

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Imperial Properties/Construction, Inc.) ASBCA No. 49899
)
Under Contract No. F08651-94-C-0071)

APPEARANCE FOR THE APPELLANT: John J. Shahady, Esq.
Houston & Shahady, P.A.
Fort Lauderdale, FL

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Sharon A. Curp, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE LIPMAN

This is an appeal from a decision of the contracting officer terminating this construction contract for default for failure to make timely completion. The record consists of the documentary evidence and the transcript of the hearing. The sole issue before us is the propriety of the default termination.

FINDINGS OF FACT

On 15 September 1994, the Government, by the United States Air Force, awarded appellant the captioned contract to furnish all labor, materials and equipment needed to construct an addition to the existing Child Care Center, Building 2579, on Eglin AFB, Florida, for a fixed price of \$295,196.69. The contract required appellant to begin performance within five days and complete performance 180 days following its receipt of the notice to proceed. (R4, vol. 1, tab 1) Appellant was an experienced Government contractor, headed by its president, Mr. Ralph Rice, a former Air Force contract specialist (tr. 2/98-99).

The contract contained or incorporated the following pertinent clauses: FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984); FAR 52.232-5 PAYMENTS UNDER FIXED PRICE CONSTRUCTION CONTRACTS (APR 1989); FAR 52.228-5 INSURANCE—WORK ON A GOVERNMENT INSTALLATION (SEP 1989); and H-22 REQUIRED INSURANCE, which required appellant to maintain Workmen's Compensation and Employers Liability Insurance. The contract also included the FAR 52.212-5 LIQUIDATED DAMAGES—CONSTRUCTION (APR 1984) clause at a rate of \$70.74 for each day of delay. It also

included, at paragraph H-807, a clause entitled PERFORMANCE (AUG 1993), in pertinent, part, as follows:

- a. Work on this project shall be accomplished during a normal workweek 7:00 AM to 4:00 PM, Monday through Friday except legal holidays. Any work desired to be accomplished during other than the normal workweek will require prior approval of the Contracting Officer.
- b. The existing Childcare Facility shall be occupied during all times. The Contractor shall notify the user if at any time the construction will become a safety concern to the adjacent playground areas where the children are playing.

The contract, at paragraph H-818, entitled UTILITY OUTAGES (OCT 1992), stated: “Contractor shall notify the Contracting Officer in writing two weeks prior to any utility outage anticipated during the performance of this contract.” (R4, vol. 1, tab 1)

The contract specifications included the following:

Section 01010 GENERAL PARAGRAPHS

1. GENERAL INTENTION: It is the declared and acknowledged intention and meaning to provide and secure a building addition to the existing Child Care Building (Bldg 2579) facility complete and ready for use.
2. GENERAL DESCRIPTION: In general, the construction consists of the civil demolition of exterior walks, paving and landscaping; selective demolition of existing walls, site clearing, earthwork, termite control, water and sanitary sewer, architectural precast concrete units, concrete slabs, unit masonry (concrete and brick), steel joists and metal decking, rough and finish carpentry, interior architectural woodwork, bituminous dampproofing, built-up roofing and flashing, building insulation, sealants, steel doors and frames, flush wood doors, hardware, glass and glazing, lath and plaster, gypsum drywall, acoustical tile ceilings, resilient flooring, sheet vinyl flooring, carpeting, special coatings, painting, visual display boards, toilet and bath accessories, and the expansion of mechanical systems (supply and exhaust), sprinklers, plumbing

and plumbing fixtures, lighting, fire alarm, and communication systems.

....

7. INTERFERENCE WITH STATION OPERATIONS:
Permission to interrupt any station utility, communication, operational or traffic service or pattern shall be requested in writing at least 10 days prior to the date of the desired interruption. The Contractor shall receive approval in writing from the Contracting Officer before the requested interruption may be put into effect. Contractor shall coordinate electrical and plumbing down times with Contracting Officer and shall include in the bid doing these after normal working hours.

....

Section 01040 SPECIAL CONDITIONS

1. SCHEDULE OF WORK:

All work under this contract shall be accomplished in the contract period as designated in advance by the Contracting Officer. The Contractor shall provide to the Contracting Officer for approval a schedule of the work. All work sequencing and phasing is subject to the approval of the Contracting Officer.

....

e. The following specific restrictions shall apply to work performed under this contract:

....

(3) Contractor shall alter their [sic] work schedules to weekends and night times as required to complete work when directed by the Contracting Officer.

a. The following areas may require after hours work, but in no way limits those areas where after hours work may be required:

.....
(2) Tie in of prime electrical and plumbing services.

.....
Section 07511 BUILT-UP ROOFING

1. SCOPE:

a. This section includes all labor, materials, transportation and equipment necessary to properly perform new roofing, roof removal (at junction with existing building), insulation and roofing work specified herein. Included as a part of the work of this Section, but not necessarily limited by it, are the following items:

- (a) Built-up roofing system (BUR).
- (b) Roof Insulation System
- (c) Carpentry

.....
3. SUBMITTALS

.....
a. Before any work is to commence, complete the following:

.....
(2) Submit copies of affidavit, warranties and certifications.

.....
(9) Manufacturer's Warranty: Work shall be subject to inspection of a representative of the manufacturer and observations of the Contracting Officer. Upon completion

of the work, the Contractor shall furnish a manufacturer's material and labor warranty of 20 Year No Dollar Limit (NDL) watertight roofing system warranty covering labor and materials and shall state the following:

a. The roof membrane and flashing will remain in a watertight condition for the warranty period.

b. The roof materials and workmanship will be covered for the duration of the warranty.

c. In the event the roof fails to so perform, the manufacturer shall without additional cost to the Government, make repairs or modifications to the roof necessary to enable the roof to perform as warranted up to the limits of the warranty as previously mentioned.

d. Warranty shall include insulation.

(10) Guarantee: This Contractor shall furnish a written signed warranty, stating:

a. "This Contractor shall and hereby does warrant, that all work executed under this Section will be free from defects of materials and workmanship for a period of three years from the date of Final Acceptance by Government. Any defects in materials and/or workmanship within this time limit will be promptly (within 14 calendar days of notification) corrected by the Contractor and without cost to the Government."

