

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
American Service & Supply, Inc. ) ASBCA Nos. 49309, 50606  
 )  
Under Contract No. F34650-94-C-0177 )

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OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

These timely appeals originate from a contract to replace two air compressors and their associated natural gas engines at Tinker Air Force Base, Oklahoma. ASBCA No. 49309 is an appeal from the Government's termination of this contract for default. ASBCA No. 50606 is from a deemed denial of the contractor's claim of \$122,243.64 for all equipment, materials, and labor supplied prior to the termination for which American Service & Supply, Inc. (American) was not compensated. American has proven that its failure to make progress and perform under the terms and conditions of the contract was due to unforeseeable causes beyond its control and without its fault or negligence, to the extent that the termination for default in ASBCA No. 49309 should be changed to a termination for the convenience of the Government. Regarding ASBCA No. 50606, American has made a sufficient showing that it is owed money on the contract. Thus ASBCA No. 50606 is remanded for determination of the quantum owed in connection with the termination for convenience.

FINDINGS OF FACT

1. On 16 September 1994 American was awarded Contract No. F34650-94-C-0177 in the amount of \$499,528 to furnish all plant, labor, tools, equipment, materials, supervision, transportation and incidentals necessary to remove two existing natural gas powered air compressors and install two new gas powered air compressors and their engines in the boiler room of Building 3001, Tinker Air Force Base, Oklahoma (R4, tab 1 at 01010-1 p. 3).

2. American certified prior to award that it was a sole proprietorship and a small disadvantaged business concern (Hispanic American) whose management and daily business operations were controlled by Ms. Pamela Escobar-Holak as owner (R4, tab 1 at 11-12).

3. When the contract was entered into, American, a small business, was owned solely by Ms. Escobar-Holak (a Hispanic American) who controlled its management and daily business operations. Its two employees were Ms. Sharon Campbell Holder and Mr. William P. (Trey) Holder, III, who is Ms. Holder's son. (Tr. 6/282, 7/86, 8/6-10, 103-06, 110) Ms. Holder became a co-owner of American while the contract was in effect, although Ms. Escobar was the majority owner (tr. 6/272).

4. The contract contained the following clauses: FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACT (APR 1989); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.236-15 SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984); and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) the latter of which states in part:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. . . .

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if –

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include . . . (ii) acts of the Government in either its sovereign or contractual capacity, . . .

. . . .

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(R4, tab 1 at 7-11)

5. Additionally, the following contract provisions are pertinent to the issues in dispute.

SECTION 00700  
GENERAL REQUIREMENTS

11.2 STANDARD PRODUCTS/SERVICE  
AVAILABILITY:

11.2.1 Materials and equipment shall be standard products of a manufacturer regularly engaged in the manufacture of such products, which are of a similar material, design and workmanship. . . .

(R4, tab 1 at 00700-6, -7)

19. SUBMITTALS: Approval by the Contracting Officer is required for all submittals. See each specification section for required submittals.

. . . .

19.4 APPROVED SUBMITTALS: The approval by the Contracting Officer shall not be construed as a complete check, but will indicate only that the general method of construction, materials, detailing and other information are satisfactory. Approval will not relieve the Contractor of the responsibility for any error which may exist, as the Contractor under the requirements of this contract, is responsible for the dimensions and design of adequate connections, details and satisfactory construction of all work. After submittals have been approved by the Contracting Officer, no resubmittal for the purpose of substituting materials or equipment will be given consideration unless accompanied by an explanation as to why a substitution is necessary.

. . . .

19.6 DISAPPROVED SUBMITTALS: The Contractor shall make all corrections required by the Contracting Officer and

promptly furnish a corrected submittal in the form and number [of] copies as required for the initial submittal. If the Contractor considers any correction indicated on the submittals to constitute a change to the contract, notice shall promptly be given to the Contracting Officer for determination.

(R4, tab 1 at 00700-10)

## SECTION 00800 SPECIAL PROVISIONS

5. SEQUENCE OF WORK: The Contractor will coordinate through the Contracting Officer to schedule access to Building 3001 boiler room. Only one compressor shall be out of service at a time. The first compressor shall be operational before taking down the second one.

(R4, tab 1 at 00800-2)

## SECTION 15400E PLUMBING, COMPRESSED AIR SYSTEM

The following shall be submitted in accordance with Section 01300 SUBMITTALS:

SD - 01 Data; GA

Data shall be submitted for the air compressor package including: air compressor, natural gas driven engine, intercooler, aftercooler, and controls. Manufacturer's descriptive and technical literature, performance data, catalog cuts, and installation instructions. Materials furnished under this section of the specification shall be submitted at one time.

(R4, tab 1 at 15400E-3)

### 2.3 COMPRESSED AIR PACKAGE

#### 2.3.1 General

The compressor shall be an angle compound direct-connected, double acting, reciprocating type driven by an internal combustion natural gas engine through a guarded belt drive.

Both the compressor and engine shall be rated for continuous duty operating at full load, full flow. All components shall be mounted on a structural base.

The unit shall be factory assembled and test run prior to shipping . . . . Natural gas supplied at 16 ounces pressure with a fuel value of 1018 BTU . . . .

(R4, tab 1 at 15400E-4)

6. The contract specified and was designed around (tr. 1/102-09; AR4, tab 11; R4, tab 147, sheet P4) the standard Cummins GTA855-A engine or equal (Engine A) which rotated counterclockwise (tr. 1/44-45, 8/124), and the standard Ingersol Rand XLE or equal compressor which rotated clockwise (tr. 1/119, 174, 4/126, 8/125-26), and thus the specified engine and compressor were not compatible (R4, tabs 48, 129; tr. 2/213).

