ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Thomas & Sons, Inc.	)	ASBCA No. 51874
	)	
Under Contract No. N62472-94-C-5259	)	

APPEARANCE FOR THE APPELLANT: Mr. James H. Thomas
President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Engineering Field Activity Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal arises from a default termination of a Navy construction contract for failure to make progress and failure to perform as required by the contract. Appellant maintains that the Government does not have reasonable basis to support the termination and that its lack of progress was excusable.

FINDINGS OF FACT

On 5 September 1997, the Navy awarded appellant Thomas and Sons, Inc. Contract No. N62472-94-C-5259 for construction of a tower at the Runway Arresting Landing System (RALS) facility at the Naval Air Engineering Station, Lakehurst, New Jersey (Lakehurst) for $811,500. The contract completion date was 17 April 1998. (R4, tab 1, Contract at 1, Specification (Spec.) § 01011, ¶ 1.5.1)

The contract provided for complete construction of a 112-foot aviation control tower, including excavation, concrete foundations, structural steel, and a fire suppression system, which is the work relevant in this appeal (*id.*, Spec. § 01010, ¶¶ 1.3, 1.4.1).

The solicitation encouraged bidders to visit the site to ascertain the nature and location of the work and conditions that could affect the work. The solicitation scheduled a site visit for 13 May 1997. (R4, tab 1, Contract at 1, Instructions to Bidders, ¶¶ 3, 4) The Lakehurst location in southern New Jersey near the Atlantic Ocean has sandy soil with a high water table subject to erosion (tr. 20, 513). The solicitation advised bidders

that the site has a groundwater elevation approximately 1.5 meters or 5 feet below the existing surface elevation. The solicitation stated that hard materials and rock would not be encountered. (R4, tab 1, Spec. § 02220, ¶¶ 1.5.c., 1.5.d.) The site is in a remote location and does not have adequate on-site water for a pressurized fire suppression system (*id.*, § 15170, ¶ 1.2.c). The site is in an ordnance area subject to "finds" that impose risk of danger to persons and property if not properly exposed. During performance of the contract, appellant did not recognize any need for soil borings or make any inquiry to obtain more data from the Government about the site conditions.

The contract required the contractor to submit a digging permit application to the contracting officer 10 days before starting excavation to identify the specific areas of excavation. The contracting officer was obligated to indicate the approximate location of all known utilities within the area identified in the application. (*Id.*, § 01011, ¶ 3.5.2.1)

The contract required submittals of a construction schedule, equipment delivery schedule, and monthly updates of both schedules (*id.*, § 01011, ¶ 1.3.1). The contract specification further provided with reference to the construction schedule:

> 3.4.2 Schedule of Work
>
> Schedule work to conform to aircraft operating schedules. The Government will exert every effort to schedule aircraft operations so as to permit the maximum amount of time for the Contractor's activities; however, in the event of emergency, intense operational demands, adverse wind conditions, and other such unforeseen difficulties, the Contractor shall discontinue operations at the specified locations in the aircraft operational area for the safety of the Contractor and military personnel and Government property. Submit a schedule of the work to the Contracting Officer for transmittal to the Operations Officer describing the work to be accomplished; the location of the work, noting distances from the ends of runways, taxiways and buildings and other structures as necessary; and dates and hours during which the work is to be accomplished. Keep the approved schedule of work current, and notify the Contracting Officer of any changes prior to beginning each day's work.

(*Id.*, § 01011, ¶ 3.4.2; emphasis added.) The specification as amended prior to bidding provided the contractor's working hours and required the contractor to apply and obtain approval from the contracting officer for work outside regular working hours (*id.*, § 01010, ¶ 3.1.1). The contractor was required to protect work against storms by securing

temporary work and closing openings in the work if there was a threat to the work or any nearby Government property from the weather (*id.*, § 01011, ¶ 3.5.3).