....

Section 15400 PLUMBING

1. SCOPE:

a. This section is an integral part of Division 15 - Mechanical and specifies furnishing and installing all equipment, materials and service necessary for and reasonably incidental to the proper completion of all plumbing and fire protection work shown on the drawings and herein specified. Work includes interior and exterior systems

b. The work on this project involves the renovation and addition of an existing building. The locations shown for existing piping have been taken from the original construction documents for the building, but there is no guarantee that the piping is installed in this exact location. The exact location of all piping shall be determined by the successful bidder as construction progresses.

(R4, vol. 4, tab 2)

Contract Drawing Sheet 3 of 20 indicated the location of the waterline. It also contained the following: “UTILITY NOTE: LOCATION OF UNDERGROUND UTILITIES OBTAINED FROM EGLIN AIR FORCE BASE UTILITY MAPS. LOCATION TO BE VERIFIED AT TIME OF CONSTRUCTION BY CONTRACTOR.” (R4, vol. 5, tab 5) (emphasis in original)

Appellant received the notice to proceed on 19 October 1994, which established a performance starting date of 24 October 1994 and a completion date of 20 April 1995 (R4, vol. 1, tab 1, vol. 4, tab 6).

Effective 12 December 1994, the parties entered into bilateral Modification No. P00001 extending the contract completion date by 21 days to 5 May 1995 due to “government delay caused by a requirement to reroute a gas line.” In the modification, appellant agreed to a release of rights to any equitable adjustment arising under the modification. (R4, vol. 1, tab 2)

Effective 11 May 1995, the parties entered into bilateral Modification No. P00002 which extended the contract completion date by 28 days to 2 June 1995 due to (1) excessive rain days from the start of performance to 10 April 1995, (2) scheduling of the work to avoid interruption of use of the children’s playground, and (3) the rerouting of drainage so as not to require removal of shade trees. In the modification, appellant agreed to a release of rights to any equitable adjustment arising under the modification. (R4, vol. 1, tab 3)

On 22 May 1995, Mr. Gordon Doyle took over as inspector for this contract. From that date through 1 September 1995, Mr. Doyle generally concurred with the percent of completion reflected by appellant on its progress reports. (R4, vol. 4, tab 8; tr. 1/136-37)

In response to a Government letter of 6 June 1995 advising that appellant was in a position to be subject to liquidated damages, appellant, by letter of 16 June 1995, alleged several specification and drawing deficiencies as causing delay (R4, vol. 1, tab 4).

On 21 June 1995, appellant signed a subcontract with Buddy Flores Roofing to perform the roofing work required by the contract (R4, vol. 2, tab 42).

By letter of 26 June 1995, the Government replied to appellant's 16 June 1995 letter, denied that the alleged deficiencies caused delay, and attributed delay to appellant's failure to adequately man the project and to provide timely material submittals (R4, vol. 1, tab 4).

Effective 18 July 1995, the parties entered into bilateral Modification No. P00003 which extended the contract completion date by 51 days to 23 July 1995 due to additional work, including items mentioned in appellant's 16 June 1995 letter, involving (1) the soffit over two doors, (2) block work in the corridor of the existing building, (3) ceiling detail in the corridor, and (4) ceiling detail above the west wall. In the modification, appellant agreed to a release of rights to any equitable adjustment arising under the modification. (R4, vol. 1, tab 4)

In August 1995, Hurricane Erin struck the Florida panhandle, including Eglin AFB (tr. 2/62-63).

As of 1 September 1995, the Government had paid appellant a total of \$199,257.76 for appellant's first eight invoices, which was 67.5 percent of the contract price, consistent with appellant's reported completion and Mr. Doyle's concurrence (R4, vol. 3, tab 81, vol. 4, tab 23). In reporting its performance completion percentages, appellant combined the roofing and moisture protection elements of work as 11 percent out of the 100 percent for the entire contract work. Of that 11 percent, representing all of the roofing and moisture protection work, the Government had accepted and paid for 4.5 percent for appellant's first eight invoices. (R4, vol. 3, tab 81, vol. 4, tabs 8, 23; tr. 1/145-46, 177)

By letter of 19 September 1995, the contracting officer confirmed information provided to appellant at an earlier meeting that the Child Care Center was suffering financial losses due to the delay in contract completion. The letter further reflected that appellant had indicated that Buddy Flores Roofing had backed out of its subcontract, and the contracting officer sought documentation of that fact and a description of the steps appellant was taking to find another roofer. The contracting officer also stated that the job was "at a standstill until roofing material submittals are turned in and approved," and reminded appellant that failure to prosecute the work with diligence to assure its timely completion was a lawful ground for terminating the contract. (R4, vol. 2, tab 34)

In September 1995, the parties unsuccessfully attempted to negotiate another completion time extension in exchange for additional work, and the drafted Modification No. P00004 was not issued. By letter of 28 September 1995, the contracting officer stated that the Government was "hereby revoking [appellant's] option to exercise Modification No. P00004 for a 69 day extension." The letter further stated that the revocation was made

pursuant to conversations with appellant's Mr. Rice in which he had indicated that he did not intend to sign the modification. The letter proceeded to issue appellant a Show Cause Notice as to why the contract should not be terminated for default due to appellant's failure to perform "within the time required by its terms and/or cure the conditions endangering performance." (R4, vol. 2, tabs 30, 32).

On 27 September 1995, appellant submitted a Material Approval Submittal for its proposed roofing system, including Big "B" Contractors as the roofer. On 28 September 1995, the Government disapproved the submittal on the ground that the proposed roofing system did not comply with the contract specifications. (R4, vol. 2, tab 33) Following further communication by the parties, the proposed roofing system was approved on 18 October 1995 (R4, vol. 2, tab 29).