7. Ms. Debra Van Swearingen was contract administrator from 30 September 1994 until June 1995 (tr. 2/196-97). On 11 October 1994 John F. Summers, contracting officer (CO), wrote American that questions or problems should be sent to Ms. Van Swearingen as contract administrator (R4, tab 5 at 1).

8. Minutes of the preconstruction conference held 24 October 1994 show Ms. Escobar-Holak, Ms. Holder, and Mr. William P. Holder, Jr. were at the meeting. Mr. Holder was the president and owner of Industrial Compressor Services (ICS) and at the time of the contract, husband of Sharon Holder (tr. 6/279, 8/118). Discussion during that meeting included American's concern that Engine A had insufficient horsepower (tr. 2/66). The minutes state in part:

5. Contractor will send a letter stating that the drivers specified are too small for the motors and requesting motors be upgraded. As the project stands right now, he states the motors will not last. The Notice to Proceed will be held for ten days in order to see if [Civil Engineering] can get the money for any necessary changes before the work starts.

(R4, tab 5; tr. 6/96)

9. On 25 October 1994 Cummins Southern Plains, Inc. quoted their GTA855-B engine (Engine B), which had a greater horsepower than Engine A (but the same counterclockwise rotation (tr. 1/45-53)), to ICS for \$37,845 (R4, tab 53).

10. In November 1994 Ms. Cynthia Obermeyer replaced Mr. Summers as CO (tr. 5/29-30).

11. On 10 November 1994 American signed the notice to proceed (R4, tab 6). Work was to commence within 10 days and be completed by 9 November 1995 (R4, tab 1 at 3, ¶¶ 11, 12B, tab 1 at 7, ¶ I-100, tab 6).

12. On 21 November 1994 the Government wrote American stating in part: “We would agree to look at any information you have on BHP rated engines when you make you[r] submittals” (R4, tab 8).

13. American submitted a Statement and Acknowledgment dated 22 November 1994 stating that ICS, as subcontractor for the contract, would: “Provide and be responsible for complete removal of existing natural gas engine driven air compressors and the installation of two new natural gas engine driven air compressors” (R4, tab 60). On 6 December 1994 the Government advised American that as prime it had to complete at least 25% of the contract work (R4, tab 62).

14. On 8 December 1994 the Government issued the first 10-day cure notice based on American’s failure to timely provide the submittals, a contract progress schedule, and a certificate of insurance, and again stated the prime contractor was required by FAR 52.219-14(b)(4) to perform at least 25% of the contract work (R4, tab 63).

15. The Government received American’s first submittals and contract progress schedule on 22 December 1994 (tr. 6/62; AR4, tab 5 at 3). The submittals included: (1) factory specifications for both the contract-specified Engine A, and the more powerful Engine B (R4, tab 148, submittal 8 at sec. B); (2) factory specifications for the Ingersol-Rand XLE air compressor which indicate that the rotation of the compressor flywheel was clockwise (tr. 2/173; R4, tabs 129, 148, submittal 8 at 11); and (3) a preliminary Ingersol-Rand skid drawing which showed only the general layout of the skid and how the components would be mounted, but had no details regarding the size of the members, such as the pipes, and contained the description: “shop drawings - preliminary skid draw[ing]” (R4, tab 148 at submittal No. 1; AR4, tab 11; tr. 3/103, 153). The skid was a metal base that the engine and compressor were mounted on (ex G-1; tr. 1/30).

16. On 4 January 1995 the CO approved the contract progress schedule (AR4, tab 12).

17. During the week of 8 January 1995, American began on-site work of pipe cutting and dismantling the first unit (R4, tab 72).

18. On 25 January 1995 American submitted a written request to Ms. Van Swearingen for an immediate answer whether the Government wanted to change the size of the engines and stated in part:

The engine order needs to be placed no later than 1/31/95 in order to maintain our scheduled completion date. Arrival of engine for Replacement of Compressor No. 1 is 45 days from date of order.

(AR4, tab 8; tr. 2/103)

19. After a meeting held 8 February 1995, Ms. Van Swearingen placed the following memorandum in the contract file:

Problem with engine. Different size may be necessary to coordinate with specified compressor. The skids may have to be changed from 4" diameter pipe to 6"-8" to handle more horsepower and more torque. The 4" pipe could buckle. Contractor will do stress test. The whole frame will be bigger pipe for stability.

Contractor will finish concrete and wait until end of week for submittal return on compressor. *If approved contractor can order compressor and go ahead and get it here.* At that time we would need to issue a stop work order until the money is obtained for them to order the different engine that coordinates with the compressor. [Emphasis added]

(R4, tab 84)

20. Ms. Van Swearingen assumed that ordering the compressor before the engine resulted in all testing being done at Tinker (tr. 2/110). Ms. Obermeyer recognized that delivery of the compressor separate from the engine and separate from the skid was "a de facto change from what the specifications require" (tr. 6/135).

21. On 14 February 1995 the CO approved American's 22 December 1994 submittals (AR4, tabs 4, 11; tr. 4/136-37).

22. By mid-February 1995 American could do no more contract work at the site until the Government decided whether Engine A or B should be ordered (tr. 6/134).

23. On 28 February 1995 the Government received American's revised contract progress schedule and contract progress report (AR4, tab 12; tr. 2/115).

24. During the week of 6 March 1995, the first compressor was delivered to Tinker Air Force Base, at which time the contract was 29% complete and three weeks ahead of schedule (R4, tab 72; tr. 2/135, 3/104, 161, 7/64). On 20 March 1995 the acting CO

approved partial payment No. 4 in the amount of \$72,550.20 based upon 29% completion of the contract work which included delivery of the compressor as a separate work element equal to 15% of the contract price (R4, tab 72 at 10, tab 83 at 5; AR4, tab 12; tr. 2/64, 111-12). After delivery of the compressor in March 1995, no other payments were approved for American (tr. 3/185).

