of Shop Drawings, Equipment Data, Material Samples, Or Manufacturer’s Certificate Of Compliance” (R4, tab 125 at 41041).

project is not completed by the contract completion date of 12/10/2020. At current, 159 days of the 280 days allotted for this project have expired due to delays by JAM Construction.

(R4, tab 24 at 1343)

9. By letter dated August 25, 2020, Mr. Hilliard informed JAM that six weeks after the partnering meeting “the results have been less than anticipated” with JAM demonstrating an inability “to provide proper submittals in accordance with the contract specifications,” which had “significantly delayed any real progress on the contract” (R4, tab 25 at 1349-50). The CO advised JAM that the government may pursue “further methods to remedy JAM’s slow progress” including “a cure notice, a show cause letter, assessment of liquidated damages, and unfavorable ratings” as well as the possibility that “a termination for default may be considered” (*id.* at 1350).

10. On March 26, 2026, the government deposed Mr. Mantilla both in his individual capacity as the JAM’s owner and CEO, and as appellant’s corporate representative pursuant to Federal Rules of Civil Procedure (FED. R. CIV. P.) 30(b)(6) (GSUMF ¶ 31).³ Regarding the statement set forth in the CO’s August 25, 2020, letter that “it’s been six weeks since [the July 15, 2020] partnering meeting and the results have been less than anticipated,” Mr. Mantilla confirmed that JAM had experienced problems with obtaining approval of submittals, which were returned to JAM with substantive comments and that JAM was solely responsible for proper compliance with submittal requirements (R4, tab 171 at 41263-64 (Mantilla Dep. at 124-25)).

11. By letter dated March 15, 2021, LT Marvie Wonsia, Supervisory CO (SCO), PWD, Whiting Field (R4, tabs 12 at 94, 26 at 1351), expressed the government’s “growing concerns about continued slow progress,” that estimated liquidated damages through the beginning of March was already \$60,000, and that liquidated damages were expected to reach \$180,000 through the estimated completion date of August 2021 (R4, tab 26 at 1351). The letter also noted that JAM had not achieved satisfactory progress on the critical path and warned of possible termination for default (*id.*).

Show Cause Notice

12. On September 1, 2021, the government issued JAM a show cause notice stating that JAM’s lack of progress on the task order was a “breach of contract terms and conditions,” that JAM was “ten months behind schedule with liquidated damages

³ “GSUMF ____” refers to the government’s statement of undisputed material facts (gov’t mot. at 1-11).

amounting to approximately \$222,000,” and that if JAM completed the project by JAM’s “revised scheduled date of 22 February 2022 (more than 14 months after contract completion date), liquidated damages would be approximately \$326,250” (R4, tab 9 at 81).

13. On September 9, 2021, JAM’s former counsel, Mr. Edward Kinberg, responded by letter, alleging COVID-19 and other factors absolved JAM of responsibility for delays and proposing a no-cost termination for convenience, allowing the Navy “to keep the approximately \$50,000 in retainage it has been holding” (R4, tab 10 at 83, 87). On November 19, 2021, JAM sent a second letter in response to the Navy’s September 1, 2021, show cause notice, stating JAM’s position that “it may be unrealistic to continue this project as a whole, to meet the schedule or to perform in accordance with JAM’s estimated costs,” and offering to enter a modification “addressing the time and cost issues” or, alternatively, requesting that “the contract be terminated for convenience with a termination for convenience being the most appropriate option” (R4, tab 11 at 89-90).

Non-Compliance Notice and Cure Notice No. 1

14. The SCO sent JAM a non-compliance notice dated January 12, 2022, notifying JAM “of its non-compliance with contract supervision and oversight requirements,” and directing that “[o]n-site work cannot continue on the subject project until adequate supervision is provided” (R4, tab 12 at 93). By separate letter also dated January 12, 2022, the CO responded to JAM’s September 9 and November 19, 2021 letters, stating and that “all delays have been caused by the Contractor and no termination for convenience will be considered,” that “[i]n consideration of the limited amount of progress to-date on this project the government intends to pursue a termination for default unless significant progress towards project completion is attained in the near future,” advising that a “cure notice will be issued shortly” (R4, tab 13 at 96).