On 4 October 1995, Hurricane Opal struck the Florida panhandle, including Eglin AFB (tr. 2/62-63). The damage caused by the hurricanes resulted in opportunities for lucrative roofing work in the area and made it difficult for appellant to find a replacement roofer which could perform in a manner to meet the contract requirements and provide the required roof warranty (tr. 2/105-07).

By letter of 10 October 1995, appellant responded to the show cause notice, denied that it had refused to sign Modification No. P00004, and indicated that it had explained its problems in finding a roofer and obtaining roofing materials due to the hurricanes (R4, vol. 2, tab 30).

Appellant's Certificate of Insurance dated 24 October 1995 reflected that its Worker's Compensation and Employers' Liability coverage had expired on 28 August 1995. On 1 November 1995, the contracting officer noted the expiration date and requested appellant to provide a "corrected original certificate" by 6 November 1995. (R4, vol. 2, tab 28)

After discussions between the parties, appellant sent the Government a letter dated 25 October 1995 seeking a time extension of 40 days, 30 of which were allegedly due to the hurricanes and 10 days for "regular rain days" during the period 23 July 1995 through 30 October 1995 (R4, vol. 2, tab 29). The contracting officer replied by letter of 6 November 1995 and stated that: (a) the revocation of Modification No. P00004 would remain in place because it would not be desirable to allow a performance time extension in return for additional work in view of the "utmost importance that this job be completed as quickly as possible to alleviate further financial loss to the user"; (b) Modification No. P00005 was forthcoming which would grant a 30-day time extension for the hurricanes, "including roofing material shipment delays," but no time extension for excess rain days for the period 23 July 1995 through 30 October 1995 "because the contractor worked only approximately two (2) weeks during this period" (R4, vol. 2, tab 26).

By letter of 6 November 1995, appellant advised the Government that it had experienced a delay in obtaining the roofing material and required a roofing schedule of (a) delivery of roofing materials on site on 9 November 1995, and (b) roofing work to begin on 10 November 1995 with work to continue on Saturday and Sunday, 11 and 12 November 1995 (R4, vol. 2, tab 25).

On 9 November 1995, appellant sent the Government a letter in which it confirmed that the roofing submittals were approved on 18 October 1995 and that, since appellant's request to work over the weekend of 11 and 12 November 1995 had been denied, the roofing work would be performed from 13 November 1995 through 18 November 1995. Appellant also took exception to the 30-day time extension granted by the Government and requested an extension of 140 days from 23 July 1995 to 10 December 1995. (R4, vol. 2, tab 20)

By letter of 27 November 1995, the contracting officer advised appellant that the time extension would be limited to 30 days until 22 August 1995, reminded appellant of the contract's liquidated damages provision, and stated that a 10 percent retainage would be withheld from future progress payments due to "inadequate performance." The contracting officer also attached to the letter a technical analysis explaining the reasons for the partial denial of the 140-day time requested time extension. (R4, vol. 3, tab 68, vol. 4, tab 4)

On 6 December 1995, the contracting officer sent appellant a letter indicating that the Government considered that the roof was "unacceptable" along with a list of alleged deficiencies, including a roof leak. The contracting officer "strongly suggest[ed]" that appellant seek the manufacturer's written assurance that the warranty and manufacturer's certification were unaffected by the alleged deficiencies. (R4, vol. 3, tab 21)

On 14 December 1995, the contracting officer sent appellant a "Show Cause Notice," stating that he was considering terminating the contract for default. He cited appellant's failure (a) to perform the contract within the time required, (b) to maintain Worker's Compensation Insurance, (c) to complete required material submittals, and (d) to directly superintend the work, and gave appellant 10 days from receipt of the notice to present facts or excuses bearing on the matter (R4, vol. 2, tab 4).

Appellant responded to the Show Cause Notice by letter of 16 December 1995. With respect to delays, it cited late delivery and late approval of roofing supplies, the adverse impact on the availability of supplies due to Hurricane Opal, and "many no cost items" which appellant performed. Appellant further indicated that, upon receipt of the Government's notice regarding the insurance expiration, it notified its insurance company to renew the policy, that it had then failed to follow up on the matter, but that the "insurance discrepancy has been corrected." Appellant also stated that there was a superintendent assigned to the job, but that, due to a "regrettable oversight," it had not properly notified the Government. (R4, vol. 2, tab 3)

On 22 December 1995, Big “B” Contractors, the roofing subcontractor, sent a “Notice to Owner” to the contracting officer, under Florida law, that it had not been paid for installation of the roof and which indicated that the subcontractor intended “to look to the bond for protection.” It sent a copy to appellant and to the surety. (R4, vol. 2, tab 2) On 10 January 1996, Big “B” Contractors sent appellant’s surety a demand for payment of \$26,000 for past due payment for the roof. It sent a copy to appellant and to the contracting officer. (R4, vol. 3, tab 78)

On 10 January 1996, appellant submitted its Invoice No. 9 which acknowledged prior payments totaling \$199,257.76 and requested payment in the amount of \$51,659.42 for an alleged 85 percent completion of work for an unspecified period of performance. The invoice reflected that 10.5 percent of the 11 percent of the work for Roof System/Moisture Protection had been completed. Mr. Doyle, the Government inspector, did not approve the invoice and considered at that time that the actual percentage of overall completion remained at 67.5 percent, with only an insignificant amount of acceptable work having been performed since September 1995. Both Mr. Doyle and the contract administrator considered that the roof, which was leaking, was incomplete and unacceptable. (R4, vol. 3, tabs 76, 77; tr. 1/173)

On 26 January 1996, the Government’s contract administrator received a letter from one of appellant’s subcontractors stating that payment from appellant in the amount of \$5,967.62 was past due for doors which the subcontractor had delivered to the job site in June 1995 (R4, vol. 3, tab 75).

On 30 January 1996, the contracting officer issued Modification No. P00005, which constituted a notice of suspension of work, due to appellant’s alleged failure to provide and maintain worker’s compensation insurance in accordance with the contract requirements. The modification stated that the suspension would remain in effect until “further modified.” (R4, vol. 1, tab 6)

On 31 January 1996, the roof was inspected, with representatives of the Government, appellant, Big “B” Contractors, and the roofing manufacturer in attendance. The Government did not accept the roof on that date. (R4, vol. 3, tabs 19, 27, 74)

On 1 February 1996, the Government took 100 photographs of the construction site which fairly depict its incomplete status as of that date (R4, vol. 4, tab 1; tr. 1/164-66).

