ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Range Technology Corporation | ) | ASBCA Nos. 51943, 54340 |
| | ) | 54341 |
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| Under Contract No. MDA908-97-C-0016 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

ASBCA No. 51943 is an appeal from the default termination of Contract No. MDA908-97-C-0016. ASBCA No. 54340 is an appeal from the denial of the claim of appellant Range Technology Corporation (Range) for an equitable adjustment in the amount of $1,270,549.00. ASBCA No. 54341 is an appeal from the government's claim for return of advance contract payments in the amount of $533,140.00. We deny all three appeals.

We previously issued a decision in these appeals on several motions and cross-motions for partial summary reported as *Range Technology Corporation*, ASBCA Nos. 51943, 54340, 54341, 04-1 BCA ¶ 32,456. We refer to findings made in that decision only to the extent necessary to an understanding of the remaining entitlement issues.

*Background*

Certain portions of the hearing testimony and a number of the documents received in evidence during the three-day hearing of these consolidated appeals are classified as SECRET. Among the classified documents is the report of an investigation of the events associated with the contract at issue in these appeals undertaken by the Defense Intelligence Agency Inspector General (DIA/IG) and the Defense Criminal Investigative Service (DCIS). (Appellant's Supplemental Rule 4 (app. supp. R4), tab 1)

Also among the classified documents are summaries of some of the interviews conducted by the DIA/IG and DCIS as part of the investigation. Five of the individuals interviewed were called to testify at the hearing: Mr. John W. Carpenter, who became chief, DIA Foreign Material Acquisition in October 1997; LTG Patrick M. Hughes, Former Director, DIA; Mr. Andrew T. Bewick, DIA contracting officer; Mr. Lawrence E. Foster, the contracting officer's representative (COR); and Mr. Simon Bardin, DIA liaison with Range. The summaries of the interviews of these five witness and two other individuals who were not called to testify were included in the hearing record by Range as app. supp. R4, tabs 8 through 14. It does not appear that the individuals interviewed were giving sworn statements.

Range relied extensively upon selected excerpts of the investigative report and the interview summaries in its post-hearing brief. Many of these excerpts were taken out of context and/or constitute opinion, pure speculation and multiple hearsay. Our findings reflect the lack of evidentiary weight given to such excerpts, particularly so with respect to the interview summaries of the individuals who were called to testify, but were not examined on the matters Range has excerpted for purposes of its brief.

Mr. William Chastain was an employee of Range who was central to the events associated with these appeals. The summaries of Mr. Chastain's interviews are not classified. They were included in the record by the government as tabs 84A, 84B, 84C and 84D of the Supplemental Rule 4 file (supp. R4). Neither party called Mr. Chastain to testify. The government has relied upon excerpts from the summaries of Mr. Chastain's interviews. It does not appear that he gave sworn statements. Our findings reflect the lack of evidentiary weight accorded to many of his summarized interview statements.

On 25 March 2005, Range filed a challenge to the SECRET classification of the DIA/IG and DCIS report (but apparently not the witness summaries) with DIA because it had relied upon information contained in the report in its post-hearing brief. DIA then classified appellant's entire post-hearing brief as SECRET, although substantial portions of the brief cite unclassified documents and testimony. By a letter dated 28 April 2005, appellant also filed a challenge to the classification of its brief. The government's brief and its reply brief were reviewed by DIA, but were not classified.

When DIA did not act upon either of Range's classification challenges within the time prescribed by applicable regulations, Range sought review by the Interagency Security Classification Appeals Panel (ISCAP). On 27 February 2006, the ISCAP voted to sustain the overall classification of SECRET on both

documents. By a letter dated 6 March 2006, appellant requested that we proceed to issue a decision without further declassification efforts on its part. Our opinion contains no classified information.

## FINDINGS OF FACT

In late June 1996, Mr. Chastain obtained a letter from a Venezuelan Army General, who was then the Chief of Staff for the Venezuelan Army, offering to assist Range obtain two RBS-70 surface-to-air anti-aircraft missile defense systems to be used for training purposes in the United States (app. supp. R4, tab 16). Range then informally offered to sell the two missile systems to MAJ Brad Stine, DIA Foreign Materiel Programs Section (app. supp. R4, tabs 15, 17). MAJ Stine was not a contracting officer (tr. 3/211). By a letter dated 9 August 1996, addressed to MAJ Stine, Range submitted an unsolicited proposal to supply two RBS-70 systems to DIA for $963,000.00. It planned to obtain the systems from the Venezuelan military. (App. supp. R4, tab 18; tr. 3/7-13, 118-19) Range then submitted details on how the delivery would be accomplished to MAJ Stine in letters dated 12 and 18 September 1996 (app. supp. R4, tab 21).

In connection with this proposal, LTG Patrick M. Hughes, who was then the Director, DIA, signed an End Use Certificate for two RBS-70 systems on 11 September 1996 affirming that the "United States Department of Defense is the end user of the . . . RBS-70 air defense systems [to be] delivered from the Ministry of Defense of Venezuela, through Range Technology Company. . . ." The equipment was to be accepted by the United States from Range at Base Aerea El Libertador in Maracay, Venezuela. (Supp. R4, tab 95; app. supp. R4, tab 19)

Department of Defense Directive No. 2040.3 defines an End Use Certificate as "a written agreement in connection with the transfer of military equipment or technical data to the United States that restricts the use or transfer of that [end] item by the United States" (app. supp. R4, tab 20, ¶ 3.1). LTG Hughes explained that an End Use Certificate assures suppliers that material will be used by the United States and that the United States will be responsible for its end use (tr. 2/7). Mr. Bewick, the contracting officer, and Mr. Foster, the COR, provided similar explanations (tr. 1/47, 95, 110, 158, 206, 211). None of these three individuals considered the End Use Certificate to be a contract for the purchase of the RBS-70 systems (tr. 1/48, 159, 2/7-8, 23). LTG Hughes did not intend the End Use Certificate to be a binding contract for the purchase of two systems (tr. 2/8). Further, during his tenure as Director, DIA, LTG Hughes did not serve as either the head of the DIA contracting activity or as a contracting officer (tr. 2/22-23).

After LTG Hughes executed the End Use Certificate, Mr. Foster gave it to the Venezuelan Colonel who was involved in the project at a meeting in

Washington, DC (tr. 1/158, 3/120). On 4 December 1996, a Venezuelan Air Force General wrote to LTG Hughes and signaled the willingness to provide two RBS-70 systems (app. supp. R4, tab 22; tr. 3/16-17).

Mr. Chris Hanson, Range's president, and Mr. Timothy D. Lacey, Range's chief operating officer, thought that the End Use Certificate was part of a DIA covert mission or operation to purchase two systems, one of which was intended for the Navy. They further thought that the End Use Certificate constituted an acceptance of an offer by the Venezuelan Army General to supply two systems and obligated DIA to purchase both. (Tr. 3/13-15, 20, 75-76, 85, 121-23, 149-50, 163-64)

*Contract Award*

On 21 February 1997, DIA issued Solicitation No. MDA908-97-R-0013 to Range for a firm-fixed price proposal to supply one RBS-70 surface-to-air anti-aircraft missile defense system. On 25 February 1997 Range submitted a proposal for just one system. (R4, tab 2; tr. 1/48, 3/20, 154) Fixed-price Contract No. MDA908-97-C-0016 for one system in the amount of $600,000.00 was awarded to Range using the Standard Form (SF) 1449 for commercial items on 10 March 1997. (R4, tab 1) *Range*, 04-1 BCA at 160,538.

