ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Shubhada Industries, Inc.	)	ASBCA No. 54016
	)	
Under Contract No. SPO440-01-C-1735	)	

APPEARANCE FOR THE APPELLANT: Mr. Babu Metgud
Vice President

APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE SCOTT

Shubhada Industries, Inc., sometimes referred to as Shubhada, Inc. (hereafter, Shubhada) timely appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO) final decision terminating for default its contract with the Defense Supply Center, Richmond, Virginia (DSCR), to supply tank speedometers. The Board held a one-day hearing. Appellant's *pro se* representative, Mr. Babu (also known as Bob) Metgud, both examined the government's witnesses and appeared as the only witness for appellant. The government submitted a post-hearing brief. Despite being accorded several opportunities to do so, appellant did not. For the reasons set forth below, we deny the appeal.

FINDINGS OF FACT

Contract History

1. On 15 November 2000, DSCR solicited proposals to supply a total of 200 speedometers, as replacement parts for M1A1 Abrams tanks, plus 100 percent options. It sought delivery by 140 days after receipt of order. Shubhada's 20 November 2000 response is not of record. (R4, tab 2 at 1, 3, 4, 6 of 18; tr. 13, 40; *see also* tab 28 at 1; compl., answer ¶ 6) Effective 8 February 2001, DSCR amended the solicitation to seek a total of 550 speedometers, plus the options; other items remained the same (R4, tab 2 at 1-5 of 5).

2. The solicitation referred potential offerors to Army Drawing No. 12325472, Rev. F, at issue, among other things (R4, tab 2 at 3 of 18). The record reflects that the

drawing was prepared by or for TACOM (then the U.S. Army Tank Automotive Command) (R4, tab 5 at 4, tab 15, *see also* tab 51 at 1). At Note 12, the drawing states:

> THIS DRAWING DEPICTS A NUCLEAR HARDNESS CRITICAL ITEM HCI. DESIGN CHANGES AND NEW DESIGNS MUST BE EVALUATED AND APPROVED FOR NUCLEAR HARDNESS BY THE ENGINEERING ACTIVITY RESPONSIBLE FOR MI/MIAI NUCLEAR SURVIVABILITY

(R4, tab 5 at 4)

3. The solicitation incorporated the Federal Acquisition Regulation (FAR) 52.233-1, DISPUTES (DEC 1998) clause by reference (R4, tab 2 at 10 of 18), which provides in part:

> (i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the [CO].

4. The solicitation also incorporated by reference the FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause (R4, tab 2 at 11 of 18), which provides in part:

> (a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor 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) of this clause); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).
>
> (2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within

10 days (or more if authorized in writing by the [CO]) after receipt of the notice from the [CO] 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. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

. . . .

(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.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

5. On 3 April 2001, Shubhada proposed to provide the 550 speedometers at $579 each, from 270 to 300 days after receipt of order, plus options at the same price. It represented that it was a small disadvantaged business. (R4, tab 3 at 1, 3-6, 13 of 18, tab 4 at 6 of 18 and last page) DSCR contract specialist Ernest Massenberg negotiated with Mr. Metgud, then identified as Shubhada's director of engineering, between 16 July 2001

and 6 September 2001 (ex. G-2 at 1). Mr. Massenberg's 16 July 2001 letter to Mr. Metgud noted that: "Due to the current back order stock position it is essential to get stock immediately" (R4, tab 8). On 31 August 2001 Shubhada increased its price to $687 per item and reduced its delivery time to 210 days. The government determined to proceed due to backorders and the urgency of its requirements, but it withdrew the options because it found Shubhada's price excessive. Previous DSCR contracts for the speedometers had been with Ametek, Inc. and Kampi Components Co., Inc. (Exs. G-1, G-2; *see also* R4, tab 30; tr. 43-45) Mr. Metgud testified that Shubhada had "a working relationship" with Ametek (tr. 111).

6. Mr. Massenberg's 11 September 2001 fax to Mr. Metgud stated: "You stated in negotiation that you were going to get parts from Ametek, Inc." He sought a written statement to that effect and said the contract could be completed thereafter. (R4, tab 10) Mr. Metgud replied on 13 September 2001:

> This is a confirmation of our telecon of today.
>
> We hereby state that Shubhada Inc[.] is getting the parts from Ametek Inc,- all the Speedometers that are manufactured in compliance with Dwg # 12325472. We will supply the same parts to you. We are expecting the communication reflecting the same from Ametek, also. Along with the parts, Certificate of Conformance reflecting Ametek's compliance will be provided.

(R4, tab 11)

7. Effective 14 September 2001 DSCR awarded the contract to Shubhada, in the total amount of $377,850. It incorporated the solicitation and Shubhada's final proposal. The contractor was to supply 550 speedometers at $687 each by 12 April 2002, with delivery expedited as much as possible. The contract indicates that it would be administered by DCM, Philadelphia (DCMC). (R4, tab 1 at 1-4 of 6) The record reflects DSCR involvement for the most part, but that it and Shubhada kept DCMC informed (R4, tabs 15, 21, 22, 26-28, 33, 35, 36, 41, 43, 47, 48).