The contract provided that the work would be under the general direction of the officer in charge, NAVFAC Contracts, who would exercise full supervision over the work on behalf of the Government (R4, tab 1, Contract at 2, Spec. § 01010, ¶ 1.6.a.). Lt. JG Kevin Quinette was the resident officer in charge of construction (ROICC). Lt. Michael Lagarde served as the Government project manager on the contract until his change of duty station on 1 October 1999. (R4, tab 3; tr. 18-19)

The fire suppression system consisted of a wet suction pit tank located below the tower that would be supplied by a 15,000 gallon underground water storage tank through a 12-inch gravity pipeline connection. The specification required that the steel pit tank be 30 inches in diameter by 14 feet deep and be set flush with the concrete slab tower floor. (R4, tab 1, Spec. § 15170, ¶¶ 1.3.b., 1.3.g., 2.9.a., 2.9.d., 3.3.b.)

The contract included standard FAR contract clauses FAR 52.211-12 LIQUIDATED DAMAGES-CONSTRUCTION (APR 1984), FAR 52.211-13 TIME EXTENSIONS (APR 1984), FAR 52.233-1 DISPUTES-ALTERNATE I (DEC 1991), FAR 52.236-6 SUPERINTENDENCE BY THE CONTRACTOR (APR 1984), FAR 52.237-1 SITE VISIT (APR 1984), FAR 52.243-4 CHANGES (AUG 1987), and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (*id.*, Contract Clauses at 1-2, 4-6, 8).

The contract included a Naval Facilities Engineering Command standard clause FAC 5252.236-9303 ACCIDENT PREVENTION (JUN 1994) to require the contractor to comply with enumerated safety provisions "in order to provide safety controls for protection to the life and health of employees and other persons" and "for prevention of damage to property, materials, supplies, and equipment" (*id.* at 10). The clause provided for the contracting officer to notify the contractor of any noncompliance and the corrective action to be taken. The contractor was required after receipt of such notice to take corrective action immediately and, if the contractor failed or refused to comply promptly, the contracting officer was permitted to issue a stop work order until satisfactory corrective action was taken. (*Id.*)

When the solicitation was issued, the Government failed to include four pages of the specification (R4, tabs 16, 23).

Appellant is a firm of building contractors located in Lakehurst, New Jersey that has been engaged in general commercial and residential construction and Government contracting for over 20 years. Appellant's president and sole owner is Mr. James Thomas. Appellant's project manager was Mr. Jason Thomas, the nephew of Mr. James Thomas. (R4, tabs 3, 7)

At the pre-construction meeting held on 15 September 1997, Lt. Lagarde and other Government representatives confirmed to Mr. James Thomas the contract requirement that a superintendent satisfactory to the Government was to be on site at all times during the performance of the work.[1] The Government also advised that the contractor's work schedule could be in any acceptable format showing the order in which the contractor proposed to carry on the work with dates for starting and completing the salient items of work. (R4, tab 3)

Appellant submitted its request for a digging permit, dated 24 September 1997. The permit was approved by the Government on 15 October 1997. Appellant received the permit on 20 October 1997. (R4, tab 7; tr. 246, 547) No excavation work could take place, however, until there was a sweep of the site for unexploded ordnance. The Government had prior knowledge of a requirement for Explosive Ordnance Disposal (EOD) sweeps, but the solicitation did not disclose the requirement or the hazardous conditions of the area to potential bidders. The safety office at Lakehurst was aware that the site was in a potentially hazardous area, but the conditions were not known to the ROICC, other Government project personnel, or appellant until two days after the pre-construction meeting. (Tr. 169, 171-72, 177)

Appellant submitted its initial project schedule, dated 28 September 1997, that showed excavation for the pit tank and the pipeline connection and installation of the pit tank before installing the footings for the foundation of the tower. This is the logical sequence of construction because of the placement of the pit tank below the tower. The pipeline connection needed to be lower than the footings for gravity flow. This sequence was approved by Lt. Lagarde as the reviewing engineer. (R4, tabs 70, 210 at 26-28; tr. 26-27, 492-93, 505)

On 11 October 1997, appellant requested copies of pages that it discovered were missing from the specifications. Appellant asserted that the omission would delay its submittals. On 22 October 1997, the Government provided the missing material. The specification provisions that appellant did not have at the time of bidding and could not use to order materials until late October 1997 concerned materials such as steel sheets and steel coating, a telescoping access ladder, insulating glass units and accessories, and restoration of unpaved surfaces upon completion of construction. The specification pages were missing for only a short time at the beginning of the contract, and we find that the omission did not cause delay to appellant's performance of the contract. (R4, tabs 16, 23; tr. 160-63, 222-23)

