ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DODS, Inc.	)	ASBCA No. 57667
	)	
Under Contract No. SPM4A7-09-M-B426	)	

APPEARANCE FOR THE APPELLANT: Mr. David Storey
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Edward R. Murray, Esq.
Trial Attorney
DLA Aviation
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON
THE GOVERNMENT'S MOTION FOR RECONSIDERATION

The government timely moves for reconsideration of our 11 June 2012 Rule 12.3 decision in *DODS, Inc.*, ASBCA No. 57667, 12-2 BCA ¶ 35,078. The government first argues that the Board based its decision on documents that do not refer to Contract No. SPM4A7-09-M-B426. As explained herein, the documents contain statements applicable to all of DODS' contracts and are relevant communications. The government then argues the Board failed to properly consider the two-prong *DeVito* test for waiver of the right to terminate. This second argument is in large part dependent upon the success of the first argument that I reject.

While drafting this decision on reconsideration, I identified an issue that we did not consider in our original decision. The issue relates to footnote 4 in the government's opening brief wherein the government admits that it "is not clear" whether the technical data package made available to DODS before April 2010 was complete. The fact that shortly after award DODS notified the government that the TDP was missing "loft contour data" and that it could not proceed until the missing data was provided combined with the admission by the government that it did not know if the TDP was complete until April 2010, well after the first article delivery date had passed, raised the issue of if DODS' failure to deliver was excused. Recognizing that I was considering adopting a different analysis in this decision, on 17 August 2012 the Board wrote the parties and requested supplemental briefing concerning the issue. The Board did not reopen the record to accept additional evidence. Both parties filed supplemental briefs and reply briefs which I considered.

Reconsideration

To prevail on reconsideration, the moving party must generally establish that the underlying decision contained mistakes in our findings of facts or errors of law or that newly discovered evidence warrants vacating our decision. *WestWind Technologies, Inc.*, ASBCA No. 57436, 11-2 BCA ¶ 34,859 at 171,478.

DISCUSSION

Erroneous Reliance on Communications

This argument falls within the mistakes in our findings of fact basis for reconsideration. In footnotes 1-3 the government contends that the Board relied upon communications that did not relate to Contract No. SPM4A7-09-M-B426 (B426). I consider each of the communications separately.

In Findings of Fact (FOF) ¶ 5 we referred to a 1 April 2010 email from Mr. Webber, DCMA, QA Representative (QAR), to Mr. Storey, president, DODS. We quoted the subject line that referenced two other contracts. However, the text quoted in our decision included the following admonition from Mr. Webber:

> Products that have been completed, without affording the government the opportunity to plan its involvement (especially those with an ISO or "Higher-Level" quality requirement), will be rejected and corrective action requested. *This applies to all of your "aged" contracts.*

DODS, 12-2 BCA ¶ 35,078 at 172,276, FOF ¶ 5 (Emphasis added). I interpret "[t]his applies to all of your 'aged' contracts" to mean all delinquent contracts including the B426 contract. In the email DCMA threatens DODS with rejection of all first articles if it isn't given an "opportunity to plan its involvement." Our decision correctly included this email and, contrary to the government's contention, it does apply to the B426 contract.

In FOF ¶ 6 we refer to another 1 April 2010 email wherein Mr. Storey asked that Mr. Webber be removed. While the email does not reference any contracts the government objects because it refers to "TTF, LLC" and not DODS. The government knows full well that there is no practical distinction between TTF and DODS. Indeed, in its "OPENING BRIEF" the government likewise refers to correspondence from TTF and includes footnote 2 that reads:

> TTF is a sister organization of the appellant, DODS. David Storey is the President of both companies and they employ all of the exact same personnel in the exact same positions. The Central Contractor Registration entries for the companies reveal that they are located in the same facility with same Primary and Alternate Points of Contact (Mr. Storey), and have the same phone and fax numbers.

(Gov't opening br. at 2 n.2) It is a bit surprising that the government now takes issue with the Board for treating TTF precisely as the government did in its opening brief. Our decision correctly included this email and, contrary to the government's contention, it is relevant to the relationship between DCMA and DODS and therefore the B426 contract.