8. On 12 October 2001, about one month after contract award, Mr. Metgud wrote to DSCR's post-award administrative CO, who was Howard James Brown. He served as CO for DSCR's Product Center Team 7 (PC 7). (R4, tab 12; tr. 13, 16; *see* R4, tab 15) Mr. Metgud stated:

> Please note that after receiving the above contract, we have been diligently working on it, in production planning.

> Upon review of the drawings and specifications on the said contract, we have some technical questions which need your clarification.
>
> The contract drawing # 12325472 for Speedometers under note # 12 makes a reference to Nuclear Hardness Critical Item (NHCI). However, the note makes a general remark and nothing specific about any requirement. Hence, I request you to provide the particular military specification you may need, so that proper design criteria will be incorporated in the product.
>
> During our due diligence, it is learnt that in the past, even at the time of the original production, this requirement was deleted. All previous Speedometers were made without any NHCI qualification. I hope your inquiry will reveal the same.
>
> I request you to please provide the exact specification of NHCI, that you may need. Otherwise, advise if the parts need to be re-manufactured just like earlier without NHCI requirement.

(R4, tab 12 at 1) Mr. Brown forwarded the letter to Gary Benson, DSCR's quality technician for the speedometer (R4, tab 16; tr. 15-16, 26, 57).

9. Shubhada did not ask any questions of the government about Note 12 prior to contract award (tr. 61, 129).

10. By letter of 26 October 2001 to Mr. Benson, Mr. Metgud stated that Shubhada was working on the contract. He said past gauges had not been designed or manufactured with an NHCI requirement because the tank was not itself so designed and General Dynamics, the original tank manufacturer, in consultation with TACOM, had deleted the requirement. He sought the exact specification and NHCI requirement, stating: "Otherwise, you may delete them as it was done in the past. As a matter of fact, nobody ever did nor will ever manufacture with that NHCI requirement." (R4, tab 13 at 1)

11. At some point after contract award, Mr. Metgud consulted with TACOM personnel, who informed him that there was no need to test the speedometers for nuclear hardness, with the caveat that Shubhada's contract was with DSCR and that he needed to communicate with it (tr. 112, 116-17).

12. On 8 November 2001 Mr. Benson sent CO Brown his response to Mr. Metgud's 12 October 2001 letter (R4, tab 16 at 1, tab 46 at 1; tr. 16). The CO then replied to Mr. Metgud by letter of 8 November 2001:

> In response to your question, note 12 clearly states that any Nuclear Hardness is incorporated already into the design of the item, in accordance with TACOM drawing 12325472, Rev F, dated January 25, 1993. Also, there are no other specifications required except those that are stated on the drawing in order to manufacture the item. Thus, the drawing is adequate for the manufacturing of the item. Lastly, there has been no remanufacturing of any items that have been manufactured in accordance with the Army drawing.
>
> In closing, you are reminded that you are still obligated to meet the specified delivery schedule of April 12, 2002.

(R4, tab 15)

13. By fax to the CO dated 9 November 2001, Mr. Metgud stated:

> Unfortunately, your explanation is not clarifying anything particular we requested. Hence, I reiterate my understanding that based on your answer, there is no need for Nuclear Testing. Material selected by TACOM will take care of it, by itself. You also stated in your letter that drawing is adequate for manufacturing as long as we use the same material. In the event that you disagree with our interpretation, please write to us immediately.
>
> Hence, we are proceeding per your interpretation.

(R4, tab 17) The CO did not receive the fax when it was sent. The fax number Shubhada used transposed the CO's number. The CO eventually received the letter as an attachment to Mr. Metgud's 7 March 2002 letter to him, below. (R4, tabs 28, 29, 32, 45 at 1; tr. 23-25)

14. By fax to Mr. Metgud, dated 29 November 2001, Ametek stated:

> AMETEK/Dixson is the manufacture [sic] of part number 12325472, NSN 6680-01-201-4806. We have been the suppliers since the early 1980's. There is a nuclear hardness spec that is part of the original drawing that we as

> the manufacture [sic] have always had to take exception to. We have no way of testing this and never have qualified the speedometer for the nuclear hardness spec. AMETEK/Dixson has supplied this part direct to General Dynamics and also on government contracts with the exception to the nuclear hardness spec. We do meet all of the other requirements of the current drawing. It was decided early on in the program that this was the most cost effective way of addressing the nuclear hardness rather than changing the drawing.

(R4, tab 18) On 30 November 2001 Mr. Metgud faxed Ametek's letter to the CO, stating that Ametek insisted upon a waiver or "letter of understanding" (R4, tab 19). Mr. Metgud asked the government to change the drawing or to issue a modification clarifying matters and excepting nuclear testing from its requirements, to avoid discriminatory practice (*id.*). Again, the CO did not receive the fax, due to an incorrect fax number, and he eventually received the letter as an attachment to Mr. Metgud's 7 March 2002 letter (R4, tabs 28, 29, 32, 45 at 1; tr. 23-25).

15. Because the government had an urgent need for the speedometers, on or about 8 February 2002 the CO inquired whether Shubhada could accelerate delivery. On 20 February 2002 the CO reported that Shubhada had responded that it could not accelerate even if premium pay were offered. (R4, tab 23; tr. 18)

16. In a 21 February 2002 letter to the CO, Mr. Metgud referred to several discussions with him that week and complained that the CO's 8 November 2001 letter was as vague as Note 12; the procurement specialist had insisted Shubhada secure the item from Ametek, although the part had been fully competitive; and Ametek refused to comply with Note 12 on the ground that the government had always given it a waiver. Mr. Metgud stated that this had placed Shubhada in "a very precarious situation" and he requested re-issue of the waiver so Ametek and Shubhada could complete the contract quickly. (R4, tab 24) By letter to the CO of 28 February 2002, Mr. Metgud asked that DSCR either issue the waiver or "[a]llow us to make the part in accordance with the [A]rmy drawing and complete the Contract. . . . If you do not insist on Ametek, it is possible to complete the contract and hence we request your concurrence for the same." (R4, tab 25) We find that appellant thereby acknowledged that the contract was not impossible to perform.

17. In a 5 March 2002 letter to Mr. Metgud, the CO denied that DSCR had insisted it procure the item from Ametek. He reiterated a 20 February 2002 oral statement he had made to Mr. Metgud that DSCR had no record of giving a waiver to Ametek. He stated that Shubhada previously had confirmed that the item would be manufactured in compliance with the drawing and he denied the waiver request. The CO

notified Shubhada that the government considered its inability to provide the speedometers in accordance with contract requirements a condition endangering contract performance and that, unless it cured the condition within 10 days after receipt of the notice, the government might terminate its contract for default. (R4, tab 26; *see also* tr. 66) Appellant did not proffer any witness from Ametek to corroborate its contention that Ametek had always received a waiver of Note 12, or of its alleged nuclear testing requirements (*see* tr. 178); DSCR's records revealed no such waiver (R4, tab 26; *see also* tr. 174-75).

18. Mr. Metgud's 7 March 2002 response asserted that Shubhada was not receiving clear answers and direction and again sought a nuclear hardness test waiver or relief from the alleged requirement that it secure the speedometers from Ametek. He contended, among other things, that DSCR abused its power and discriminated against a small business. (R4, tab 28) He stated that Shubhada had been "waiting" for clarification for many months and he attributed all delay to the government's inability to provide "uniform specifications" (*id*. at 3).

19. Upon receipt of the 7 March letter, the CO consulted with Mr. Benson and with counsel (R4, tab 29; tr. 26). He replied by letter of 17 April 2002, which was after the end of the contract's 12 April 2002 performance period:

> It appears you still are under a misunderstanding regarding Note 12. Along with your March 7 letter, you furnished a copy of a November 29, 2001 Ametek letter . . . . DSCR has not waived Note 12 for Ametek. That Ametek letter also indicated that it had no way for "testing this and never have qualified the speedometer for the nuclear hardness spec." However, . . . the Government is not requiring your firm or subcontractor to test the speedometer for nuclear hardness.
>
> In an effort to further clarify the meaning of Note 12, you are advised that if the speedometer is manufactured in accordance with the design requirements of the drawing, the speedometer will satisfy the nuclear hardness requirement, without any additional testing or certification required of the contractor. Thus, since your contract requires you to deliver a speedometer made in accordance with the design requirements of the drawing, your compliance with Note 12 is accomplished by supplying a speedometer in accordance with the TACOM drawing. Indeed, further action regarding compliance with the nuclear hardness requirement referred to in Note 12 would only be triggered if you intended to change

> the design of the speedometer set forth in the drawing. Of course, you have no authority to change the design set forth in the drawing and your contract with DSCR requires you to deliver the exact item described in the drawing.

(R4, tab 33 at 1) The CO noted that Shubhada had not effected the requested cure, but he afforded it another chance, prior to his taking final action, to advise whether it would perform the contract in accordance with all of its terms. If so, he sought a proposed revised delivery schedule and an offer of consideration for any extension. (*Id*. at 2)

20. Mr. Metgud testified concerning the CO's 17 April 2002 letter:

> By that time, we had made those parts almost. Then, we would have tested for anything. If they say that they have to be tested, okay, we could do that. But they have to tell us what kind of radiation level they wanted.

(Tr. 137) We find that this is an additional acknowledgment by appellant that the speedometers called for by the contract were not impossible to produce.

21. By letter to the CO of 22 April 2002, Mr. Metgud stated: Shubhada would be able to supply the parts per the CO's 17 April 2002 letter; once DSCR gave notice to proceed, "*we can remove the hold and start proceeding*," and the project had been on hold due to DSCR's "mixed, contradicting, and confusing signals" (R4, tab 34 at 1 (emphasis added)). He sought a 30-week delivery period from notice to proceed. He alleged that DSCR had caused Shubhada to incur delay damages consisting of extended overhead costs, added material costs, labor costs and other costs; the delay damage cost was $66.90 per unit; and he sought a modification adding that amount to the contract price. He suggested that DSCR exercise its 100 percent options immediately to mitigate delay damages. He concluded that, after the requested modification issued, Shubhada could proceed immediately. (R4, tab 34)