Mr. Bewick used a FAR Part 12 commercial item contract because he wanted a "streamlined" contract. He thought that Range was "pretty unsophisticated" and that it would help Range obtain financing. He also thought that the system was a non-developmental item for which there was a "great arms market." (Tr. 1/128-29)

Mr. Hanson understood that the contract was for only one system because of what he thought were funding problems, but he always believed that the operation or mission was actually for two systems (tr. 3/20). To him, the contract had no meaning and was simply a "vehicle to move money around" (tr. 3/85). Mr. Lacey likewise acknowledged that the contract was for only one system (tr. 3/154). He characterized the contract as the overt aspect of the operation (tr. 3/128) and thought that it was "meaningless" because the End Use Certificate expressed the real intent of the operation (tr. 3/171). Mr. Chastain understood from Messrs. Hanson and Lacey that two systems were to be delivered and was certain that the Venezuelans always expected to deliver and to be paid for two systems (supp. R4, tab 84B at 88, tab 84D at 115).

Mr. Hanson expressed the view that Mr. Bewick was "extraneous" to the operation because DIA covert personnel, specifically Mr. Bardin, who was Range's principal contact, and Mr. Foster, to whom Mr. Bardin transmitted

information he obtained from Range, were the true sources of authority (tr. 3/91-92). Mr. Lacey described Mr. Bewick as a "bean counter" (tr. 3/171).

Mr. Foster had explained to appellant at the outset that he was not a contracting officer (tr. 1/160-61). Mr. Lacey, who had acknowledged receipt of Mr. Foster's designation as the COR, however, claimed not to have understood Mr. Foster's role as COR (R4, tab 3; tr. 3/156).

The contract contained an addendum that incorporated clause 52.999-4011, DELIVERY INSTRUCTIONS: FOB DESTINATION, which provided in relevant part in paragraph 2, Equipment Delivery, that "[t]he exact date and time [for delivery] is to be determined at the discretion of the US Government" (R4, tab 1 at 8). The intent was to have Range propose a delivery date, but because the government, including the United States Embassy in Venezuela, needed to coordinate delivery, the government retained the right to approve the exact day and time of the delivery (tr. 1/49, 2/86). Mr. Foster was responsible for the government's coordination of proposed delivery dates (tr. 1/208). Both Messrs. Hanson and Lacey acknowledged that the contract gave the government the discretion to approve delivery dates Range proposed (tr. 3/76, 155). Mr. Hanson expected that approval would come from either Mr. Foster or Mr. Bardin (tr. 3/25-26).

LTG Hughes explained that a "government-to-government" acquisition is one that is the subject of an official Memorandum of Agreement or Understanding between two governments (tr. 2/40). This project was not such an acquisition and was never changed to become one (tr. 2/41-42).

*Financing*

Range was not able to obtain contract financing and met with Mr. Bewick on 4 April 1997 to discuss the issue. By a letter dated 7 April 1997, Mr. Lacey requested a contract modification for partial payment of $330,000.00 that included $91,000.00 for the "first and second installments for downpayment [sic] on cost of goods" (R4, tab 6 at 1, 2, attach. A). In another letter dated 7 April 1997 sent to Mr. Bewick by fax, Range offered to apply a "factor of 1.5%," which reduced the total contract price to $591,000.00, in consideration of its partial payment request (R4, tab 7).

The offer was acceptable to the government and Modification No. P00001 was issued 8 April 1997, authorizing an advance payment of $330,000.00 and reducing the total contact price to $591,000.00. The modification incorporated a non-commercial item contract clause, FAR 52.232-12, ADVANCE PAYMENTS WITHOUT SPECIAL BANK ACCOUNT (JUL 1990)--ALTERNATE V (JUL 1990). In the event of a termination for a fault of the contractor, the clause provides in

subparagraph (h)(2) that the government may demand immediate repayment of unliquidated advance payments and may charge interest at the Treasury rate as provided in subparagraph (e)(3). (R4, tab 8)

*The Second System*

Also in April 1997, Mr. Lacey told Mr. Bardin that the Venezuelans had taken two RBS-70 systems from inventory and could not replace them. He asked Mr. Bardin whether the U.S. government could store the extra system until Range found another buyer. (Tr. 2/59-60) Mr. Darrell Neal was the representative of the Huntsville Missile Intelligence Center, the intended customer for the one system DIA had contracted with Range to supply. Mr. Neal expressed concern about Range's request in an email dated 28 April 1987, characterizing it as a "bad idea," but Mr. Foster attempted to persuade him that it was a necessary step. (R4, tab 9; tr. 1/163-64, 2/60-61)

In June 1997, the United States Embassy temporarily halted any delivery pending a Venezuelan military personnel rotation and the potential retirement of the Venezuelan Air Force General involved in the operation (R4, tabs 17, 18). *Range*, 04-1 BCA at 160,538. Also in June, the Navy's prior interest in obtaining a system resurfaced, together with possible funding (R4, tab 16; tr. 3/21). Mr. Foster contacted Range and solicited an offer for a second RBS-70 system that he told Range should be under $500,000.00 (tr. 3/21-22, 123-24).

By a letter dated 7 July 1997, Range offered to supply a second system for $495,000.00, and to ship it with the first system. The letter stated that the offer was "good until July 9, 1997" and inquired about whether the second system would be added to the existing contract. (R4, tab 20)

The second system was discussed at a meeting on 16 July 1997 during which Mr. Lacey again represented that the system could not be returned to the Venezuelan military's inventory and acknowledged his understanding that the government would not be obligated to purchase the second system if it agreed to store the system until an acceptable purchaser was located (R4, tab 23; tr. 1/59, 62-64, 66, 168-69, 171, 2/62-64). Mr. Lacey's representations were based upon information he claimed to have obtained from Mr. Chastain (tr. 3/166-68). The summary of a DIA/IG interview of Mr. Chastain conducted on 4 February 1999 under a grant of immunity from the Department of Justice, however, indicates that Mr. Chastain was not under the impression that the missiles had been written off the Venezuelan military's inventory, and that he did not communicate such information to either Mr. Hanson or Mr. Lacey (supp. R4, tab 84D at 118; tr. 2/204, 3/213-14).

The government eventually agreed to store the second RBS-70 missile system (tr. 1/66-67). Modification No. P00003 was executed on 18 July 1997 to "add a provision to the contract to store . . . residual material presented to the Government under this contract." The modification stated that the government would select one of the two RBS-70 systems to be delivered by Range and further that:

> . . . The Government will permit the contractor to temporarily store the remaining material at a Government-designated site on Redstone Arsenal, at no additional cost to the Government, for a period not to exceed 180 days from delivery providing the material has not been inspected and rejected. The parties agree the Government is under no obligation to purchase the remaining material, and it shall be removed from the facility by the end of the 180 day period at the contractor's expense.