25. On 5 April 1995 the Government wrote American to submit a proposal to “[s]ubstitute the Cummins GTA855-B for the Cummins GTA855-[A] that was originally specified in the contract” (R4, tab 13; tr. 4/81). On 18 April 1995 American submitted a response to the request for proposal and included the costs for the change of engine *and the skid refabrication*. The cost difference for the two engines was \$7,445 each. The costs to “refabricate and modify” each skid were set out separately from the costs of the difference in the price of the engines. (R4, tab 14)

26. On 27 and 28 April 1995 negotiations were conducted between American and the Government to discuss substituting Engine B for Engine A (R4, tab 92). The Price Negotiation Memorandum does not address the subject, but the parties agree that during the negotiations the Government told American that it would not be necessary to modify the skids because the mounting characteristics, which include the weight and size, of Engine A and Engine B are the same, thus the same skid would support each engine. The parties dispute whether American was told that if the skids were modified, then testing, including dynamic testing, would be necessary. (Tr. 4/24-25, 91-92, 6/129, 7/32-34; R4, tab 21 at 3)

27. When the proposal for Modification No. P00001 was submitted, ICS as American’s subcontractor had already built (subcontracting “a lot of it,” primarily the welding) the first skid with six-inch piping using a design developed by Ingersol-Rand in about 1960 (tr. 1/243, 6/137, 7/32-34, 8/127, 199-202). American and ICS never modified either of the skids, that is American and ICS never changed an engineering part from the original (tr. 8/143-44).

28. Following the negotiations, bilateral Modification No. P00001 with an effective date of 28 April 1995, was executed by American on 12 May and the Government on 16 May. The modification stated as follows:

FIRST: Contractor shall provide all labor, tools, materials, equipment, transportation, and incidentals necessary to amend the Cummins Engine referenced on Drawing Sheet P-4, “Air Compressors #1 & #3 Schedule”, as follows:

FROM: GTA855-[A]            TO: GTA855-B



SECOND: Contract Completion Date is hereby extended as follows:

FROM: 9 NOV 95                      TO: 11 DEC 95

THIRD: As a result of the above changes, the contract amount is hereby increased by \$22,000.00 as follows:

FROM: \$4[9]9,528.00

BY: 22,000.00

TO: \$521,528.00

FOURTH: The compensation of \$22,000.00 and a 30-days [sic] extension to the performance period, as agreed upon and incorporated by this modification, is full and final payment for all work described above, and includes compensation for all impact or delay claims arising from this modification, any previous modifications to date, and any other Government delays to date.

(R4, tab 2; tr. 1/193)

29. On 5 June 1995 the Government received American's Submittal 14 which included an Oklahoma draftsman's cad-cam detailed drawing of the Ingersol Rand design that showed the skid plan view in different sections, and the skid had six-inch pipes (R4, tabs 16, 21 at 3). On 8 June 1995 the Government approved the submittal with the notation on page 2: "For a preliminary skid drawing this appears, OK [sic]. However this doesn't take the place of a stamped drawing certifying the stand will handle the compressor and engine load." (R4, tab 147, Sheet S-1, 148 at submittal 14; AR4, tab 15; tr. 2/188-91, 4/135) Ms. Van Swearingen interpreted this statement as a directive to American to obtain a stamped drawing certifying the stand would handle the compressor and engine load (tr. 2/191).

30. There is no evidence that the Government was told or in any way inquired whether the skid was modified (tr. 6/129, 144), rather, it was the impression of Government representatives that American intended to modify the skid (tr. 4/29) based primarily on: (1) the minutes of the meeting held 8 February 1995 which reflected a discussion that the skid was to be modified from four- to six- or eight-inch pipes; (2) American's request for costs of skid modification in its proposal in anticipation of Modification No. P00001; and (3) American's detailed skid drawing in submittal 14 showing six-inch instead of four-inch

pipes, which indicated to the Government a change from the earlier submitted drawing although the earlier drawing did not have the size of pipes and was preliminary (tr. 4/81-84, 91-96, 137, 6/124-25, 144, 7/272; findings 15; R4, tab 148 at submittal 14). American never provided a drawing or submittal indicating four-inch pipes for the skid or that the skid was modified (tr. 3/234-38, 4/134-40, 188, 6/122).

31. There were no contract specifications for the size of the piping or of any other parts used in building the skid; in the Government's view, the contractor was to design and build the skid to be stable enough for the components it was to carry (R4, tab 17 at ¶ 11; tab 29; tr. 3/238, 6/122, 125-26, 144).

32. The contract's only references to the "unit" and the "mount" that attaches to the compressor and engine, or the "skid" are found in section 2.3 entitled COMPRESSED AIR PACKAGE which states that: "All components shall be mounted on a structural base." "The unit shall be factory assembled and test run prior to shipping" (finding 5; R4, tab 1 at 15400E-4). The contract contains no definition of "unit."

33. There was no contract requirement to test the skid individually (tr. 1/139, 2/186, 4/176). There was no contract requirement for static or dynamic stress loading tests to be conducted on the skid (R4, tab 1 at 15400E-4), and the contract was never modified to require an Oklahoma engineer's detailed drawing (tr. 2/187, 7/32-34, 46).

34. Although (1) the contract called for a factory assembled and tested compressor unit and (2) both Ingersol-Rand and Cummins factory-test their products (tr. 1/104-05), there is no evidence that any company produces and factory-tests a gas engine driven compressor unit, whether or not mounted on a structural base unit (tr. 4/147, 6/136).