In FOF ¶ 7 we refer to a 27 May 2010 email from Mr. Webber to Mr. Storey. The government correctly points out that the subject is "Paradrouge Assembly" that is not the "aircraft former" purchased by the B426 contract. However, this email contains a statement that applies to all of Mr. Storey's contracts, "[h]owever, please remember during our meeting of April 22nd, I informed you (then) that my participation on all First Articles is 100%." *DODS*, 12-2 BCA ¶ 35,078 at 172,277, FOF ¶ 7. "[A]ll First Articles" includes the B426 contract first article. We commented in our decision, "This is confusing at best but could reasonably be interpreted as a requirement that Mr. Webber be present during first article production." *DODS*, 12-2 BCA ¶ 35,078 at 172,280. Our decision correctly included this email and, contrary to the government's contention, it does apply to the B426 contract.

In FOF ¶ 11 we referred to a 21 January 2011 email from Mr. Torrence, DCMA, to Mr. Storey. We pointed out that the email referred to another contract but it also stated that DODS' quality manual was not rejected. This was a point of contention between DCMA and DODS. In a 5 May 2011 letter to CO Williams, Mr. Webber provided an explanation that included his statement that based on an "extensive audit" he had found TTF's Quality System "noncompliant to the ISO 9001-2000" with some problems of a "systemic nature." *DODS*, 12-2 BCA ¶ 35,078 at 172,278, FOF ¶ 19. Mr. Webber went on to say that such a finding "does not stop production" unless it "remains noncompliant" in which case product "can (and will be rejected)." *Id.* In his 4 May 2011 letter to CO Williams, Mr. Storey stated that Mr. Webber told him that all of DODS' work performed would be rejected because the quality system is unacceptable. *DODS*, 12-2 BCA ¶ 35,078 at 172,278, FOF ¶ 18. Therefore, our decision correctly included this email and, contrary to the government's contention, it does apply to the B426 contract.

In FOF ¶ 14 we referred to a 29 March 2011 email from Ms. Wynne, DCMA, to Ms. Beniest, DODS. The government states, "[b]ut the subject line of the e-mail notes that it is in regard to contract SPM4A7-09-M-0928 and makes clear that it is directed to TTF, not DODS" (gov't mot. at 4 n.3). I dealt with the TTF issue above – there is no

practical difference between TTF and DODS. Again, as with the other documents referred to in the footnotes, this e-mail contains general information applicable to all of Mr. Storey's contracts. The 29 March 2011 email is relevant because it takes the position that "no one in DCMA has ever delayed production at TTF" and reiterates the point that DCMA only wants the "OPPORTUNITY to review" production processes. *DODS*, 12-2 BCA ¶ 35,078 at 172,277, FOF ¶ 14. Additionally, in his 5 May 2011 email to CO Williams, QAR Webber admitted that he imposed "'Hold Points' on several key processes of his, 'Plating', 'Heat Treating' and 'Composite/Metallic Bonding' to name a few." *DODS*, 12-2 BCA ¶ 35,078 at 172,278, FOF ¶ 19. It is unclear what Mr. Webber meant by "Hold Points" but it appears inconsistent with an "OPPORTUNITY" to inspect production processes.[1] This was part of the ongoing discussion between the government and DODS and applies to all of DODS' contracts, including the B426 contract. Our decision correctly included this email and, contrary to the government's contention, it does apply to the B426 contract.

As we stated in our decision, referring to all of the contemporaneous documents referred to in our FOFs, "this series of communications between the government and DODS was confusing, contradictory and consistently encouraged DODS to continue performance while at the same time failing to reestablish a firm delivery date." *DODS*, 12-2 BCA ¶ 35,078 at 172,280. Nothing in the government's motion persuades us that our conclusion was mistaken. There were no mistakes of fact in our findings of fact and that basis for reconsideration is denied.

Erroneous Legal Standard

Next the government argues that we did not properly "perform the familiar two-prong analysis required by *DeVito*" (gov't mot. at 7) (footnote omitted). This argument falls within the errors of law basis for reconsideration. The government correctly quotes from the *DeVito* decision:

> The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

DeVito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969). The first element in the quote is, "(1) failure to terminate within a reasonable time after the default under

[1] Since this is a record submission, the Board did not have an opportunity to question Mr. Webber on this and other matters.

circumstances indicating forbearance." Failure to terminate assumes a right to terminate. The right to terminate is dependent upon an unexcused failure to meet the delivery date, i.e., a default. *DeVito* and its progeny all require as a fundamental prerequisite a failure to terminate based upon an unexcused failure to deliver on a valid delivery date. Without a default there is no right to terminate and, therefore, nothing to waive–the *DeVito* analysis simply does not apply. The Board did not address the importance of this fundamental premise in its 11 June 2012 decision but addresses it in this decision on the motion for reconsideration.

Government's Technical Data Package

The government included the declaration of Mr. Walter W. Wade in the record (R4, tab 34 at 1). Mr. Wade is the customer service section chief with DLA-Aviation. The purpose of his declaration is to explain CFolders and DODS' access to them. Mr. Wade explains:

> CFolders is the DLA on-line data distribution system which makes complete technical data packages (TDP) to include, engineering drawings, specifications and stable based mylars available to certified vendors on open purchase request. This data can be viewed and downloaded until the contract is awarded. Once awarded, the TDP is only available to the contract awardee. Both DODS, Inc. (DODS) and TTF, L.L.C. (TTF) have access to CFolders and have used it in the past.

(R4, tab 34 at 1) Mr. Wade explained that his customer service team could, upon request, assist vendors with problems with a TDP such as illegible, missing or incomplete data. He also explained that the system tracks vendor access and that TTF accessed drawings for the aircraft former on 22 June 2009 and 22 July 2009. *Id.* In its opening brief the government discusses this evidence, but acknowledged that it did not know if all of the required information (loft contour data) was available in 2009:

> It is not clear from the record whether these loft data pages were available in CFolders at the time the solicitation [for the B426 contract] was issued, the [B426] contract awarded, and TFF/DODS initially accessed the technical data package through CFolders in June and July 2009. At any rate, the record demonstrates that they were available in CFolders by April 2010 when TTF downloaded them.

(Gov't br. at 4 n.4)

Based on the existing record I know the following:

(1) TTF/DODS downloaded contract B426 data in June and July 2009 (R4, tab 34, ¶ 4);

(2) On 22 July 2009 the Defense Supply Center Richmond (DSCR) awarded contract B426 (R4, tab 1 at 1);

(3) The first article delivery date was 21 August 2009 (R4, tab 1 at 2);

(4) On 3 August 2009 DODS began work on the contract (R4, tab 37);

(5) On 6 August 2009, DODS wrote DSCR stating that the TDP did not have "Loft contour" data. DODS requested a complete TDP, stated that it put the first article on "a hold" pending receipt of the missing loft data and requested an additional 30 days from receipt of the complete TDP to deliver the first article. (Compl., ex. A at 4);[2]

(6) There is nothing in the record indicating that the government acted on DODS' 6 August 2009 letter[3];

(7) DODS failed to deliver the first article on the due date of 21 August 2009;

(8) On 8 December 2009, Mr. Justin Thompson, Administrative Contracting Officer (ACO), DCMA Texas, emailed CO Williams stating in part, "SPM4A7-09-M-B426 – there are pages missing in the drawing the contractor received from the Government for this contract. The contractor cannot proceed with production without the complete documentation."[4] (Compl., ex. A at 8);

(9) On 15 April 2010, ACO Thompson emailed Ms. Ebony Bradley, DSCR, stating, "Please see below and attached regarding contracts SPM4A7-09-M-B426. It appears the contractor still has not received a complete drawing for this contract." (Compl., ex. A at 7);

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[2] In footnote 4 of our decision we stated that we considered documents attached to DODS' complaint to be in the record as if part of the Rule 4.

[3] The fact that the government does not know if the TDP was complete until April 2010 tends to support the conclusion that the government failed to investigate the allegations in DODS' letter and the completeness of the TDP in the CFolders.

[4] It is unclear if Mr. Thompson's statement that DODS cannot proceed with production without the missing data is his independent conclusion or simply his repeating DODS' contention.

(10) DODS admitted it had a complete TDP in April 2010. *DODS*, 12-2 BCA ¶ 35,078, FOF ¶ 4;

(11) After the 21 August 2009 delivery date passed, the government failed to set a new first article delivery date;

(12) The government admits in its opening brief that it is "not clear" that loft contour data was in the CFolders before April 2010 (gov't br. at 4 n.4).

In its 13 September 2012 supplemental brief, the government repeated its position that it does not know if the loft contour data was in the CFolders before the 21 August 2009 first article delivery date, "The record is simply unclear as to whether some of the loft data was initially missing from the technical data package" (gov't supp. br. at 7). It also stated, "[w]e also know that the data was available for download at least April 12, 2010, when a new solicitation for the part was issued and DODS downloaded it. Whether the data was available for download in this intervening period is unclear." (*Id.*) (Citation omitted)

Given the record itemized above, and most significantly DODS' 6 August 2009 letter stating loft contour data was missing from the TDP combined with the government's uncertainty about the completeness of the data in the CFolders, I can only conclude that the government did not make a complete TDP available to DODS prior to the first article delivery date of 21 August 2009. The missing data was at a minimum the "Loft contour" data. Both parties agree that a complete TDP was available to DODS in April 2010, eight months after the 21 August 2009 first article delivery date. Now I must consider if the missing data was necessary for performance.