On 2 February 1996, Mr. Doyle provided the contract administrator with the recommendations of the Air Force’s Civil Engineer as to each of the work elements on appellant’s progress report requesting payment on the basis of 85 percent completion. Among his recommendations was that further payment be denied for the Roof System/Moisture Protection item because of discrepancies pointed out during the

inspection; however, he recommended that payment be made for one percent progress on electrical items. (R4, vol. 3, tab 69)

On 6 February 1996, appellant submitted another progress report, for the period 1 September 1995 to 31 January 1996, in which it reduced the percentage of completion from 85 percent to 77 percent. For the Roof System/Moisture Protection work element, appellant reported completion of 9.5 percent of the total of 11 percent. Mr. Doyle recommended a 71 percent overall completion rate, with eight percent of the total of 11 percent for the Roof System/Moisture Control work element. (R4, vol. 3, tab 64; tr. 1/175-77)

On 7 February 1996, appellant's superintendent told Mr. Doyle that the roof was leaking in the area of Toddler Room C and that the fire alarm subcontractor had earlier reported a leak in the same area (R4, vol. 3, tab 69).

On 8 February 1996, appellant submitted another contract progress report for the same period, 1 September 1995 to 31 January 1996, in which appellant further reduced the reported percentage of completion from 77 percent to 74.5 percent and reduced the amount included for the Roofing System/Moisture Protection work element to 8 percent out of the total of 11 percent, the amount which Mr. Doyle had accepted for that work element on appellant's 6 February 1996 progress report. On the 8 February 1996 progress report, Mr. Doyle reduced the amount of acceptable overall completion from 71 percent to 68.5 percent, with all of the reduction coming from the Roofing System/Moisture Protection work element. Mr. Doyle also added the following comment with regard to that work element: "Recommend no further payment until Warranty & Guarantee is received/approved. Note: As per superintendent and my observation roof has leak." (R4, vol. 3, tab 62; tr. 1/177-79)

On 12 February 1996, the contracting officer issued Modification No. P00006 releasing the work suspension because of appellant having obtained the required insurance (R4, vol. 1, tab 7).

By letter of 12 February 1996, the contracting officer advised appellant that, based upon the 31 January 1996 inspection and subsequent inspector evaluation reports, the roofing system remained unacceptable for several listed reasons including ongoing leaks and the requirement for appellant to submit a warranty. The letter continued:

3. Until the discrepancies are corrected, further payment on the roofing element of the work will not be made. Therefore, your invoice number 9 can only be paid at 68.5% in lieu of 74.5% complete. The increase of 1% actual performance is based on the electrical element of work, to date. Your invoice has been corrected to identify 68.5% complete in order to expedite payment processing.

4. Future payments under this contract (after invoice number 9) must contain a 10% retainage withheld by the Contracting Officer. The retainage is being withheld pursuant to FAR Clause 52.232-5, entitled "Payments Under Fixed Price Construction Contracts" (Apr 1989).

5. This contract remains in a Liquidated damages state. The Contracting Officer reserves the right to terminate your Notice To Proceed as conditions warrant. Therefore, you are required to submit a revised Contract Progress Schedule . . . and an explanation of projected performance to the Contracting Officer, no later than **22 February 1996**. (emphasis in original)

(R4, vol. 3, tab 19)

Appellant wanted to tie-in the underground water lines to the addition, in part to enable it to test the sprinkler system (tr. 2/124), although there is evidence that the sprinkler system could have been tested in sections without connection to the exterior water service by the use of a temporary line (tr. 2/160-62). On 12 February 1996, Mr. Doyle twice visited the construction site and was told by appellant's superintendent that appellant was having difficulty in locating the tie-in point for the underground water lines. Mr. Doyle told him that he would provide Government assistance if appellant continued having trouble. (Ex. G-1; tr. 2/176-77)

On 13 February 1996, the contract administrator prepared payment for Invoice No. 9 for payment in the amount of \$2,921.97, and, on 20 February 1996, appellant was paid that amount in lieu of the \$20,633.77 requested (R4, vol. 3, tabs 54, 57, vol. 4, tab 23). The reduced payment adversely affected appellant's ability to compensate its roofing subcontractor and to pay for supplies (tr. 2/119).

By letter of 15 February 1996, appellant advised its roofing subcontractor that the roofing system remained unacceptable to the Government as well as to appellant, and it listed the identical specifics as were contained in the contracting officer's letter to appellant of 12 February 1996 (R4, vol. 3, tabs, 17, 19).

On 22 February 1996, appellant submitted a Contract Progress Report for the period 17 February through 24 February 1996 and reported that it was 81.7 percent complete. Mr. Doyle assessed completion at 69.35 percent and indicated his bases for disagreement with appellant. (R4, vol. 3, tab 52)

Appellant signed its Invoice No. 10 on 27 February 1996 in which it requested a progress payment in the amount of \$38,965.96 (R4, vol. 3, tab 35). The record is not clear as to the date upon which appellant actually submitted the invoice to the Government contracting office.

On or about 27 February 1996, the contracting officer discussed with appellant's Mr. Rice possible extension of the required contract completion date (R4, vol. 4, tab 26; tr. 2/40). On 29 February 1996, appellant's superintendent signed a revised progress schedule reflecting a starting date of 2 March 1996 and a completion date of 15 April 1996 (R4, vol. 3, tab 73). On that same date, Mr. Doyle visited the site during a rainstorm and observed that the roof continued to leak at the site of Toddler Room C (R4, vol. 4, tab 26).

On 1 March 1996, the parties signed Modification No. P00007, the sole stated purpose of which was to extend the contract completion date. The modification included the following:

C. THE CONTRACTOR AGREES THAT ANY RIGHTS TO ANY EQUITABLE ADJUSTMENT IN ANY CONTRACT TERMS WHICH AROSE HERETOFORE UNDER ANY CLAUSE OF THIS CONTRACT AS A RESULT OF THE ADDITION AND OR CHANGE OF REQUIREMENTS DESCRIBED HEREIN, ARE FULLY SATISFIED BY THE TERMS OF THIS SUPPLEMENTAL AGREEMENT.

D. THE GOVERNMENT EXPRESSLY RESERVES THE RIGHT TO TERMINATE THE CONTRACT IN ACCORDANCE WITH THE CONTRACTS [sic] DEFAULT CLAUSE, IF THE CONTRACT IS NOT COMPLETED BY 15 APRIL 1996. ADDITIONALLY, THE GOVERNMENT RESERVES THE RIGHT TO IMPOSE LIQUIDATED DAMAGES AGAINST [APPELLANT] BASED ON THE ORIGINAL COMPLETION DATE. (emphasis in original)

(R4, vol. 1, tab 8)

During visits to the construction site on 4 and 5 March 1996, Mr. Doyle observed that appellant's superintendent was digging by hand and using a crowbar in an attempt to locate the water tie-in point. Mr. Doyle provided appellant with a T-handled probe from the Government's plumbing shop, the superintendent used the tool to locate a hard object underground but, despite Mr. Doyle's recommendation, appellant did not dig down to verify that the object found was the metal water pipe. (R4, vol. 4, tab 22; Ex. G-2; tr. 2/178-79)

During his visit to the site on 5 March 1996, Mr. Doyle discussed the roof leak with appellant and the roofing subcontractor, who was contending that the source of the leak was the adjacent, existing roof. Mr. Doyle pointed out the location that the leak had been observed and, together with a crew from the Government's civil engineering office, took measurements which indicated that the new roof had not been installed with the slope required by the contract. (R4, vol. 4, tab 22)

By letter of 6 March 1996, the contracting officer again reminded appellant that the roofing system remained unacceptable, and included the following:

3. Until the discrepancies are corrected, further payment on the roofing element of work will continue to be withheld. In addition, it is now necessary for the Contractor to explain, in writing, of [sic] how he intends to correct the problems identified. Since, [sic] the roofing element of work is critical to other work being performed, the Contractor must provide the Contracting Officer a schedule (timeline) for the repairs. The schedule should express the Contractor's roof repairs and explain how this work will be completed by the new completion date of 15 April 1996.

(R4, vol. 3, tab 16)

On 10 March 1996, appellant submitted a progress report in which it again listed the total completion percentage at 81.7 percent, but indicated the applicable performance period to be 24 February 1996 to 10 March 1996. Mr. Doyle assessed the percentage of completion to be 70.05 percent and listed his bases of disagreement with appellant, which included his observation of the roof leak on 6 and 7 March 1996. (R4, vol. 3, tab 48) Mr. Doyle's assessment was confirmed by other Government personnel who visited the site on 20 March 1996 and observed that no work was in progress (R4, vol. 3, tab 47). By letter of 21 March 1996, the contracting officer advised appellant (a) of debris at the construction site and problems with some work elements and (b) that a request by appellant to work weekends, which the Government had received on that date, had been approved (R4, vol. 3, tab 46).

On 25 March 1996, Mr. Doyle, along with the Government's contract administrator and mechanical engineer, visited the construction site, documented the roof leak in Toddler Room C, and advised both appellant's superintendent and president of that fact. At that time, appellant's superintendent confirmed that he had physically located the water tie-in point. (R4, vol. 3, tabs 43, 45, vol. 4, tab 22; tr. 2/180-81)

On 26 March 1996, appellant submitted a contract progress report for the period 11 March 1996 to 24 March 1996 for which it claimed overall completion of 82.6 percent.

Mr. Doyle's assessment of the report, dated the same day, was that completion was at 70.5 percent. (R4, vol. 3, tab 44) After discussing the matter with Mr. Doyle, on that same date the Government's contract administrator authorized payment on appellant's Invoice No. 10 in the amount of \$5,965.96, which corresponds to the 70.5 percent completion (R4, vol. 3, tabs 35, 44; tr. 1/84-89). The Government did not withhold the 10 percent retainage, and its finance office paid appellant \$5,973.75 on 17 April 1996 (R4, vol. 4, tab 23). The payment in an amount lower than requested adversely affected appellant's ability to compensate subcontractors and to pay for materials (tr. 2/122).

On 2 April 1996, appellant's president sent a letter to the contacting officer in which he indicated that the reduction in progress payments was unfair and that, because of its resultant problem in paying subcontractors, appellant was "on the verge of a work stoppage" (R4, vol. 3, tab 41).

On that same date, appellant's superintendent, despite his earlier representation to the contrary, told Mr. Doyle that he was unable to find the location of the water tie-in. Mr. Doyle immediately informed the Government's civil engineering plumbing shop and they located the tie-in point and advised appellant of the location in the morning of 3 April 1996; appellant's superintendent acknowledged the Government assistance. Appellant also indicated that, due to other commitments, its plumbing subcontractor would not be available to return to work on this contract until 10 April 1996. (R4, vol. 3, tab 34, vol. 4, tabs 3, 22; tr. 2/180-83) In the afternoon of that date, Mr. Doyle and the Government contract administrator visited the site, took photographs, and observed safety problems due to uncovered and unprotected holes, as well as the fact that appellant had no workers on the job (R4, vol. 3, tab 39, vol. 5, tab 2). On 4 April 1996, the contracting officer sent appellant a notice of noncompliance with safety requirements (R4, vol. 3, tab 38).

On 6 April and 7 April 1996, appellant performed no work. On 8 April 1996, the Government's contract administrator and Mr. Doyle visited the site, there were two people performing work, and appellant's superintendent was advised that the roof still leaked in Toddler Room C. (R4, vol. 3, tab 25, vol. 4, tab 22)

On 9 April 1996, appellant submitted a contract progress report covering the period 31 March 1996 to 7 April 1996 and claiming overall completion of 83.5 percent. Mr. Doyle assessed overall completion to be 72.6 percent and recorded the specific bases for his disagreement with appellant. (R4, vol. 4, tab 10)

As of 11 April 1996, appellant was still in the process of obtaining materials to perform the water tie-in (R4, vol. 3, tab 24, vol. 4, tab 22).