35. In the view of Ms. Obermeyer, the static and dynamic load tests were a contract requirement regardless of whether the skid was modified because these tests would have been part of the information obtained from the required factory-testing of the "unit" (tr. 6/130-31).

36. In June 1995 Ms. Van Swearingen went on medical leave, after which time Ms. Obermeyer served as both CO and contract administrator (tr. 2/123, 6/57-58).

37. On 10 July 1995 the Government received submittal number 15 which included a compressor skid analysis stamped by Mark A. Prather, an Oklahoma engineer (AR4, tab 16). In Mr. Prather's view, after these first tests there was no reason for further tests and the capabilities of the skid were such that it would handle the motor and the compressor (tr. 3/34-37).

38. On 25 July 1995 a meeting was held among representatives from American and the Government. Minutes of that meeting taken by Rick Estep, the contract specialist (tr. 3/275), state in part:

While in the meeting, it was determined that the contractor was not reporting percentage of work completed. The progress reports have delivery of compressor, delivery of skid, and delivery of engine as work elements. It was explained to the contractor that only salient work elements are to be on the schedule and reports and not delivery. It was explained to the contractor that the Government will pay for high dollar end items however, they are not to appear on the schedule. Time was taken to explain to the contractor how to report the work elements. The[y were] told that they can report a partial percentage of any work element.

When the meeting adjourned, it was agreed that the contractor will get an amended progress schedule ready. The Government will get the submittal for the skid out by Tuesday. The Government will pay for high dollar end items when the contractor invoices and provides proof of payment.

(R4, tab 99)

39. On 25 July 1995 the Government disapproved submittal 15 stating that:

It appears that this analysis was based on a static load only. The Gov[ernmen]t must be assured that the subject skid is capable of supporting the air compressor and its associated equipment under a dynamic load. I.E.: Reaction loads on supports during start-up, operation, and locked-rotor such as twisting [,] bending, shear, etc.

(AR4, tab 16) At trial Ms. Van Swearingen interpreted this statement as a direction to American to do these tests (tr. 2/194, 4/140). The Government required the second skid test because there was no dynamic analysis (tr. 4/142-44).

40. On 4 August 1995 the first Engine B was delivered to Building 3001, Tinker AFB (AR4, tab 18).

41. In response to the 25 July meeting, American submitted a revised progress schedule dated 15 August 1995 which showed completion in August 1996 (R4, tab 16). On 17 August 1995 Ms. Obermeyer wrote American and stated in part:

2. The first thing to discuss is the progress schedule. You are requested to reference the contract clauses FAR 52.236-15, Schedules for Construction Contracts. You will note that the schedule shall consist of the salient work characteristics and should be in scale to demonstrate your company's suitable progress through the completion of this project. The work elements shall be limited to those tasks which will indicate the progress of the work and which may be readily identified and measured by personnel monitoring the contractor's progress. The clause continues to state that failure to comply with this requirement allows the Contracting Officer to withhold progress payments.

3. . . . There have been five different conversations since 10 May 95 in which the Government has specifically requested a new progress schedule. To date, a correct schedule has not been received. This is a violation of FAR 52.236-15. This failure to comply with the contract terms and condition will cause payments to be withheld and could lead to possible termination of your contract for default.

4. As we discussed in the meeting of 25 Jul 95, delivery of material/items [sic] is not a salient work characteristic. . . . The faxed copy of the [15 August 1995] schedule is not acceptable with the delivery of the compressor and the engine as characteristics for a progress schedule. A corrected schedule is expected in this office no later than 25 Aug 95.

Additionally Ms. Obermeyer stated that American was not entitled to a completion date of the week of 2 August 1996. Rather the contract mandated completion date, which included Modification No. P00001's 32-day extension, was 11 December 1995. (R4, tab 17)

42. Weekly contract progress reports from 6 March 1995 through 7 July 1995 which reflect that delivery of the compressor, engine and skid were set out as separate work elements and delivery of the compressor was 15% of the "total job," were approved on behalf of the CO by Ms. Van Swearingen or Mr. Estep, as contract administrators (R4, tab 72; tr. 2/133). American asserts that it listed delivery of an item, such as the compressor or engine, as an element on the contract progress reports pursuant to instructions by the Government (R4, tab 21 at 2-4). Ms. Obermeyer testified that the approvals of the progress reports from March to July 1995 were made in error because they did not reflect the elements in an approved progress schedule (R4, tab 72; tr. 6/205-08). Ms. Obermeyer

considered delivery should not be shown as a work item on the contract progress report (tr. 2/332-34).

43. On 23 August 1995 American responded to the Government's 17 August letter with another proposed progress schedule which listed a completion date of 20 September 1996, more than nine months past the contract completion date. The schedule no longer listed delivery of any components as salient work characteristic; however, progress reports submitted following this 23 August letter continued to include delivery of components as work elements. (R4, tabs 18, 72)

44. On 25 August 1995 American's proposed schedule dated 23 August 1995 was received in the mail room at Tinker (tr. 6/155-58; AR4, tab 20; R4, tab 18). This proposed schedule was disapproved because: (1) the performance period was shown as 20 September 1996 rather than 11 December 1995; (2) a proper request for a time extension had not been received; and (3) the proposed progress schedule did not meet the requirements to grant an extension (tr. 6/159-61).

45. On 28 August 1995 the Government sent a cure notice regarding American's alleged failure to submit a valid insurance certificate, a revised progress schedule and revised weekly progress and payroll reports (R4, tab 19).

46. On 5 September 1995 Ms. Obermeyer wrote:

2. . . . [A]s discussed in our conversation of 30 Aug 95, these forms are still unacceptable. The proposed progress schedule represents a contract period of performance of 10 Nov 94 thru 20 Sep 96. The contractual period of performance is established as 10 Nov 94 thru 11 Dec 95.