(R4, tab 26)

Mr. Bewick explained that the modification was intended to formalize the agreement reached at the 16 July 1997 meeting (tr. 1/66-67). *Range*, 04-1 BCA at 160,539. Mr. Lacey, however, was of the opinion that the language regarding the lack of any obligation on the part of the Government to purchase the second system was "meaningless" and he signed the modification "[j]ust to move on with the project" (tr. 3/127, 172). Mr. Hanson thought it was a "CYA kind of thing" and commented that Range had signed "a bucketful of these things" (tr. 3/93).

Modification No. P00004 was executed on 23 July 1997 for the purpose of relieving the government "of any and all liability for contractor stored equipment and to limit final disposition of the stored equipment." It provided in relevant part:

> . . . The contractor agrees to hold the US Government harmless for any damage to or loss of the equipment. The contractor must prove to the Government's satisfaction that sale and/or disposition of the remaining material is to a source approved by the US Government.

(R4, tab 28) Mr. Lacey again signed the modification to "continue with the project" (tr. 3/130).

Mr. Lacey was responsible for arranging air transportation of the equipment from Venezuela to the United States and contacted Matrix International Logistics, Inc. (Matrix), a freight forwarding company (tr. 3/176). The first contact between Range and Matrix took place on 17 July 1997 (supp. R4, tab 88 at 168; tr. 3/51). A Certificate of Competent Authority issued by the Department of Transportation (DOT) to cargo carriers is required to transport hazardous material into the United States (tr. 1/174, 2/179). The air cargo carrier, the period of validity, and the pick-up and destination points are specified, although the latter apparently can be verbally changed fairly quickly (tr. 1/176-77, 2/180). Once the shipper has a Certificate of Competent Authority, approximately three to seven days are needed to arrange the flight details (tr. 3/57). Mr. Foster obtained DOT Certificates of Competent Authority for Range (supp. R4, tabs 89 through 91; tr. 1/176).

There was some evidence that Range proposed a delivery for either 23 or 27 July 1997 (R4, tab 32; supp. R4, tab 84B at 78; tr. 2/197-200). The record indicates, however, that Range had not made any actual arrangements with Matrix for air transportation at the time and there is no evidence that DOT had issued the necessary Certificate of Competent Authority (supp. R4, tabs 82, 89 through 91; tr. 2/181-83, 3/51-53). In any event, on 25 July 1997, Mr. Lacey advised Matrix that "shipping these items has been delayed a few weeks" (supp. R4, tab 88 at 188). It also appears that there may have been a problem associated with Mr. Chastain, who was trying to obtain a visa for a Venezuelan technician to accompany the delivery (R4, tab 29; supp. R4, tab 84B at 78-80).

*Second Advance Payment to Range*

On 25 July 1997, Range submitted an invoice of itemized expenses incurred totaling $205,000.00. The itemization includes an entry of $150,000.00 for "Payment on cost of goods." (R4, tab 30) This same $150,000.00 entry was included in a revised invoice submitted to the government on 4 August 1997 in the amount of $203,200.00 (R4, tab 33). Mr. Lacey told Mr. Bewick that the $150,000.00 was the amount paid for the RBS-70 system (tr. 1/69).

Also in July 1997, the United States Ambassador to Venezuela, Mr. John F. Maisto, attended a meeting at DIA headquarters at which the contract was discussed. Mr. Carpenter, who would become the Chief, Foreign Material Division in October 1997, also attended the meeting. An excerpt from the DIA/IG's summary of its interview with Mr. Carpenter in the summer of 1998 reflects that there was discussion at the meeting about whether the acquisition was "institution to institution," but not what it meant. (App. supp. R4, tab 8 at 844) Mr. Carpenter explained that, at the time, he thought that the senior Venezuelan military members representing their government had made known to the United

States Government that they could deliver the equipment, using a contractor as the intermediary (tr. 2/124-26).

On 21 August 1997, the parties executed Modification No. P00005 which included authorization for a second advance payment, this time in the amount of $203,200.00 (R4, tab 34). Mr. Bewick was against giving Range the second advance payment, but was out of the office on leave when the payment was made (tr. 1/69-70). Modification No. P00005, like Modification No. P00001, incorporated the non-commercial item contract advance payment clause, FAR 52.232-12, Alternate V (R4, tab 34).

*Continued Delivery Efforts*

On 29 August 1997, DOT issued a Certificate of Competent Authority (CA)-9708019 to an air cargo carrier named Amerijet International, Inc. (Amerijet) to fly one shipment of cargo from Caracas, Venezuela to Redstone Arsenal, AL. It was valid until 30 September 1997. (Supp. R4, tab 89) On 10 September 1997, DOT extended the Certificate of Competent Authority to 31 December 1997 (supp. R4, tab 90).

There is conflicting evidence in the record as to whether Range proposed a delivery on 31 August/1 September 1997 and, if so, why it was delayed (R4, tab 35; supp. R4, tab 84D at 115). However, the record does reflect a proposed delivery on 13 September 1997 was unacceptable to the United States Embassy because it was too close to a planned visit by President Bill Clinton (R4, tab 35). *Range,* 04-1 BCA at 160,540.

It also appears that a delivery date was proposed in October 1997. On 8 October 1997, Mr. Lacey executed a contract with Matrix for a proposed charter date of 17 October 1997 from Margarita Island, Venezuela to Redstone Arsenal, AL (supp. R4, tab 82 at 30-32). Matrix advanced $60,000.00 to a broker, Tailwind International (Tailwind), to supply an aircraft from Amerijet for this delivery (supp. R4, tab 82 at 36, tab 93; tr. 3/54-55). This was the only firm contract between Matrix and Range (tr. 3/55). The planned delivery for 17 (or possibly 19) October 1997 was apparently cancelled by the United States Embassy because of a regional conference to be attended by Fidel Castro, among others (R4, tabs 37, 39; supp. R4, tab 84D at 117). Range did not reimburse Matrix for the $60,000.00 it had advanced (tr. 3/57-58).

Mr. Bewick considered the actions by the United States Embassy with respect to the proposed delivery dates to be within the contract delivery approval provisions (tr. 1/134-35). Mr. Hanson agreed that delivery should not be made on the day of President Clinton's visit or when there were meetings with Fidel Castro,

but questioned the length of the delivery restrictions (tr. 3/78-79). Mr. Lacey thought it was an abuse of discretion to restrict delivery due to the President's visit or the Castro meetings (tr. 3/174).

On 18 October 1997, preliminary arrangements were made by Tailwind to charter an aircraft from Kitty Hawk Charters, Inc. (Kitty Hawk) for the same departure and arrival locations (supp. R4, tab 92). On 28 October 1997, DOT issued a Certificate of Competent Authority CA-9710017 to Kitty Hawk to transport one shipment of cargo from Margarita Island to Redstone Arsenal not later than 31 December 1997 (supp. R4, tab 91). The evidence was conflicting as to whether a 1 November 1997 delivery was scheduled, but the Kitty Hawk Charter Worksheet for the relevant period indicates that a flight scheduled for 1 November 1997 was cancelled by Tailwind when it was delayed to 8 November 1997 because Kitty Hawk did not have an aircraft available (supp. R4, tab 84D at 119, tab 87 at 136, 142, 145). The record has no reliable evidence as to the reason for the cancellation.