15. By letter dated January 14, 2022, Mr. Garry Murphy, CO, NAVFAC Southeast, issued a cure notice advising JAM that the government may terminate the contract for default “unless all items listed below are cured within 10 days,” including (1) submission of a resume package for the “deficient supervisor oversight position,” (2) “a realistic completion schedule (Primavera P6),” and (3) correction of “all storm water protection plan (SWPP) deficiencies onsite” (R4, tab 15 at 100).

16. By letter dated January 21, 2022, JAM responded to the cure notice acknowledging its “supervisor oversight position” remained unfilled, that it was unable to “propose a reasonable schedule,” and agreeing to resolve SWPP issues (R4, tab 16 at 101-02).

JAM Abandons the Project Site

17. By email dated February 15, 2022, Mr. James Harding, JAM Superintendent, informed Mr. Robbie Boccabello of Bocci Group, Inc., a JAM subcontractor, as follows:

We have been put on an indefinite hold and we will be leaving the site soon. Please send someone over this week to pick up your tools and equipment before there is no one one [sic] site to let you in the gate. I will need the names of whoever will be coming to pick the stuff up so I can make sure they have a current pass. If you have any questions please let me know.

(R4, tab 27 at 1353, 1355)

18. By email dated February 22, 2022, Mr. Boccabello informed Mr. Hilliard:

I am a subcontractor for JAM Construction on the B2945 Elevator Addition project. I was given notice by JAM last week that the project was placed on hold and to make plans to remove material and equipment off the job. Jose gave me your email address to contact you about payment, specifically for the reinforcing material.

(*Id.* at 1353)

19. By email also dated February 22, 2022, Mr. Hilliard informed Mr. Boccabello, “I was unaware that JAM had decided to place the project on hold,” that the government “did not instruct JAM to stop work,” and that “[i]f you have any payment issues, you need to address this with your prime contractor JAM” (*id.*).

20. Regarding JAM’s departure from the job site, Mr. Mantilla, in his individual capacity, and as corporate representative, testified that JAM left the project in February 2022, prior to termination of the contract, stating as a reason that JAM’s superintendent on the project resigned and that other than removing equipment at the site, JAM did not have any workers at the site. Mr. Mantilla also testified that both of JAM’s subcontractors left the jobsite, and that “I couldn’t get anybody else to go there, so I didn’t have anybody to go. I even tried to take somebody from -- from here, from Jacksonville. Nobody wanted to go there.” (R4, tab 171 at 41399-41400 (Mantilla Dep. at 260-61))

Cure Notice No. 2

21. By letter dated March 22, 2022, Ms. Nicole Wilhelm, Chief of Contracting Office, NAVFAC Southeast, issued a second cure notice based upon JAM's failure "to perform within the time required by [the contract's] terms or cure the conditions endangering performance as fully described to [JAM] in multiple letters of concern and progress meetings" (R4, tab 17 at 104). Ms. Wilhelm noted that JAM was more than 15 months behind schedule and that approximately \$357,000 in liquidated damages had accrued as of March 2022 (*id.*).

22. By letter dated March 31, 2022, JAM, through counsel, responded to the March 22, 2022 cure notice asserting, "[a]s previously stated, JAM is continuing its efforts to perform on the project and will continue its best efforts to do so until the project is either terminated or completed" (R4, tab 18 at 108). JAM's response made no mention that it unilaterally had declared to its subcontractor that the project "on hold" or that it had directed its subcontractor to demobilize from the site.

Termination of the Contract for Default

23. By letter dated May 24, 2022, Ms. Wilhelm, as CO, issued a COFD terminating the contract for default, stating that JAM (1) had "abandoned the project," (2) "breached its contractual duty to perform," (3) "failed to make progress with the diligence required to ensure project completion," (4) "failed to comply with material provisions of the contract," (5) "failed to provide an acceptable schedule," and (6) "failed to provide proper contract supervision and oversight personnel" (R4, tab 19 at 145).