3. The [nine-]month extension is unacceptable to the Government. A minimal time extension is negotiable when appropriate consideration has been offered by the contractor once an appropriate reason for the delay has been recognized by the Government. To date, a consideration has not been offered nor an appropriate reason for the delay. Consequently, the progress schedule and related weekly progress report are unacceptable.

4. As all of the conditions of the Cure Notice dated 28 Aug 95 [have] not been satisfied, it will be necessary for your company to cure the remaining contract deficiencies noted by the date specified in the Notice. Failure to respond to this cure notice

will result in further action by the Government to resolve your contract delinquency.

(R4, tab 20)

47. On 12 September American's attorney wrote the Government, outlining American's position on many points in this dispute and requesting a change order, seemingly for both time and costs, for the skid tests (R4, tab 21 at 8). The letter refers to statements by American to the Government in June 1995 that the skid testing was a change to the contract (R4, tab 21 at 6).

48. American presented copies of letters dated 13 June and 27 July 1995 which stated American considered the skid tests to be a change to the contract and requested a change order for an equitable adjustment and additional time (SR4, tab 15 at 4, tab 16 at 5). The Government had no record of having received either of these letters (tr. 5/212-17). We are unaware of any reference to these letters in other documents in the Board's file. We find the letters were not received by the Government.

49. On 15 September 1995 American requested a progress payment of \$59,361.79 for an additional 10% of cumulative contract performance (29% to 39%) for delivery of the first engine (R4, tab 22). Ms. Obermeyer felt she could not pay the requested progress payment because the invoice was not acceptable as submitted, because delivery of the engine was not a proper work element (tr. 6/166-69).

50. On 19 September 1995 Ms. Sharon Holder wrote the Government and stated in part:

I am at a loss to understand your position that the proposed revised progress schedule is unacceptable. The revised schedule was submitted at the Government's request to incorporate the delay caused by its decision to change the engine and the additional skid testing unilaterally imposed by the Government to support its decision to not add reinforcement. . . . Please change your position or, to avoid misunderstandings, provide a written response explaining in detail each and every reason why the proposed schedule is unacceptable.

I am also at a loss to understand your position that the Weekly Contract Progress Report (CPR) was unacceptable as submitted. The CPR was a photocopy of the sub-elements of work specifically incorporated and approved by the Government since February 1995. . . .

(R4, tab 23)

51. On 29 September 1995 Ms. Obermeyer wrote American and stated in part:

2. The Government has spent an inordinate amount of time with your company explaining the progress schedule. There have been verbal conversation and written explanation provided to your company on numerous occasions. . . . During the negotiations of Modification P00001, your company negotiated a 30 day time extension for the changes associated with that modification. That makes your new contract completion date 11 Dec 95. That means everything associated with the completion of this contract must be accomplished prior to 11 Dec 95.

3. The Weekly Progress reports were rejected because they are invalid. The weekly progress elements are taken directly from the Contract Progress Schedule. Since your company has yet to submit an acceptable schedule, it is conclusive that the weekly progress reports would also be unacceptable. These two documents are directly related. . . . These documents do not reflect any percentage of completion, even for what has previously been accomplished. The need to carry the percentages has been explained numerous times to your company. Once a progress schedule has been accepted, the progress reports must reflect the work elements and be completed in full prior to acceptance of the weekly progress reports.

(R4, tab 24)

52. By October 1995 American understood that the proposed contract schedule would be approved only if it stated a 11 December 1995 completion date (tr. 7/57). On 12 October 1995 American responded to a Government's 29 September 1995 letter and requested a time extension from 11 December 1995 to 31 May 1996, with a proposed progress schedule attached based on these dates (R4, tab 25). The schedule was not approved because there was "no offer of consideration, and an adequate request for an extension had not been completed" (tr. 6/164).

53. A 13 October 1995 show cause letter was delivered to American on 19 October 1995. The letter informed the contractor that it had failed to satisfy all the deficiencies noted in the cure notice of 28 August 1995, specifically the failure to submit the revised

progress schedule and the progress reports, and the lack of performance on the contract. American was informed of its 10-days in which to present in writing, any facts which might have bearing on the Government's consideration of a default termination. (R4, tab 26)

54. On 17 October 1995 the Government received submittal 18 which included the results of a dynamic test load on the skid (R4, tab 148 at submittal 18).

55. On 20 October Ms. Obermeyer wrote American and stated in part:

4. The discussing [sic] concerning the skid testing requirement did not begin until early June. As modification P00001 was signed on 12 May 95, you can understand that the modification could have nothing to do with the need to provide testing results for the skid. The quality of the skid did not become an issue until after [Modification No. P00001] had already been processed.

(R4, tab 29)

56. Also on 20 October 1995 American delivered the skid to the work site (R4, tab 28), at which time all the components (skid, engine, and compressor) for the first compressor were at the site and ready to be assembled (tr. 6/170). American's contract progress reports after 20 February 1995 reflect that the work remaining on 20 October 1995 comprised 56% of the contract work (R4, tab 72). American was not permitted to install the skid with the engine and compressor until the Government had reviewed and approved the test results on the skid (R4, tab 29 ¶ 5).

57. On 24 October 1995 the Government approved submittal 18 without comment (R4, tab 148 at submittal 18).

58. The static and dynamic load tests were specialized, computer simulation type tests that took four to five months or from 1 June to 24 October 1995 for performance and Government approval (tr. 2/316, 7/39-44). There is no evidence that the skid tests and the Government approval could have been performed in less time, unless the tests were performed simultaneously (tr. 6/138-42). The software for the dynamic tests could have been purchased in June rather than 31 July 1995 as it was (tr. 3/19-20).