*Meetings on 8-9 November 1997*

On 8-9 November 1997, Mr. Chastain brought the Venezuelan Colonel to Northern Virginia to meet with Messrs. Lacey, Bardin and Foster in order to get the project "back on track" (exs. G-1, -2; tr. 1/178-79, 2/66-67). Mr. Carpenter did not attend the meetings (tr. 2/123-24). After the meetings took place, Messrs. Foster and Bardin wrote a "CONTACT REPORT" detailing what had occurred (exs. G-1, -2; tr. 1/180-81, 2/66).

The Colonel was the representative of the Venezuelan Air Force General who was at the center of the project and explained that only he and the General had knowledge of all of the details of the project (supp. R4, tab 84D at 119; ex. G-2; tr. 2/68). At the time, the missiles apparently were at a secured Venezuelan military inventory storage site in Caracas, Venezuela (tr. 1/183, 2/67-68). The Colonel explained that the shipment would have to be delayed until mid-December because technicians from Bofors Defense, the missile manufacturer, were in Venezuela to upgrade all of its RBS-70 systems by adding a thermal site and provide related training (supp. R4, tab 84B at 81, 119; ex. G-2; tr. 1/183-84). We find on the basis of the preponderance of the evidence that the Colonel would not commit to a specific delivery date until he conferred with the General after returning to Venezuela the following week (supp. R4, tab 84B at 82; tr. 1/185, 212-13, 2/68-69, 88-89).

At the time of the meeting, as extended by bilateral Contract Modification Nos. P00002, P00003, and P00005 through P00007, delivery was to be made by 16 November 1997 (R4, tabs 15, 26, 34, 36, 38).

*Further Delivery Date Extension*

Mr. Bewick's memorandum of a 12 November 1997 telephone conference with Mr. Lacey states in relevant part:

> 3. We spoke about extending the delivery date. Mr. Lacey recommended extending the delivery date until January. He said he would advise of a more certain date for mid-Dec in the coming days. I told him we would draft a mod to extend the contract through the end of Dec.

(R4, tab 42; tr. 1/72-74) Mr. Lacey recalled that Range was supposed to pick a day within a range of days in December suggested by the Colonel during the 8-9 November 1997 meeting, but on cross-examination conceded that his recollection was inconsistent with the notes of his telephone conversation with Mr. Bewick (tr. 3/133, 191). We find that both his recollection and the memorandum of the telephone conference are also inconsistent with his later testimony that the government, not Range, was supposed to pick a day within the range proposed by the Colonel (tr. 3/137-38).

The conversation between Mr. Bewick and Mr. Lacey was precipitated by a letter written by Mr. Hanson on 10 November 1997. The letter requested a final contract payment of $58,000.00 and an additional $80,000.00 to charter an aircraft to transport the systems and asserted that Range had "encountered barriers to the performance" due to disagreements between DIA and United States Embassy personnel. It alleged that embassy personnel had "continually and actively opposed this project" and "interfered with [its] planning and movement of equipment; and [had] actively tried to stop the project in myriad ways [sic]." (R4, tab 41) Mr. Bewick inquired about Range's allegations, but was unable to substantiate them (tr. 1/71-72). Mr. Foster was also unable to substantiate the alleged interference by the embassy and recalled that Range had been instructed "from the very beginning" to stay away from the embassy (tr. 1/186-87).

On 24 November 1997, in both a telephone conversation and by letter, Mr. Bewick advised Mr. Hanson that his payment request was denied (R4, tabs 45, 46). Mr. Bewick's letter noted that the contract balance was $57,800.00 (not $58,000.00) and that Range had "not given a full accounting of the funds advanced to date nor has it provided an explanation of how it intends to use a further advance payment" (R4, tab 46). He, nevertheless, expressed a willingness to discuss an increase of $9,000.00 in the shipping expenses (R4, tab 45). Mr. Hanson indicated he would contact the supplier and the carrier to inquire

about delivery without advance payment (*id.*). If he did so, he did not relay the response to Mr. Bewick (tr. 1/77).

The government did agree to Range's request for a delivery time extension and also on 24 November 1997, the parties executed bilateral Modification No. P00008, extending the date by which delivery was to be made to 31 December 1997 (R4, tab 40). During the November 1997 time period, LTG Hughes began to express interest in the acquisition because of all the problems that had been encountered (tr. 1/216-18). The significant documents and correspondence relating to it were provided to him by Mr. Carpenter and BG Robert A. Harding, DIA Director of Operations (app. supp. R4, tab 8 at 845; tr. 2/113, 118).

*The Cure and Show Cause Notices*

On 22 December 1997, Mr. Foster and another DIA officer, Mr. Richard Tisdell, met with Mr. Lacey in Columbus, Ohio to evaluate whether the mission should continue (tr. 1/188). Mr. Lacey was concerned that Mr. Chastain had become a problem and relayed his understanding, obtained from Mr. Chastain that the Venezuelan Air Force General had become "bullheaded" and was refusing to deliver the equipment (tr. 1/188-91). Mr. Lacey also expressed reservations about whether Range could complete the operation and whether it could account for and recover the funds advanced by the government (tr. 1/219). He believed that Mr. Chastain was the cause of the delivery problems (tr. 3/192-93). (R4, tab 48; ex. G-3)

On 23 December 1997, Mr. Bewick issued a cure notice based upon Range's failure to "nominate delivery dates," advising that the government was considering termination for cause under FAR 52.212-4(m) (R4, tab 47). He was of the view that Range was not "making satisfactory progress on the contract" (tr. 1/78-79) and was referring to nomination of a delivery date prior to 31 December 1997 (tr. 3/214-15). Range did not propose any delivery dates in December, either before or after issuance of the cure notice (tr. 1/71, 146, 2/70, 3/215).

In a letter dated 29 December 1997, addressed to Mr. Bardin with a copy to Mr. Bewick, Mr. Hanson blamed United States Embassy personnel, the Venezuelan Air Force General and Mr. Chastain equally for the "situation" and advised that Range had directed Mr. Chastain to take no further action on the project and to return to the United States. He also advised that Range could not determine whether the Venezuelan Air Force General had actually received the down payment money or whether he had taken the cash and decided not to deliver the equipment. He recommended that DIA meet with the Venezuelan General and Colonel. (R4, tab 49)

The following day, Mr. Bewick met with BG Harding, Mr. Foster and other government personnel to discuss Mr. Hanson's letter (R4, tab 51). Mr. Bewick recommended that the contract be "cancelled" (app. supp. R4, tab 10 at 10). It was agreed that Range's assertions of government interference were unsubstantiated and that a show cause letter should be issued giving Range 16 days, due to the holidays, to respond (R4, tab 51; tr. 1/80-82). The show cause letter was issued 31 December 1997. It stated that the government was considering terminating the contract for default and whether it was in the government's best interest to extend contract performance. The letter advised that, while Range's allegations of United States Embassy personnel interference had not been substantiated and there were insufficient details to support Mr. Lacey's statement that the supplier would be available in January for a meeting, Range had 16 days to provide any facts bearing on the question of future delivery. (R4, tab 52)

Mr. Hanson responded to the show cause letter on 8 and 9 January 1998. His letters did not address the concerns raised in the show cause letter, but rather requested an explanation about why DIA had implied to Mr. Chastain that he was in danger and should leave Venezuela. Additionally, Mr. Chastain had expressed to Mr. Hanson the view that DIA was attempting to obtain the equipment without Range's assistance and Mr. Hanson also wanted information about contacts DIA might be having with the suppliers and what Range's future role and compensation would be. (R4, tabs 53, 54)

*The 5 January 1998 Meeting*

The evidence relating to DIA's belief that Mr. Chastain should leave Venezuela is associated with a meeting on 5 January 1998 that he had with the Venezuelan Army General who was the new Chief of Staff. Mr. Chastain had decided to visit the General to enlist his help in obtaining the missile systems and requested a meeting with him, apparently with the approval of Messrs. Hanson and Lacey. (Supp. R4, tab 84A at 61; tr. 3/109) Mr. Foster did not authorize the meeting and thought that it was a bad idea because he was under the impression the Venezuelan Army General did not know about the proposed sale (tr. 1/192-96). Neither Mr. Bardin nor Mr. Bewick had knowledge of the meeting and neither approved it (tr. 1/83-84, 2/72-73).