ASBCA No. 63378 – Appeal of Termination for Default

24. On August 10, 2022, JAM appealed the May 24, 2022, COFD, which the Board docketed as ASBCA No. 63378. On September 26, 2022, JAM filed its complaint, asserting that the government's "hardline and unforgiving" review and processing of JAM's submittals delayed its completion of the contract task order (compl. dtd. September 26, 2022, ¶¶ 74, 116 – 25), and that the government failed to account for excusable delays to the critical path of the project (*id.* ¶¶ 124 – 34). JAM sought conversion of the default termination to one for the convenience of the government (*id.* ¶¶ 43, 134).

April 1, 2025 COFD - Liquidated Damages

25. On February 28, 2025, Ms. Renee M. Comfort, Chief of Contracting Office, NAVFAC Southeast, as CO, issued a demand for payment in the amount of \$1,155,750 for liquidated damages calculated based upon the difference between the

task order's required completion date of December 10, 2020, and the date of the CO's letter demand - a total of 1,541 days multiplied by the daily liquidated damages rate of \$750 (R4, tab 28). The demand letter stated that "[t]he Government retains the right to reissue this demand for payment as part of a final decision pursuant to FAR 32.605 should payment not be made by the contractor within 30 days from the date of this letter" (*id.*). On April 1, 2025, the CO issued a COFD assessing liquidated damages as set forth in the CO's February 28, 2025, demand letter (R4, tab 29 at 24679).

ASBCA No. 64226 – Appeal of Liquidated Damages Assessment

26. On June 27, 2025, JAM appealed the April 1, 2025, COFD seeking liquidated damages, which the Board docketed as ASBCA No. 64226, and consolidated with ASBCA No. 63378.

CO Decision Dated January 12, 2026

27. On January 12, 2026, Ms. Wilhelm issued a "decision" (which she did not assert was a CDA COFD) responding to JAM's August 19, 2025, "Purported Claim," and JAM's November 24, 2025, "Supplemental information to Purported claim" (R4, tab 62).⁴ In rejecting the "purported claim," the CO summarized, stating "[t]he essence of the relief asked for in JAM's recent submissions are merely a regurgitation of what is already on appeal at the Board," and that JAM's submissions fail to set forth "a clear and unequivocal statement," providing adequate notice to the CO about "the basis and amount of [its] claim for time or costs of Government Delays" (*id.* at 28220). The CO also took the opportunity to increase the demand for payment of liquidated damages to reflect the additional time from issuance of its previous liquidated damages COFD, to January 12, 2026, the date of the CO's "decision" - in the total amount of \$1,394,250 (*id.* at 28221).

ASBCA No. 64439 – Appeal of CO's January 12, 2026 Decision

28. On January 21, 2026, JAM appealed the CO's January 12, 2026 decision, which was docketed as ASBCA No. 64439, and requested consolidation with ASBCA Nos. 63378 and 64226, which the Board granted on January 28, 2026.

⁴ Our previous decision details additional statements of fact discussing claims documentation and legal argument submitted by JAM's counsel to the government after JAM's August 10, 2022 appeal of the May 24, 2022 COFD. *J.A.M. I*, at 190,300-301 (SOF ¶¶ 9, 11, 13-16). For brevity, we do not restate here those statements of fact. Familiarity with that decision is presumed.