Appellant was unable to schedule the required EOD sweeps. The EOD team was not at Lakehurst, but came from a Naval Weapons Center according to its schedule and

could take as long as 15 days to arrive on site after the ROICC requested a sweep. The record is not clear as to when the first EOD sweep was made or how many sweeps were made during appellant's excavation. Permission to proceed with excavation was given for two feet after each sweep. Up to 25 July 1998, no more than three sweeps had been made, and according to Lt. Lagarde, appellant was authorized to excavate at a maximum depth of six feet. The greatest depth of excavation, which was for installation of the pit tank, was approximately 15 feet, which would require eight sweeps.[2] (R4, tabs 21, 156; AR4, tab 5; SR4, tabs 5, 21; tr. 169-73, 177, 191, 193, 208-10, 215, 243, 245, 455, 472, 479-80, 483)

Other than some excavation appellant did not work on the site after contract award because of nearby F-18 aircraft testing, which was not completed until 23 March 1998. By letter dated 6 February 1998, appellant submitted a proposal that estimated additional costs for a contract modification. The Government could not locate an electrical ductbank that was shown on the plans to be under the taxiway. Appellant included the additional work of installing it in its proposal. Appellant's work was delayed by the aircraft testing, wet weather, and EOD sweeps which could not be timely scheduled. Appellant proposed additional costs in the amount of $194,524.80 for the changes to the contract work and for Government-caused delay. The Proposal/Estimate for Contract Modification form, which Mr. James Thomas prepared and signed for appellant, specifically stated:

> Estimated time extension and justification
>
> Request a 150 day extension of time due to design error and omissions, delay in digging due to E.O.D. requirement not in plans and specifications.

(R4, tab 58 at 2) The Government found that appellant had included overhead costs in direct labor and requested that its rate of $700 per day for overhead be set forth separately. The amount of appellant's proposal was lowered during negotiations because the Government elected to have the installation of the new electrical ductbank performed by another contractor. On 24 March 1998, appellant submitted a revised proposal in the amount of $97,579.67 that added 30 days for F-18 testing to the requested extension of 150 days of compensable delay. (R4, tab 73 at 2; tr. 239-40)

On 6 April 1998, the parties met to negotiate the change order. In a letter dated 15 April 1998, appellant requested 144 days of compensable delay and rejected a Government offer because it did not provide enough days of Government delay. Mr. James Thomas' letter stated:

> Should we arrive at a satisfactory conclusion, financially we would want to see addressed in the SF50 modification is [sic] the correct term extended by 184 [sic] days, and a statement that no further delay costs shall be demanded excepting those that may occur after our full return to work and further there shall not be any Liquidated Damages assessed prior to our return to work.

(R4, tab 79 at 1) The Government agreed to an extension of time of 203 days, which was more than the 144 (or 184) days appellant requested, based on 21 days of compensable delay, including days of delay due to the EOD sweep requirement, 168 days of concurrent delay, and an additional 14 days for weather delays. On 15 May 1998, the parties reached agreement on a new schedule and a total equitable adjustment of $28,950.00. The Government thus acknowledged its responsibility for delays that were the subject of appellant's proposal: EOD sweeps, F-18 aircraft testing, defects and omissions in the specifications, and differing site conditions, all of which we find had impacted appellant's excavation work. (R4, tabs 58, 63 through 66, 70 through 74, 76, 78, 79, 85, 87, 91, 92; SR4, tabs 4, 14; tr. 20-23, 192, 225, 231, 238-42, 246-48)

Bilateral Modification No. P00001, dated 21 May 1998, provided an increase of $28,950.00, and an extension of 203 calendar days. The contract completion date was amended to 6 November 1998. The modification provided for specific work "[a]s a change to the subject contract" (R4, tab 2 at 2). The agreement included the following release language:

> Acceptance of this modification by the contractor constitutes an accord and satisfaction represents [*sic*] payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of or incidental to, the work as herein revised. The contractor agrees to and does release the Government from any and all liability under this contract for any and all alleged claims or requests for equitable adjustments to the contract price or time arising under this contract as of the date of execution of this modification.