COL Sergio De la Pena was the United States Army Attache to the United States Embassy in Venezuela at the time (tr. 2/129-30). On 5 January 1998, he received a telephone call from the Venezuelan Army General inquiring about why Mr. Chastain wanted to meet with him. COL De la Pena had just learned that the General had also requested to speak to LTG Hughes by telephone.

He asked to be present during the telephone call and was invited to the General's office. COL De la Pena did not see Mr. Chastain. (Tr. 2/136-40) The General telephoned LTG Hughes and inquired about the End Use Certificate and Mr. Chastain's status and conduct (tr. 2/141-43). LTG Hughes told him that Mr. Chastain was not a representative of DIA and did not have authority to speak on behalf of him or DIA (tr. 2/9). He nevertheless assured the General that, if the missiles were shipped from Venezuela, they would come to the United States for its use (tr. 2/10).

After the telephone conversation with LTG Hughes, the Venezuelan Army General made comments that COL De la Pena reasonably considered to be threatening to Mr. Chastain (tr. 2/141-44). COL De la Pena documented the events of the day in a contemporaneous memorandum (supp. R4, tab 97). Because of these events, Mr. Foster called Mr. Hanson and urged him to tell Mr. Chastain to leave Venezuela for his personal safety (tr. 1/197, 2/146). At the hearing, Mr. Hanson agreed that if COL De la Pena's account of the day's events was correct, he could understand why DIA had asked him to encourage Mr. Chastain to leave the country (tr. 3/112-13). COL De la Pena thought that the Venezuelan Army General was not aware of the RBS-70 project before his meeting with Mr. Chastain and felt that Mr. Chastain had introduced "a lot of unnecessary turbulence into a very good relationship that [the United States] had with the Venezuelan military" (tr. 2/157-58).

LTG Hughes did not authorize Mr. Chastain's visit and considered it to be a "disruptive kind of activity" (tr. 2/11-12). On 7 January 1998, he sent a memorandum to the Secretary and Deputy Secretary of Defense regarding the incident and advising that the contract had "expired" on 31 December 1997 and that DIA "expect[ed] to notify [Range] of its default and [DIA's] intent to recover [the] funds advanced" (app. supp. R4, tab 3; tr. 2/19-21). There had been no disagreement voiced to him and it was his impression that everyone within DIA held the same view about Range's non-performance of the contract (tr. 2/23-26).

On 9 January 1998, COL De La Pena and the United States Defense Attache, Navy CPT Richard E. Davis, met with the Venezuelan Army General in an attempt to smooth over the events of 5 January 1998, during which CPT Davis represented that DIA no longer had a relationship with Range. (App. supp. R4, tab 1 at 296, tab 14 at 692) By a hand-written note dated 10 January 1998, LTG Hughes directed a "full-blown" IG investigation of the contract because he thought there was a serious problem that needed to be corrected (app. supp. R4, tab 2; tr. 2/16-18).

On 12 January 1998, Mr. Bewick had separate telephone conversations, first with Mr. Lacey and then with Mr. Hanson. He told both men that Range

needed to substantiate its reasons for nonperformance and that he was thinking about terminating the contract and proceeding on that path. (R4, tab 55; tr. 1/85-86) In a 13 January 1998 telephone conversation, Mr. Lacey told Mr. Bardin that it was still possible that the systems could be delivered if there was a personal meeting with the Venezuelan Army General (app. supp. R4, tab 1 at 299). Also in a telephone conversation on 13 January 1998, LTG Hughes explained to Ambassador Maisto that DIA had nothing to do with Mr. Chastain's visit to the Venezuelan Army General and that "DIA would no longer be involved in any clandestine acquisitions in Venezuela" and would "get out of [his] hair" and consult on any covert action. The Ambassador's notes indicate that he agreed with LTG Hughes' decision to "shut down the entire operation." (App. supp. R4, tab 1 at 299-300) LTG Hughes was not examined about this conversation.

*The Termination for Default*

By a letter dated 15 January 1998, Mr. Bewick responded to Range's 29 December 1997, and 8 and 9 January 1998 letters. He explained that DIA's suggestion that Mr. Chastain leave Venezuela was based upon information obtained from the Department of State, that Mr. Chastain's involvement had been "disruptive and that he was likely to be detained or arrested if he remained" and that DIA's contacts with the suppliers had consisted only of discussions regarding Mr. Chastain's relationship with DIA and his business in Venezuela resulting from Mr. Chastain's 5 January 1998 visit to the Venezuelan Army General. He directed Range to "take no further action under this contract in Venezuela without prior discussion of the proposed action and specific approval of such action by" DIA. (R4, tab 58)

Mr. Hanson responded on 19 January 1998 with a description of events that it appears took place on 5 January 1998, and not after Mr. Chastain was encouraged to leave Venezuela as the letter suggested. Mr. Hanson's representation that Mr. Chastain arranged the telephone call with LTG Hughes and the Venezuelan Army General and that Range informed DIA about the telephone call in advance is contrary to our findings of fact. In any event, Mr. Hanson expressed the view that delivery could still be arranged if a DIA field officer met with the General. (R4, tab 59) The following day, Mr. Lacey similarly told Mr. Bewick that the delivery was still possible if DIA would meet with the supplier, but Mr. Bewick responded that the contract was being terminated (R4, tab 60; tr. 1/90).

On 22 January 1998, Mr. Lacey told Mr. Bardin that Mr. Chastain had told him after talking with the Venezuelan Colonel that there was still interest in supplying the missile systems and that the Colonel had attempted to contact Mr. Bardin. Several telephone messages were left for Mr. Bardin that day which

DIA personnel believed were from the Venezuelan Colonel, at least one of which apparently included Mr. Chastain, during which the Colonel indicated an interest in pursuing the delivery, so long as Mr. Chastain was involved and an additional commission provided. (R4, tab 63; app. supp. R4, tab 1 at 303) At the time, DIA was proceeding with the termination and was concerned that Range was still engaged in "some low-level activities" relating to the contract (R4, tab 62).

There are two notations in the DIA/IG and DCIS report regarding a telephone conversation between Mr. Lacey and, it appears, Mr. Bardin on 26 January 1998 during which Mr. Lacey suggested that someone from DIA call the Venezuelan Colonel because they were ready for delivery and shipping arrangements were needed. Mr. Bardin told Mr. Lacey that Mr. Bewick had issued a letter directing Range to take no further action. During the conversation, Mr. Bardin seemingly indicated that the government would probably accept a shipment even if it was made against the contracting officer's direction because the government had already paid for the missile, but also cautioned that Range was to take no action to cause that to happen. (App. supp. R4, tab 1 at 304-05) There was no testimony about this conversation at the hearing.