59. On 31 October 1995 Ms. Obermeyer signed AF Form 3056, Termination Authority, and referred the matter to Mr. Keith R. Palmer, the Termination Contracting Officer (TCO) (R4, tab 112).

60. By letter dated 7 November 1995 American requested an extension of time on the contract from 11 December 1995 to 29 March 1996. American stated that the



extension was necessary due to delays caused by Government's requested skid testing which delayed performance by 5 months. (R4, tab 114)

61. By letter dated 8 November 1995 American responded to the Government's show cause letter dated 13 October 1995. American asserted that the delays were due to Government-imposed tests on the skid, and set out the time and effort required in completing these tests. American also pointed out the Government's obligation to provide American with time and compensation for Government-caused delays and requested that the contract not be default terminated. (R4, tab 30)

62. By letter dated 9 November 1995 the TCO denied American's request for an extension of time stating that the skid testing was a contract requirement and the request lacked any offer of consideration (R4, tab 117).

63. On 10 November 1995 American faxed a response to the TCO's 9 November 1995 letter offering \$1,000 in consideration for the extension of contract performance period to 29 March 1996 (R4, tab 118; tr. 6/164-65).

64. On 12 November 1995 American faxed the TCO a four-page letter requesting an extension of time and that the contract not be default terminated (AR4, tab 38).

65. On 13 November 1995 the TCO responded that \$1,000 was inadequate consideration "for the length of time requested and the value of the uncompleted work" (R4, tab 119; tr. 2/340). Also on 13 November 1995 American faxed the Government and stated in part (tr. 2/342, 7/61-63):

3. American respectfully [sic] requests that the Government advise the amount of consideration to be offered for an extension of time to complete work on contract F34650-94-C-0177.

(AR4, tab 39 at 2)

66. The TCO terminated the contract 14 November 1995, 28 days prior to the 11 December 1995 contract completion date. The TCO outlined the contract performance to date and noted the Government's issues with the contractor. The termination notice stated that "[a]s of the date of this notice, acceptable progress schedules have not been received nor has acceptable progress toward installation of major components for the first of the two compressors been accomplished." (R4, tab 3; tr. 6/165) American's timely appeal was filed with the Board on 20 November 1995 and docketed as ASBCA No. 49309.

67. At the time of the default, the TCO knew that American was asking for time extensions due to testing of the skid. At the hearing, the TCO could not point to any contract requirement for skid testing other than testing of the unit. (Tr. 2/313-15)

68. Pursuant to FAR 49.402-3 Procedure for Default, the TCO was required to provide a copy of any cure notice or show cause notice to the small business specialist and the Small Business Administration regional office nearest the contractor. This was not done. (Tr. 2/348)

69. On 1 July 1996, the Government executed contract Modification No. P00003 which was a takeover agreement with American's surety, Gulf Insurance Company. The agreement contained the following:

SECOND: The contractor shall make the necessary adjustments to accommodate the rotation between the engine and the compressor. The Government acknowledges these changes will render the compressor as a "non-standard" compressor.

....

FIFTH: The contractor shall have 240 calendar days from the date of this agreement to complete the remainder of the project.

(R4, tab 133 at 4, 6) Completion of the takeover agreement was subcontracted to ICS (R4, tab 127 at 2).

70. The Government representatives testified that they discovered the rotation problems at the end of March or the first of April 1996 (tr. 2/211-12, 5/179). Mr. Holder testified that in the latter part of December 1994 he advised Ms. Van Swearingen of the rotation problems (tr. 8/138).

71. If the compressor were to rotate counterclockwise, the oil pump assembly had to be changed (tr. 7/159, 8/126). The takeover agreement allowed 110 days for change of the oil pump assembly (R4, tab 133).

72. The Government's concern was that if the compressor's oil pump was changed, the compressor would become a custom unit and not the standard manufactured unit (tr. 2/263, 6/31-35; R4, tab 128 ¶ 5; finding 69 ¶ 1).

73. The Government inventoried the material left on-site on 22 July 1996; this inventory included the compressor, engine, skid and two drive belts, but did not include a

control panel (R4, tab 122). The units can be operated without a control panel and only a temporary control of some kind (tr. 1/114, 7/65). There is no proof the control panel was not ordered or was not stored elsewhere.

#### ASBCA No. 50606

74. On 2 July 1996 the Government received American's invoice, No. 1345 dated 22 May 1996 in the amount of \$122,243.64 based on an alleged 52% completion. This percentage completion included costs of on-site materials and equipment such as the first Engine B and the first skid and related piping. Invoice No. 1345 was certified pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended. (R4, tab 33)

75. On 6 March 1997, American filed a second appeal with the Board which was docketed as ASBCA No. 50606. American's notice of appeal stated that the appeal was from the CO's deemed denial of a certified claim it filed "in or about October 1996" (compl. ¶ 31). The Government denied receiving that asserted claim, and filed a Motion to Dismiss for Lack of Jurisdiction. American could not produce a copy of the claim it alleged was filed in October 1996, and then declared that its 22 May invoice in the amount of \$122,243.64 was its claim.

76. The Board denied the Government's motion in a decision dated 29 March 2000. The Board held that American's certified request for payment of \$122,243.64 dated 22 May 1996 was a certified claim under the CDA and not a routine request for payment as argued by the Government. *American Service & Supply, Inc.*, ASBCA No. 50606, 00-1 BCA ¶ 30,858 at 66,758.

#### DECISION

Termination for default is a drastic sanction that should be imposed upon the contractor only for good cause in the presence of solid evidence. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government has the burden of proving that its default termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987).