(*Id.*) The amount of compensable delay due to EOD sweeps and other causes is not specifically referenced in the language of the modification (tr. 208). The delay costs appellant had incurred were discussed in the negotiations (tr. 177, 191-92). Mr. Thomas did not express any reservation of delay claims to Lt. Lagarde, but indicated satisfaction with the modification (tr. 23). We find that appellant understood it released all claims for delay arising out of the contract prior to the modification.

In a letter dated 20 March 1998, Mr. James Thomas indicated his understanding of the logical sequence of work for the installation of the pit tank and the foundation. Lt. Lagarde had inquired as to why no work could begin on the tower until after all underground utilities were installed. Mr. Thomas specifically stated that the water line comes under the footings and must be installed first to prevent undermining the footings. (R4, tabs 70, 193; tr. 27, 537-38)

In mid-May 1998, appellant elected to change its planned sequence of work without notice to the Government. On or about 13 May 1998, appellant's masonry subcontractor began installing formwork for the footings for the foundation of the tower. While Lt. Lagarde was away on official duty, the formwork was completed. On 3 June 1998, appellant advised the Government in a daily report that it was ready to pour concrete to complete the foundation. Lt. Lagarde learned on his return to Lakehurst that the pit tank and pipeline connection had not yet been installed contrary to appellant's construction schedule. He asked appellant repeatedly for an explanation of how appellant would place the pit tank without undermining the formwork. The Government did not direct appellant to change its sequence of construction. (R4, tab 5 at report #66, tabs 99, 117, 134, 138; tr. 28-34, 47, 519-20, 548)

Appellant explained that it planned to use a shoring system consisting of a digging box to keep compacted earth from falling below the formwork. Work adjacent to the space to be excavated for installation of the pit tank was not to be disturbed according to appellant's plan. A pump would be on site to handle dewatering. Appellant decided that only after the tank was installed would the footings be cast in concrete. (R4, tabs 125, 139; tr. 30-33)

By letter dated 16 July 1998, the Government raised its concern about appellant's failure to make progress noting that minimal construction activity had occurred during 90 days that had passed of the 203 day extension provided in Modification No. P00001. In its letter the Government requested that appellant submit updated schedules and a detailed plan of action for installing the pit tank. (R4, tab 138)

On 24 July 1998, appellant received delivery of the pit tank on site (R4, tab 5 at report #103; tr. 528).

During the weekend of 24-25 July 1998, appellant proceeded after regular hours without approval from the contracting officer or EOD authorization to excavate further than six feet to install a digging box and place the pit tank. The result was undermining and damage to the formwork for the footings, and the pit tank was not installed in an excavation deep enough for the top of the tank to be at floor level. The Government

notified appellant of the correction that would be required. (R4, tab 5 at report #105, tab 146; SR4, tab 19; tr. 34-42, 243, 480)

On 29 July 1998, appellant acknowledged that its efforts to protect the footings while installing the pit tank were unsuccessful. Appellant agreed to repair the footings after the tank was installed at the proper depth. (R4, tab 147)

On 30 July 1998, Lt. Lagarde and a contracting officer saw appellant's backhoe operator trying to excavate the center of the site with the backhoe braced on the footing formwork. The Government stopped appellant's work because there was no approved superintendent on site supervising the work. The Government also had safety concerns about the use of the backhoe. (R4, tab 155; tr. 106-07) At this time Lt. Lagarde did not have confidence that appellant could perform the corrective work, install the pit tank properly with the equipment being used, and complete the project within the time remaining in the contract (tr. 118).

On 30 July 1998, the Government sent appellant a cure notice that it considered appellant's failure to prosecute the work in a diligent manner a condition that was endangering performance of the contract. It no longer appeared to the Government possible to complete the work on time because less than 100 days remained in the contract. The letter requested a response by 6 August 1998 as to how appellant would complete the project. (R4, tab 148)