Also on 26 January 1998, Mr. Bewick expressed "serious concerns" about proceeding with the contract to Mr. Carpenter and questioned whether Range was capable of performing. Mr. Carpenter responded that LTG Hughes was "providing the day-to-day direction" for the project and proposed a meeting to discuss options (app. supp. R4, tab 1 at 304). The following day, 27 January 1998, Mr. Bewick met with BG Harding and others from the DIA Program Office to reach consensus on his proposal to terminate for a recommendation for LTG Hughes. (R4, tab 66) He did not know whether the DIA leadership supported termination, but he was aware that oversight committees would have to be informed of the termination and he wanted to let LTG Hughes know what was happening (tr. 1/92-94). It was agreed that Mr. Lacey should be given one last opportunity to explain the circumstances and Mr. Foster was directed to call him (R4, tab 66; tr. 1/92). Meanwhile, there were some residual discussions about whether direct communications between LTG Hughes and the Venezuelan military principals could produce delivery of the system (app. supp. R4, tab 1 at 304-05).

By a letter dated 30 January 1998, Mr. Bewick terminated the contract for default for failure to make delivery by 31 December 1997 with reference to an appeal under the commercial item disputes clause contained in FAR 52.212-4. The termination letter stated that the government was entitled to return of advance payments in the amount of $533,140.00 ($60.00 less than the total amount advanced), but did not make a specific demand for payment. (R4, tab 67) *Range*,

04-1 BCA at 160,541. Nobody at DIA, and in particular neither LTG Hughes nor BG Harding, directed him to terminate the contract (tr. 1/86, 92, 94).

DIA did not receive any RBS-70 missile systems from Range and has not been reimbursed for either the first advance payment of $330,000.00 or the second advance payment of $203,200.00, a total of $533,200.00 (tr. 1/54, 70).

*Subsequent Proceedings*

On 30 September 1998, Range submitted a claim to the contracting officer seeking to convert the termination for default into one for convenience of the government and to have the contract constructively changed to require delivery of two systems. Range also sought an equitable adjustment of $1,270,549.00, less a deduction of $533,140.00 for government advances. (R4, tab 75) In a final decision dated 18 December 1998, the contracting officer denied appellant's claim in its entirety and made a formal demand for payment of $533,140.00 (R4, tab 79). An appeal was docketed on 4 January 1999. Thereafter, ASBCA No. 51943 was assigned to the appeal from the termination for default, ASBCA No. 54340 was assigned to appellant's affirmative claim, and ASBCA No. 54341 was assigned to the appeal from the government's claim for refund of advance payments. *Range*, 04-1 BCA at 160,542.

We denied the government's motion to dismiss ASBCA No. 51943, finding detrimental reliance on the defective and confusing notice of appeal rights provided by the government in connection with the 30 January 1998 termination letter under *Decker & Company v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996). *Range*, 04-1 BCA at 160,543.

## DISCUSSION

*ASBCA No. 51943 – Termination for Default*

The parties disagree about whether this was a commercial items contract. The disagreement arises in connection with the potential difference in recovery of termination for convenience damages under FAR Parts 12 and 49. With respect to Range's challenge to the default termination itself, however, there is no substantive difference between the applicable provisions of FAR 52.212-4, CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (AUG 1996) and FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984).

FAR 52.212-4 provides in pertinent part:

> (f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . .
>
> . . . .
>
> (m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. . . . If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

FAR 52.249-8 similarly provides in relevant part:

> (a) (1) The Government may, subject to paragraph[] (c) . . . below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contactor fails to –
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); . . .
>
> . . . .
>
> (2) The Government's right to terminate this contract under subdivision[ ] (1)(ii) . . . above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.
>
> . . . .

> (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. . . .
>
> . . . .
>
> (g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

Under either clause, the government has the burden of proving that its default termination for Range's failure to deliver the equipment was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). We previously concluded that Range's allegations of government-caused delay prior to 24 November 1997 were barred by six bilateral contract modifications (Modification Nos. P00002, P00003, and P00005 through P00008) extending the time for delivery, all of which contained releases/waivers. *Range*, 04-1 BCA at 160,548-49. Bilateral Modification No. P00008 extended the time for delivery to 31 December 1997, but Range again did not make delivery. The government, therefore, has carried the initial burden of proof by showing that Range did not comply with the contract terms and did not make delivery within the specified time.

The burden thus shifts to Range to show that its nonperformance was due to excusable causes beyond its control and without its fault or negligence. *See KSC-TRI Systems, USA, Inc.*, ASBCA No. 54638, 06-1 BCA ¶ 33,145 at 164,260 (applying FAR 52.212-4); *Kamp Systems, Inc.*, ASBCA No. 54192, 03-2 BCA ¶ 32,412 at 160,438 (applying FAR 52.249-8).

Central both to Range's challenge to the government's default termination and to its affirmative claim is its contention that the government delayed contract performance after 30 November 1997. Range argues that the government failed to provide approval of a proposed December 1997 delivery date, thereby breaching its duty to cooperate and not interfere with or hinder Range's performance, and that there was no concurrent delay. Additionally, as to the termination, Range contends that the contracting officer did not exercise discretion, but was merely complying with higher orders, and that the government waived its right to terminate.

*The Government Did Not Delay Performance*

The parties agree that contract clause 52.999-4011, DELIVERY INSTRUCTIONS: FOB DESTINATION required Range to obtain approval from the government of proposed delivery dates. Range asserts that the Venezuelan Colonel proposed a delivery date in mid-December 1997 (apparently alleged to be 13 December 1997) during the meetings that took place on 8-9 November 1997 in Northern Virginia. It further asserts that the government failed to provide the required approval. The evidence does not support its contentions.

As we found, the Colonel explained during the 8-9 November 1997 meetings that the shipment would have to be delayed until mid-December because all of the Venezuelan RBS-70 missile systems were being upgraded by the manufacturer. The overwhelming preponderance of the evidence relating to that meeting supports the conclusion that the Colonel would not commit to a specific delivery date until he returned to Venezuela and conferred with the Venezuelan Air Force General. The attempts by Range in its post-hearing brief to cast doubt upon the credibility of Messrs. Bardin and Foster on this issue and the contemporaneous "CONTACT REPORT" of the meetings with the Venezuelan Colonel that they prepared are without factual support (app. br. at 68-70). And, its reliance upon an excerpt from the summary of Mr. Carpenter's interview is without evidentiary value because he did not attend the meeting. Mr. Bewick's memorandum of his subsequent 12 November 1997 telephone conference with Mr. Lacey reflecting that Mr. Lacey would advise him of a "more certain date for mid-Dec" further dispels any notion that a firm delivery date was proposed for government approval.