Mr. Mantilla's Deposition Testimony Regarding Delay

29. Regarding JAM's responsibility for delays on the project, during his March 26, 2026 deposition Mr. Mantilla testified as follows:

Q. Okay. My question is: how many days of delay are you asking to be attributed to the government on this project?

A. Oh, I don't -- I -- I can't recall.

Q. How many days of delay do you think are attributable to you on this project?

A. I -- I can't recall.

Q. As you sit here today, do you believe that J.A.M. was responsible for any of the delays?

A. Oh, I'm sure that we were. We were, you know, but it's -- it's a -- it's a -- it's like this. See what I mean?

(R4, tab 171 at 41380-81 (Mantilla Dep. at 241-242))

DECISION

I. Standard of Review

It is well established that “[s]ummary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *First Com. Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); FED. R. CIV. P. 56(A). FED. R. CIV. P. 56(a), entitled “MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT, provides that “[a] party may move for summary judgment identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought.” The government, as the moving party, “bears the burden of establishing the absence of any genuine issue of material fact. . . .” *Bubble Room, Inc. v. United States*, 159 F.3d 553, 561 (Fed. Cir. 1998). In challenging the government's motion, JAM “must set forth specific facts showing that there is a genuine issue for trial.” *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968). To establish a genuine issue of material fact, JAM must present sufficient evidence upon which this Board could decide in its favor after “drawing the requisite inferences and applying the applicable evidentiary standard. . . .” *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986)). Mere conclusory statements are inadequate. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *ECC Int'l LCC*, ASBCA Nos. 61176, 62029, 21-1 BCA ¶ 37,824 at 183,692 (appellant's counsel “simply saying it does not make it so.”).

II. Burden of Proof

JAM challenges the government's default termination of its contract and task order, as well as the government's assessment of liquidated damages, and requests that the Board convert the default termination to one for the convenience of the government (SOF ¶¶ 24-26, 28). A termination for default is a government claim for which "[t]he government bears the burden of proof in establishing the validity of a default termination." *Cascade Designs, Inc.*, ASBCA No. 62378, 22-1 BCA ¶ 38,068 at 184,843 (quoting *Johnson Mgmt. Grp. CFC, Inc. v. Martinez*, 308 F.3d 1245, 1249 (Fed. Cir. 2002)). Once "the government satisfies its burden of establishing the validity of the default termination, the contractor has the burden of establishing that the default was excusable," which the contractor can meet if it demonstrates that "the government materially breached the contract thereby discharging appellant's duty to perform," or that its failure to perform was well beyond its "control and without its fault or negligence or that of its subcontractors or suppliers," or that the CO's "default decision was arbitrary or capricious or an abuse of discretion." *Id.* (citations omitted).

The government's assessment of liquidated damages is likewise a government claim for which government bears the initial burden of proving by preponderant evidence "that the contractor failed to meet the contract completion date and that the period of time for which it assessed liquidated damages is correct." *Sauer Inc.*, ASBCA, No. 62395, 21-1 BCA ¶ 37,845 at 183,753 (quoting *KEMRON Env't Servs. Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,399); *Pinewood, Inc.*, ASBCA No. 63588, 25-1 BCA ¶ 38,813 at 188,804 (preponderance of the evidence standard). Once the government has met its burden, the appellant must demonstrate by preponderant evidence "either that the government incorrectly assessed the damages under the contract, or that appellant's failure to comply with the terms of the contract was excusable." *Id.* (quoting *Chem-Care Co.*, ASBCA No. 53614, 06-2 BCA ¶ 33,427 at 165,726).

III. The Government is Entitled to Partial Summary Judgment on the Issue of Whether it had a Valid Basis for the Termination for Cause

"A contractor's unexcused abandonment or repudiation of the promised performance may be perceived as a material breach of contract." *Polyurethane Prods. Corp.*, ASBCA No. 42251, 96-1 BCA ¶ 28,154 at 140,545. The right of the government to summarily terminate a contract for default, where the contractor abandons performance, "is an established common law remedy that the Government retains under paragraph [d] of the Default clause." *Id.* Indeed, the contract's disputes clause required JAM to "proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract" (SOF ¶ 2).