As of the scheduled completion date of 15 April 1996, appellant had not completed work on the contract, and the Government's contract administrator estimated overall completion to be approximately 73 percent. On that date, the contracting officer, the

contract administrator, as well as Mr. Doyle and the Government's mechanical engineer, visited the site and took pictures. The facility was not habitable for its intended purpose. There was no work being performed and there remained many deficiencies in the work, including an incomplete HVAC system, an incomplete fire suppression system, a roofing system which still leaked, bathrooms without toilets, and a substantial amount of debris, including construction material which had become water damaged. (R4, vol. 4, tab 22, vol. 5, tab 3; tr. 1/46-49, 56-59, 210-11, 2/18-19, 131)

On 16 April 1996, the Government's contract administrator sent by facsimile and mail a show cause notice dated 15 April 1996 which stated that the Government was considering terminating the contract for default since appellant had failed to perform within the required time period. Copies were sent to the surety and to the Small Business Administration. Appellant was given 10 days to provide a response. (R4, vol. 3, tab 9; tr. 1/70)

On 19 April 1996, appellant submitted its last contract progress report, dated 15 April 1996, which covered performance during the period 8 April 1996 to 15 April 1996. The report claimed overall completion of 88.65 percent, but Mr. Doyle, with explanatory detail of numerous deficiencies, assessed overall completion to be 75.15 percent and was of the opinion that the Government could make no use of the facility. (R4, vol. 4, tab 11; tr. 1/155) Mr. Doyle's assessment was consistent with the assessments of the Government's contract administrator, mechanical engineer and architect (R4, vol. 4, tab 19; ex. G-8; tr. 1/54-55, 212-14, 2/20-24).

Mr. Doyle visited the construction site on 22 April 1996 and observed only three workers performing some digging for a sidewalk with no other workers present. He asked appellant's superintendent when the water tie-in work would be performed and was told that it would be done when appellant paid its plumbing subcontractor. (R4, vol. 4, tab 22) Mr. Doyle visited the construction site on 23 April 1996 and observed that no workers or superintendent were present (R4, vol. 4, tab 22).

By letter dated 24 April 1996, which the Government received on 26 April 1996, appellant responded to the 15 April 1996 show cause notice. The letter (a) recounted appellant's difficulty in locating the water tie-in point, (b) cited inadequacies in the contract plans and specifications (which, although not pointed out in the letter, had been addressed in bilateral Modification No. P00003), (c) stated that the project had come to a standstill because of deficiencies in the roof which prevented other subcontractors from performing work, and (d) reported that its subcontractor, Big "B" Roofing, although scheduled to correct the roofing deficiencies on 17, 18 and 22 April 1996, had not appeared on those dates and had not notified appellant as to when the deficiencies would be corrected. Appellant estimated that it would complete the contract "on or about" 18 May 1996. (R4, vol. 3, tab 7)

On 29 April 1996, appellant's superintendent called Mr. Doyle and informed him that it had scheduled the water tie-in to be accomplished the next day. Mr. Doyle reminded him that appellant was required to notify the Government's civil engineering plumbing shop, the fire department, the bio-environmental shop and the user. Mr. Doyle visited the site that afternoon and observed that no work was being performed and that appellant had not yet dug the trench for the water piping. Mr. Doyle also visited the site on 30 April 1996 and observed that no work was being performed. (R4, vol. 4, tab 22)

On 30 April 1996, the contracting officer received appellant's Invoice No. 11. It listed \$208,113.65 as having been previously paid and requested payment of \$13,726.05 for an overall completion of 75.15 percent. (R4, vol. 3, tab 4, vol. 4, tab 23) On that same date, the contracting officer received the technical analysis by the Government's civil engineering office of appellant's response to the show cause notice. That analysis reviewed each of appellant's allegations and concluded that "[civil engineering] does not believe that the contractor will complete the contract by 18 May 1996 or if the contractor is even capable of ever satisfactorily [sic] completing the contract." (R4, vol. 4, tab 12)

Mr. Doyle visited the construction site on 2 May 1996, observed that the water tie-in had not yet been accomplished, heard concerns expressed by appellant's superintendent as to whether appellant's plumber could do the job, gave advice on how to avoid water contamination, and reminded the superintendent that the water outage associated with the water tie-in must be carefully planned to avoid interference with the operations of the child care facility. Mr. Doyle again visited the site on 6 May 1996 and was advised by appellant's superintendent that he did not know if any work would be accomplished that day and that the plumber had shown up drunk the previous day and was not permitted to perform any work. (R4, vol. 4, tab 22; tr. 1/156-58)

On 7 May 1996, the contracting officer signed documents, including (a) a statement of facts, (b) an assessment of appellant's response to the order to show cause, and (c) a memorandum for file under the subject "Investigation for Default," which constituted an analysis of the propriety of the termination of the contract for default. In the last document, she stated that she had considered the factors set forth in FAR 49.402-3(f), although the document did not list the factors, and she concluded that termination was the proper course of action because of appellant's failure to complete the contract work by 15 April 1996 and its failure to complete required material submittals under the contract. (R4, vol. 4, tabs 14-16; tr. 2/41-47)

Mr. Doyle visited the construction site on 7, 8 and 10 May 1996 and no work, other than a small amount of drywall finishing, was being performed (exs. G-3, -4).