Loft Contour Data

The government was notified that the TDP was missing loft contour data no later than 6 August 2009, several weeks before the first article due date of 21 August 2009. There is nothing in the record indicating that the government responded to DODS' 6 August 2009 letter or acted in any manner to investigate and resolve the issue. The government cites *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491 for the proposition that "LCI's acceptance of the technical data package with the missing documentation defeats its allegation that its failure to timely deliver the first article was due to an inadequate data package and thus excusable" (gov't supp. br. at 7). However, in *Local Contractors* the contractor was aware of the missing data before award, had access to much of the missing information in the form of preproduction engineering proposals (PPEP) and deviations from previous contracts and incorporated the "missing" information into its manufacturing process – in *Local Contractors* the incomplete TDP did not prevent the contractor from performing.

The government argues, "[i]n addition, DODS has completely failed to meet the second element of excusable delay, as it has not explained why or how the allegedly missing information caused it to delay its performance" (gov't supp. br. at 8). In fact, neither party put any explanation of loft contour data in the record to include the effect of missing data on DODS' ability to perform. All I have is DODS' timely complaint that it had to put performance "on hold"[5] until it received the complete TDP. In its supplemental reply brief the government continues to argue that it doesn't matter if the TDP was incomplete because DODS had the complete TDP in April 2010 but "did not resume performance" (gov't supp. reply br. at 3). The government argues that "to the extent technical data was initially missing" the facts do "not change the [*DeVito*] analysis" (gov't supp. reply br. at 4). The government's argument fails to consider the effect of its defective TDP on DODS' obligation to deliver or appreciate the importance of a valid delivery date to the *DeVito* waiver analysis.

Regardless of the meager record, I must decide if loft contour data was necessary for the manufacture of the first article. In making this decision I am confronted with three facts: (1) I have found that the TDP provided to DODS was missing loft contour data; (2) in its 6 August 2009 letter DODS asserts that it could not produce the first article without the missing data; and (3) the government effectively admits that its TDP was defective and has not rebutted DODS' assertion it could not perform. On this record I can only conclude that DODS is correct. I find that DODS could not complete the first article without the missing loft contour data.

Patent Ambiguity

In its supplemental brief the government argues that it does not matter if the loft contour data was missing because it constituted a patent ambiguity that imposed a duty to inquire upon DODS (gov't supp. br. at 7). There is nothing in the record to indicate that DODS inquired before award. Patent ambiguity and the associated duty to inquire indeed provide a powerful defense to the government. Generally if an ambiguity is patent and a contractor fails to inquire before award, it assumes the risk that its interpretation is correct. *Blue & Gold, Fleet L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) ("Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has 'a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation' in a subsequent action against the government."). Typically these cases deal with claims for increased costs of performance. *Robins Maintenance, Inc. v. United States,* 265 F.3d 1254, 1258 (Fed. Cir.

[5] In our decision we found that DODS continued to perform some work after 21 August 2009 (FOF 3), but we do not interpret "on hold" to mean that no work was done.

2001) ("RMI cannot recover because it made an affirmative decision to bid on a specification, which it knew to be inaccurate")[6].

However, this is a termination for default case in which I have found that performance was impossible without the missing loft contour data. The first question is if there is a patent ambiguity. In this case the "ambiguity" is data missing from the TDP. The bar to prove patent ambiguity is "high:"

> As we have stated,'"[t]he doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter."' *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (quoting *E.L. Hamm & Assocs. Inc. v. England*, 379 F.3d 1334, 1342 (Fed. Cir. 2004)). For that reason, the bar to proving patent ambiguity is high, and the inconsistency must be so "obvious, gross, [or] glaring, so that plaintiff contractor had a duty to inquire about it at the start." *NVT Techs*., 370 F.3d at 1162 (internal quotation marks omitted, alteration in original).

LAI Services, Inc. v. Gates, 573 F. 3d 1306, 1315-16 (Fed. Cir. 2009).

There is nothing in the record from the pre-award period other than the request for quotations (R4, tab 3), DODS' quote (R4, tab 4), and the abstract of offers (R4, tab 5). The bid package available for download is not in the record. The documents actually downloaded by DODS are not in the record. The government assumes, without any proof or discussion, that the missing loft contour data amounts to a patent ambiguity. Given the fact that the bar to prove patent ambiguity is "high" and there is no evidence in the record for me to assess the government's position, I conclude that the government has failed to meet its burden of proving patent ambiguity.