On or about 4 August 1998, Lt. Lagarde again observed with a contracting officer appellant's efforts to install the pit tank. While one man was guiding the pit tank, appellant used a backhoe to move the pit tank and lower it into its location within the digging box. Lt. Lagarde considered appellant's operations unsafe and recommended to the contracting officer that work be stopped until safety concerns were addressed. The contracting officer told appellant to stop work. Mr. Thomas E. Pierce, a safety officer at Lakehurst, was asked for an overall assessment of the work using a backhoe. He visited the site and determined that the backhoe was sufficiently rated for lifting the weight of the pit tank and could be used, but he had other concerns for the personal safety of persons walking around the edges of the trench. He saw fissuring and cracking of the ground that indicated the possibility of the edges caving in. Up to this time appellant had made four attempts with the backhoe to install the pit tank at the proper depth. (R4, tab 5 at report # 110; SR4, tab 19; tr. 43-44, 51, 106-07, 117-19, 255-56)

The contracting officer issued an order, dated 4 August 1998, to appellant to stop work for unsafe operation of the backhoe and failure to comply with contract requirements. The contracting officer considered appellant's on-site performance unacceptable. A meeting to discuss the Government's concerns was to be held no later than 7 August 1998. No further excavation was to occur until specifically authorized by

the Government. (R4, tab 155) The lack of an EOD sweep, which was not scheduled to take place again until 13 August 1998, did not delay appellant's excavation in July and August 1998 (R4, tab 153).

Appellant did not perform work on site after 3 August 1998 (R4, tab 5 at report # 110; tr. 73).

Safety concerns and an adequate shoring plan were discussed with Mr. Jason Thomas in a meeting with Government representatives on 7 August 1998. Appellant presented a plan in a letter, dated 11 August 1998, that it would remove the northwest footing to facilitate installing the pit tank and pipeline connection and would continue to use the backhoe. (R4, tabs 162, 170; tr. 46-50)

Appellant did not respond to the cure notice. On 10 August 1998, the contracting officer sent appellant a show cause letter that requested appellant contact the ROICC office to arrange a meeting with the contracting officer to provide any additional information as to why the contract should not be terminated for default (R4, tab 166; tr. 107). On 11 August 1998, the contracting officer provided appellant opportunity to respond to the cure notice by 12 August 1998, and advised appellant of a meeting tentatively scheduled for 19 August 1998 with appellant and appellant's surety (R4, tab 171).

By letter dated 13 August 1998, appellant stated that there was time to complete the contract and furnished an updated schedule. Appellant represented that long lead items were in production, material was on site, and subcontractors were in place. Appellant noted several items that it considered had contributed to slow progress: the EOD sweep requirement, installation of the missing ductbank under the taxiway by another contractor, relocation of the trailer, drilling of newly installed handhold boxes, and obtaining a rating of existing piping to provide the requested pressure test of newly installed piping. (R4, tab 178) Appellant's difficulties after Modification No. P00001 that may have slowed its progress did not cause its failure to perform timely and satisfactorily the excavation, installation of the fire suppression system, and pouring of the foundation required prior to construction of the tower.

Lt. Lagarde made a schedule analysis to project appellant's contract completion date. The items of work fully completed accounted for 57 days of appellant's construction schedule, which left 168 days remaining for the project. Lt. Lagarde added 168 days to 19 August 1998, the date of the scheduled show cause meeting, to project a completion date in February 1999. In making this projection, he assumed that no time would be required for approval of submittals or receipt of materials such as the structural steel. He made an alternative, more realistic projection without these assumptions that appellant would not be able to complete the contract until early to late May 1999. (Tr.

108-11) The Government did not have a written schedule analysis for proof at the hearing of the accuracy of Lt. Lagarde's projection, but we find that he made an analysis and that it validly supported his opinion that appellant would not complete the contract by the amended contract completion date (tr. 148).

Ms. Marilyn Colot, a contracting officer with termination authority who participated in the decision to terminate appellant's contract for default, received the ROICC recommendation to terminate, inspected the site, discussed the Government's concerns with ROICC personnel, and reviewed appellant's project schedules with Lt. Lagarde (tr. 370-74, 429-30). She understood that appellant had completed eight percent of the job in 62 percent of the contract time (tr. 372). She reviewed appellant's response to the show cause notice and assessed whether appellant was entitled to any further extension of time for Government-caused delays after Modification No. P00001 (tr. 431).

