ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Tawazuh Commercial and Construction Co. Ltd.	)	ASBCA No. 55656
	)	
	)	
Under Contract No. W91B4L-06-C-0021	)	

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OPINION BY ADMINISTRATIVE JUDGE WILLIAMS

This appeal arises from the default termination of a contract to pave a road in Afghanistan. In addition to challenging the propriety of the termination, Tawazuh Commercial and Construction Co. Ltd. (TCCC or appellant) requests an equitable adjustment of $2,756,450, broken down as follows: $1,341,450 for paving 18 kilometers of road, $281,000 for equipment destroyed in an attack on its base camp, and $1,134,000 allegedly incurred as a result of a suspension of work. A hearing was held in Kabul, Afghanistan. Only entitlement is before us.

FINDINGS OF FACT

Contract and Performance

1. On 20 December 2005, the Kandahar Regional Contracting Center at Kandahar Airfield (KAF) awarded the above referenced contract in the amount of $2,981,000 to appellant for constructing 40 kilometers of the road connecting Kandahar City and Tarin Kowt, Afghanistan (R4, tab C-1 at 1-3). The north and south sections of the road had been previously paved by other contractors, leaving only the "Middle Section," which is the subject of this appeal, to be completed (tr. 38). Initially, the contract was administered by the 864th Engineer Battalion (Pacemakers) of the United States Army. The performance period was 26 December 2005 through 8 July 2006 (R4, tab D-2).

2. The following FAR clauses, which were incorporated into the contract by reference, are relevant, in part, to this dispute.

> FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002)
>
> ....
>
> (f) *Title, liability, and reservation of rights.* All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not be construed as—
>
> (1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or
>
> (2) Waiving the right of the Government to require the fulfillment of all of the terms of the contract.
>
> FAR 52.236-6, SUPERINTENDENCE BY THE CONTRACTOR (APR 1984)
>
> At all times during performance of this contract and until the work is completed and accepted, the Contactor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to

the Contracting Officer and has authority to act for the Contractor.

FAR 52.236-11, USE AND POSSESSION PRIOR TO COMPLETION (APR 1984)

(a) The Government shall have the right to take possession of or use any completed or partially completed part of the work.... The Government's possession or use shall not be deemed an acceptance of any work under the contract.

FAR 52.242-14, SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor...to suspend...all or any part of the work [for] the period of time that the Contracting Officer determines appropriate....

(b) If...performance...is, for an unreasonable period of time, suspended...an adjustment shall be made for any increase in the cost of performance...(excluding profit).... [N]o adjustment shall be made...for any suspension...to the extent that performance would have been so suspended...by... the fault or negligence of the Contractor....

FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996)

....

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work...conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not—

(1) Relieve the Contractor of responsibility for providing adequate quality control measures;

(2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;

(3) Constitute or imply acceptance....

....

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

....

(g) If the Contractor does not promptly replace or correct rejected work, the Government may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

FAR 52.246-21, WARRANTY OF CONSTRUCTION (MAR 1994)

(a) [T]he Contractor warrants...that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor....

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984)

(a) If the Contractor refuses or fails to prosecute the work...with the diligence that will insure its completion

within the time specified...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.... In this event, the Government may take over the work and complete it by contract or otherwise.... The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time.... This liability includes any increased costs incurred by the Government in completing the work.

(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-

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity....

....

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

(R4, tab C-1, §§ E, I)

3. Contract section F, Deliveries or Performance, stated in part:

The contractor will carry insurance to cover the cost for replacement or repair of vehicles lost, stolen or damaged through criminal acts, natural acts (commonly called acts of God), or hostile acts. This is to preclude the

government from being held liable for claims generating from any of the above.

(R4, tab C-1, § F-1) (Emphasis in original)

4. The Statement of Work (SOW) provided, in part, as follows:

1. **GENERAL:** This project will improve 40 Kilometers of provincial road in the vicinity of the village of Tanuchay south to the village of Tangi. The road will be graded, scarified, shaped to improve drainage and sealed with bitumen and gravel to improve trafficability and weather resistance.

2. **SUMMARY**:

2.1 Location: Provincial road connecting Kandahar City and Tirin Kot....

2.2 Length of Project: 39,690 meters.

2.3 Type of Construction: Temporary.

3. **SCOPE OF WORK**: Provide all necessary labor, equipment and materials to upgrade the...road...connecting previously completed paved sections of the road.

3.1 Scarify, grade, add 10cm lift of well graded gravel to improve road sub base. Sub base must be compacted to a minimum of 90% compaction.

3.2 Shape/grade (crown) roadway width to improve drainage. Crown must maintain a minimum of 1% slope and not to exceed a maximum of 3%. Where necessary, crown may be substituted for a uniform gradient from edge to edge; slopes must be maintained to ensure drainage. See attached typical road section view. Piles of excess gravel or graded material will not be left on sides of road.

3.3 The contractor will set the road elevation to provide a smooth even surface and tie in with the existing road

drainage. Extreme care must be used to avoid damaging or altering existing drainage or irrigation systems.

3.4 Seal sub base with a single treatment of bitumen and gravel (Chip and Seal). Bitumen cut back range will not exceed 15-30%, application range is 1.6-2.0 liters/square meter. Gravel will be 5-10 millimeter and washed, coated with 10% diesel or kerosene. Gravel will be rolled, with a final pavement thickness of at least 10 mm.

(R4, tab C-1, attach. 1 at 1) (Emphasis in original)

5. The typical road section view to which section 3.2 of the SOW referred reiterated that the contractor was to "[s]hape/grade (crown) roadway width to improve drainage" and that the "slopes must be maintained to ensure drainage" (R4, tab C-1, attach. 1 at 3). A "DITCH" was depicted at each side of the road cross section (*id.*).

6. The following clauses in the SOW are also relevant, in part, to this appeal:

> 4. **GOVERNMENT PROVIDED SUPPORT:** No Government support is provided. The contractor is responsible for all items of life support including worker temporary living facilities,...liability for equipment loss...and any other aspect of support required to complete this effort....
>
> **5. SAFETY AND LIABILITY**: The Afghan National Army and Afghan National Police have established posts and routine patrols along this section of road. This is the extent of security that will be provided. **U.S. Military or Afghan Security Forces WILL NOT provide active security for contractor operations**....Contractor assumes all responsibility for the safety of the workers on the job site....
>
> **6. TRAFFIC CONTROL**: The contractor shall maintain one lane of traffic open on the road at all times....
>
> **7. CLEAN-UP:** The contractor shall ensure the road surface and areas around the work site are free of any debris and materials upon completion of work each day....Piles of excess gravel or graded material will not be left on sides of road....

> **8. QUALITY ASSURANCE/QUALITY CONTROL (QA/QC):** The contractor must provide on site quality control measures to ensure construction and materials standards are met. The US Government will conduct on site quality assurance at periodic intervals to be determined by the US Government. The contractor shall provide quality control/assurance documentation to the Government upon site visits.

(R4, tab C-1, attach. 1 at 2) (Emphasis in original)

7. Bidders were advised at the pre-bid conference that they "will be required to ensure that the road is crowned to allow for drainage;" there was existing drainage for the road; no new "drainage structures" were required, unless the contractor damaged the "existing structures" during the work; and the contract did not require construction of culverts (R4, tab D-40, Appendix B at B-2). Appellant's representative and general manager, Haji Fariduddin, who attended the conference, understood this to mean that it did not have to include drainage, "which is the ditch," in its bid, because "the ditch has been provided" (tr. 13, 15-16, 85; *see* tr. 288 (facts alleged in opening statement, affirmed to be true, accepted as testimony)). The Pacemakers apparently had constructed at least some ditches along the road. They understood, however, that, while "[d]rainage structures" such as culverts and low water crossings were not included in the contract, if ditches did not exist in certain places, the contractor was to adhere to the SOW and provide a road "with ditching" as specified in the cross-section. (R4, tabs D-24, -35) The contracting officer (CO) and the contracting officer's representative (COR) also disagreed with appellant's interpretation (tr. 60, 85, 213).

8. Appellant planned to use the first 15 days for mobilization. After that, it planned to divide the work into 5 eight-kilometer sections, allocating 36 days for each section, for a total of 180 work days, and a grand total of 195 days. (R4, tab D-1) Appellant's crew consisted of approximately 250 security guards and a range of 250 to 300 workers (tr. 21, 206, 267).

9. On 9 January 2006, appellant submitted its first progress payment request, in the amount of $59,620, or two percent of the contract price, for "some of the mobilization jobs." The government paid the invoice without objection on 12 January 2006. (R4, tabs D-4, E-2)

10. On 29 January 2006, Capt John Dingeman, deputy chief of contracting for the KAF, inquired into the status of the work. Appellant replied that approximately 10 kilometers of the sub base and base course were ready for the bitumen prime coat, that

the bitumen prime coat had been applied to about 5 kilometers of the section, and that about 1.5 kilometers of the base course were totally completed. (R4, tab D-5)

11. On 11 February 2006, appellant submitted progress payment request No. 002, in the amount of $596,200, or about 20 percent of the contract price, for the first eight kilometer section of the road (R4, tab E-3). Based on the verification of MAJ Jerry L. Farnsworth, II, now LTC Farnsworth, the Pacemakers' executive officer, the government paid the invoice without objection on 16 February 2006 (R4, tab E-3; tr. 36). At the hearing, LTC Farnsworth testified that the Pacemakers had not been able to perform an "on-ground" inspection of the road and that the invoices were paid because appellant needed to pay its people and they did not want to "penalize" appellant because the Pacemakers could not get a security force together (tr. 40-42).

12. On 26 February 2006, appellant submitted progress payment request No. 003, in the amount of $596,200, or about 20 percent of the contract price, for the second eight kilometer section of the road (R4, tab E-4). LTC Farnsworth testified that progress payment request No. 003 was submitted only two weeks after progress payment request No. 002, leading the Pacemakers to question whether the work had been completed. He explained that, while Pacemaker personnel had performed a flyover of the road, they had not been able to put "boots on the ground" due to an inability to assemble a security force. As a result, the government denied progress payment request No. 003. (Tr. 42-43)

13. By Modification No. P00002 dated 20 March 2006, administrative authority for the contract was turned over to the United States Army Corps of Engineers (COE). The modification included the remark "CUSTOMER IS HIGHLY ENCOURAGED TO COMPLETE A SITE VISIT ASAP TO GET AN UPDATED PERFORMANCE STATUS IN REFERENCE TO THE SCHEDULE TO ACCURATELY PAY THE NEXT 20% PROGRESS PAYMENT." (R4, tab C-3; tr. 186-87)

14. On 27 March 2006, appellant again requested payment of progress payment No. 003 (R4, tab E-5). On the same date, appellant submitted progress payment request No. 004, in the amount of $596,200, for the third eight kilometer section (R4, tab E-6).

15. On 1 April 2006, MAJ John Litz, the COR for the COE, with other government representatives, drove the road to assess its condition. Based on his observations and interviews of some of appellant's workers, MAJ Litz concluded there were major deficiencies with the completed work, the materials used and the methods of application. He also observed that chipped aggregate and bitumen were being applied by hand. (R4, tab D-20; tr. 61-64) MAJ Litz detailed his findings in a "TK Road Inspection Summary" report dated 1 April 2006 and sent his quality assurance team in to inspect the road and verify his observations (R4, tab D-20, -21; tr. 67-68).

16. MAJ Litz' inspection summary provided in part as follows:

1) As of 01 APR 06, grading has reached about 26k, which is over 60% of the contracted distance. The chip seal operation has reached almost 24k (60%). The surface has failed severely in several areas where runoff is moving under and over the road surface. Workers on site appear to not be familiar with the contract profile. They are merely grading the existing surface, compacting and applying chip seal.

2) Contractor has not adhered to the contract specs. The contract performance features were observed as follows:

a. Ditching at 2:1 slope on both sides-There is no evidence that the contractor has cut ditches anywhere on the road. If ditching exists, it was cut previously or it has been damaged by construction and erosion.

b. 1m Shoulder at 5% grade on both sides-There is no shoulder for most of the road. Only the traveled-way width exists.

c. 7m traveled-way width crowned at 1-3%-The traveled way width is generally 7m. The road appears to be crowned to shed water to either side or to one side, which is acceptable.

d. Compacted sub-base, 90% compaction-The contractor is compacting the subbase with vibratory rollers. However, there are many voids...and there was no compaction testing equipment on site while work was ongoing. Chip sealed surface is sinking in many small areas which appear[s] to be caused by poorly compacted subgrade/base course.

....

f. 10cm of well-graded base course added to the subbase, 90% compaction, crushed gravel-The material being used is pulled out of adjacent hillsides or stream beds. It contains soils and rounded river rocks, which are not suitable for a compacted base course. This material is being mixed with crushed aggregate.... After this material is distributed on the subbase it is compacted, [but not] tested. Voids were observed on the surface where chip seal was being applied.

> When surface samples were taken, it was observed that the chip seal was not adhering to the base course due to the large amount of soil fines.
>
> g. 5mm-10mm chipped aggregate used for the wear surface-A sample of material being used...for the chip seal appeared to be from 3mm to 6mm. It is crushed and clean. This aggregate has a high aspect ratio which causes it to lie on the flat side when compacted, therefore minimizing the thickness of the wearing surface.
>
> h. 10 mm of chip seal wear surface, single treatment, 7m traveled-way width-The surface is generally less than 10mm in thickness. Several measurements were made on different section[s] of the road and were often 2mm to 7mm.
>
> i. All debris is to be removed from the roadside at the end of the contract: There are many piles of aggregate and soil on the roadside....

(R4, tab D-20 at 2)

17. The trip report issued by the quality assurance team, covering the period 1-7 April 2006, identified the following deficiencies:

> Many problems exis[t] in this section including poor base course, poor application of SBST [single bituminous surface treatment, meaning single layer of chip seal], and little to no drainage.
>
> ....
>
> Base course (Pictures 1-3) is not to contract specification (well graded gravel). Large river rock is found near the surface and voids are present....
>
> Bitumen is applied by hand, not uniformly as proper construction methods dictate. Most striking is that the kettle is not being heated. From this we can assume they are cutting the bitumen with diesel or another petroleum based liquid, to increase the viscosity....
>
> [T]he crushed aggregate is comprised of small flat pieces (not idea[l] for SBST) and is being manually applied by shovel

from the back of a truck...before passes made with a steel roller.

....

The finished product does not meet the road profile.

Excess materials exist on shoulders.

Surface is thin and very soft....Note small aggregate....Surface is uneven and surface failure already exists.

On one occasion..., our convoy stopped and the surface came up under the friction of the LAV tire. This is evidence of very weak bond and further supports poor quality bitumen and thin chip seal layer. Special note: this was 6 April 06, high summer temps will worsen this effect.

Erosion is present due to lack of drainage (no ditching).

Potholes! This is striking considering the project is still under construction.... *Picture 6* shows surface failure and bleeding. Further evidence of poor construction.

(R4, tab D-21 at 1, 7, 9, 10)

Suspension of Work, Cure Notice

18. On 5 April 2006, after having been briefed by MAJ Litz, LTC Darrel L. Johnson, the CO, issued a suspension of work order. The CO advised appellant that it was "anticipated" government representatives would be on site "within the next 14 days" and that until the government was assured that the road complied with the contract, further progress payment requests would not be approved. (R4, tab C-4) No further work on the contract was accomplished after this date.

19. The COE awarded a contract to an independent contractor to conduct tests to determine if appellant's work complied with the contract specifications (tr. 70). Shortly after award, the testing contractor visited the site but refused to perform due to safety threats and its contract was terminated (tr. 186-89, 208-10).

20. On 11 May 2006, appellant advised the government as follows:

> As you know the 8KM of Section 2 and the 8KM of Section 3 which make a total of 16KM of this road have been completed a long time ago....
>
> ....
>
> [T]he company has been spending about $18,000 each day on this project while waiting on the Government and not working. Today is the 11 May 2006 which makes the 37th suspension day....
>
> During the above suspension our company base camp at Wach Bakhtoo came under an attack from Taliban. The enemy killed one [of] our worker[s] [and] wounded 4 [others, one very badly]. Taliban burned out 15 pieces of our equipments.

(R4, tab D-31) Appellant's finance manager, Haji Mohammaddin, testified that appellant had insured all of the equipment and had paid the owners for the destroyed equipment (tr. 265, 270-71).

21. On 13 May 2006, the CO reiterated that the COE would test the road prior to approving any more progress payment requests. He concluded by stating that "the Government will not pay for defective or deficient work." (R4, tab D-29)

22. On 16 May 2006, the CO issued a cure notice. The notice stated that government field inspections had revealed substandard workmanship and materials in the construction of the road, namely inadequate chip seal thickness, inadequate base course thickness and compaction, noncompliant materials and inadequate drainage. Appellant was given ten days in which to respond and submit a remediation plan. (R4, tab C-5)

23. On 19 May 2006, appellant provided the following written comments (paraphrased) in reply to the cure notice: (1) all work was performed in accordance with the contract; (2) the contract indicated that the type of construction was "temporary;" (3) the contract did not include a warranty; (4) the Pacemakers inspected the different phases of the project and were "very pleased" with appellant's work; (5)-(7) the Pacemakers paid appellant's first two progress payment requests; (8)-(10) the Pacemakers accepted section 2 of the road; (11) the COE inspected and accepted sections 2 and 3 of the road; (12) the COE approved appellant's request to move its base camp to a third new location for completion of sections 4 and 5; (13) the COE misinterpreted the

contract to require appellant to provide drainage; (14) although the stop work order stated that testing would be performed in 14 days, appellant did not hear that a contractor was ready to perform the tests until 16 May 2006; (15)-(17) the stop work order cost appellant around $18,000 per day, impacting its ability to pay subcontractors; (18) during the suspension, appellant suffered human and financial loss; (19) the road has been open for traffic and used by vehicles of up to 80 tons; (20) appellant performed extra work that was not part of the contract and for which it has not been compensated; (21) the villagers were not happy about the construction of the road, making it difficult to perform the work, but appellant tried its best to keep them happy; (22) appellant successfully completed 26 kilometers of the road; and (23) it did a good job. (R4, tab D-34)

24. Despite repeated requests beginning in early April 2006, appellant did not provide any quality control test results, a log showing that quality control tests had been conducted or a remediation plan in reply to the cure notice (R4, tab D-36; tr. 70-72, 111, 192).

25. On 19 May 2006, LTC Farnsworth advised MAJ Litz that the Pacemakers had only performed a flyover inspection of the road because they did not have a security element. He also stated that no one from the Pacemakers had authorized appellant to deviate from the specifications. On 20 May 2006, CPT Nick Melin, the Pacemakers' construction officer, advised MAJ Litz that appellant had been informed many times that it was behind schedule; from the aerial reconnaissance the Pacemakers had determined that, considering distance only, appellant was only a little more than 20% complete at the time of the 40% inspection; appellant had attempted to secure a contract to install additional culverts along the route, which the Pacemakers had not approved; appellant had not been exempted from ditching, which was required by the contract; and the Pacemakers had not authorized appellant to dispense with binder or to use substandard base course. (R4, tab D-35)

26. LTC Farnsworth had traveled the road prior to the construction of the north and south sections. He also traveled the road after those two sections were paved and the middle section was just a sub base laid out and graded by the Pacemakers. (Tr. 14, 36, 38-39, 56-57) The middle section involved rough drainage and the Pacemakers worked with many of the villages to avoid cutting off their irrigation systems. The irrigation systems basically consisted of a pipe four to six inches in diameter with box culverts using sand bags for headwalls to control erosion. (Tr. 56-58)

27. Haji Fariduddin testified that appellant did additional jobs it was not obligated to do under the contract, such as putting irrigation culverts in place, without requesting payment, so it would have a work relationship with the people of the region (tr. 22-23). Appellant's project manager, Haji Mohammad Yosouf, testified that appellant brought

the irrigation problem to the government's attention but did not receive any funding and proceeded to do the work at its own expense (tr. 274, 278-79).

28. On 21 May 2006, MAJ Litz, Ms. Andrea Duff, the COE's incoming area engineer, Haji Fariduddin (serving as interpreter), and Haji Mohammad Sadeeq Momand, appellant's general director (R4, tab D-34 at 2), met to discuss the cure notice (R4, tab D-36 at 1-5; tr. 209). During the meeting, Mr. Momand asserted, among other things, that the Pacemakers had inspected and accepted the work and had said it was very good; appellant had provided exactly what the contract required; appellant had many engineers checking that the road had the necessary surface thickness; ditches were not required by the contract; the handover to the COE was very bad and the COE did not understand what the Pacemakers had told appellant. As to whether appellant believed it had achieved the road profile, which required shoulders, appellant responded that the Pacemakers had already built the road, had advised appellant "to just follow the road as it existed," and appellant was "just supposed to provide the chip seal" (R4, tab D-36 at 2). Appellant stated that the contract was poorly written and that MAJ Litz did not understand it. When MAJ Litz stated that the chips appellant had used were very small and flat and appeared to be tailings from a quarry operation that were too small to achieve the contract-required road surface, appellant did not challenge the characterization of the chips but responded that the Pacemakers had paid appellant so they thought the work was good. Appellant stated that it had suggested DBST (double bituminous surface treatment) during the pre-bid conference, but funding only allowed for the single layer, and it was told another layer would be added to the road later "so we did not have to make the road perfect" (*id.*). Regarding quality control, appellant stated that "[t]he Government must take our word that the QC has been performed" (*id.* at 3). Appellant added that the government was always welcome to visit the road, and it would have been nice if it had done so, but it chose to fly in a helicopter. Appellant blamed the government's suspension of work for the fact that its camp was attacked and a man killed, alleging that but for the suspension, it would have moved to a safer area. It stated that it had not been paid and its workers had not been paid. It planned to charge the government $1800 per day, file a claim, and submit invoices for 40% and 60% work completion. Appellant advised that it had replied to the cure notice and would not provide a further reply.

Expert and Other Evidence on Specification Compliance

29. After its first contracted inspector refused to perform, in May 2006 the COE moved as quickly as possible to obtain the services of Dr. Reed B. Freeman, a COE research civil engineer then stationed in Bagram, who was tasked with another project at the time (tr. 208-10). Dr. Freeman received a PhD from the University of Texas in civil engineering with an emphasis in geotechnical engineering and concrete materials and a M.S. in civil engineering with an emphasis in asphalt pavement. He is a registered professional engineer, has taught at the university level, and is a member of numerous

professional societies. At the time of his testimony, he was Chief of the Quality Assurance Branch at the Afghan Engineer District in Kabul. (Tr. 114-21) The Board accepted Dr. Freeman as an expert in the fields of road design, construction, inspection, and quality assurance (tr. 120).

30. From 31 May 2006 to 3 June 2006, Dr. Freeman, MAJ Litz, and MGSgt Paul L. Atherton (inspection team) inspected the road and took samples (R4, tab D-40 at 3; tr. 75). The inspection team took samples at 15 randomly selected locations-each from a different 1.5 kilometer segment of the road. At each location, road geometry was measured, including width, crown, and ditch dimensions. Material samples included the surface treatment material, loose surface treatment aggregate, and the base course. Surface treatment samples were easily peeled off the base course using a flat-head shovel. Due to lack of aggregate in the surface treatment, samples of the surface treatment aggregate had to be obtained from the edge of the driving lane, where the aggregate had been transported in a loose state by traffic. The sub base and base course materials were nearly identical, thus preventing thickness determinations for the base course layer. (R4, tab D-40 at 3-5)

31. On 4 June 2006, MAJ Litz e-mailed a preliminary report of the inspection team's findings to the CO. He stated that the road was worse than he had thought two months ago and was dangerous to drive on. He identified the following "major" defects:

> - The surface has little to no aggregate in the surface. Chip aggregate is miniscule and provides a surface that is consistently less than 5mm. It has a consistency of a fruit roll-up due to the heat.
> - The surface is oily and slick. Vehicles slide in curves as the tires pull up chunks of the thin, oily surface. Our boots would sink into the surface in many places.
> - From the start of section 2 there are large chunks of surface missing (bare spots) all the way up (26km).
> - Base course has too many fines to allow the surface to adhere. We sliced the surface with a knife and peeled it with a shovel to get the sample, which would not have happened with the right base course material.
>
> In addition to no ditching, equipment ruining existing ditching, noncompliance with road crowning and the other points that were made 2 months ago, you can start the termination notice immediately.....

(R4, tab D-37)

32. Although Dr. Freeman issued his written report on 14 June 2006 (R4, tab D-40), eight days after the CO terminated appellant's contract for default (below), Dr. Freeman had inspected the site, conducted testing, knew what his report would be, and had communicated the information verbally to the CO prior to the termination (tr. 240-41). The CO described Dr. Freeman's report as a written version of the CO's conversations with MAJ Litz and Dr. Freeman immediately upon their return from the field (tr. 193-94). The Summary of Findings in the report provided, in part, as follows:

> The Middle Section of the Kandahar-to-Tarin Kowt Road is a two-lane provincial road covered with a single surface treatment (i.e. chip seal). Despite being placed less than a year ago, the roadway surface is distressed. Bare spots...are being caused by abrasion and surface peeling under traffic. Some bare spots have already progressed into potholes, or surface depressions....
>
> The causes of surface distress were three-fold. First of all, the surface treatment contains insufficient aggregate; the chip seal aggregate was found almost entirely in a loose state on the sides of the roadway. Without aggregate, the asphalt cement binder is left unprotected against sunlight and traffic. Secondly, the asphalt cement is soft. This could be partially attributable to lack of protection by aggregate. The original asphalt cement could also have been too soft or the binder could have been cut back with a chemical that has not fully evaporated out of the asphalt cement matrix. The third problem is that the base course material contains excessive fine particles, thus preventing the surface treatment from adhering adequately.
>
> [The contractor failed to follow the specifications as follows:]
>
> 1) While the specification required that the surface treatment be at least 10 mm in thickness, the surface treatment placed by [TCCC had] an average value of 7 mm. This insufficient thickness is a reflection of the poor retention of bound aggregate and the fact that the aggregate was under-sized. Poor aggregate retention was documented by estimating aggregate quantities in the surface treatment samples after extraction; these quantities were found to be on the

order of one-half published typical values. The under-sized aggregates were documented with sieve analyses; for each sample of surface aggregate, 60 to 75 percent of the particles were finer than the specified minimum of 5 mm.

2) While the specification required a binder application rate of 1.6 to 2.0 liters per square meter of roadway surface, the measured values of [TCCC's] applications were on the order of one-half to three-quarters this amount. Lack of binder would contribute to aggregate loss.

3) The specification required the base course to be 'well-graded.' [A] common definition for well-graded aggregates includes conformance to two parameters calculated from particle size distributions: uniformity coefficient and coefficient of curvature. All the samples of [TCCC's] base course...failed the coefficient of curvature requirement due to excessive fines. For the [TCCC] base course samples, the percent passing the No. 200 sieve was as high as 23 percent. Excessive fines would prevent adequate bonding between the surface treatment and the base course. Gradations conforming to standard practice...contain less than 10 percent fines and are shown to meet the 'well-graded' requirements as defined by uniformity coefficient and coefficient of curvature.

....

Structurally, the road will withstand traffic loads as long as conditions remain dry. It is [my] opinion, that if the road is not repaired before winter rains, it will deteriorate quickly. The bare spots and potholes on the pavement surface will allow water to access the base course. The base course will weaken substantially when wet due to the presence of excessive fines. Traffic will then damage the pavement structurally.

(R4, tab D-40 at 23-24) Dr. Freeman opined that the specification's drainage construction requirements were ambiguous (*id.* at 24).

33. Dr. Freeman testified that a surface treatment is to protect the strong underlying base course from moisture and traffic abrasion (tr. 149) and that a single bitumen surface treatment which can be called temporary is often used to protect a pavement structure up to a few years with plans of adding a second layer of asphalt at a future date (tr. 153-56, 158). It was Dr. Freeman's opinion that the distress in the pavement was not related to load level or erosion water but rather to poor quality materials (tr. 158), and if appellant had placed two layers of pavement the condition of the road would have been twice as bad (tr. 176). A major concern was the fact that the distress observed by the government representatives occurred within a matter of only a few months after the work was completed.

Termination for Default

34. Prior to terminating appellant's contract for default, in addition to the CO's discussions with MAJ Litz and Dr. Freeman, he also conferred with technical representatives at the Afghanistan Engineer District compound, the chief of Engineering and Construction, the project manager, the deputy district engineer for project management and the district engineer. All information the CO received was that the road was defective and did not meet the contract's requirements, but the government could not convince appellant that any of its work was defective. (Tr. 192-95)

35. Prior to the default termination the CO considered the following pertinent factors in FAR 49-402-3, Procedure for default (tr. 195):

> (1) The terms of the contract and applicable laws and regulations.
>
> (2) The specific failure of the contractor and the excuses for the failure.
>
> (3) The availability of the supplies or services from other sources.
>
> (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

Regarding items (1) and (2), the CO reiterated that the government had had multiple discussions with appellant concerning performance problems. The CO had not seen any documentation that appellant had met any of its contract requirements. Appellant's cure notice response was inadequate. The Pacemakers had denied that they had ever advised appellant that they were happy with its work. Appellant had not provided any quality control documentation and had not supplied required contract submittals. The fact that the road was temporary did not mean that it did not have to be durable and that appellant did not have to comply with contract requirements. The government was not receiving any value for monies paid. The road as built by appellant fell apart as appellant moved forward. The bituminous membrane that was to protect the road base was failing terribly on a project that was less than 70 days old. The base course was not well graded or compacted. There were excessive fines. Appellant did not provide a road in accordance with the contract's cross-sectional view. It did not shape the roadbed and shoulders. The government was not receiving what it had contracted for, regardless of whether there was any ambiguity in the ditching or drainage structure requirements. The government was not eager to terminate the contract for default, because of the expense to the government and to appellant and the criticality of completing the high visibility mission. It considered a termination to be a last resort and had been seeking to show appellant how it could comply with the contract's requirements and perform the project successfully, but appellant never acknowledged any possibility of defective work. Therefore, it provided no excuse for noncompliance. Concerning items (3) and (4), multiple contractors were available to perform the road project, which had great significance to Afghanistan and to the allied forces. It was urgent to accomplish the mission and get the road in place. (Tr. 189, 195-205)

36. On 6 June 2006, the CO terminated the contract pursuant to the Default clause, asserting that appellant had failed to perform its contract obligations; it had failed to provide a remediation plan in accordance with the cure notice and to demonstrate that it could complete the work by the original completion date; and its failure to perform in accordance with the contract requirements was not excusable (R4, tab C-6). The CO concluded:

> Multiple field inspections conducted by the Area Engineer Office personnel revealed substandard workmanship and materials being implemented and incorporated into the works along approximately 40-kilometers of the Middle Section of the Terin-Kowt Road which were not in compliance with the contract design criteria and drawings.
>
> It is determined that [TCCC] has failed to provide adequate "Chip Seal" application thickness,...base course thickness and compaction and that materials used in

> construction of the road base and surface...failed to meet technical specifications. In some cases the road surface is now a safety hazard to vehicles transiting the road. Additionally, [TCCC] has failed to provide adequate drainage provisions as detailed in the contract drawing to safeguard against erosion and premature road failure.

(R4, tab C-6 at 2)

37. On 8 June 2006, appellant stated to the CO via email that it wished to contest the government's decision to terminate the subject contract for default and to submit a claim for costs associated with this decision. Appellant asked the CO to inform it of the proper procedures for filing such a claim. In response the CO sent appellant a copy of the Disputes clause. The CO noted that the claims process was spelled out in the Disputes clause, and stated that "[m]y advice is to follow these procedures should you choose to contest the decision to terminate the subject contract." We find that appellant could reasonably or objectively conclude that the CO would reconsider the termination for default if appellant followed the specified procedures. (R4, tab D-39)[1]

Appellant's Claim

38. On 7 August 2006, appellant submitted a certified claim pursuant to the Disputes clause in the amount of $2,756,450. Appellant argued *inter alia* that its work conformed to the contract, which had been terminated improperly without testing results. It sought payment of $1,341,450 for paving 18 kilometers of the road (26 kilometers less the 8 kilometers for which it had been paid), $281,000 for equipment destroyed by the Taliban, and $1,134,000 allegedly incurred as a result of the government-ordered suspension of work. Appellant contended the suspension lasted 63 days, from 5 April 2006 through 6 June 2006, when the contract was terminated. The government contends that it lasted 41 days, from 5 April until 16 May 2006, when the cure notice was issued. Appellant stated that the suspension was to last only 14 days and the extended suspension had resulted in the Taliban attack. (R4, tab D-41; tr. 210)

39. On 10 September 2006 the COE awarded a reprocurement contract to a different contractor for the road project, which included, among work on other road sections, demolishing the SBST placed by appellant on the middle section of the road and designing and constructing DBST for that section. The government did not retain any of

[1] *See William Howard Wilson d/b/a Wilson Maintenance*, ASBCA No. 47831, 97-1 BCA ¶ 28,911, *aff'd on recon.*, 97-2 BCA ¶ 29,131; *Sach Sinha and Associates, Inc.*, ASBCA No. 46916, 95-1 BCA ¶ 27,499.

appellant's work. It paid the reprocurement contractor to remove appellant's work totally so that the road work could be performed properly. (R4, tab C-7 at 2-3 of 92; tr. 210-11)

40. On 13 September 2006, the CO denied appellant's claim. He cited grounds for default and left the termination in place. Concerning appellant's affirmative claims, he asserted that the government was entitled to reject the defective work and would not pay for it; under the contract appellant bore the risk of equipment loss; the work suspension did not shift that risk to the government; and the suspension was caused by the contractor's negligence, its defective work, and its refusal to provide quality control and other contract-required documents. (R4, tab B)

41. Appellant filed a timely notice of appeal, which was docketed as ASBCA No. 55656 on 27 November 2006.

42. At the hearing, the parties primarily focused upon the disputed propriety of the termination for default, with appellant offering some testimonial evidence about its affirmative claims, set forth above.

DECISION

Propriety of Termination for Default

The government has the burden of proving that the termination for default was justified. *Lisbon Contractors, Inc.*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Failure to comply with contract specifications, and to promptly replace or correct rejected work, justifies a termination for default, as set forth in subparagraph (g) of the Inspection and Construction clause, which provides that "[i]f the Contractor does not promptly replace or correct rejected work, the Government may...terminate for default the Contractor's right to proceed" (finding 2). *American Renovation and Construction Co.*, ASBCA No. 53723, 10-2 BCA ¶ 34,487 at 170,080; *Firma Tiefbau Meier*, ASBCA No. 46951, 95-1 BCA ¶ 27,593 at 137,490.

On 12 January 2006, the government paid invoice No. 001, in the amount of $59,620, for appellant's mobilization costs. On 11 February 2006, appellant submitted invoice No. 002, in the amount of $596,200, for the first eight kilometer section of the road. Invoice No. 002 was paid on 16 February 2006.

The government was unable to inspect the first section of the road except by air prior to paying invoice No. 002. LTC Farnsworth, the Pacemakers' executive officer, testified that the invoice was paid because appellant needed to pay its expenses and the government did not want to penalize appellant because the government could not get a security force together. On 26 February 2006, appellant submitted invoice No. 003, in

the amount of $596,200, for the second eight kilometer section of the road. This request was submitted only two weeks after invoice No. 002. The government still had not been able to conduct an on-the-ground inspection of the road. It was suspicious regarding the alleged percentage of completion and declined to pay the invoice.

Site visits by government personnel in April and May 2006 revealed significant deviations from the specifications, the use of noncompliant materials, and substandard workmanship. In particular, the specifications required the surface treatment to be at least 10 millimeters thick. Dr. Freeman found that the average thickness of the surface treatment was 7 millimeters and that "the chip seal aggregate was found almost entirely in a loose state on the sides of the roadway" (finding 32). The material used for the base course contained a large quantity of fines, which prevented the chip seal from properly adhering. The road was not crowned in accordance with the specifications and appellant's workers did not appear to be familiar with the contract profile. MAJ Litz reported that the workers were merely grading the existing surface, compacting and applying chip seal. The road surface had noticeable potholes, large barespots, voids, and many small areas where the chip seal was sinking. In addition, there were piles of aggregate and soil along the roadside in direct contravention of the specifications. During their on-site visit, the inspection team did not observe any compaction testing equipment on the site. Bitumen was being applied by hand and chipped aggregate was being spread by hand from the back of a truck. On occasion, the surface of the road came up under the friction of the government vehicle's tires, evidence of a very weak bond.

Dr. Freeman, whose testimony and report we found highly persuasive, concluded that the failure of the road was caused by insufficient aggregate, too soft asphalt, and excessive fine particles in the base course material. In his opinion, the deficiency that the average surface treatment was only 7 millimeters thick, rather than the contract required 10 millimeters, was caused by poor retention of aggregate in the surface treatment and the use of under-sized aggregate. The specifications required a binder application rate of 1.6 to 2.0 liters per square meter of roadway surface. The measured values of the binder application rates used by appellant were on the order of one-half to three-quarters of this amount, which would result in aggregate loss. The specifications also required appellant to use "well graded" gravel for the construction of the base course. Appellant used excessive fines in the base course, which would impact adequate bonding between the surface treatment and the base course.

In addition, appellant failed to reply adequately to the government's 16 May 2006 cure notice. The CO directed appellant to provide a plan to remedy the defects in the road within ten days. Appellant did not provide the requested plan and did not provide any of the requested quality control test results. Appellant's 19 May 2006 reply to the cure notice advanced 23 reasons why default termination was improper, essentially arguing that its work complied with the contract requirements and had been accepted.

When MAJ Litz, the COR, met with Haji Mohammad Sadeeq Momand to discuss the cure notice on 21 May 2006, he refused to acknowledge that there were any defects in the road and declined to submit an additional reply to the cure notice.

The technical evidence and FAR factor considerations the CO relied upon in issuing his final decision support it overwhelmingly. Considering the numerous defects in materials and workmanship, appellant's refusal to provide the requested remedial plan or any of the requested quality control documents, or indicate any willingness to correct the road, and appellant's failure to prove that it complied with the specifications, we find that termination for default was fully justified under the Inspection of Construction clause. Furthermore, it is apparent, with regard to the contract's Default clause, that appellant would not have completed compliant performance within the contract-specified period, even if it were extended to allow for the period of suspension.

The Default clause accords a contractor the opportunity to show that its default was excusable. Appellant had that opportunity here. Although it did not submit a brief, it provided a detailed response to the cure notice, enumerating 23 excuses for its failure to perform, met with government officials on 21 May 2006 to convey its position, and offered hearing testimony.

In essence, appellant's arguments in opposition to the termination for default can be separated into three basic categories. First, appellant asserts, with only generalized unsupported statements, and no firm evidence, that the construction of the road was in accordance with the requirements of the contract.

Second, appellant asserts that the contract's SOW indicates that the road was temporary; the Pacemakers inspected, accepted and paid for work; and the contract did not include a warranty clause. The "temporary" designation was a reflection of the government's intent to add a second course of bituminous pavement in the future. It relates to the estimated life of the completed road, which should have been up to a few years prior to a planned application of a second layer of bitumen surface. It does not relieve the contractor from complying with the specific requirements set forth in the contract documents. The fact that the road began to show signs of serious deterioration immediately following construction reflects major failures by the contractor to comply with the contract requirements.

It is not necessary to discuss the specific details of the government's payments or inspections. The Payments clause provides that payments shall not be construed as relieving the contractor from the responsibility for all materials and work and do not waive the government's rights to require the fulfillment of all contract terms. The Inspection of Construction clause directs that the contractor shall maintain an adequate inspection system and perform inspections to ensure that the work complies with contract

requirements. There is no evidence in this appeal, other than unsupported general testimony, that appellant performed any inspections. The Inspection of Construction clause further provides that government inspections are for the sole benefit of the government and neither relieve the contractor of its responsibility to conform to the requirements of the work nor constitute acceptance. (Finding 2) In *Amigo Building Corp.*, ASBCA No. 54329, 05-2 BCA ¶ 33,047 at 163,823, the contractor argued that the government was responsible for delaying the project because the government disapproved acrylic wall finish (AWF) after it was substantially complete and the government was remiss for not rejecting the finish during earlier government inspections. We rejected this argument, stating:

> Ultimately, it is the contractor's responsibility to "ensure that the work performed under the contract conforms to contract requirements." FAR 52.246-12(b), finding 2. Further, the fact that the government provided a quality assurance representative did not "[r]elieve the Contractor of responsibility for providing adequate quality control," or "constitute or imply acceptance" of the AWF. FAR 52.246-12(c). As stated in contract provision FAR 52.246-12(c), government inspections are for the sole benefit of the government and do not relieve the contractor of its responsibility for complying with the contract. Amigo's complaint that the government inspector's silence regarding the unacceptable AWF while making daily visual inspections (app. br. at 5-6) is unavailing. It is well established that the government's right to inspect work generally does not relieve a contractor of its obligation to perform, nor can the contractor properly rely on government inspection for the discovery and correction of any errors.

Bidders were erroneously informed at the pre-bid conference that the contract did not include a Warranty clause. It incorporated the Warranty of Construction clause by reference, which provides that the contractor warrants that the work conforms to the contract requirements and is free of any defects (finding 2). Regardless, the propriety of the default termination does not depend upon that clause.

Third, appellant argues that the COE misinterpreted the contract, which did not require ditching, and took a long time to perform testing to determine whether the completed portions of the road complied with the contract. Dr. Freeman opined that the contract's drainage construction requirements were ambiguous. The contract did not require appellant to build new culverts and drainage structures. However, the road cross-section drawing, to which appellant was to conform, depicted ditches. Moreover,

the SOW at clause 3.3 required the contractor to tie into and to avoid damaging the existing road drainage and irrigation system. The government inspections found problems with the road drainage as appellant's equipment was ruining existing ditching, road crowns were in noncompliance and, contrary to contract requirements, there were piles of aggregate and soil left on the roadside. Appellant stated that it provided drainage efforts for the benefit of the villagers but admitted it was to make the villagers happy and said at one point that it did not seek payment. At best appellant performed this work as a volunteer. Appellant failed to provide any specific information regarding its allegations of extra contractual ditch effort and has not identified a single government directive which led it to perform any non-required ditch work. Finally, as the CO testified, regardless of whether there was any ambiguity concerning ditching or drainage, the contractor was not otherwise meeting basic contract requirements (finding 35).

In sum, the government met its burden to prove the propriety of its termination of appellant's contract for default.

Appellant's Affirmative Claims

Road Work Claim

Regarding appellant's $1,341,450 claim for payment for the 18 kilometers of road for which the government did not pay, the evidence shows that the road work did not comply with contract specifications, was failing, and was unsuitable for use for its intended purpose. The government had to pay a reprocurement contractor to demolish all of appellant's road work, including the portion for which the government had paid appellant $596,200. Appellant has failed to prove entitlement to the claimed payment.

Equipment Destruction Claim

Appellant seeks payment in the amount of $281,000 for equipment destroyed in an attack by the Taliban on appellant's base camp during the work suspension period. However, the contract places security risk solely on the contractor's shoulders. Clause 4 in the SOW provides the contractor is responsible for all items of life support including equipment loss. Clause 5 provides neither the U.S. military nor Afghan Security Forces will provide actual security for the contractor. Section F of the contract, Deliveries or Performance, specifically provides that the contractor is required to carry insurance, including for vehicle damage, even if the cause of the damage is hostile acts. Appellant knew of its potential risks as demonstrated by the fact that it included approximately 250 security guards in its proposal for performing the work. It also acknowledged at the hearing that it carried insurance on the equipment used on the project.

Suspension of Work Claim

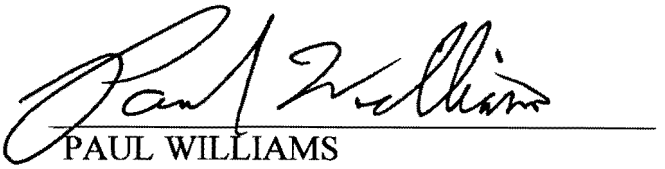
We disagree with appellant's $1,134,000 claim that the CO was not timely in having appellant's work tested for compliance with the contract's requirements. Under the Suspension of Work clause, appellant is entitled to an adjustment only if the work is suspended for an unreasonable period of time. Contrary to appellant's contention, the CO did not make a legally binding promise to test the road in 14 days; he merely stated that he "anticipated" being able to do so (finding 18). Given that the original testing contractor refused to perform due to security threats; it then took time to obtain the services of Dr. Freeman, who was located elsewhere and tasked with other work; appellant failed to provide requested quality control documentation; the deficiencies in the road were numerous; and that extensive testing was required, we conclude, under the particular circumstances of this appeal, that the suspension period, whether measured by the 41 days between the suspension and the cure notice, or the 63 days between the suspension and the termination, was not unreasonable.

CONCLUSION

It is unfortunate that appellant's failure to comply with the contract requirements did not come to light earlier in the performance of its work. However, appellant would have us decide that the government's alleged failure to perform an early adequate inspection shifts the contract performance issues to the government's shoulders. This we cannot do. The contract clauses and the relevant law clearly establish that it was appellant's legal responsibility to maintain an adequate inspection system to ensure that its work conformed to the contract requirements. The government proved that appellant was in default and appellant did not establish that the default was excusable.

The appeal is denied.

Dated: 13 June 2011



PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

CHERYL L. SCOTT
Administrative Judge
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. 55656, Appeal of Tawazuh Commercial and Construction Co. Ltd., rendered in conformance with the Board's Charter.

Dated:

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