On 13 May 1996, appellant's superintendent told Mr. Doyle that the water tie-in had been performed over the weekend (on 11 and 12 May 1996) although appellant had not provided the requisite notice to the Government civil engineering office. Upon an

inspection with the Government's mechanical engineer, Mr. Doyle determined that the tie-in was performed in an acceptable manner, but that neither water lines from the valve to the building nor required thrust blocks had been installed. On 15 May 1996, Mr. Doyle determined that appellant had placed concrete around the area of the water tie-in which did not meet the contract requirements. He also observed that appellant had performed some minor electrical work and had sanded some corridor walls. (Ex. G-4)

On 15 May 1996, the Government's contract administrator wrote a memorandum for the record reflecting that he had been advised by the Government's legal office to withhold payments "pending termination for default." The memorandum also stated that the building was not habitable and listed the work elements still incomplete, including the roof, windows, the water line, the HVAC system, the fire alarm and sprinkler system, and interior finishes and lighting fixtures. After noting the adverse effects upon operation of the child care facility because of the delay in completion of the addition, the memorandum continued, as follows:

[Appellant] IS STILL PROGRESSING SLOWLY, TO NON-EXISTENT. THE [superintendent] HAS STATED THAT THEY CANNOT COMPLETE BY 18 MAY 96, BASED ON THEIR SHOW CAUSE RESPONSE DATE.

THIS CONTRACT IS PENDING TERMINATION ACTION, AND THE LIQUIDATED DAMAGES OF \$71.74 PER CALENDAR DAY OF DELAY HAVE BEEN PRESERVED BY THE GOVERNMENT. SINCE 23 JULY 1995, THE LIQUIDATED DAMAGES WILL BE ASSESSED UNTIL RE-PROCUREMENT ACTION IS COMPLETE. INVOICE NUMBER 11, VALUED AT \$13,726.65 (APPROVED 13 MAY 96) MUST BE SUSPENDED FROM PAYMENT ACTION, PENDING THE OUTCOME OF THE T FOR D AND THE LD ASSESSMENT CHARGES, PER [the Government legal office]. FUTURE PAYMENTS UNDER THIS CONTRACT WILL BE WITHHELD, UNPAID, UNTIL RESOLUTION BY THE CONTRACTING OFFICER.

The memorandum was approved by the contracting officer. (R4, vol. 4, tab 17) The Government did not pay appellant's Invoice No. 11 because the amount of liquidated damages to which the Government had reserved its right was more than that payable under the invoice. The Government had earlier paid invoices in amounts which were less than liquidated damages to which the Government had reserved its right, because, at the time of those payments, the then existing contract completion date had not yet been reached. (Tr. 1/108-11)

On 17 May 1996, Mr. Doyle visited the construction site and observed only one worker performing some electrical wiring (ex. G-4). On 21 May 1996, Mr. Doyle discovered that appellant had covered the ditch containing the water tie-in despite the problematic thrust block, but informed appellant's superintendent that, while the installation of other thrust blocks would have to conform to the specifications, appellant would not be required to dig up and replace the thrust block already installed. Mr. Doyle also noted some other problems with the work, including stucco cracks and separations. (Ex. G-5)

On 24 May 1996, Mr. Doyle visited the construction site and saw no evidence of any work having been recently performed. He had photographs taken of the exterior and interior of all rooms of the building addition which accurately depict the status of performance and condition of the construction site on that date. The building lacked potable water and plumbing fixtures, and the roofing system, fire alarm system, doors and windows, and the HVAC system remained incomplete. Appellant had made insignificant progress since the 15 April 1996 scheduled completion date. (R4, vol. 5, tab 4; exs. G-6, -8; tr. 1/63-69, 158-63, 2/27)

On 24 May 1996, the contracting officer issued Modification No. P00008 terminating the contract for default for (a) failure to complete the work by the 15 April 1996 completion date established by bilateral Modification No. P00007, (b) failure to complete required material submittals in accordance with the provisions of the contract and the specifications, and (c) failure "to prosecute the work diligently and in accordance with the contract provisions." The modification also advised that appellant was liable for liquidated damages at the rate of \$70.74 per calendar day of delay, stated that it constituted the final decision of the contracting officer, and advised appellant of its appeal rights. (R4, vol. 4, tab 5) In reaching her decision, the contracting officer considered (a) that appellant's failure to complete by 15 April 1996 did not arise from causes beyond appellant's control or without its fault or negligence and (b) appellant's lack of progress after 15 April 1996 (tr. 2/41, 47).

Consistent with her 7 May 1996 memorandum, the contracting officer testified that she had, in good faith, considered the FAR 49.402-3(f) factors (R4, vol. 4, tab 16; tr. 2/24-47, 59-60). However, under cross examination she also testified that, at the time of the termination: (a) she did not know whether appellant had any guaranteed loans outstanding; (b) she did not know specifically to which subcontractors appellant owed progress payments, although she knew that some had not been paid; (c) she did not perform an analysis as to how long it would take appellant to complete performance because appellant's level of effort was insufficient to achieve completion; and (d) she did not analyze how long, and at what cost, it would take a replacement contractor to complete the contract (tr. 2/47-57).

On 3 June 1996, appellant's president signed its Invoice No. 12 requesting payment of \$36,899.58 on the basis of a claimed 87.65 percentage of completion (ex. A-2). The

Government did not make a payment based on the invoice because the Government had received neither a progress report reflecting completion of 87.65 percent nor any evidence or indication of the basis for the invoice (tr. 1/113-15).

Appellant timely appealed the contracting officer's decision terminating the contract for default.

The record includes an allegation by Mr. J.L. Brown of Big "B" Contractors, appellant's roofing subcontractor, in his sworn deposition, that Mr. Doyle used racial epithets in referring to the roofing subcontractor's superintendent and to appellant's president, and that Mr. Doyle had stated that he would do whatever was necessary to get appellant off the job (ex. A-3, pp. 24, 26, 59). In his sworn testimony during the hearing, Mr. Doyle denied the allegations, and there was testimony by other Government personnel that they had never heard Mr. Doyle speak in that manner. The record also contains allegations that, on one occasion, appellant's superintendent used abusive language toward Mr. Doyle and that the roofing subcontractor's Mr. Brown used racial slurs in general. (R4, tabs 37, 39; tr. 1/181-82, 198-203, 216-19, 2/7, 28) On the basis of the totality of the testimony and the presiding judge's opportunity to observe Mr. Doyle's testimony, we find that Mr. Doyle did not use a racial epithet or take any action based on any improper motive in his dealings with appellant or its subcontractors. We make no finding with respect to the other allegations of abusive or inappropriate speech.