On 19 August 1998, Ms. Colot and other Government representatives, including contracting officers and Lt. Lagarde, met with Messrs. James Thomas and Jason Thomas and appellant's surety's attorney before deciding to terminate the contract for default. The primary focus of the meeting was appellant's subcontractors, two of whom had walked off the job. Mr. James Thomas faulted appellant's subcontractors because, as he told the Government, they did not "move the job for him this time" (tr. 429). He did not assure the Government that appellant would meet the contract completion date. Mr. Thomas said that an additional 60 to 90 days would be needed. In an effort to obtain reconsideration of the Government's intention to terminate the contract, appellant offered a list of subcontractors who would be carrying out key elements of the project. An ROICC employee telephoned the subcontractors to verify the existence of purchase orders. Of the five subcontractors appellant identified, only one had a purchase order with appellant. Long lead time items, such as the underground storage tank and the pipe connecting it with the pit tank, had not been ordered. Appellant's information about its suppliers did not assure the Government that materials would be delivered to the site in sufficient time for timely completion of the contract. (R4, tabs 102, 190 through 192; tr. 117, 376-79, 412-15, 420-21, 429, 439-40)

After the meeting concluded on 19 August 1998, Ms. Colot made her independent decision to terminate the contract for default because she did not believe there was a reasonable likelihood that appellant would complete the contract even by May 1999. In addition, she considered that there were serious safety concerns with appellant's shoring plan. She had also received the opinion of appellant's surety's attorney that appellant did not have the financial ability to complete the job. (Tr. 373-74, 380-83)

The Government prepared a detailed memorandum of findings and recommendations to support the decision. On 20 August 1998, the Government

terminated appellant's contract for default in whole, effective immediately, due to appellant's failure to make progress with the work and failure to perform as required by the contract. Unilateral Modification No. P00002 confirmed the contracting officer's final decision. (R4, tabs 2, 194, 195)

On 2 November 1998, the Government awarded a contract to Kuhnel Company for completion of appellant's defaulted contract. The contractor received the same plans and specifications that were included in appellant's contract. The successor contract completion date initially was 17 April 1999, an extension was granted by contract modification, and work was only 90 percent complete a year later. The record is without evidence of the causes of the successor contractor's delay. (R4, tab 215; tr. 20, 164, 551)

Appellant filed this timely appeal.

Appellant presented testimony at the hearing of Mr. Irving A. Cornine, a contract management and administration consultant with extensive experience in the construction industry, particularly in structural steel and major fabrications. Mr. Cornine was an advisor to Mr. James Thomas beginning in May 1998, but never visited the site during contract performance. He testified that the EOD sweep requirement, which in his opinion had a very severe impact on performance, should have been included in the solicitation. He considered the project impossible to perform because the contractor was not alerted to the severity of the water condition and the unstable soil and the contract did not provide for shoring to prevent undermining. Since the excavation had to remain open and exposed to above ground water flow for 10-20 days before the EOD team would authorize further work, he considered the specifications defective. Mr. Cornine also described the placement of the pit tank which he believed could have served its function if it remained at a 12-foot depth because the top could have been cut off or the floor raised to ensure that it was level and possible to embed in the concrete floor of the tower. (SR4, tab 28; tr. 451-65, 492-505) Appellant did not present testimony from either Mr. James Thomas or Mr. Jason Thomas.

The Government presented the testimony of Mr. Charles Heckman, who was qualified as an independent scheduling expert. He performed a schedule analysis of the status of the schedule at the time of Modification No. P00001 and also at the time of the termination to provide an opinion in his report (the Heckman report) of the projected completion date at the time of the termination. He reviewed in detail the project files and considered all of the alleged Government-caused delay in his analysis. Mr. Heckman found that appellant had completed eight percent of the work at the time of termination while 49.2 percent was scheduled to have been complete at the time of the termination. He estimated on the basis of certain assumptions that appellant would complete the contract by 9 February 1999. He considered that the rework required before pouring the

footings in concrete would extend the completion date further. (R4, tab 216; tr. 320-23, 325, 345-46, 355)

DECISION

Termination for default is a drastic sanction that should be imposed upon a contractor only for good cause in the presence of solid evidence. The Government has the burden of proving that its default termination was justified. The test in a progress failure default termination is whether there was a reasonable belief on the part of the contracting officer that there was no reasonable likelihood that appellant could perform the contract by the completion date as extended. *Lisbon Contractors, Inc. v. United States,* 828 F.2d 759, 765 (Fed. Cir. 1987); *Michigan Joint Sealing, Inc.,* ASBCA No. 41477, 93-3 BCA ¶ 26,011 at 129,325-26, *aff'd,* 22 F.3d 1104 (Fed. Cir. 1994) (table). The Government must prove that at the time of termination the contracting officer had a valid basis for concluding there was no reasonable likelihood the contractor could complete the work within the time remaining for performance. Termination is appropriate if a demonstrated lack of diligence indicates the Government cannot be assured of timely completion. *Discount Co. v. United States,* 554 F.2d 435, 441 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 938 (1977).