Moreover, if a December delivery date had been proposed, the alleged failure of the government to approve such a date seemingly would have been discussed during the 22 December 1997 meeting in Columbus, Ohio. And, if not discussed then, it surely would have been addressed in Range's 29 December 1997, and 8 and 9 January 1998 responses to the contracting officer's 23 December 1997 cure notice, which was based upon Range's failure to "nominate delivery dates," and his 31 December 1997 show cause. Yet, there is no such evidence. Similarly, there is no evidence that the government's alleged failure to approve a mid-December delivery date was raised by Range in subsequent telephone conversations with Mr. Bewick on 12 January 1998 during which Mr. Bewick again advised both Messrs. Hanson and Lacey of the need for Range to substantiate reasons for its nonperformance.

Range also suggests that a 27 January 1998 delivery was proposed. This suggestion appears to be based upon the telephone messages left for Mr. Bardin by

the Venezuelan Colonel on 22 January 1998, and a representation by Mr. Lacey, also to Mr. Bardin, on 26 January 1988 that they were ready for delivery and that shipping arrangements needed to be made (app. br. at 70, 89). This evidence is wholly insufficient to establish a proposed delivery for 27 January 1998. First, the 22 January 1998 telephone messages make no reference to any particular delivery date and are probably best characterized as seeking additional commissions with Mr. Chastain's participation for some possible further delivery. Next, Mr. Lacey's representation, based solely upon excerpts from the DIA/IG and DSIC report, was made the day before the alleged delivery proposal, leaving no possible opportunity for necessary shipment approvals and coordination. There are no other corroborative facts to support the alleged proposed 27 January 1998 delivery date.

We conclude that the government did not delay contract performance. Concurrent delay, therefore, is not an issue we must decide. In summary, Range's failure to deliver was not excusable or without its fault or negligence.

*The Contracting Office Exercised Independent Discretion*

Range's next contention is that the contracting officer failed to exercise his discretion because he was improperly influenced by others in DIA, in particular BG Harding and LTG Hughes (app. br. at 72-75). The applicable law provides that a contracting officer's decision is not valid if it was issued at the direction of a superior and was not based upon his or her own independent judgment. *See Inter-Continental Equipment, Inc.*, ASBCA No. 36807, 94-2 BCA ¶ 26,708 at 132,863, *recons. denied*, 94-3 BCA ¶ 27,005; *Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863 at 162,847, *aff'd on recons.*, 05-2 BCA ¶ 33,088. The facts in these appeals do not support such a legal conclusion.

Mr. Bewick issued the cure notice on 23 December 1997. After receiving Mr. Hanson's response, Mr. Bewick reasonably conferred with other DIA personnel, including BG Harding, on 30 December 1997 to discuss Range's response to the cure notice and consider DIA's options. He then issued a show cause letter on 31 December 1997. There is no evidence that a termination decision had been made by BG Harding as Range contends, or anybody else at DIA, at this time.

LTG Hughes had become interested in the project in the fall of 1997 and, as reflected in the record evidence, he had more day-to-day involvement in the operational aspects of the project during January 1998. Specifically, he informed the Secretary and Deputy Secretary of Defense on 7 January 1998 that DIA intended to inform Range that it was in default and that the government would

seek to recover the funds advanced and subsequently advised Ambassador Maisto that DIA would discontinue activities such as those undertaken with Range.

LTG Hughes' actions were taken in an agency administrative capacity as the Director of DIA and not, as Range contends, as DIA's senior procurement executive. The regulations Range cites to support its contention, FAR 1.601 and DFARS 202.101, simply provide for the establishment of contracting activities. Moreover, as LTG Hughes made clear in his testimony, he did not serve either as the head of DIA's contracting activity or as a contracting officer. In this regard, we are not persuaded that there is evidentiary record support for Mr. Carpenter's comment that LTG Hughes was providing "day-to-day direction" of the project, and in particular the contractual aspects of it.

On 20 January 1998, Mr. Bewick advised Mr. Lacey during a telephone conversation that the contract was being terminated. On 27 January 1998, Mr. Bewick again reasonably met with BG Harding and other DIA personnel to reach consensus on his proposed termination for a recommendation for LTG Hughes because oversight committees would have to be informed of a termination decision. Following discussion, it was agreed that Mr. Lacey be given one last opportunity to explain the circumstances. On 30 January 1998, Mr. Bewick terminated the contract for default. There is absolutely no evidence that any superior instructed him to take this action. To the contrary, Mr. Bewick testified that neither BG Harding nor LTG Hughes instructed him on what to do insofar as the termination was concerned and the evidence established that there was agreement within DIA regarding Range's failure to perform. The fact that there was agency input into the contracting officer's termination decision has no impact upon the legal validity of the decision. *See Nuclear Research Corp.*, ASBCA Nos. 28641, 28979, 86-2 BCA ¶ 18,953, *aff'd*, 814 F.2d 647, 650 (Fed. Cir. 1987).

Finally, while Range made reference to *Darwin Construction Co. v. United States*, 811 F.2d 593 (Fed. Cir. 1987), in passing in its post-hearing brief, it did not contend that there was any abuse of discretion on the part of the contracting officer for failure to consider the factors set forth in FAR 49.402-3(f). We infer that this is because Range has asserted that FAR Part 12 and not FAR Part 49 is applicable. Absent any contention regarding such an alleged abuse of discretion, we have no reason to address the issue.

*The Government Did Not Waive Its Right to Terminate*

As to its waiver argument, Range must show two elements: (1) that the government failed to terminate within a reasonable time after the default under circumstances indicating forbearance; and (2) that Range relied upon the failure to

terminate and continued performance with the government's knowledge and implied or express consent. *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969). Reasonable government delay in terminating does not constitute forbearance if the government has not encouraged performance. *H. N. Bailey & Associates v. United States*, 449 F.2d 376, 383-85 (Ct. Cl. 1971).

The government did not immediately terminate the contract when delivery was not made by 31 December 1997. Instead, following a meeting of DIA personnel, Mr. Bewick issued a show cause notice giving Range 16 days within which to reply in order to evaluate whether to extend contract performance.

On 12 January 1998, Mr. Bewick spoke to both Messrs. Hanson and Lacey regarding the show cause, told them that he was thinking about termination and was proceeding on that path and again asked them to substantiate Range's reasons for nonperformance. On 15 January 1998, Mr. Bewick directed Range to "take no further action under this contract in Venezuela without prior discussion of the proposed action and specific approval of such action by" DIA. After Mr. Hanson and Mr. Lacey both suggested that a delivery could possibly be arranged through the Venezuelan Army General if he could meet with DIA, Mr. Bewick told Mr. Lacey that the contract was being terminated.

On 22 January 1998, the Venezuelan Colonel left a series of telephone messages for Mr. Bardin asking that an additional commission be sent to secure a potential future delivery and that Mr. Chastain be involved. On 26 January 1998, when Mr. Lacey told Mr. Bardin that the Colonel had advised him that they were ready and that shipping arrangements needed to be made, Mr. Lacey was again told to take no further action on behalf of the government. The contract was terminated on 30 January 1998.

The only conclusion that can be reached from these facts is that the government did not delay unreasonably in terminating the contract under circumstances indicating forbearance. Contrary to Range's contentions, the show cause letter was not a letter of encouragement. Nor was Mr. Bewick's 15 January 1998 letter directing Range to take no further action in any way similar to the delivery approval requirements of the contract. Finally, in context, the comment made by Mr. Bardin on 26 January 1998 regarding possible acceptance of delivery cannot be construed to have been made to encourage continued performance inasmuch as it was made in conjunction with yet another reminder that Range was not to take any further action on behalf of the government.