22. The CO had not issued a stop work order and did not consider that he had any obligation to issue a notice to proceed (tr. 29). He responded to Mr. Metgud by letter of 14 May 2002 that Shubhada itself had imposed any performance hold; DSCR had consistently required that it perform in accordance with the contract by the 12 April 2002 delivery date; and there was no government delay or basis for a price increase. He rejected option exercise. However, he stated DSCR was willing to reset the delivery period by 30 weeks from the date of a contract modification and, because Shubhada had apparently misread the specification, DSCR would forego consideration for the extension. He asked Shubhada to confirm by 20 May 2002 that it would fully perform the contract at the original price. (R4, tab 35)

23. By fax to the CO of 17 May 2002, Mr. Metgud augmented his previous allegations of government misconduct. He alleged that Shubhada had not imposed a hold and that contract delay was all due to DSCR, "deliberately in part and negligently in part, by issuing incomplete specifications and avoiding to clarify the confusing and contradicting specifications." (R4, tab 36 at 1) He now alleged DSCR was costing Shubhada $12,981 per month in extended overhead and sought reimbursement for damages, stating that otherwise, it reserved the right to submit a claim. He concluded "[a]s soon as we receive the appropriate Mod, we will proceed and perform per the contract" (*id*. at 2).

24. By letter of 29 May 2002, faxed to Mr. Metgud, the CO forwarded a proposed bilateral modification to extend the contract delivery date to 15 January 2003, with all other terms remaining unchanged. He required that the modification be signed and returned within 10 days. (R4, tab 37)

25. On 4 June 2002, at a DSCR business conference, the CO gave Mr. Metgud a copy of the modification for signature, but Mr. Metgud informed him that he would not sign it and began to reiterate past complaints (R4, tabs 38, 45 at 2; ex. G-3; tr. 72-73). By letter to the CO of 10 June 2002, Mr. Metgud stated:

> As we discussed in the conference . . . we have been losing money on this contract because of government withholding certain information instead of making a full disclosure. As you know, if we were made to sit on the contract, we still have to pay employees salaries, overhead cost such as rent, telephone, electricity and many more. This is called extended overhead cost which is costing us nearly $12,981/month attributed to this contract.

(Ex. G-3 at 1) Mr. Metgud noted that Shubhada could submit a claim, or DSCR could exercise its options. He sought a modification stating that the government had caused the delay and concluded:

> Finally, I request your prompt attention and quick action *so that we can get going. It is important to note that our 30 week delivery time starts from the date of receipt of acceptable modification to the contract* . . . . [Emphasis added]

(*Id*. at 2)

26. DSCR issued unilateral Modification No. P00001, dated 29 June 2002, which extended the speedometer delivery date from 12 April 2002 to 27 January 2003, a

290-day extension. The modification left the other contract terms unchanged; noted that Shubhada could file a claim and provided filing information; but warned that, per the Disputes clause, it must continue to perform and, if it did not meet the new date, the government would terminate its contract for default. Shubhada received the modification on 12 July 2002. Even if measured from that date, Shubhada still had 199 days to complete the contract, which is 59 days more than the 140-day performance period DSCR had sought in the solicitation and only 11 days less than Shubhada's original 210-day performance period and the additional 210-day period it had sought in its 10 June 2002 letter. Appellant did not provide any evidence that the performance period established by the modification was unreasonable. We find that it was reasonable. (R4, tabs 39, 40) In the meantime, by letters to the CO of 1 and 3 July 2002, Mr. Metgud alleged improper, unethical, government behavior and threatened action against DSCR and individuals allegedly mismanaging Shubhada's contract. He contended, variously, that government-caused delays had cost Shubhada $12,981 per month for the past 9 to 10 months, or $133,000, and that damages were continuing to accrue. (R4, tabs 41, 42) Mr. Metgud apparently sent a copy of his 1 July letter to a Small Business Administration (SBA) office at DSCR (*id*.). There is no evidence of record that the SBA ever sought to intervene or inquired of the CO or PC 7 about Mr. Metgud's complaints.

27. By letter to the CO of 19 July 2002, Mr. Metgud stated that the modification was "unacceptable;" it did not include the "true reasons" for the modification; and it was "arbitrary" (R4, tab 43 at 1). He continued:

> Hence, I request you to include the exact reasons and the deviations you suggested and which we mutually agreed upon and which are as follows:
>
> 1) Disregard Note #12 in the contract drawing as permitted for previous contractor for the past 20 years.
> 2) No nuclear testing of any kind is required to be conducted on the Speedometer.
> 3) This delay is government caused due to mis-communication and confusing specs of the government.
>
> The above three items must be included in the Mod.
>
> . . . .
>
> Further, please note that upon submitting the claim to the [CO], you are responsible to resolve equitably within reasonable amount of time preferably 30 days but not to exceed 90 days. As you know this delay has been costing us $12,891 [apparently a transposition of $12,981], every single

> month for the past 10 months, for no fault of [Shubhada]. We request the government to reimburse this unnecessary cost caused by the government.
>
> *Upon resolving the above, please let me know, so that I'll give you the exact delivery date from that point. As you know, the delivery dates depend upon workload, prior commitment and production schedules etc*. Please do not set arbitrary deadlines without any justification and verification from us. . . .
>
> Hence, may I request you to respond promptly and timely, so that we can resolve this issue *and start getting into production*. If you could respond in 10 days with an acceptable Mod including all the above three items it would move the project expeditiously. [Emphasis added]

(*Id*. at 1-2) Shubhada's complaint indicates that it did not consider the letter to be a CDA claim; it alleges that its costs exceed $150,000 and that it will submit a claim (compl. ¶¶ 35-36). Mr. Metgud testified that Shubhada had not filed a claim (tr. 138), and there is no evidence that it has done so to date. In any case, the letter did not include the certification required for claims exceeding $100,000. 41 U.S.C. § 605(c)(1).

28. CO Brown determined that Shubhada had repudiated the unilateral modification (tr. 37-38). By memorandum dated 22 July 2002, he reviewed the contract history and recommended that the contract be terminated for default. He noted that there were no speedometers on hand; backorders totaled 142; the supplies were required and were available from another source; and Shubhada had not received progress or advance payments. (R4, tab 45; *see also* tr. 40)

29. After reviewing CO Brown's memorandum and the contract file, the termination contracting officer (TCO), Edward G. West, concluded that the contract should be terminated for default. Based upon Mr. Metgud's 19 July 2002 letter, he concluded that Shubhada would not proceed with contract performance. He determined that, even though it was not delinquent under the new delivery schedule, the schedule was in jeopardy. (Tr. 87-89, 91) The TCO's 15 August 2002 memorandum reports that the contract should be terminated for default under FAR 52.249-8 for failure to perform and repudiation. It reflects concurrence by counsel. (R4, tab 46) There is no allegation or evidence that either the CO or the TCO acted outside the discretion vested in them.

30. On 20 August 2002, the TCO faxed a "TERMINATION FOR DEFAULT NOTIFICATION" to Mr. Metgud notifying him that Shubhada's contract was terminated for default for its failure to perform in accordance with the contract and its failure to

deliver in accordance with the delivery schedule. On 22 August 2002 the TCO issued unilateral Modification No. P00002, designating it as his final decision terminating the contract for default for failure to make delivery without excusable cause for delay, and notifying Shubhada of its appeal rights. The modification did not mention repudiation. (R4, tabs 47, 48; tr. 88)

31. By letter of 27 August 2002 to Alma Charles, who was chief of PC 7, copied to DSCR's base commander, Mr. Metgud sought reversal of the termination (R4, tab 49). He stated that Shubhada had negotiated with DSCR for 11 months prior to contract award and *"[u]pon receipt of the contract*, [Shubhada] requested clarification for Note # 12 which was asking for Nuclear Hardness Testing requirement" (emphasis added); and that, after receiving a vague response, he "further investigated and the [CO] hinted to me that I must buy this part from Ametek and supply it" (*id*. at 3). He alleged that Shubhada had expended funds to find alternate sources to manufacture the product. He noted that DSCR had unilaterally extended the contract delivery date to 27 January 2003 and stated: "Due to that we started mobilizing several subcontractors as well as Dept of Defense labs to get the project moving" (*id*. at 4). Among other things, he contended that Shubhada had lost nearly $150,000 on the contract; PC 7's contract mismanagement had discriminated against Shubhada, as it had in connection with another contract and other solicitations; and DSCR was in default, not Shubhada (*id*.).

32. Shubhada has not provided any documentary or other corroborative evidence that it started to mobilize several subcontractors and Department of Defense laboratories upon or following DSCR's extension of the contract delivery date to 27 January 2003. There is no evidence that Shubhada ever entered into a subcontract or other agreement with Ametek or any other company in connection with Shubhada's contract performance. The weight of the evidence of record does not substantiate that DSCR required Shubhada to use Ametek as a subcontractor or supplier.

33. By letter of 5 September 2002 to the base commander, referring to the contract at issue, Mr. Metgud claimed that PC 7 was discriminating against small businesses and he sought intervention. By letter dated 19 September 2002, Ms. Charles responded to Mr. Metgud's 27 August 2002 letter. Concerning the contract at issue, she stated that Shubhada had rejected the modification extending the delivery date to 27 January 2003 and that the rationale for the default termination was in the termination modification and the correspondence between Shubhada and the government preceding the termination. She asserted that DSCR strongly encouraged small business participation in its acquisitions and opined that Shubhada had been treated fairly. The base commander responded similarly to Mr. Metgud's discrimination claim by letter dated 27 September 2002. (R4, tabs 50, 51, 53)

34. On 15 November 2002 Shubhada timely appealed to the Board from the termination of its contract for default.

Additional Findings Based Upon Hearing Testimony And Record Evidence

35. Mr. Metgud testified that, as soon as Shubhada was awarded the contract, and also apparently after it received the CO's 17 April 2002 letter that no nuclear hardness testing was required, a government quality assurance representative (QAR) advised it that he would not approve the speedometer unless Note 12 were removed by modification from the drawing. Mr. Metgud also testified that he had raised the QAR's alleged position with CO Brown at the DSCR conference and several other times. The CO credibly denied that Mr. Metgud had done so. (Tr. 70, 73, 107, 109-111, 113-15, 130-34, 139-41, 144, 146-48, 151-54, 159-61) Appellant did not mention the QAR in its correspondence with DSCR or call the QAR to testify. There is no documentary or other corroborating evidence of record that Shubhada raised the QAR issue with DSCR, prior to the termination of its contract for default or thereafter, or that a QAR would not accept the part unless Note 12 were removed or waived. In fact, Mr. Metgud conceded that Shubhada never tendered anything to a QAR for inspection under the contract (tr. 152).