The Government has shown that at the time of the termination in August 1998, there was no reasonable likelihood that appellant could complete the RALS tower by 6 November 1998, the amended contract completion date. Appellant had not installed the pit tank at the required depth and had not repaired the footings or poured the concrete for the foundation. Long lead time materials had not yet been ordered. In July 1998, the Government had reason to be concerned about appellant's lack of progress and issued a cure notice. Appellant did not provide the required response. The Court of Appeals for the Federal Circuit has recently stated:

> When the government has reasonable grounds to believe that the contractor may not be able to perform the contract on a timely basis, the government may issue a cure notice as a precursor to a possible termination of the contract for default. When the government justifiably issues a cure notice, the contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor.

Danzig v. AEC Corp., 224 F.3d 1333, 1337 (Fed. Cir. 2000) (citations omitted). Appellant did not assure the Government that it would perform by the amended contract completion

date, but requested an additional 60-90 days for the work. The Government project manager analyzed the schedule and estimated the time that appellant would need to complete the contract. He provided this information to the contracting officer who formed a reasonable belief after discussion with the project manager and independent investigation that there was no reasonable likelihood that the contractor could perform all that was required within the time remaining for performance. *See Cox & Palmer Const. Corp.*, ASBCA Nos. 38739, 38746, 92-1 BCA ¶ 24,756, *aff'd on reconsid.*, 93-1 BCA ¶ 25,219. The Government has proved appellant was in default.

After the Government's burden is met, the contractor has the burden of going forward to prove either that it was making progress such that timely completion of the contract was not endangered or that there was excusable delay that entitled it to a contract completion date extension that would have rendered its performance timely. *Michigan Joint Sealing, Inc., supra*, 93-3 BCA at 129,325*; RFI Shield-Rooms,* ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 at 61,735. Appellant argues that it completed 25 percent of the contract work as of the time of termination to dispute the Government's expert testimony that only eight percent of the work was achieved at the time of the termination, but has offered no evidence to support its assertion. Appellant disputes the reliability of the Heckman report on a claim that Mr. Heckman did not consider all the facts, review the contract, or consider all the events which occurred during the performance of the contract. Based on review of Mr. Heckman's report and testimony at the hearing, we disagree with appellant's assertions and conclude that the Government's calculation was accurate. Appellant has not persuaded us that its lack of progress did not endanger performance.

Appellant argues that its delay was excusable because the EOD sweep requirement, which was not in the contract and allegedly had a significant impact on appellant, prevented it from scheduling excavation and proceeding in a timely manner. The EOD sweep requirement changed the contract terms. The parties agreed to compensation for delay in Modification No. P00001. In agreeing to a new completion date in the modification, the parties eliminated from consideration the causes of delay prior to the mutually agreed extension. *SRM Manufacturing Co.*, ASBCA Nos. 44750, 45729, 00-1 BCA ¶ 30,618. The contractor cannot later rely upon any alleged antecedent delay as an excuse for nonperformance. *RFI Shield-Rooms, supra; Alberts Associates, Inc.*, ASBCA No. 45329, 95-1 BCA ¶ 27,480 at 136,887.

Appellant claims that Modification No. P00001 only covered changes in the contract work and the work that was affected by other delays was not set forth in the modification. Appellant correctly notes that the modification does not enumerate the delay periods, but it included a comprehensive release of claims. Appellant argues that it accepted release language limited to delay arising from the changes in work without reference to the EOD requirement or other causes of delay and that it did not intend to

waive a claim for delay caused by the sweeps. Appellant states simply that "[i]t is a known fact that the language in a modification governs the conditions of that modification" (app. br. at 15). Appellant suggests that the omission of the memorandum of negotiations for Modification No. P00001 from the record in the appeal is proof that causes of delay other than the changed work were never considered and are not covered by the modification.