The Government states there are two grounds for the default of American's contract to replace two air compressors and their associated natural gas engines. First, as stated in the termination notice: "[a]s of the date of this notice[,] acceptable progress schedules have not been received nor has acceptable progress toward installation of major components for the first of the two compressors been accomplished." The second clause is somewhat enlarged in the Government's brief as: there was no reasonable likelihood that American would have completed the contract by 11 December 1995, and there were no excusable delays of sufficient duration to warrant converting the termination for default to one of

convenience. The second alleged ground is “the material misrepresentation that American made to the Government in the solicitation.” (Gov’t br. at 229)

We address the second point first. The Government argues that the contract was *void ab initio* because American certified in the solicitation that it was a small, disadvantaged woman-owned business concern (Hispanic American), whose management and daily business operations were controlled by Ms. Pamela Escobar-Holak as sole proprietor, when it was only a facade for American’s subcontractor, ICS, which was not a minority owned, small business concern, but rather was owned by Sharon Holder’s husband. However, this record does not support the Government’s position. The facts of the record are that Ms. Escobar-Holak was the owner and controlled the management and daily business operations of American at the time the contract was entered into and American’s certifications made in connection with award of the contract were accurate (findings 2, 3).

Regarding the Government’s first point, the law applicable to a contractor's failure to provide assurances of timely completion is a branch of the law of anticipatory repudiation. *Danzig v. AEC Corporation*, 224 F.3d 1333, 1337 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001). In a progress failure default termination the Government is not required to prove absolute impossibility of performance or a contractor’s complete repudiation or abandonment. *McDonnell Douglas Corp. v. United States*, Nos. 02-5034 *et al.*, 2003 U.S. App. LEXIS 4812, at \*17 (Fed. Cir. March 17, 2003). Rather the default provision requires a “reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance.” *McDonnell*, 2003 U.S. App. LEXIS 4812, at \*19. Once the Government establishes it has the right to terminate for default, the contractor has the burden to come forward with evidence to show that its failure to make progress was excusable or was caused by a material breach by the Government. *Lisbon, supra*, at 765.

It is undisputed that American could not complete the contract by 11 December 1995, the completion date established by Modification No. P00001 (findings 43, 52, 60, 61, 63-65). Rather American argues that during contract performance American pointed out that the Government-required skid tests resulted in Government-caused delays which entitled American to an approximate five-month extension of time.

Pertinent facts are the following. No later than 24 October 1994 American told the Government that the specified Engine A had insufficient horsepower for the requirements under the contract (finding 8). On 5 April 1995 the Government requested a proposal to substitute Engine B for Engine A (finding 25), and Modification No. P00001 granting a thirty-two day extension of time and the additional funds for Engine B, effective 28 April 1995, was executed 12 and 16 May 1995 (finding 28), resulting in a contract completion date of 11 December 1995. On 8 February 1995, prior to the Government’s determination which engine should be ordered, the Government authorized that the compressor be delivered to the work site. It is undisputed this action resulted in a change to the contract

(findings 7, 10, 20) in that it was a change to the contract-required “factory assembled and test run prior to shipping” of the unit. The pertinent contract requirement is 2.3.1 of Section 15400E which states:

The compressor shall be an angle compound direct-connected, double acting, reciprocating type driven by an internal combustion natural gas engine through a guarded belt drive. Both the compressor and engine shall be rated for continuous duty operating at full load, full flow. All components shall be mounted on a structural base.

The unit shall be factory assembled and test run prior to shipping . . . .

(Findings 5, 32-35)

The Government required static and dynamic testing of the skid before the first skid could be approved and then assembled with the first engine and compressor. The Government argues the contract permitted this testing because: (1) while there was no specific requirement for independent skid testing, the Government was entitled to order the separate static and dynamic skid tests pursuant to the Section 15400E requirement that the “unit” be tested prior to delivery to the work site; or (2) alternatively the Government, when it authorized American to deliver the compressor before a decision was made on the engine size, was entitled to change the contract by deleting the requirement for testing the “unit” prior to shipping, and substituting the skid tests instead. We cannot accept the interpretations the Government urges.

Also the Government argues that it was entitled to order the static and dynamic skid tests because it justifiably assumed that American had modified the skid from the preliminary skid drawing submitted with American’s first submittal. It is undisputed that when American responded to the request for proposal to substitute Engine B for Engine A, the first skid was built and American requested compensation to modify the skids, a change which the Government refused (findings 25, 26). No amounts were included in Modification No. P00001 for skid modification and the skids were never modified (findings 27, 28). The mounting characteristics, which include the weight and size, of Engine A and Engine B are the same, thus the same skid would support each engine (finding 26). No dimensions or any other requirements for the skid were set out in the contract. The Government asserts that the successful bidder was to build the skid stable enough for the components it was to carry. (Findings 30-33)

This record does not reflect that the Government was entitled to request any independent testing of the skid, even if there was a modification of an earlier submitted drawing, even if that drawing was not “preliminary.” Any testing was brought about because

the Government authorized the compressor delivered prior to the “unit” factory testing, an order that resulted from defective specifications for the size of the engine.

The Government does not dispute that approximately five months were necessary for the static and dynamic tests which the Government demanded prior to approval of the skid (Gov’t br. at. 184-85, 192-93; finding 58). The Government does assert in its briefs that both tests should have been performed at the same time (Gov’t br. at 202; Gov’t reply br. at 43, 47). The Government has not discussed, and has not convinced this Board, that American should have interpreted the Government’s statement “For a preliminary skid drawing this appears, OK [sic]. However this doesn’t take the place of a stamped drawing certifying the stand will handle the compressor and engine load.” (finding 29) as requiring both static and dynamic testing. Further, on this point this record reflects only that the computer software for the dynamic testing could have been ordered in June rather than 31 July (finding 58). The Government requests that we assume that the preceding fact is proof that the two tests could have been performed simultaneously and about seven to eight weeks of the five months could have been saved.