Government's Burden of Proof

The government has the burden of proof in a termination for default case. *New Era Contract Sales, Inc.*, ASBCA No. 56661 *et al.*, 11-1 BCA ¶ 34,738 at 171,022. Normally, once the government proves failure to make timely delivery, it satisfies its burden to make a prima facie case of default and the burden shifts to the contractor to prove an excuse. *Id.* (Failure to make timely delivery establishes a prima facie case for

[6] Robins bid on a grounds maintenance contract knowing that the acreage stated in the solicitation was inaccurately low. When the government agreed to modify the contract to correct the acreage, Robins submitted a claim for the additional work. The CO denied the claim.

termination for default). It is undisputed that DODS did not deliver the first article on 21 August 2009. However, I have also found that the loft contour data was not available to DODS before 21 August 2009 and that the data was necessary for DODS to manufacture the first article. Therefore, DODS' failure to deliver the first article was caused by the government's incomplete TDP and said failure to deliver was excused. The 21 August 2009 delivery date was not an enforceable date and DODS was entitled to an extension. Accordingly, the government had no right to terminate. *B.V. Construction, Inc.*, ASBCA No. 47766 *et al.*, 04-1 BCA ¶ 32,604 at 161,356 ("Where a contractor is entitled to an extension of time, as here, issuance of a notice of default termination is premature. [citations omitted] Accordingly, even if we had concluded that the 24 April 1994 completion date set unilaterally by NASA's CO was reasonable and that NASA had made a *prima facie* case justifying default termination, we would hold NASA's default termination improper because BV was without fault or negligence in its failure to perform and such failure was beyond its control.") The government's argument that "[b]ut even if it were a legitimate excusable delay, it would not change the result of the waiver analysis set forth in *DeVito*" (gov't supp. br. at 9), simply fails to recognize that an unexcused failure to deliver based on a valid delivery date is an absolute prerequisite for a *DeVito* waiver analysis. Without this prerequisite, as is the case here, there is nothing to waive and a *DeVito* waiver analysis does not apply. Now I must decide if the government was required to reestablish a first article delivery date.

I held that DODS' failure to deliver the first article on 21 August 2009 was excused and cannot form the basis for termination. Under similar circumstances we have held:

> Where a performance date has passed and the contract has not been terminated for default within a reasonable time, time does not again become "of the essence" until the government issues a notice that sets a new time for performance, which is both specific and reasonable from the standpoint of the performance capabilities of the contractor at the time notice is given. Thus, after waiving a contract completion date, the government cannot terminate a contract for default based upon a contractor's failure to make progress with or complete the contract work unless it reaches agreement on a new completion date with the contractor or establishes by specific notice a new completion date, which is reasonable based on the contractor's performance capabilities at the time that date is established. [Citations omitted]

Technocratica, ASBCA No. 47992 *et al.*, 06-2 BCA ¶ 33,316 at 165,188. I believe that the logic of *Technocratica*, while not precisely on point with our facts, is sound and I apply it to DODS' situation. The government failed to reestablish a delivery schedule. Therefore, it had no right to terminate DODS for "failure to perform" on 13 June 2011 (R4, tab 19).

CONCLUSION

For the reasons stated above, the government's motion for reconsideration is denied.

Dated: 18 December 2012

Craig Clarke

CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

Eunice W. Thomas

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

OPINION CONCURRING IN RESULT BY JUDGE THOMAS

I concur in result in the denial of the motion for reconsideration. Our original decision relying upon *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969), was correct. We should not change the analysis on reconsideration.

It may be that, as concluded by Judge Clarke, appellant was excusably delayed from August 2009 when it reported it did not have needed technical data until April 2010 when it received a complete technical data package. If so, the delivery date for the first article should have been extended from 21 August 2009 until May 2010 (30 days after availability of the technical data package).

The government terminated the contract for default on 13 June 2011. Appellant has not proved further excusable delay from April 2010 to 13 June 2011. Accordingly, appellant was in default on 13 June 2011.

Under these circumstances, I believe the preferable analysis is to consider whether the government waived the original delivery date (21 August 2009) and proceed from there. I conclude that it did waive that date for the reasons stated in our original decision.

Dated: 18 December 2012

Eunice W. Thomas

EUNICE W. THOMAS
Administrative Judge
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. 57667, Appeal of DODS, Inc., rendered in conformance with the Board's Charter.

Dated:

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