36. Mr. Metgud testified that, by the time of the 4 June 2002 DSCR conference, Shubhada had made a "half-done" speedometer prototype; that he showed it to several people at the conference; and that he told CO Brown he had it (tr. 122-26). The CO credibly denied that Mr. Metgud mentioned or showed him any prototype:

> Q During the conference, you and me we discussed we have been performing on that, we are designing the -- you know, the -- we have been trying to build that. It is only a design spec, and we have been performing. We are building our own, you know, the speedometer. But it is going to take time. We have been spending a lot of engineering hours on that. I brought it to your attention. Am I right or wrong?
>
> A You're incorrect, sir.
>
> Q Huh?
>
> A You are incorrect. You did not bring it to my attention.
>
> Q You don't remember that?
>
> A No, sir, I do not.
>
> Q Okay. Okay. Probably I showed you the half-done part also by that time.

A No, sir, you did not.

Q Okay.

(Tr. 71-72)

37. Mr. Metgud testified that, while he corresponded with DSCR, Shubhada "started doing our own design" (tr. 112). He stated that it was prepared to test if testing had to be done, but needed to know the level of testing required (*id*.). He added:

> [T]hen, later on, we were working on this and building our own, I mean, . . . we had to do some engineering on this one. We thought the engineering, it cannot be done.
>
> [I]t is not like a drawing has been already prepared, detailed drawing - - manufacturing drawing, and then we are just only fabricating. . . . somebody has to engineer this one.

(Tr. 113) He further testified that, during the letter exchange:

> In the meanwhile, we were designing the -- you know, our own . . . based on the performance, same performance specifications, we, you know, were developing the product. Product development is a key. . . . Those things, we are doing that.
>
> Then, . . . at the different stages, some different parts be made, and I have some samples I will give you, and the finished product also. That's where the major bulk of the cost comes.

(Tr. 117-18) Mr. Metgud testified several times that Shubhada had not changed the speedometer drawing's design (tr. 112, 157-58, 181). He considered the drawing to be a performance specification but acknowledged that it contained design requirements (tr. 134, 149-50). Mr. Metgud represented that Shubhada had produced a partial prototype during the course of its contract that was "materially the same thing as what is spelled in the drawing" (tr. 150). We find appellant to have conceded that it was not impossible to construct a speedometer in accordance with the contract drawing, whether or not appellant actually did so during contract performance.

38. Mr. Metgud testified that after Shubhada received the unilateral modification it continued with product development and that it was ready to produce the speedometers

when its contract was terminated (tr. 143-45). Shubhada has not provided any documentary evidence that it was ready to produce when its contract was terminated. The weight of the evidence is to the contrary.

39. Even if, at some point, before or after contract termination, Shubhada partially or nearly completed a speedometer prototype and/or related parts, there is no documentary or other corroborating evidence that Shubhada ever presented even a partially completed speedometer to DSCR prior to contract termination. The weight of the evidence is to the contrary.

40. We find no evidence of government negligence; discrimination; bad faith; or interference, or failure to cooperate, with Shubhada in its contract performance.

DISCUSSION

The government contends that appellant's contract was properly terminated for default because it repudiated the contract. The government bears the burden to prove a default termination justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If it does, the burden shifts to appellant to show that the failure to perform was beyond its control and without its fault or negligence or that of its subcontractors or suppliers, *H. Roth GmbH*, ASBCA Nos. 39496, 39497, 92-2 BCA ¶ 24,794 at 123,675; or that the CO's default decision was arbitrary or capricious or an abuse of the CO's discretion, *Darwin Construction Co. v. United States*, 811 F.2d 593, 598 (Fed. Cir. 1987).

Anticipatory Repudiation

A CO may terminate a contract based upon anticipatory repudiation when the contractor positively, definitely, unconditionally, and unequivocally manifests its intent not to render the promised performance within the contract performance period. *Cascade Pacific Int'l v. United States*, 773 F.2d 287, 293 (Fed. Cir. 1985); *Howell Tool and Fabricating, Inc.*, ASBCA No. 47939, 96-1 BCA ¶ 28,225 at 140,941. In the event of anticipatory repudiation, the government may terminate the contract forthwith and is not required to issue a 10-day cure notice. *Polyurethane Products Corp.*, ASBCA No. 42251, 96-1 BCA ¶ 28,154 at 140,545.