The Government did not receive American’s 13 June and 27 July 1995 letters (finding 48). However, in this appeal American asks only for an extension of time for the skid tests, a request which was clearly conveyed to the Government prior to the termination for default.

Also in this connection American asserts that the 32-day extension which it accepted in Modification No. P00001 was insufficient time, rather it incurred a 90-day Government-caused delay due to the change of engine size. American may well have incurred a greater than 32-day delay, but this record does not entitle this Board to grant additional time to that provided for in Modification No. P00001, a binding, bilateral agreement which recites that it compensated American for the delay associated with the engine change. *Neri Corp.*, ASBCA No. 48799, 96-1 BCA ¶ 28,180 at 140,668. However, in considering the time required to complete the contract, the time required for the Government’s decision to change the engine should not be included in the time necessary to order and install the second unit, as we discuss later.

Additionally, the Government’s position that to avoid a default termination, American had to submit a contract completion schedule reflecting how American would, without an extension for the skid testing, complete the remaining approximate 56% of the contract in approximately a month, is unsupportable. Notice to proceed was acknowledged 10 November 1994. The week of 6 March 1995 when American, according to its progress report, was 29% complete and three weeks ahead of schedule, American could do no further work until the Government decided which engine should be ordered (findings 22, 24). Before the first engine was delivered, the Government required the skid testing. The first engine was delivered 4 August which, according to American’s progress report resulted in 39% contract completion, and the first skid was delivered 20 October 1995

(findings 40, 49, 56). American was not allowed to assemble the compressor, engine and skid until the skid tests were approved on 24 October 1995 (findings 56, 57). The terminating contracting officer knew at the time of the default that American was requesting time extensions due to skid testing and at the hearing could not point to any contract requirement for skid testing other than testing of the unit (finding 67). American, in response to the Government's instructions, submitted \$1,000 in offer for an extension of time and when the amount was refused as insufficient, faxed a request to know the amount needed. The contract was terminated for default the following day, which was 21 days after the last skid test was approved by the Government and 28 days prior to the contract completion date of 11 December 1995. (Findings 62-66)

Additionally at trial and in its briefing the Government argues there were other potential delays which entitled the Government to default American for failure to make progress: (1) the inventory after default termination did not include a control panel, a necessary part for any lengthy tests of the first unit; and (2) the engine and compressor did not rotate in a compatible manner and 12 weeks were required to remedy the situation by changing the oil pump assembly. A default termination can be upheld on any ground which existed at the time of the contracting officer's decision. *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994); *Aerobotics, Corp.*, ASBCA No. 52134, 02-2 BCA ¶ 31,974. The Government states it had no knowledge of these circumstances which had caused no delay at the time of the default. Thus they do not assist the Government in satisfying the test that the contracting officer had a reasonable belief that there was no reasonable likelihood that American could perform the contract by the completion date as extended. *McDonnell*, 2003 U.S. App. LEXIS 4812, at \*23.

Concerning the first point, the only proof that on the date of termination American did not have the control panel "on site or ordered" (Gov't br. at 185), is that the control panel was not part of the equipment found on the site after the termination. There is no proof that the control panel was not either stored in another location or on order with a delivery date so that no delay would result after the Government approved the dynamic skid test (finding 73).

Concerning the second point, it is undisputed that the compressor which was set out in the specifications rotated in a counterclockwise direction, and both the engine which was set out in the specifications and the engine which was substituted by Modification No. P00001 rotated in a clockwise direction (findings 6, 70). To be compatible, the oil pump assembly in the compressor had to be changed, and in doing so, the compressor became a "non standard" item which violated the requirements in 11.2 of Specification 00700 (findings 5, 69, 71, 73). However, the rotation problem was caused by the defective specifications, which would have entitled American to the 12-week extension.

This record does not clearly reflect the time which would be required for the remaining approximately 56% of the contract work (finding 56) to assemble the first unit

and order and install the second unit. However, in making this determination, we may consider factors usually relied upon by courts and contract boards, such as a comparison of the percentage of work completed and the amount of time remaining under the contract. *McDonnell*, 2003 U.S. App. LEXIS 4812, at \*21.

The default termination issued approximately one year after the notice to proceed, and when there was one month remaining in the contract. During that year American completed 29% of the contract work during the first approximately 3 months (10 November 1994 to mid-February 1995) (findings 11, 22, 24), and American was delayed 3 1/2 months (31 January to 16 May 1995) for the Government to decide which engine to order (findings 18, 28), and another nonconcurrent 5 months (1 June to 24 October 1995) for the skid tests (finding 58). Thus it is reasonable to assume that American could assemble the first compressor and complete the second compressor in 5, or even 3, months (the extension for the skid tests) plus the one month left in the contract.

The Government has not carried its overall burden to prove that the default termination was justified under any set of facts of which we are aware. Thus the default termination is converted to a termination for convenience. Accordingly, ASBCA No. 49309 is sustained. Regarding ASBCA No. 50606, American has made a sufficient showing that it is owed money on the contract. Thus ASBCA No. 50606 is remanded for determination of the quantum owed in connection with the termination for convenience clause.

Dated: 29 April 2003

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JEAN SCHEPERS  
Administrative Judge  
Armed Services Board  
of Contract Appeals



I concur

I concur

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

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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 Nos. 49309, 50606, Appeals of American Service & Supply, Inc., rendered in conformance with the Board's Charter.

Dated:

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