We do not accept the interpretation appellant has attempted to give the parties' agreement in Modification No. P00001. Appellant's cost proposals included incurred delay costs with specific reference to delay due to the EOD requirement and omissions in the specifications. Lt. Lagarde testified that several delay claims were submitted before the negotiations, the discussions covered all the incurred delays, and after the modification was executed, appellant was satisfied. Appellant did not testify to any other understanding. We interpret the modification in accordance with the parties' intentions to provide compensation for delays caused by the EOD sweep requirement, defective specifications, and differing site conditions. We have no evidence to support appellant's claimed intention regarding the release of claims. Furthermore, the subjective, unexpressed intent of one of the parties is irrelevant to contract interpretation. *See Andersen Consulting v. United States*, 959 F.2d 929, 934 (Fed. Cir. 1992); *City of Oxnard v. United States*, 851 F.2d 344 (Fed. Cir. 1988). The modification thus barred appellant from asserting these claims as justification for its failure to make progress towards completion of the contract. *See Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1344 (Fed. Cir. 1999).

We have not found that the EOD requirement, critical as it was at the beginning of the contract, prevented appellant's excavation activities on specific days after Modification No. P00001 was executed on 21 May 1998. Nor did it cause the contract to be impossible to perform, as appellant has asserted (app. br. at 6). In July 1998, after delivery of the pit tank, appellant proceeded with its excavation without waiting for sweeps. We also do not consider that knowledge about the requirement for EOD sweeps that the Government may have had prior to issuance of the solicitation can serve to excuse appellant's default.

Appellant maintains that the pages missing from the specification greatly impaired its ability to complete the submittal process, procure the required materials, and schedule the related work. Appellant further maintains that the contract was impossible to perform because the Government never amended the contract to include the pages after it sent them to appellant. We have found that appellant obtained the needed information well in advance of its on-site work and that the omission did not impact appellant's work. We conclude that the omission, for which appellant has not shown any specifically related delay, does not excuse appellant's default. Appellant has failed to demonstrate delay that was the fault of the Government had any impact to the schedule after the parties'

agreement in Modification No. P00001. Consequently, it cannot serve as basis to excuse appellant's default.

Appellant states that the contracting officer's decision to terminate was "inconceivable, if not incredible," but has offered no grounds for finding it invalid as an abuse of discretion (app. br. at 15). We find no substantiation of appellant's allegation of "fraud, perpetrated upon this contractor" (app. br. at 17; app. reply br. at 4). Appellant has argued that an assessment of liquidated damages could not be made because it was a penalty. There is no contracting officer's final decision concerning liquidated damages from which appellant has filed a notice of appeal. Appellant stated in its complaint that no assessment of liquidated damages had been made. The matter of liquidated damages is not before the Board for decision. Appellant's other arguments have been considered and also found without evidentiary support. They do not warrant further discussion.

The Government asserted that appellant's failure to pay its subcontractors was a serious breach that constituted an additional ground for the default termination.[3] We have not addressed other portions of the Government's comprehensive case in light of our conclusion that the contracting officer properly found appellant in default at the time of the termination and appellant has not proved that its default was excusable.

The appeal is denied.

Dated: 13 November 2000

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

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

NOTES

[1] *See* FAR 52.236-6 SUPERINTENDENCE BY THE CONTRACTOR (APR 1984).

[2] Appellant presented testimony at the hearing that only seven sweeps were required to set the pit tank, described as a 30-inch pipe, because setting it at 12 feet was sufficient, provided the top was cut off or the floor raised to the top level of the tank (tr. 457-58, 468).

[3] The Government relied on several grounds to support the termination in its pre-hearing statement and briefs, which were summarized as follows: (1) failure to make progress; (2) failure to perform as required under the contract (*i.e.*, non-conforming work, unsafe conditions, failure to rectify unsafe conditions); (3) safety violations; (4) failure to pay subcontractors; and (5) failure to provide assurances to the contracting officer when called upon to do so (Gov't reply br. at 5, *see* Gov't br. at 35-43).

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. 51874, Appeal of Thomas & Sons, Inc., rendered in conformance with the Board's Charter.

Dated:

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