Here, commencing about a month after contract award, appellant evidenced a reluctance to perform. It sought the NHCI requirement allegedly applicable to the speedometers per drawing Note 12, or its deletion, stating that nobody ever had or ever would manufacture with that requirement. (Finding 10) It consulted with TACOM personnel, who advised that there was no need for nuclear hardness testing, but that appellant should communicate with DSCR (finding 11). We need not decide whether the CO's 8 November 2001 letter to appellant, that the drawing itself was adequate to

manufacture the item, was unclear. Even if it was, appellant's reply, regardless of the fact that the CO did not receive it at the time, interpreted the CO's letter to state that there was no need for nuclear testing and stated that appellant was proceeding per that interpretation. (Findings 12, 13)

However, thereafter, based upon Ametek's statement that it had no way of testing for nuclear hardness and had always taken exception to nuclear hardness aspects of the drawing's specifications, appellant wrote to DSCR that Ametek was insisting upon a waiver or a "letter of understanding" (finding 14). Appellant sought a drawing change or a modification excepting nuclear testing from its alleged requirements. The CO did not receive appellant's letter when sent (*id.*), but appellant communicated with him in February 2002 and again sought a waiver. At the same time, it stated that, if DSCR did not insist upon Ametek, "it is possible to complete the contract," thus acknowledging that it was not impossible to perform. (Findings 16, 20)

The CO's 5 March 2002 cure notice stated that DSCR had no record of providing a waiver to Ametek, and denied that it had insisted that appellant procure the part from Ametek, but appellant continued to seek a nuclear hardness test waiver or relief from the alleged requirement that it use Ametek. The evidence does not support a finding that Ametek had always received a waiver of Note 12 or of its alleged nuclear testing requirements, or that DSCR required appellant to use Ametek. (Findings 17, 18, 32)

On 17 April 2002, after the end of the contract's 12 April 2002 performance period, the CO gave appellant another chance to perform, stating that the government was not requiring it or its subcontractor to test the speedometer for nuclear hardness. He sought a new delivery schedule and consideration for an extension. (Finding 19) Instead of proposing a new schedule or taking any steps to perform, appellant responded that it could supply the parts per the CO's letter and that it would remove a "hold" on the project and "start proceeding" once DSCR gave a notice to proceed and increased the contract's unit price by modification. It also sought option exercise. (Finding 21)

DSCR continued to try to secure contract performance. On 14 May 2002 the CO stated that DSCR was willing to reset the delivery period by 30 weeks, foregoing consideration. He asked appellant to confirm that it would fully perform the contract at its price. (Finding 22) However, appellant's efforts continued to be "letter-writing aimed at securing a waiver of the contract requirements, not at production." *See F&L Packing Corp.*, ASBCA No. 42362, 93-1 BCA ¶ 25,305 at 126,063 (government did not waive right to terminate by delaying termination action.) Rather than accepting the schedule offered and assuring that it would perform, appellant continued to allege government misconduct and to seek a modification incorporating its alleged damages (finding 23). When the CO proffered a bilateral modification extending delivery to 15 January 2003, with other contract terms remaining unchanged, appellant declined to sign it. Instead, it alleged that its delivery time would not start until it received a modification stating that

the government had caused the delay. DSCR then issued a unilateral modification extending delivery to 27 January 2003, a time period which we found reasonable; stating that appellant could file a claim; but warning that, under the contract's Disputes clause, it must perform; and, if not, the government would terminate its contract for default. (Findings 24-26)

DSCR had an urgent need for the speedometers; appellant was aware of that need; and it had originally agreed to expedite delivery to the extent possible (*see* findings 5, 7, 15). However, again, rather than performing, on 19 July 2002 appellant stated that the unilateral modification was unacceptable. Before supplying a delivery date, it demanded a contract modification that Note 12 be disregarded; no nuclear testing was required; and the delay was government-caused, and it continued to seek reimbursement for alleged damages. It also equivocated that any delivery date would depend upon workload, prior commitments and production schedules. (Finding 27) Its refusal to perform, unless the government fulfills its demands for a price increase or other actions beyond those the contract requires the government to perform, is considered contract abandonment and creates a right in the government summarily to terminate for default. *James B. Beard, D.O.*, ASBCA Nos. 42677, 42678, 93-3 BCA ¶ 25,976 at 129,171, *aff'd mem.*, 11 F.3d 1070 (Fed. Cir. 1993) (unpublished).

The CO determined that appellant had repudiated the unilateral modification and he recommended that the contract be terminated for default. He noted that the speedometers were required; there were none on hand; they were available from another source; and appellant had not received payments under the contract. The TCO concluded that, based upon appellant's 19 July 2002 letter, appellant would not proceed with the contract, and even though it was not delinquent under the revised schedule, the schedule was in jeopardy. He determined that the contract should be terminated for default under FAR 52.249-8 for failure to perform and repudiation. (Findings 28-29) The modification terminating the contract for default cited failure to make delivery without excusable cause for delay and did not mention repudiation (finding 30), but it is clear that the CO, the TCO, and the chief of PC 7 determined that appellant had repudiated the contract (*see* findings 28, 29, 33). In any event, a default termination may be justified by circumstances existing at the time even if the government cited another reason for the termination. *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 at 157,936.

Appellant did not provide any documentary evidence for its contention at the hearing that it was ready to produce when its contract was terminated. It conceded that it never tendered anything to a QAR for inspection under the contract. Even if it partially or nearly completed a speedometer prototype or related parts at some point, there is no evidence that it ever presented even a partially completed speedometer to DSCR prior to contract termination. The weight of the evidence is to the contrary. (Findings 35, 38, 39) Rather, appellant engaged in correspondence and complaints that expressed its

unwillingness to perform the contract absent unreasonable concessions the government was not required to make. This amounts to anticipatory repudiation of its contract. *Beeston, Inc*., ASBCA No. 38969, 91-3 BCA ¶ 24,241 at 121,220-21.

Failure to Perform Inexcusable

Appellant alleges in its complaint that the default termination was improper and must be converted to a termination for convenience because: (1) DSCR failed to cooperate with it and improperly interfered with its ability to perform the contract by failing to grant the requested waiver of nuclear hardness testing, said to have been routinely granted to manufacturers over many years; (2) DSCR's inclusion of Drawing No. 12325472 in the contract without providing the requested clarifications; its insistence upon nuclear hardness testing; and its failure to define the specific testing necessary, rendered contract performance impossible; and (3) DSCR's direction that appellant use Ametek as its subcontractor; Ametek's refusal to manufacture the speedometer without a waiver of nuclear hardness testing; and DSCR's refusal to grant a waiver, rendered contract performance impossible.

Appellant did not raise any concern about the speedometer drawing until after a negotiation period extending over several months and until about one month after contract award (*see* findings 1, 5, 7, 8). If appellant had questions about the drawing, it should have raised them prior to contracting to supply the speedometer in accordance with the drawing.

The weight of the evidence does not support appellant's allegations that DSCR required it to obtain the speedometers from Ametek, or that DSCR waived Note 12 for Ametek or any other manufacturer (findings 17, 32). Even if Ametek refused to deliver the speedometers without a waiver of the alleged nuclear testing requirement, the contract's Default clause requires appellant to make reasonable efforts to locate alternate sources of supply (*see* finding 4). *Progressive Tool Corp*., ASBCA No. 42809, 94-1 BCA ¶ 26,413 at 131,392. There is no corroborating evidence to support appellant's contention that it sought to mobilize several subcontractors and laboratories following DSCR's extension of the contract delivery date to 27 January 2003, or that it ever entered into an agreement with any company concerning its contract performance (finding 32). In any case, even after the CO assured appellant in writing that no nuclear hardness testing was required under the contract (finding 19), appellant did not perform.

There is no evidence to support appellant's allegations that performance was impossible. The doctrine of impossibility does not require a showing of literal impossibility, but only of commercial impracticability, but appellant must show that a supervening event, after it entered into the contract, made performance impracticable; the event's non-occurrence was a basic assumption upon which the contract was based; the occurrence of the event was not its fault; and appellant did not assume the risk of

occurrence. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294-95 (Fed. Cir. 2002). Appellant has not established any of these factors. Indeed, based upon its own representations, apart from those in its complaint, we have concluded that contract performance was not impossible. (*See* findings 16, 20, 37)

Appellant's unsatisfied demand that DSCR modify the contract in a manner acceptable to appellant did not excuse its failure to perform. DSCR had no duty to do so. As noted, a contractor cannot impose a condition upon its continued performance that the government has no duty to perform. *Vinyl Technology, Inc*., ASBCA No. 47967, 97-1 BCA ¶ 28,974 at 144,298. The contract's Disputes clause requires appellant to perform pending final resolution of its dispute (*see* finding 3). *Standard Coating Service, Inc.*, ASBCA Nos. 48611, 49201, 00-1 BCA ¶ 30,725 at 151,776 (contractor that had not filed claim with CO could not condition contract completion upon price increase; even if it were to file claim, Disputes clause required it to proceed diligently pending claim's final resolution); *Howell Tool*, *supra*, 96-1 BCA at 140,941.

There is no evidence to support appellant's allegations in its correspondence, its complaint, or at hearing, of government negligence; discrimination; bad faith; or interference, or failure to cooperate, with appellant in its contract performance (finding 40). Argument is not proof. *Harvex Trading Co*., ASBCA Nos. 38279 *et al*., 92-3 BCA ¶ 25,027 at 124,756.

Appellant has not met its burden to prove that its nonperformance was excusable.

Government Did Not Abuse Discretion in Terminating Contract for Default

The FAR 52.249-8 Default clause accords the government certain discretion whether to terminate a contract for default (*see* finding 4). In determining whether there has been an abuse of discretion, we examine whether there was subjective bad faith; whether there was a reasonable basis for the decision; the degree of discretion reposed in the CO; and whether applicable regulations and laws have been observed. *F&L Packing Corp*., *supra*, 93-1 BCA at 126,063. There is no evidence that CO Brown acted in bad faith in recommending contract termination. Indeed, the CO demonstrated repeated patience and willingness to allow appellant to perform. *See id*. The CO's memorandum recommending default termination reviewed the contract history and reported that there were no speedometers on hand; there were backorders; the supplies were required and available from another source; and appellant had not received progress or advance payments (finding 28). He was aware of the government's urgent need for the speedometers (*see* finding 15). The TCO reviewed the CO's ultimate recommendation to terminate, and the contract file, and, with the concurrence of counsel, came to the reasonable decision to terminate the contract for default. There is no evidence to suggest that either the CO or the TCO exceeded the scope of the discretion vested in him (finding 29). Appellant has made no showing of any violation of applicable regulations and laws.

The government did not abuse its discretion in terminating appellant's contract for default.

DECISION

The appeal is denied.

Dated: 29 November 2007

CHERYL L. SCOTT
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 No. 54016, Appeal of Shubhada Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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