The additional activities undertaken by Range on the contract after the show cause letter was issued were not based upon any justifiable reliance on the government's failure to immediately terminate or with the government's

knowledge and express or implied consent. Further, the government did not encourage performance after the delivery period expired. Mr. Chastain met with the Venezuelan Army General on 5 January 1998 without DIA's knowledge, encouragement or authorization. Indeed, the government considered Mr. Chastain's visit to be both dangerous to him personally and disruptive to the project. The telephone calls on 22 January 1998 from the Venezuelan Colonel were totally unsolicited by the government, as was the telephone call from Mr. Lacey on 26 January 1998 urging DIA to contact the Colonel.

The government's short delay in terminating the contract was not unreasonable under the circumstances. There was no waiver on the part of the government of its right to terminate the contract for default for failure to make delivery by 31 December 1997.

In sum, we conclude that the government did not delay performance of the contract either after 24 November 1997, when Modification No. P00008 was issued, or after 30 November 1997, as Range contends. The contracting officer exercised independent discretion in deciding to terminate the contract and the government did not waive its right to terminate after Range failed to make delivery by 31 December 1997. Thus, the government's contention that Range did not have the capability to deliver the missiles is of no consequence. We nevertheless note that there was a lack of evidence supporting the existence of any transportation arrangements made by Range during December 1997, either with Matrix, or any other freight forwarding company, to arrange with a shipper such as Tailwind to supply an aircraft from either Amerijet or Kitty Hawk. There also is no evidence to support the possibility that arrangements could have been made for a shipment on 27 January 1998.

Accordingly, Range's challenge to the default termination in ASBCA No. 51943 must be denied. Our conclusion regarding the termination for default dispenses with the need to resolve whether the contract is subject to the termination for convenience provisions of FAR Part 12 or FAR Part 49.

*ASBCA No. 54340 – Range's Claim for $1,270,549.00*

Because Range's affirmative claim for an equitable adjustment in the amount of $1,270,549.00 in ASBCA No. 54340 is also based upon alleged government-caused delay, the appeal in ASBCA No. 54340 must be denied for the same reasons we concluded the default termination was proper in ASBCA No. 51943.

We also conclude that there is no merit to Range's contention that the contract was constructively changed to include delivery of two RBS-70 missile

systems. In order to demonstrate a constructive change, Range must prove that it was compelled to perform additional work not required by the contract by a person acting with contractual authority and that the work was not volunteered. *See Len Company and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967).

The contract awarded to Range on 10 March 1997 was for one RBS-70 missile system. The record reflects that Range informed DIA in April 1997 that two systems had been taken out of inventory by the Venezuelans and asked that the second system be stored by the United States Government. In June 1997, when the Navy expressed a renewed interest in obtaining a RBS-70 missile system, Mr. Foster contacted Range and solicited a proposal to supply a second system for under $500,000.00, but no action was taken by DIA on that proposal.

The second system was discussed again at a meeting on 16 July 1997, during which the government finally acceded to Range's continued requests to transport the second system to the United States, allegedly because it could not be returned to inventory. The government did not direct or compel Range to deliver two systems and Mr. Bewick made clear to Mr. Lacey that, while the government would allow Range to bring two systems into the United States and would store the second system, it would not be obligated to purchase it. These terms and conditions of the delivery of the second system were memorialized in Bilateral Modification Nos. P00003 and P00004. As is readily apparent, Range volunteered to deliver a second system; it was not compelled to do so by the government and the government had no contractual obligation to purchase it.

Nor does the record support Range's contention that the End Use Certificate somehow created such a contractual obligation for two systems. First, the initial letter from the Venezuelan Army General, the execution of the End Use Certificate by LTG Hughes, and the subsequent letter from the Venezuelan Air Force General signaling willingness to supply two RBS-70 missile systems all occurred in 1996, several months before the contract was awarded. These events, therefore, cannot be construed to constitute a constructive change to the contract quantity because there was no contract in existence.

Second, the plain words of the End Use Certificate itself make clear that the certificate is an agreement relating to the transfer or use of the missiles, not the purchase of them. *Cf. Vertol Systems Co., Inc.*, ASBCA No. 52064, 00-2 BCA ¶ 31,081 at 153,457 (End Use Certificates relate to import/export requirements). Third, even if the End Use Certificate could, in some appropriate circumstance, become a contractual document, the requisite intent to form a contract was not present here. *See Maher v. United States*, 314 F.3d 600, 606 (Fed. Cir. 2002), *cert denied*, 124 U.S. 133 (2003) (the elements for both express and implied-in-fact contract formation require a mutual intent to contract, including an offer, an

acceptance and consideration); *Walsh Construction Company of Illinois*, ASBCA No. 52952, 02-2 BCA ¶ 32,024 at 158,279, *aff'd*, 80 Fed. Appx. 679 (Fed. Cir. 2003). LTG Hughes testified unequivocally that he did not intend the End Use Certificate to be a binding contact for the purchase of two systems. The speculative opinions of Messrs. Lacey and Hanson on this issue do not change this clear lack of intent, particularly in light of their disregard for the written contract and modifications they executed. And finally, we note that Range's present contention is inconsistent with its 7 July 1997 offer to sell the second system, which inquired about whether the second system would be added to the existing contract.

*ASBCA No. 54341 – The Government's Claim for Return of $533,140.00*

In the final decision issued on 18 December 1998, the government made a formal demand for repayment of $533,140.00 it had advanced to Range. The appeal from this demand was docketed as ASBCA No. 54341. The government bears the burden of proving both entitlement to the repayment and the amount of its recovery. *See Leal Petroleum Corp.*, ASBCA No. 36047, 92-1 BCA ¶ 24,719 at 123,380.

The evidence established that the government made two advance payments to Range under FAR 52.232-12 – Alternate V. The first payment was made by Modification No. P00001, in the amount of $330,000.00; the second payment was made by Modification No. P00005, in the amount of $203,200.000. These advances have not been refunded to the government. The evidence also established that the government did not receive delivery of the RBS-70 missile system for which the advance payments were made under the contract and that Range's failure to make this delivery was not due to excusable causes beyond its control and without its fault or negligence.

Range agrees that FAR 52.232-12(h)(2) authorizes the government to recover unliquidated advance payments in the event of a failure to deliver and an unexcused termination for default (app. br. at 11-12, 100). *See Do-Well Machine Shop, Inc.*, ASBCA Nos. 34565, 40895, 99-1 BCA ¶ 30,320 at 149,947, *aff'd on recons.*, 99-2 BCA ¶ 30,548; *P.T. Sarana Daya Taruna*, ASBCA No. 26240, 86-3 BCA ¶ 19,170 at 96,919, *recons. denied*, 87-2 BCA ¶ 19,696.

We conclude that the government is entitled to refund of advance payments made to Range in the amount of $533,140.00. The appeal from the government's claim demanding repayment of this amount in ASBCA No. 54341 is denied.

## CONCLUSION

The appeals underlying ASBCA Nos. 51943, 54340 and 54341 are denied. The government is entitled to recovery of $533,140.00.

Dated: 19 June 2006

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

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. 51943, 54340, 54341, Appeals of Range Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals