ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Advance Construction Services, Inc.	)	ASBCA No. 55232
	)	
Under Contract No. DACW38-03-C-0004	)	

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OPINION BY ADMINISTRATIVE JUDGE WILSON

This appeal stems from the contracting officer's 23 September 2005 decision to terminate a contract for the construction and improvement to an existing embankment and levee along the Mississippi River in Louisiana for default. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 7105(e)(1)(A). The parties have submitted post-hearing and reply briefs. Only the propriety of the default termination is before the Board for decision.

FINDINGS OF FACT

1. On 20 December 2002 the U.S. Army Corps of Engineers (government, respondent, or Corps) awarded Contract No. DACW38-03-C-0004 (the contract) to Advance Construction Services, Inc. (appellant or Advance) in the amount of $7,663,850.00 (R4, tab D-1). The work project, referred to as item 457-R, required appellant to furnish all plant, labor, materials and equipment in furtherance of levee enlargement along the Mississippi River in Madison Parish, Louisiana (*id.* at 3; tr. 1/18). The work under the contract included, *inter alia*, excavation, hauling, and placement of the following: (1) 1,470,800 cubic yards (cy) of levee embankment, semicompacted (contract line item number (CLIN) 0013); (2) 451,200 cy of berm embankment, semicompacted (CLIN 0014); and 371,100 cy of berm embankment, uncompacted (CLIN

0015) (R4, tab D-1 at 6). The total amount of material to be placed under these three CLINs was 2,293,100 cy. Prior to submitting its offer, appellant's principal, Mr. Robert Najor (with 35 years in the construction industry and who had worked on several similar levee projects (tr. 1/32-34)), reviewed the site drawings and visited the site on "at least three different occasions" (tr. 1/34, 51-57, 110-15). During these visits, appellant noticed the location of the areas where the excavation would take place (borrow areas) including a pond located in Borrow Area No. 2-B (*id.*). The record also indicates that appellant was simultaneously working on an adjacent project, titled "453-R", and shared water pumps, excavation, hauling, and other equipment between the two sites (tr. 1/128, 210, 226-27).

2. The contract required the work to be completed within 450 calendar days after receipt of the notice to proceed (R4, tab D-1 at 114). In addition to this requirement, the contract reads: "The Contractor shall be required to...prosecute the work diligently" (*id.*). The notice to proceed (NTP) was received by appellant on 19 March 2003 (R4, tab D-2 at 2). The contract prescribed that an Exclusion Period "between 1 January and 31 May inclusive...has not been considered in computing the time allowed for completion." The contractor may perform work during this period upon written notice to the contracting officer. (R4, tab D-1 at 133) Additionally, the contract contained a clause which reads:

> 1.28 TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER
>
> a. This provision specifies the procedure for determination of time extensions for unusually severe weather in accordance with Contract Clause DEFAULT (FIXED-PRICE CONSTRUCTION). In order for the Contracting Officer to award a time extension under this paragraph, the following conditions must be satisfied:
>
> > (1) The weather experienced at the project site during the contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the project location during any given month.
> >
> > (2) The unusually severe weather must actually cause a delay to the completion of the project. The delay must be beyond the control and without the fault of the Contractor.

b. The following schedule of monthly anticipated adverse weather delays is based on National Oceanic and Atmospheric Administration (NOAA) or similar data for the project location and will constitute the base line for monthly weather time evaluations. The Contractor's progress schedule must reflect these anticipated adverse weather delays in all weather dependent activities.

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY
WORK DAYS BASED ON FIVE (5) DAY WORK WEEK

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
(5)	(4)	(5)	(5)	(6)	(4)	(3)	(3)	(2)	(3)	(4)	(5)

c. Upon acknowledgement of the Notice to Proceed (NTP) and continuing throughout the contract, the Contractor shall record on the daily CQC report, the occurrence of adverse weather and resultant impact to the normally scheduled work. Actual adverse weather delay days must prevent work on critical activities for 50 percent or more of the Contractor's scheduled work day. The number of actual adverse weather days shall include days impacted by actual adverse weather (even if adverse weather occurred in previous month), be calculated chronologically from the first to the last day of each month, and be recorded as full days. If the number of actual adverse weather delay days exceeds the number of days anticipated in paragraph b, above, the contracting officer will convert any qualifying delays to calendar days, giving full consideration for equivalent fair weather work days and issue a modification in accordance with Contract Clause DEFAULT (FIXED-PRICE CONSTRUCTION).

(R4, tab D-1 at 132-33) Thus, under Section b of this provision, referred to hereinafter as the Unusually Severe Weather clause, the contractor will only be allowed a time extension due to weather in a given month for days in excess of those already accounted for in the contract.

3. The contract also included the following provision:

SECTION 02222

EXCAVATION

....

3.2.2.1 Requirements

> The material necessary for the construction of the embankments shall be procured from borrow areas and required excavations by haulage or otherwise.... The borrow areas excavated under this contract shall be drained of water regardless of its source, including subsurface water, and kept free of water during excavation, as excavation will not be permitted in water nor shall excavated material be scraped, dragged or otherwise moved through water. Drainage of borrow areas shall be accomplished by ditching, sump pumping, or other approved methods.... The Contractor shall consider in his plan for borrow area excavation that the ramps and the 3 foot levee cap shall consist of earth material excavated from Borrow Area No. 1 only.... Borrow Area No. 2 shall be excavated in the following order: Borrow Area No. 2-A shall be depleted of all suitable embankment material prior to beginning excavation operations in Borrow Area No. 2-B... Borrow area No. 2-B excavation shall be made continuous throughout the length of the borrow area, and shall be excavated beginning at the northwest limits as shown and continuing to the southeast to the required depths, at the width necessary to provide the required quantity of suitable material....

(*Id.* at 223-24) Borrow Area No. 2-B was about 7500 feet west of the lower (southern) limit of item 457-R (*id.* at 391-92). The contract did not specify the order in which the excavated material was to be placed on the levee or the berm. The contract further included the clause FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which provided in pertinent part:

> (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time,

> the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed....
>
> (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—
>
> (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include...(x) unusually severe weather...; and
>
> (2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.
>
> (c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(*Id.* at 101-02) This clause did not prescribe any cure or show cause notice.

4. Appellant submitted a "CONSTRUCTION PROGRESS CHART" dated 1 July 2003 which lists a 22 June 2005 completion date for the project (R4, tab E-2 at 2). The government, by letter dated 8 July 2003, approved appellant's construction schedule (R4, tab E-3). We find that the original agreed-upon completion date for the project was 22 June 2005. The record shows that as early as 25 August 2003, appellant was falling behind schedule on the project (R4, tab E-5). By letter dated 2 October 2003, appellant requested a deviation from the excavation requirement that it begin at the northwest limits of Borrow Area No. 2-B in order to "allow the collection of water at the lowest corner [of Borrow Area No. 2-B]" which would permit the water to be discharged into an adjacent drainage canal (ex. A-28). The Corps denied this request on 10 October 2003, indicating

that prior agreements with the landowners dictated the manner in which the borrow area was to be depleted (ex. A-29).

Weather Delays

5. On 13 January 2004, Mr. Thomas Matthews (COR/ACO Matthews), acting in his capacity as the administrative contracting officer, executed a Determination and Findings (D&F) which indicated that Advance was due a 28-day contract time extension due to weather for the period 1 June 2003 through 31 December 2003, establishing a new contract completion date of 20 July 2005. The extension was determined as follows:

Month	Days Delayed 50% or more	Anticip'd Delay	Unanticip'd Delay	Work Day to Cal. DayConv.	Time Ext.
Jun 1-30	4	4	0	7/7	0
Jul 1-31	2	3	0	7/7	0
Aug. 1-31	2	3	0	7/7	0
Sep. 1-30	2	2	0	7/6	0
Oct. 1-31	5	3	2	7/6	2
Nov. 1-30	14	4	10	7/7	10
Dec. 1-31	21	5	16	7/7	16
				Total	28

(R4, tab E-15) The record also contains monthly summary documentation of weather delays signed by the government's construction representative, Mr. David Townsend (*id.* at 2-8). Accordingly, Modification No. A00002 dated 14 January 2004 was unilaterally issued extending the completion date by 28 days (R4, tab D-3A).

6. Advance wrote the Corps on 12 March 2004 requesting that the extension should be adjusted to 37 days for the months of November and December of 2003 (ex. A-8).

7. By letter dated 8 October 2004, the government notified appellant that it had previously been informed that Advance was behind schedule and had planned to bring on a subcontractor to increase production. The government noted that although a subcontractor was briefly used, it was no longer working on the project. According to the government, the lack of adequate operating equipment, untimely response to job deficiencies, and schedule slippage by appellant were causes for concern. Thus, the government requested that Advance provide a plan "as to how and when you propose to get back on schedule." (R4, tab E-17) Appellant responded, by letter dated 15 October 2004, expressing its concerns about getting the project back on schedule. Advance indicated that it was negotiating with other subcontractors to supplement its work force, and received commitments from equipment suppliers to provide additional

equipment. Finally, appellant stated: "Advance is committed to completing this project and is taking steps necessary to increase its work force and bring the project back on schedule." (R4, tab E-19)

8. On 21 October 2004, COR/ACO Matthews, pursuant to the Default and the Unusually Severe Weather clauses of the contract, issued Modification No. A00005, extending the contract by 51 days for the time period 1 June 2004 through 30 September 2004 (R4, tab D-3C; E-20). The D&F supporting the modification stated: "During this period, work was delayed 63 days because of adverse weather" (R4, tab E-20 at 3). Once the anticipated delay days (12) were taken into account, the remaining days (51) were added to the contract completion date. The memorandum listed 9 September 2005 as the new contract completion date.

9. By letter dated 16 November 2004, the Corps informed Advance that it needed the specifics of how it planned to complete within the required time in writing. Additionally, the Corps stated that appellant's production rate was "less than 70 percent of that necessary to complete on time." The Corps also indicated that Advance was entitled to a 13-day time extension due to unusually severe weather during October 2004, and established 22 September 2005 as the required contract completion date. (R4, tab E-21)

10. On 11 January 2005, COR/ACO Matthews issued Modification No. A00006, which extended the contract by 57 days during the 1 October 2004 through 31 December 2004 contract period and by 2 days for the 1 November 2003 through 31 December 2003 period because of unusually severe weather and high river stages (R4, tabs D-3D, E-24). Thus, the modification extended the contract by 59 additional days. The new contract completion date was 7 November 2005. (R4, tab E-24 at 4)

11. By letter dated 31 January 2005 Advance notified the Corps that it disagreed with the methodology employed to calculate weather delay days under the contract and requested a review of the time extensions previously granted by the government. Appellant contended:

> The specifications state, "if the number of adverse weather delay days exceed the number anticipated" then "the contracting officer will convert any qualifying delays to calendar days, giving full consideration for equivalent fair weather work days." Through our review of the modification issued by the ACOE, the contract has been extended on a workday basis. There has been no conversion to calendar days made.
>
> ....

> We feel that there should be a conversion factor calculated each month and that number should be multiplied by the actual work days lost. This calculation would allow the contract to be extended on a calendar day basis. We need the contract to be extended on calendar days to correspond with our progress schedule.

(R4, tab E-22)

12. The Corps responded, by letter dated 10 February 2005, explaining that the conversion factor referenced in Paragraph c of the time extension clause is used to "convert work days to calendar days when a contractor's normal work schedule is less than 7 days a week." The Corps indicated that it evaluated the previously-granted time extensions on a calendar day schedule and not a work day schedule, and as such, a conversion factor was not applicable. (R4, tab E-23)

13. The Corps Quality Assurance Reports for the month of June 2005 show that appellant minimally used one 12 inch pump (and later two small 6 inch pumps) and gravity to dewater Borrow Area No. 2-B (R4, tab E-10 at Bates 183-215). We find that during the month of June 2005, appellant did not aggressively attempt to drain the water in Borrow Area No. 2-B. By letter dated 21 June 2005, the contracting officer, Ms. Joan Arnold (CO Arnold) informed Advance that it was approximately 10 percent behind schedule and was "falling further behind with the passage of each day on which a less than diligent effort is made...to perform productive work." As of the date of this letter, the government indicated that Advance's current work effort was "completely unsatisfactory." CO Arnold stated further: "unless this condition is cured within 14 days after your receipt of this notice, the Government may terminate for default under the terms and conditions of the Default clause of this contract." (R4, tab E-27)

14. Appellant responded, by letter dated 1 July 2005, contesting the contracting officer's assessment that it had failed to diligently pursue contract performance and asserting that conditions were "not satisfactory for productive hauling operations to be performed, but they soon will be." Specifically, appellant stated:

> It is true that we are pumping from the landside and riverside borrow areas, preparing to resume work. Additionally, the riverside berms on the north and south ends of the project where material is to be placed are, or have been, under water and are drying. On June 25, 2005, your staff used a hydraulic excavator to remove a blockage (beaver dam) from off the

> right-of-way to drain the fill area on the south end of the job. This work temporarily drained some standing water, but the blockage has returned. Today, the water is not draining. On the north end, we continue to pump water from the borrow area and fill areas. We believe that a time extension of 30 days for June 2005 will be required.

(R4, tab E-28)

15. The Corps replied, by letter dated 12 July 2005, informing appellant that it had not provided specific information in order to "adequately monitor" Advance's efforts and commitment to complete contract performance. In the letter CO Arnold stated:

> As of the date of this letter you continue to do very little to progress the project in a diligent manner. Although you state in your July 1 letter that you have five new off road hauling units (trucks) being prepared for shipment to this project as well as there being available to you other trucks and support equipment that you plan to mobilize to the project, the fact of the matter is that as of the date of this letter no production equipment is on site. Even if the five hauling units and the other undefined number of trucks were on site, it is not clear that you would have sufficient equipment and man power to timely perform the contract.
>
> ....
>
> Based on the time remaining in the contract you would have to produce approximately 10,000 cubic yards of levee and berm embankment per day to complete the contract within the required time. Based on your current stated plan to mobilize an undefined number of hauling units, it does not appear that you could possibly complete the contract within the required time.

Appellant was given 10 days to present evidence regarding whether its failure to perform arose from causes beyond its control. (R4, tab E-29) The CO used the 10,000 cy production rate as a benchmark to assess whether appellant could complete the project on time.

16. By letter dated 1 August 2005, appellant responded to the Corps' 12 July 2005 letter disputing the government's contention that it had not taken steps to improve contract progress. Appellant noted that it added additional equipment on-site "in response to your June 21 letter wherein you cited lack of on-site equipment as a deficiency." Also, appellant contended that the government's failure to adequately fund the work and weather delays (high river stages) affected appellant's progress under the contract. Advance stated further:

> Based on the time extensions granted to date by the Corps and the remaining time to complete the levees, we acknowledge that your letter correctly concludes that we would need to produce completed embankment of approximately 10,000 cubic yards per day (cy/day). In your letter, you are concerned that the number of hauling units stated in our July 1 letter can not [sic] possibly complete the levee in the required time. However, the number of hauling units is not the controlling factor. We can mobilize sufficient trucks or tractors with scraper pans to haul more than 10,000 cy/day. However, within a limited work area on the levee, we cannot reduce the natural moisture content in borrow materials quickly enough to accomplish both compliance with the contract moisture requirements for semi-compacted fill and continuous placement of material at a rate of 10,000 cy/day. Moisture content reduction in the earth materials is the limiting factor to building this levee.

This letter also mentions a subsequent in-person meeting scheduled for 2 August 2005 where the parties would discuss appellant's performance plan. (R4, tab E-35)

17. By letter dated 4 August 2005, CO Arnold related the following:

> You requested the meeting with me to discuss work performance issues. At the meeting you requested 45 days within which to demonstrate that you are committed to completing the contract and that you have the capability of doing so in a timely manner.
>
> Based on the commitments you made at our meeting I have decided to delay my final decision on terminating the contract and will grant you the opportunity to perform. My expectations are that you will immediately take the steps you

> outlined at our meeting to complete the contract within the required time. The steps you outlined are: (a) bring a subcontractor on board, (b) augment your spread of production equipment, (c) operate two 10-hour shifts per day seven days a week, (d) satisfactorily place approximately 10,000 cubic yards of levee and berm embankment per day, and (e) either Mr. Bob Najor or Mr. Lew Najor will be on site at all times to personally oversee the construction operations as well as management of job site personnel.
>
> ...Understand, however that by granting you this opportunity to perform in no way establishes a new completion date nor does the Government waive any of its rights under the contract to assess liquidated damages or terminate for default.

(R4, tab E-36; tr. 4/48-49, 129-30)

Cure Period

18. By letter dated 8 August 2005, Advance acknowledged the contracting officer's decision to evaluate its progress over the next 45 days and stated the following:

> The material that is in borrow area 2B is extremely moisture sensitive and will require a lot of drying time. We discussed with you the possibility of attempting to achieve some of the drying in the pit. This will require opening up a large portion of the pit and...will help speed up the drying by having more surface area that is open to air-drying.

Advance also requested authorization to place fill over more than one 5000-foot station increments. Advance noted further that it would be requesting a review of the days that have been lost during the project because the "time allowed to complete this project may eliminate the need for moving the estimated 10,000 cubic yards." (R4, tab E-37) Thus, we find that counting from 8 August 2005 the 45-day cure period would expire on 22 September 2005.

19. On 16 August 2005, COR/ACO Matthews determined that the contract was excusably delayed 31 calendar days for the contract period 1 June through 31 July 2005 due to "wet site conditions caused by high river stages and rainfall." Accordingly, the

letter concludes that appellant "will be entitled to an increase in performance time for excusable delay that occurs after August 2005." (R4, tab E-39)

20. By letter dated 19 August 2005, COR/ACO Matthews, in addition to directing appellant to submit a current and updated Quality Control Plan, communicated the following:

> The Contracting Officer notified you by telephone on August 3, 2005 that we had decided to delay a final decision on terminating the contract and allow you a 45 day period within which to perform in accordance with your stated plan.... As of the date of this letter 16 days have passed (approximately 1/3 of the 45 day period) and you have mobilized two John Deere Tractors with double pans,...but it does not appear that you have contracted with a subcontractor nor have you operated two shifts per day or hauled and placed 10,000 cubic yards of embankment per day. Based on the circumstances of allowing you a 45 day period within which to perform in accordance with your plan, we expected a much faster response in order to protect your interest. Your best daily production has been in the range of 5,000 to 6,000 cubic yards, but that was only on one day. All other days have been less. So far we are disappointed in your effort.

COR/ACO Matthews also stated that in September 2003 respondent had already waived the 5000-foot restriction and allowed Advance to open up a large portion of Borrow Area No. 2-B (with the exception of a 300 foot wide corridor on the east side of the borrow area) for drying purposes. (R4, tab E-40) Thus, the Corps again used the 10,000 cy figure as a standard to assess whether appellant was making a serious effort to complete the contract on time.

21. By letter dated 22 August 2005, CO Arnold opined after personally visiting the job site: "It appears to me that the problem you have is your failure to have sufficient production equipment on site to make satisfactory progress." The contracting officer indicated further that the government would continue to monitor progress and that the 45 day period to get the contract back on track "will expire on 22 September 2005." (R4, tab E-41; tr. 4/201)

22. Appellant responded, on 24 August 2005 requesting a time extension of 143 calendar days due to high river stages. Specifically, appellant requested 80 days for the period of 1 June to 19 August 2003; 14 days for July 2004 (though acknowledging

that respondent had granted 24 days extension); and 59 days for the period of 1 June through 29 July 2005. (R4, tab E-42) Additionally, on 24 August 2005, appellant began working double shifts on the project (R4, tab E-9 at Bates 129, tab E-10 at Bates 60-61).

23. By letter dated 2 September 2005, appellant requested an additional time extension due to a diesel fuel shortage resulting from Hurricane Katrina (R4, tab E-43). The government responded, by letter dated 6 September 2005, that the fuel shortage "is an unforeseeable cause of delay" beyond appellant's control. Thus, the contracting officer made a determination that "the fuel supply disruption is an excusable cause of delay as contemplated by the Default clause." However, the contracting officer noted that Advance had received 8,000 gallons of diesel fuel on 6 September 2005 and added that "we expect you to be diligent in taking whatever steps you can to mitigate the delay in your work." (R4, tab E-44)

24. Additionally, on 6 September 2005, COR/ACO Matthews responded to appellant's 24 August 2005, 143 calendar day time extension request for the period of 1 June 2003 through 29 July 2005. The government granted an additional 7 day time extension for the period of 1 June 2004 through 31 July 2004. The balance of the request was denied. (R4, tab E-45 at 4) The government further allowed, by letter dated 14 September 2005, an additional 6 calendar days for the period of 1 August through 31 August 2005 (R4, tab E-48).

25. By letter dated 14 September 2005, appellant responded to the government's denial of the majority of the requested delay days, requesting that the government "reassess the 2003 and 2005 periods for high river stages" (R4, tab E-53).

26. The record contains a D&F dated 23 September 2005 wherein CO Arnold explains her decision to issue Modification No. P00017, which extended the contract 41 calendar days for the contract period 1 June 2005 through 23 September 2005 due to excusable delays. CO Arnold wrote:

> 1. Contract Data.
>
> ....
>
> d. The contract performance time has been increased 138 calendar days pursuant to the Default clause under provision of Modification Nos. A00002, A00005, and A00006 because of unusually severe weather and river stages during the period March 20, 2003 through December 31,

2004. These increases in performance time established the required completion date as November 7, 2005.

e. The contract is approximately 50 percent complete as of September 23, 2005.

2. Time Extension.

a. The period evaluated for time extension in this [D&F] is June 1, 2005 through September 23, 2005. The original contract period ended on June 22, 2005 and the extended contract period began on June 23, 2005.

....

f. Based on the foregoing, a modification under the Default clause increasing the contract performance time 41 calendar days (12+25+4) [37 days for June – August 2005 plus 4 days for fuel supply disruption] is justified. This time extension will establish December 18, 2005 as the required completion date. The contract price will not change.

(R4, tabs E-51, D-3G)

27. In a separate D&F, also dated 23 September 2005 to justify her default termination of the contract, CO Arnold stated the following:

1. The 45 day period expired on 22 Sep 2005 and it was clear that Advance had not performed in accordance with their plan and they were continuing to fall further behind schedule.

m. As of 22 Sep 2005 there are 87 days left in the contract performance time. In order to finish on time Advance would have to haul and place approximately 14,000 cubic yards of embankment per day. However, based on Advance's recent average daily production of approximately 6,420 cubic yards, they will require approximately 199 days in order to complete the embankment. This is approximately 112 days late.

(Supp. R4, tab 90)

28. Although CO Arnold gave appellant a chance to show it could make sufficient progress to ensure timely completion of the project by placing approximately 10,000 cy of fill material per day, the record reflects that appellant averaged 6,407 cy on days when it placed embankment during the 45-day period (resp. supp. ex. 1, tab 8 at Bates 100-01; ex. A-63 at 97-98).[1] On 23 September 2005, after expiration of the 45-day cure period, CO Arnold issued written notice to Advance terminating the contract for default, citing a failure to "prosecute the work with such diligence that would ensure its completion within the time specified [in the contract]." The contracting officer also indicated that a final decision setting forth the details of the decision would follow. (R4, tab E-52) Modification No. P00016, dated 23 September 2005, which terminated the contract for default, was enclosed (*id.* at 3-4, tab D-3F). This termination occurred 86 days prior to the 18 December 2005 CO Arnold-determined contract completion date. CO Arnold also reasoned that in order to finish on time, appellant would have to haul and place approximately 14,000 cy of embankment material per day (supp. R4, tab 90 at 4-5).

29. By letter dated 20 October 2005, appellant filed its notice of appeal with the Board challenging the termination (R4, tab A).

30. On 2 December 2005, a different contracting officer, Ms. Jeri McGuffie (CO McGuffie) issued a final decision providing the details promised in the 23 September 2005 termination notice (R4, tab B). In addition to terminating the contract, the contracting officer extended the contract an additional 7 days due to high river stages during the months of June and July of 2004 resulting in a contract completion date of Sunday 25 December 2005. The CO determined that as of 22 September 2005, it would have taken appellant at least 183 days to complete the work. (*Id.* at 38)

31. Appellant confirmed at the hearing that it had only completed less than one-half of the excavation and placement CLINs of the contract prior to the termination (tr. 1/120-21). We find that at the time of termination, 1,248,110 cy of material remained to be placed under the subject contract.[2] Accordingly, we further find that as of

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[1] We reach this amount by adding the average amounts of cy placed per day for the months of August and September 2005 (18 days in each month) and dividing that sum in half. Thus, August 2005 cy average = 4770 (resp. supp. ex. 1, tab 8 at Bates 100). September 2005 cy average = 8044 (*id.* at Bates 101). Total = 12814/2 =6407 cy per day.

[2] This amount is derived by adding the total load counts from the government's payment records through 31 August 2005 (resp. supp. ex. 1, tab 4 at Bates 95) and Load Count Spreadsheets for September 2005 (*id.*, tab 8 at Bates 101) to get a total sum of 1,044,990 cy placed under the subject CLINs. Thus, the amount remaining to be placed under the contract was 1,248,110 cy (2,293,100 – 1,044,990) (finding 1).

23 September 2005, appellant would have needed a productivity rate of approximately 13,277 cy per day in order to complete the contract by 25 December 2005, assuming no weather days.[3]

Expert Witnesses

32. The government offered Mr. George J. Strickler of Capital Project Management, Inc. (CPMI), an expert in scheduling analysis and delay and productivity analysis (tr. 4/264). Mr. Strickler compared the Contractor Quality Control (CQC) reports, the Corps' Quality Assurance Reports (QAR), job site weather data and the reports of Advance's experts, William F. Connole of Franvel Corp. and Lin B. Heath of Nicholson Professional Consulting, Inc. (NPCI), and analyzed the Franvel/NPCI added excusable delay days (resp. supp. ex. 1 at Bates 16-24). His production analysis charts indicate that Advance was behind its as-planned schedule, as updated in September 2003, March 2004 and July 2005, respectively, by 89 days (as of 31 December 2004), 49 days (as of 31 July 2005), and 20.6 days (as of 22 September 2005) (resp. supp. ex. 1, tabs 5-7). Appellant advances its own proposed finding of fact (PFF ¶ 183) that Mr. Strickler opined that, as of July 2005, Advance was only 15.6 production days behind schedule (app. br. at 44, 52). Mr. Strickler assumed, for this purpose that Advance was entitled to 5 additional weather days factored in by appellant's experts (tr. 4/273). Mr. Strickler's analysis also shows, however, that Advance's July 2005 as planned schedule contemplated that it would place 660,685 cy in October 2005 and 239,175 cy in the first 7 days of November, numbers vastly greater than it ever achieved.

33. Mr. Connole was offered as an expert in analyzing delay and productivity, damages and means and methods of levee construction, fill placement and time required for project completion (tr. 2/167-68). Mr. Heath was offered as an expert in analyzing delay and schedule, productivity and time required for project completion (tr. 2/236-37). Messrs. Connole and Heath opined that, in addition to the 186 days of excusable delay the CO granted Advance, the contractor was entitled to 42 more days of excusable delay: 16 in 2003, 6 in 2004 and 20 in 2005, although their selection of such days in December 2004, June and July 2005 differed somewhat (ex. A-63 at Bates 65, ex. A-61 at 5-6). Based on the degree that the CQCs, QARs and other record evidence substantiated those 42 days, and Mr. Strickler did not rebut them (resp. supp. ex. 1 at Bates 18, 23), we find that Advance is entitled to 20 days of additional excusable delay, 11 days in June, September, October and December 2003, 1 day in October 2004 and 8 days in June-July

[3] This amount is derived by dividing the amount of placement material remaining under the contract (1,248,110 cy) by the remaining days left under the contract after termination (94) equals 13,277 cy.

2005. Those 20 days increase the number of excusable delay days from 186 to 206 and extend the contract completion date (allowing for the Exclusion Period) from 25 December 2005 to 14 June 2006. Extending the completion date by 20 days means that appellant would still have needed a productivity rate of approximately 10,948 cy per day, assuming no weather days, to complete the contract within the remaining 114 days (*see* footnote 3, above). We find unpersuasive the views of Messrs. Heath and Connole about post-termination excusable delay days and speculations about how Advance might have reconfigured its work shifts and equipment deployment post termination to perform the remaining, more than half of the contract work.

Motion to Strike

Appellant filed a motion to strike portions of the government's post-hearing brief, specifically: (1) proposed Finding of Fact 71 citing Mr. Strickler's opinion that the Corps "over-allowed" 24 calendar days under the Unusually Severe Weather clause; (2) all references by the Corps to appellant's allegedly misleading the Corps or the Board as to equipment availability (gov't br. at 19-20); (3) the government's attempt to introduce Mr. Strickler's opinion testimony as to the Unusually Severe Weather clause (gov't br. at 51-56); (4) the government's allegedly unsubstantiated calculation of days available after 25 December 2005 (gov't br. at 57); and (5) pages 60-72 of the government's brief analyzing Messrs. Connole and Heath's reports. (App. reply br. at 12-13)

The government filed a separate response to appellant's motion to strike contending that although the Board did strike Mr. Strickler's legal interpretations of the Unusually Severe Weather clause of the contract in his 3 May 2007 Supplemental Report (resp. supp. ex. 1) in its previous Interlocutory Order dated 7 June 2007, it did not strike Mr. Strickler's Supplemental Report in its entirety. Accordingly, the government argues that Mr. Strickler's analysis and conclusions contained in his Supplemental Report are properly part of the record in this proceeding. Regarding the government's allegations that appellant misled the Corps and the Board regarding the number of hauling units it was planning to use, the government avers that appellant's contentions are conclusory and not based on evidence in the record. With regard to the motion to strike portions of the Corps' time analysis, the government avers that the record indicates that it did in fact review appellant's request for an additional 143 days and the CO performed an analysis of how much time it would take to complete the project, which is contained in the 23 September 2005 D & F. Finally, with regard to the portions of the government's brief concerning rebuttal of appellant's experts, the Corps contends that Advance's argument lacks legal authority and numerous portions of the record refute or contradict the allegations and opinions of Messrs. Connole and Heath. (Gov't reply mot. to strike, 1-5)

The Board's Interlocutory Order clearly strikes Mr. Strickler's legal interpretations of the Unusually Severe Weather clause. We affirm that ruling. Accordingly, we grant the motion to strike proposed Finding of Fact 71 and those portions of pages 51 to 56 of the government's brief premised upon Mr. Strickler's opinion that the Corps misapplied the Unusually Severe Weather clause. We do not strike those portions of pages 51 to 56 which explicate factual material. We conclude that the remaining challenged portions of the government's brief consist of permissible argument based upon the evidence in the record.

DECISION

The government argues that the termination was proper because appellant failed to prosecute the work with such diligence as would ensure completion of the contract on time. The government contends that at the end of the 45-day period in which appellant was given the opportunity to demonstrate its ability to get the project back on track, appellant would need at least 183 days to complete the contract. Thus, once the contractually required Exclusion Period is factored in, the government contends that the contract completion date slips from 25 December 2005 to 22 August 2006, which was unacceptable. (Gov't br. at 10-11)

Appellant contends that the government failed to meet its burden of proof in establishing that the termination for default was proper (app. br. at 47-53). Specifically, appellant contends, the Corps has not offered evidence to show that appellant could not complete the remaining work within the remaining time left on the contract, properly adjusted for excusable delay. Additionally, appellant argues that the contracting officer abused her discretion by: (1) terminating the contract before the cure period had expired; (2) incorrectly calculating the time remaining on the contract; (3) failing to exercise sound business judgment before terminating the contract; and (4) failing to grant all excusable delays due to unusually severe weather and the adverse effects of high river stages at the site based on information available to her when she decided to terminate the contract. (*Id.* at 53-56) Finally, appellant alleges that the Corps interfered with its ability to perform utilizing the construction means and methods it had planned at Borrow Area No. 2-B, and thus hindered its progress (*id.* at 48, 64-72).

The government has the burden of proving that the termination for default was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). The contracting officer terminated the contract for default on 23 September 2005 reasoning Advance had failed to "prosecute the work with such diligence that would ensure its completion within the time specified [in the contract]" (finding 28). To justify termination for endangering contract performance, the government must prove that the contracting officer had the reasonable belief that there was "no reasonable likelihood that

the [contractor] could perform the entire contract effort within the time remaining for contract performance." *Giuliani Associates, Inc.*, ASBCA Nos. 51672, 52538, 03-2 BCA ¶ 32,368 at 160,164 *aff'd*, 111 F.App'x 606 (Fed. Cir. 2004), *citing Lisbon*, 828 F.2d at 765; *Danzig v. AEC Corp.*, 224 F.3d 1333, 1336-37 (Fed. Cir. 2000).

The revised contract completion date, which takes into account all excusable delays granted by the government, was 25 December 2005 (finding 30). We have extended that date to 14 June 2006 (finding 33). It is clear that from as early as August of 2003 Advance was behind schedule (finding 4). As of July 2005, the record is clear that the parties were using the placement of 10,000 cy fill material per day as a factor to show Advance how far behind schedule it was and to assess whether it could finish the project on time (findings 15-16, 20). During the cure period, on days when Advance placed embankment material, the average amount placed was 6,407 cy (finding 28). Based on this productivity, and given the fact that appellant completed less than half of the contractually required work over close to three construction seasons, it was highly improbable that Advance could have excavated and placed the remaining 1,248,110 million cy of fill material needed to complete the levee project by 18 December 2005 (the contract completion date used by CO Arnold in her 23 September 2005 termination decision), 25 December 2005 (the date used in the final decision issued by CO McGuffie) (finding 30), or 14 June 2006 (the date which we have accepted). Accordingly, there was no reasonable likelihood that Advance could perform the entire contract effort within the time remaining for contract completion. *Lisbon*, 828 F.2d at 765.

Even assuming, *arguendo*, that the Corps terminated the contract prior to the expiration of the 45-day cure period, because of excusable delays during the cure period, appellant's arguments must fail. As we stated in our previous denial of appellant's motion for summary judgment under this appeal: "When a contractor is so delinquent that its performance in the time remaining in the cure period can make no difference, default termination is proper." *Advance Construction Services, Inc.*, ASBCA No. 55232, 07-2 BCA ¶ 33,585 at 166,368, *citing Contract Automotive Repair & Management*, ASBCA No. 45316, 94-1 BCA ¶ 26,516 at 131,985-86. After almost three years of contract performance, appellant only managed to complete less than one-half of the excavation and placement CLINs (finding 31). It is clear from the record, as explained above, that any extra days added to the cure period would not have made a difference in appellant's ability to complete performance on or before the contract completion date as extended.

Appellant further contends that the CO failed to exercise sound business judgment in analyzing the amount of liquidated damages as compared to the cost of reprocurement after a default termination. Specifically, appellant argues that if it had been allowed to complete performance, it could have finished 89 days beyond the adjusted contract

completion date. As such, appellant concludes that it would have incurred liquidated damages in the amount of $42,275. Thus, appellant proffers that the CO should have completed an analysis as to whether terminating Advance and reprocuring was more economical than allowing appellant to continue performance and assess liquidated damages. (App. br. at 47, 61-3) Appellant cites no case law or contract provision that would require the government to perform such an analysis. Accordingly, we hold that the government has met its burden and proven its *prima facie* case for default termination.

Once the government has met its burden, the burden shifts to the defaulted contractor to prove that its nonperformance was excusable. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). Under ¶ (b)(1) of the FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause, an excusable "delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor." Appellant has not proven that it was entitled to any more than 20 additional days due to weather delays other than those specifically mentioned above (finding 33). Even if appellant's 42 additional days of extension were considered, resulting in a new completion date of 6 July 2006, there was no reasonable likelihood of timely completion.

Further, appellant alleges that its nonperformance should be excused because the Corps: (1) improperly restricted opening up Borrow Area No. 2-B; (2) failed to provide adequate drainage details into Borrow Area No. 2-B; and (3) imposed improper restrictions on embankment moisture control (app. br. at 64-72). The Corps contends that appellant's problems with excessive water in Borrow Area No. 2-B resulted from its subpar efforts to dewater the area. Based on the record, we agree. For the entire month of June 2005, appellant did not aggressively attempt to drain the borrow area (finding 13). In fact it was the Corps, not appellant (as required by the contract), that removed the beaver dam obstruction in the borrow area allowing for the water to drain (finding 14). Additionally, appellant was using one 12-inch pump and gravity (and later two small pumps) to dewater the area (finding 13). The contract clearly required that appellant was responsible for drainage in the borrow areas, not the Corps (finding 3). Thus, the fact that the borrow area was not suitable for excavation was not the government's fault. Regarding the adequacy of the drawings with respect to drainage details, appellant viewed the site and drawings prior to bidding on the project (finding 1). It strains credulity to believe that appellant, who has been engaged in this type of work for over 35 years and completed several similar levee enlargement projects, would not have done its due diligence with regard to how to comply with the contract's dewatering requirements. Finally, with regard to the Corps improperly restricting appellant's moisture control, appellant's arguments do not comport with the record. Accordingly, Advance has not met its burden to show that its nonperformance was excusable.

CONCLUSION

The appeal is denied.

Dated: 8 June 2011

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting 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. 55232, Appeal of Advance Construction Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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