It is undisputed that JAM left the job site in February 2022 and did not return prior to the government's termination of the contract for default approximately two months later (SOF ¶¶ 17-20, 23). Record evidence from JAM's subcontractor establishes that it was informed by JAM that work on the project was on hold and was instructed to make plans to remove material and equipment from the job site (*id.* ¶¶ 17-19). Moreover, deposition testimony from Mr. Mantilla establishes that JAM's project superintendent resigned and that, other than removing equipment at the site, JAM did not have any workers at the site (*id.* ¶ 20). According to Mr. Mantilla, both of JAM's subcontractors left the jobsite and Mr. Mantilla was unable to "get anybody else to go there, so I didn't have anybody to go Nobody wanted to go there" (*id.*). JAM's abandonment of the jobsite was a material breach of the contract, thereby justifying the government's termination of the contract for cause. *M.C. & D. Cap. Corp. v. United States*, 948 F.2d 1251, 1256 (Fed. Cir. 1991) (contractor "breached the contract by abandoning the work and leaving the job site prior to correcting the deficiencies. The latter conduct itself justified the government's termination of the contract").

Appellant does address or even attempt to refute the government's factual assertion that JAM abandoned the project in February 2022 (gov't mot. at 7, 10, 14 (¶¶ 29, 37)).⁵ Indeed, JAM's response to the government's motion for summary judgment consists mainly of sweeping statements by counsel to the effect that the government has not met its burden of establishing the absence of any material issues of fact (app. resp. at 2-3).⁶ As noted above, however, counsel's "simply saying it does not make it so." *ECC Int'l LCC*, 21-1 BCA ¶ 37,824 at 183,692; *Betance Enters., Inc.*, ASBCA No. 63076 *et al.*, 23-1 BCA ¶ 38,273 at 185,841 n.13 (appellant's allegations supported only by argument of counsel are insufficient to warrant full exposition of the facts at trial).⁷

⁵ During oral argument, counsel for appellant, although not wanting to use the word "abandon," confirmed that appellant left the job site and did not return prior to contract termination (tr. at 41-43) ("J.A.M. demobilized and was – physically left this project site sometime in February of '22. That, we do not dispute"). We consider counsel's statement during oral argument to be a judicial admission regarding JAM's departure from the jobsite. *Korte Constr. Co.*, ASBCA No. 63148, 23-1 BCA ¶ 38,454 at 186,909 n.5, recon. denied, 24-1 BCA ¶ 38,580, *aff'd Korte Constr. Co. v. Sec. of the Army*, 2026 WL 961704 (Fed. Cir. Apr. 9, 2026) (unpublished).

⁶ The pages of JAM's May 22, 2026, responsive brief are unnumbered. Citations to that filing are to the page numbers as designated by PDF reader.

⁷ Appellant's brief contains no citations to the Rule 4 file, stating instead that certain dates "are easily verifiable by documents in the Rule 4 file" (app. resp. at 5). However, it is appellant's burden and obligation to provide citations to the record in support of its factual and legal assertions. It is not the role of the

Appellant's counsel complains that the government's motion relies upon Mr. Mantilla's deposition testimony taken "almost 6 years after the events in question," seemingly faulting government counsel for "making a statement and characterizing facts in a specific way – as if the deposition were cross-examination" (*id.* at 3). Government counsel's treating Mr. Mantilla - an adverse witness - as if he were testifying on cross-examination, thereby allowing counsel to ask leading questions, seems entirely reasonable. See Federal Rules of Evidence (FED. R. EVID.) 611(b) and (c)(2). According to appellant's counsel, "Mr. Mantilla, on that day and at that time, was unable to verbally dispute Government's Counsel' characterizations," asserting also that "a deposition is a one-sided affair with only opposing counsel questioning witnesses and choosing what issues to address and what documentary evidence to review" (app. resp. at 3-4). Appellant's arguments ignore the fact that Mr. Mantilla was testifying both in his individual capacity as JAM's owner and CEO, and as appellant's corporate representative pursuant to FED. R. CIV. P. 30(b)(6), speaking on behalf of appellant "about information known or reasonably available to the organization." Mr. Mantilla's difficulty in addressing - as JAM's corporate representative - certain aspects of JAM's claim falls squarely on appellant, not the questioning of government counsel. Moreover, appellant's counsel was free to conduct its own questioning deemed necessary to correct the record, or to submit a declaration by Mr. Mantilla addressing any mischaracterization of the facts, yet appellant cites no such testimony by Mr. Mantilla in its responsive brief.

For these reasons, we find that the government has met its burden of establishing by preponderant evidence the validity of the default termination, and that appellant has failed to set forth specific facts showing that there is a genuine issue for trial regarding the validity of the government's termination of the contract for cause. Accordingly, we grant the government partial summary judgment, finding that the government had a valid basis for its decision to terminate the contract for default. As we discuss below, however, we deny the government's motion for summary judgment on the issue of JAM's defense to the default termination - that JAM's failure to perform was excusable.

Board "to sort through the record" in search of documents that support a party's arguments or factual assertions. *Matcon Diamond, Inc.*, ASBCA No. 59637, 20-1 BCA ¶ 37,532 at 182,259 (citing *Essential Constr. Co. & Himount Constructors Ltd., JV*, ASBCA No. 18706, 89-2 BCA ¶ 21,632 at 108,833 (refusing "to become appellant's advocate" in appeal of delay claim); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs").

IV. The Government is Not Entitled to Summary Judgment on JAM's Affirmative Defense of Excusable Delay

Although we have held here that JAM's repudiation of the contract provided the government the summary right to terminate the contract, as noted above, this simply shifts "the burden to appellant to prove that its decision to abandon performance was excusable under the Default clause . . . or was caused by a material breach of contract. *Graham International*, ASBCA No. 50360, 01-1 BCA ¶ 31,222 at 154,111 (citing *DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 19,960 at 101,049). The government argues in general terms that any delays experienced on the project were attributable to JAM (gov't mot. at 14-15). As support, the government cites the deposition testimony of Mr. Mantilla, alleging that he could not "identify a single day of delay attributable to the government, despite [appellant's] acknowledgement that at least some delay was certainly attributable to Appellant" (gov't mot. at 14-15 (citing GSUMF ¶ 32)). The government's reliance upon Mr. Mantilla's deposition testimony on this issue is misplaced. Although Mr. Mantilla acknowledged that JAM was responsible for some of the delays, when asked by government counsel the number of days appellant attributes to government delay and the number of days attributable to appellant, Mr. Mantilla responded "I can't recall" (SOF ¶ 29). Mr. Mantilla's inability to recall the number of government-caused days of delay does not establish that there were no days of delay attributable to the government, nor is it a factual issue that we can resolve on summary judgment.

The government also cites as support testimony of its expert Mr. Khaled Aziza, who, according to the government, performed a windows analysis and attributed 643 calendar days of delay to JAM and 15 calendar days of delay to the government (gov't mot. at 15 (citing R4, tab 65 at 39)). According to the government, JAM "chose not to designate an expert to address this issue;" therefore, "[w]ithout a countervailing expert witness, Mr. Aziza's report is uncontested and establishes as a matter of undisputed fact that the delays in this case are not attributable to the Navy" (*id.*). We disagree. Expert testimony is presented as an aid to the Board and, in considering expert testimony, the Board exercises its "sound discretion in deciding which statements and positions to accept and which to reject." *Trade West Constr., Inc.*, ASBCA No. 61068, 22-1 BCA ¶ 38,214 at 185,597 (citing *S.W. Marine, Inc., San Pedro Div.*, ASBCA No. 28196, 86-2 BCA ¶ 19,005 at 95,980 ("trier of fact is not bound by expert testimony and may substitute his common sense judgment for that of the expert.")). Simply because one party consulted an expert while the other did not, does not, ipso facto, establish as undisputed the statements and conclusions set forth in that expert's report, particularly in the context of a motion for summary judgment. Whether appellant can meet its burden to establish government caused or other excusable delay is an issue best left for the hearing (or pursuant to Rule 11 submission), where issues of fact can be decided by the Board as finder of fact.