DECISION

The Government terminated this construction contract for default because of appellant's (a) failure to complete within the required completion date, (b) failure to complete required material submittals in accordance with the provisions of the contract and specifications, and (c) failure to prosecute the work diligently and in accordance with the contract provisions. Appellant contends that its failure to meet the required completion date and any performance problems were due to causes beyond its control and without its fault or negligence.

Under the terms of the contract's Default clause, the Government had the right to terminate the contract for default if appellant failed to complete the contract within the time specified in the contract, including any time extension. Our record reflects that the required contract completion date was extended by a series of bilateral contract modifications to 15 April 1996 and it is undisputed that appellant failed to complete performance by that date. The Government was therefore entitled to terminate the contract unless appellant's failure to meet the required date was due to causes beyond its control and without its fault or negligence. Appellant has the burden of proving such excusable causes.

Initially, appellant points to numerous design deficiencies and other problems in performance as attributable to either the Government or to the hurricanes which occurred in

1995 and which adversely affected appellant's ability to obtain and retain roofing subcontractors. However, appellant ignores the fact that it entered into several bilateral contract modifications which followed those events and contained releases. The latest of those, Modification No. P00007 dated 1 March 1996, extended the completion date to 15 April 1996 and provided that appellant agreed that any rights it had to an equitable adjustment which arose prior to the date of the modification were "fully satisfied" by the terms of Modification No. P00007. Among the events which predated the modification and of which appellant was fully aware were the hurricanes and the alleged design deficiencies. The release in Modification No. P00007, therefore, serves as a bar to appellant's receiving any further relief from the Government for those causes. *RFI Shield-Rooms*, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 at 61,731.

Appellant further contends that its performance was delayed by the Government's refusal to allow appellant to test the water sprinkler systems, thereby making it impossible to perform interior work at the child care facility.

We observe, initially, that our record reflects that appellant was aware, prior to the date of Modification P00007, that it was having difficulty in finding the location of the water tie-in. However, even under the assumption that that alleged cause of delay was not included in the modification, (a) the contract placed upon appellant the responsibility to verify the location of underground utilities obtained from Air Force utility maps, (b) the Government, upon request, provided assistance to locate the water tie-in location, (c) the record reflects problems with the performance of appellant's plumbing subcontractor, and, (d) appellant has not proven that the water tie-in point was at a location which should not have been anticipated.

Appellant contends that the Government breached the contract by failing to make progress payments when due and attacks the Government's estimates of completion and reductions in the progress amounts claimed. Appellant emphasizes the Government's failure "to pay a penny on a roof that was 100% complete, without justification." (App. br. at 17) It also maintains that the unjustifiable reductions in the payments commenced when Mr. Doyle became the inspector and that Mr. Doyle was motivated by racial considerations in attempting to get appellant off the job.

There is a presumption that Government officials perform their duties correctly, fairly and in good faith, and the burden of proof to overcome that presumption is a heavy one. *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977); *Quality Environment Systems, Inc.*, ASBCA No. 22178, 87-3 BCA ¶ 20,060 at 101,568. As our findings above demonstrate, appellant has not met that burden here. The allegations of bad faith remain unproven allegations in the light of Mr. Doyle's persuasive testimony to the contrary, testimony by others, as well as contemporaneous evidence of his efforts to assist appellant's performance.

Under the terms of the contract's FAR 52.232-5 PAYMENTS UNDER FIXED PRICE CONSTRUCTION CONTRACTS (APR 1989) clause, the contracting officer is to make payments on estimates of completed work meeting the standards of quality established under the contract. The record reflects that Mr. Doyle's recommendations of the acceptable percentages of completion upon which invoices were paid were based upon a detailed rationale for each work element, and included the bases of any disagreements with the percentages claimed by appellant. Additionally, his estimates were supported by other Government personnel and by contemporaneous evidence indicating the extent of completion at the time of the progress payments. With respect to the roofing system, our findings reflect that, in reporting its performance completion, appellant combined the Roofing System and Moisture Protection elements of work as 11 percent out of the 100 percent for the entire contract work, that at the time of the termination the roof still leaked and that the Government had not yet been provided with the required warranty. Under those circumstances, we are unable to conclude that the Government's payment of eight percent out of the 11 percent for the Roof System/Moisture Protection work element was unreasonable. We conclude that Mr. Doyle's assessments of the percentages of completion were reasonable and provided a valid basis for the amounts of the contracting officer's progress payments.

Appellant contends that the contracting officer, in deciding to terminate, failed to fulfill the FAR 49.402-3(f) provision that she "shall" consider the following factors:

- (1) The terms of the contract and applicable laws and regulations.
- (2) The specific failure of the contractor and the excuses for the failure.
- (3) The availability of the supplies or services from other sources.
- (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
- (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

It is well established that the purpose of the FAR factors is to alert the contracting officer of areas of concern which should possibly be considered prior to terminating a contract for default. They are not prerequisites to a valid default termination and the extent to which a contracting officer considers them may aid us in determining whether the contracting officer has abused her discretion in terminating the contract. *DCX, Inc. v. Perry*, 79 F.3d 132 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996); *Michigan Joint Sealing, Inc.*, ASBCA No. 41477, 93-3 BCA ¶ 26,011, *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994) (table).

Here, the contracting officer's memorandum stated that she had considered all of the factors, but our findings cast some doubt upon the extent to which, if at all, she considered some of the factors. However, under the facts of this case, where (a) there was a need for the facility, (b) the required completion date had passed, (c) major items of work remained to be done and the facility was uninhabitable, (d) appellant was making almost no progress and could not even provide its own estimate for completion, and (e) appellant failed to demonstrate that its failure to perform was due to causes without its own fault or control, the contracting officer's decision to terminate for default was reasonable.

The appeal is denied.

Dated: 20 April 2001

RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49899, Appeal of Imperial Properties/Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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