The government argues in its reply brief that its two motions to strike JAM's affirmative defense of government caused delay "make clear that there is no legal defense available to [a]ppellant," and that "[a]s such, the Navy is entitled to judgment both as a matter of fact and as a matter of law" (gov't reply at 4). We recognize that the government filed its reply brief prior to the Board's issuance of our June 2, 2026 opinion, in which we held that "we may consider JAM's non-monetary claim of alleged government caused delay, asserted as an excuse to its termination for cause." *J.A.M. I* at 190,305. However, having now determined that JAM may present government caused delay as an affirmative defense, the government's argument to the contrary has lost its legal footing.

Regarding JAM's attempts to comply with ENG Form 4025-R submittal requirements, JAM challenges the government's "'prescription' of the Form 4025-R," suggesting that the documents cited by the government (gov't mot. at 3 (¶ 10); *see* SOF ¶¶ 6-7) were not issued by the CO "and do not, in and of themselves, demonstrate that they were actually communicated to JAM" (app. resp. at 2-3).⁸ Although communication and imposition of ENG Form 4025-R as a contractual requirement arguably presents a controverted issue of material fact which we therefore do not decide here, we note that use of ENG Form 4025 and 4025-R, both of which are titled "Transmittal Of Shop Drawings, Equipment Data, Material Samples, Or Manufacturer's Certificate Of Compliance" (FOF ¶ 6 n.2), is commonplace in Federal government construction contracts. *ECC Int'l, LLC*, ASBCA No. 58875, 20-1 BCA ¶ 37,683 at 182,952; *JAAAT Technical Services, LLC*, ASBCA No. 61180, 19-1 BCA ¶ 37,297 at 181,426-431.

Appellant argues that the government's recitation of facts "fails to properly take into account the fact that, during the entire period described in that section, the country was in the middle of the COVID-19 pandemic" (app. resp. at 3 (referencing GSUMF ¶¶ 13-38)).⁹ Indeed, the government's motion does not substantively address JAM's

⁸ During oral argument, appellant's counsel discussed alleged delays by the government in the processing of certain submittals and the government's direction to utilize ENG Form 4025 (tr. at 63-77). Government counsel countered that appellant, not the government, was responsible and at fault for alleged submittal delays (tr. at 100-05). However, this exchange by counsel only highlighted the fact that there exist material issues of fact - as to responsibility for delays in submission and approval of submittals - that cannot be resolved on summary judgment.

⁹ During oral argument, appellant's counsel also discussed the impact of COVID-19 on JAM's ability to perform the contract, referencing certain documents as support (tr. at 78-85). The government countered arguing that, at the time JAM left the job site in February 2022, "COVID was over by then" and that the documents cited by appellant's counsel are more general in nature and that

allegations concerning the impact of COVID-19 on JAM's ability to perform task order work or its validity as an affirmative defense and references COVID-19 only in passing (*see* gov't mot. at 5 (¶ 18), 8 (¶ 34)). On the evidence before us, whether JAM is entitled to additional time for alleged delays encountered because of COVID-19 presents a material issue of fact that we are unable to resolve on motion for summary judgment. *BCI Construction USA, Inc.*, ASBCA No. 62657 *et al.*, 24-1 BCA ¶ 38,522 at 187,264.

For the above reasons, we find that the government, as the moving party, has not met its burden of establishing by preponderant evidence the absence of any genuine issue of material fact regarding JAM's affirmative defense of excusable delay and, as such, the government is not entitled to judgment as a matter of law on that issue.

CONCLUSION

The Board grants the government partial summary judgment regarding the propriety of decision to terminate the contract for default and denies the government's motion for summary judgment regarding JAM's affirmative defense that the default was excusable.

Dated: July 28, 2026



DAVID B. STINSON
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

“[t]here is not a single document anywhere in the record that says how COVID specifically affected J.A.M.” (tr. at 103-05). However, this exchange by counsel likewise only highlights the need for a hearing where such issues of fact can be decided by the Board as finder of fact.

I concur



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

I concur



DAVID D'ALESSANDRIS
Administrative Judge
Acting 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 Nos. 63378, 64226, 64439, Appeals of J.A.M. Construction Services, Inc., rendered in conformance with the Board's Charter.

Dated: July 28, 2026



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals