ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Matrix Research, Inc.	)	ASBCA Nos. 56430, 56431
	)	
Under Contract No. W15P7T-05-C-N002	)	

APPEARANCES FOR THE APPELLANT: Mr. H. T. Starkland
President
Mr. Steve O. Cato
Vice President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Daniel A. Wolverton, JA
Geraldine Chanel-Carpenter, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

By letter dated 28 May 2008, the contracting officer issued a final decision terminating the subject contract for default and asserting a government claim for unliquidated progress payments in the amount of $151,028.45. Appellant timely appealed the contracting officer's final decision terminating the contract for default (ASBCA No. 56430) and assessing unliquidated progress payments (ASBCA No. 56431). Only entitlement is before the Board.

FINDINGS OF FACT

1. The U.S. Army Communications – Electronics Command (CECOM), Ft. Monmouth, New Jersey, following a formally advertised invitation in which appellant was the only bidder, awarded the subject firm, fixed-price contract to appellant, a small business, on 20 June 2005 (R4, tab 1; tr. 1/66-67). For the fixed price of $559,998.00, appellant was required to supply 20 rotary pump units manufactured in accordance with drawings specified in the contract, 15 pneumatic 72 ft. masts manufactured in accordance with the contract drawings, four support cylinders, together with certain specified technical data package review reports and scientific and technical reports.

2. The contract contained the standard clauses for supply type contracts, including, but not limited to, FAR 52.232-16, PROGRESS PAYMENTS (APR 2003) and ALTERNATE I (MAR 2000); FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.243-1, CHANGES –

FIXED-PRICE (AUG 1987); and FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). The Progress Payments clause provided in pertinent part:

> The Government will make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts of $2,500 or more approved by the Contracting Officer, under the following conditions:
>
> (a) Computation of amounts....
>
> ....
>
> (4) The Contractor shall not include the following in total costs for progress payment purposes in paragraph (a)(1) of this clause.
>
> ....
>
> (ii) Costs incurred by subcontractors or suppliers.
>
> ....
>
> (iv) Payments made or amounts payable to subcontractors or suppliers, except for –
>
> (A) Completed work, including partial deliveries, to which the Contractor has acquired title; and
>
> ....
>
> (b) *Liquidation.* Except as provided in the Termination for Convenience of the Government clause, all progress payments shall be liquidated by deducting from any payment under the contract, other than advance or progress payments, the unliquidated progress payments, or 80 percent of the amount involved, whichever is less. The Contractor shall repay to the Government any amounts required by a retroactive price reduction, after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly....

(c) *Reduction or suspension.* The Contracting Officer may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract....

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress or (ii) unsatisfactory financial condition.

....

(h) *Special terms regarding default.* If this contract is terminated under the Default clause, (i) the Contractor shall, on demand, repay to the Government the amount of unliquidated progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which the Government elects not to require delivery under the Default clause....

3. The contract schedule provided that delivery of SLIN 0001AA, 20 ea. Rotary Pump Units and SLIN 0003AA, 4 ea. Cylinder Support was 180 days after award, or 18 December 2005. The delivery schedule for the SLIN 0002AA, 15 ea. Mast, was 210 days after award, or 16 January 2006. (R4, tab 1 at 4-7) Appellant delivered the Rotary pumps under SLIN 0001AA on 4 October 2005, and the Cylinder Supports under SLIN 0003AA on 5 May 2006 (compl. ¶ 1, answer ¶ 1). However, appellant never delivered the 15 Masts, and the contracting officer terminated the contract for default on 28 May 2008 on the undelivered balance of 15 Masts, and demanded the return of $151,028.45 unliquidated progress payments (R4, tab 60).

4. The masts were designed to hold two antennas weighing approximately 700 pounds, and consisting of five sections. They were designed to be mounted on a truck and to be raised and lowered through the use of a pneumatic air compressor. Each mast weighed approximately 1,500 pounds without antennas and approximately 2,200 pounds with the two antennas mounted on it. Guide wires were necessary if the wind exceeded 25-35 mph. (Tr. 1/89-91) Appellant subcontracted the manufacture or fabrication of the masts to VDH Precision Machining (tr. 1/98, 2/12-13, 131, 3/17).

5. By contract Modification No. P00002, effective 20 March 2006, the parties extended the contract delivery schedule for SLIN 0002AA, masts, from 16 January 2006 to 14 June 2006, and SLIN 0003AA, support cylinders, from 18 December 2005 to 6 April 2006 (R4, tab 3). In consideration for the extensions, appellant offered, and the government accepted a price reduction for these two items.

6. Then, on 8 March 2007, the parties once again executed Modification No. P00003, extending the delivery schedule for SLIN 0002AA (R4, tab 6). This modification provided for a split delivery, extending the delivery schedule for 15 masts from 14 June 2006 to one mast to be delivered on 20 April 2007, and 14 masts to be delivered on 17 June 2007. The appellant offered, and the government accepted, a price reduction for this extension.

7. By letter dated 10 May 2007, the contracting officer informed appellant that since it had not completed the required delivery of the one mast on 20 April 2007 as required by contract Modification No. P00003, the government was seeking consideration for extending the contract due to this delay (R4, tab 7). Therefore, in consideration of any further schedule extensions, the contracting officer requested that appellant provide a proposal to cover first article testing for the mast quantities not yet delivered. The proposal was to include the development of the first article test plan, the details for the testing, and the testing schedule. The government was to provide a revised version of the Statement of Work (SOW) outlining the First Article Test (FAT) requirements. The contracting officer then forwarded to appellant a revised SOW incorporating a requirement for a proposed FAT and requested appellant to respond with its FAT proposal not later than 22 June 2007. (R4, tab 8)

8. The SOW, as originally incorporated in the contract, did not require the Unique Item Identification (UID) on the masts (R4, tab 2). The revised SOW forwarded to appellant for reference purposes in its development of the FAT Plan contained a requirement for the UID marking on all items with an acquisition cost of $5,000.00 or more as well as to all other items which the government identified in the contract as requiring UID marking (supp. R4, tab 70). The question arose during a telephone conference between appellant and government engineers in October 2007 regarding the apparent inconsistency between what was contained in the revised SOW and the original SOW in the contract (R4, tab 20). Government engineers, therefore, sought verification from the contracting officer as to whether the contract listed the UID requirement or not. The engineers also inquired with respect to what the status was of providing GFE to the appellant. Ultimately, the UID requirement was never incorporated in the contract (*see* finding 22).

9. Bilateral Modification No. P00005 was issued on 1 June 2007 (R4, tab 5). According to this modification, Modification No. P00004 was not issued due to PADDS

systems limitations. Nevertheless, Modification No. P00005 established a delivery schedule for all 15 masts under SLIN 0002AA as 17 June 2007, and deleted the separate delivery date of 20 April 2007 for one mast as previously established in Modification No. P00003.

10. Appellant submitted what it represented to be its First Article Test Procedure to the government on 5 June 2007 (supp. R4, tab 71). By letter dated 12 June 2007, the contracting officer requested a revised proposal that contained all of the elements that the government had requested in its previous letter of 10 May 2007 (R4, tabs 7, 9). According to the contracting officer, appellant's submittal addressed only the First Article Test Plan, but did not provide a detailed copy of the test procedures, details of testing, such as, the test procedures used for first article tests, including shock, vibration, and functional tests, a testing schedule for the units, and a final test report that included all the data resulting from the test, and the estimate of the costs for providing this testing should the government elect to authorize this effort. Accordingly, appellant was requested to submit a revised first article test package not later than 25 June 2007.

11. Although the first article test issue was not resolved, and appellant had not submitted a proposal for such testing that was acceptable to the government, the parties executed contract Modification No. P00006, dated 27 July 2007, which extended the delivery schedule for the 15 masts from 17 June 2007 to 24 August 2007 (R4, tabs 11, 12, 13). Indeed, the industrial specialist at DCMA Long Island wrote appellant on 31 July 2007:

> Hank/Steve, I see that the Army has released modification P00006 for the subject contract. Irregardless of the first article, it would appear the Army has given it's [sic] final date for Matrix to deliver ALL mast assemblies by 8/24/07. I have questioned my counterpart as to the deletion of any verbage in P00006 relating to the first article. And it would seem almost impossible to make that consideration with an 8/24 completion date. I see all your submittals in respect to the F/A determination with Wyle. My question is, and you may have given it to the Army already, is how you intend to make the 8/24/07 final delivery date. Unless all mast assemblies are near completion for the plating and painting processes, of which I have no indication they are, how would you expect to meet this new date? If you have supplied a milestone of some fashion in which you meet this new delivery requirement, please just forward that to me for record. I also apologize for not calling you back Steve. I am not that integral to the process for you to want to spend too much time talking to me.

> For all intent and purposes, I can only report what is basically happening at VDH. I have no authority in which to course your efforts in performance of this contract. Again, if you have supplied the Army with information relating to this new delivery date, please just forward that to me. You probably won't hear from me again unless directed toward some effort at VDH. I wish you luck with this new schedule!

(R4, tab 13) The industrial specialist had worked on this contract and during visits to VDH saw very little progress, and at the time he wrote this message, concluded that it would be difficult for appellant to complete all 15 masts by the specified delivery date set forth in contract Modification No. P00006 (tr. 3/32, 37-41). During a visit shortly after writing this message, the industrial specialist noted that there was only one mast going for processing and was told that the entire number of 15 units were not being processed because VDH did not have the money to process the remaining masts.

12. For reasons that are unclear from the record, there was no inspection held in August or September 2007 in order to meet the scheduled delivery date. The government asserts in its brief that appellant informed the government that it was ready to do acceptance testing on three masts on 26 September 2007 at Wyle Laboratories, but that because of the short timeframe, the government requested appellant to postpone the testing date to 1 October 2007 (gov't br. at 5). Appellant had issued a purchase order in early August 2007 to Wyle Laboratories, Inc., in Huntsville, Alabama to perform functional testing on three masts, and internal government correspondence suggests that appellant had requested acceptance testing to be held at Wyle Laboratories on 26 September, the actual record of the request is not so clear. (Supp. R4, tab 65)

13. The delivery schedule was extended again by contract Modification No. P00007, dated 26 September 2007, after appellant had failed to make the 24 August 2007 delivery date established by Modification No. P00006 (R4, tab 14). The purpose of this modification was to "Extend the delivery date on SLIN 0002AA from qty 15 Masts on 24 August 2007 to qty 3 Masts on 05 October 2007 and 12 Masts on 07 December 2007." Moreover, according to this modification, the government "accepts the postponement of the Acceptance and Functional Testing from 26 September 2007 to 01 October 2007 as consideration for the schedule extension," which consideration was accepted at no additional cost to the government. What this means and what consideration flowed to the government for granting this extension is unclear from the record unless it was the government's inability to attend the testing because of the allegedly short timeframe from appellant's notification of a date for testing and the actual proposed date for the testing.

14. In any event, the testing occurred on 1 October 2007 at Wyle Laboratories, and did not go well (supp. R4, tabs 75-77; tr. 1/91-100, 101-06, 112-14, 2/69-72, 4/18). In fact, it went quite badly. First, contract Drawing No. C5078031 established the acceptance test procedure for the pneumatic masts (supp. R4, tab 66 at 98A-99). The test equipment included the 37-foot mast support, an air supply regulator, and suitable test fixtures, two non-metallic pneumatic test lines. Although appellant did not have the proper test set up, it continued with the test anyway. The tubing was metallic rather than the specified non-metallic. There was no regulator. The support base did not conform to the specifications. Ropes were used to steady the mast as it was raised and to ensure that in was raised in the upward position. Normally, the mast should have been raised in minutes. However here, it took approximately an hour to raise it in the test as the air pressure was increased to its full extent. The test should have held the mast in its full upright position for 45 minutes to an hour. However, after 20 to 30 minutes, the air pressure began to decrease and the mast began to descend slightly, which was unacceptable.

15. While appellant intended to test three masts, it was only able to test one mast, and that mast did not pass the acceptance testing because of the buckling of the mast and its slight descent. Therefore, on 2 October 2007, the decision was made to stop the testing and resume it in four or five weeks after appellant had taken corrective action and obtained government-furnished equipment (GFE) for which the contract did not provide at that time. (Tr. 1/99-100, 112-14) There was some disagreement between the appellant and government engineers as to the cause of the failure of the mast in the acceptance testing. Appellant's vice president opined that all the masts were defective because of the seals, which he thought were leaking. Appellant's Corrective Action Report of 20 November 2007 essentially advanced this theory (supp. R4, tab 81). The government engineers expressed the view that the possible leaking of the seals may have been a contributing factor, but that there was an issue of structural integrity of the masts and how they were built, specifically that they were not fabricated in accordance to the specifications and had not been built to the correct tolerances. The government sought analysis from appellant to support its theory, however no analysis was forthcoming. (Tr. 2/52-55) Although appellant submitted revisions to its Corrective Action Report, it did not change its position (R4, tabs 51-54).

16. On 3 October 2007, appellant submitted a request to the government for GFE, which included the air supply regulator and mast clamp required by the drawings for the acceptance tests (R4, tab 16). Over the next five to six months, the parties were unable to resolve the issues that prevented the government from making the GFE available to appellant (R4, tabs 17-38). On 6 December 2007, the contracting officer informed appellant that it still had not identified the resolution to four major concerns of the government which had not been addressed in appellant's Corrective Action Report relating to the acceptance testing procedures and the failure on the part of appellant to

provide inspection papers assuring that the masts were manufactured in accordance with the specifications and drawings (R4, tab 26; tr. 1/52-54). Accordingly, the contracting officer informed appellant that the government would not provide GFE that had been requested by appellant until appellant first furnished the inspection papers that assured appellant, and indeed, the government, that the masts were fabricated in accordance with the drawings and specifications.

17. The contract incorporated FAR 52.246-2, INSPECTION OF SUPPLIES – FIXED-PRICE (AUG 1996), which provided in pertinent part that the contractor was to maintain an inspection system acceptable to the government which required the contractor to "prepare records evidencing all inspections made under the system and the outcome" (R4, tab 1 at 13). The clause further required the contractor to keep and make available to the government these records so that the government could review and evaluate them as reasonably necessary to ascertain compliance with that paragraph.

18. The contract also included the Technical Data Package, which included a Critical Item Product Fabrication Specification (contract Drawing No. C5078036) requiring appellant to maintain records of inspections in order to ensure that the masts had been manufactured in accordance with the drawings and specifications (supp. R4, tab 66 at 100-11; tr. 1/126-33). Section 3 sets out the design and construction requirements for, and the performance characteristics of the pneumatic mast. Section 4 defines the Quality Assurance Provisions, and provides that:

> Responsibility for Inspection. Unless otherwise specified in the contract or order, the supplier is responsible for the performance of all inspection requirements specified herein. Except as otherwise specified in the contract or order, the supplier may utilize his own or any other facility acceptable to the procuring activity. The procuring activity reserves the right to perform and monitor any of the inspections set forth in this specification where such inspections are deemed necessary to ensure that supplies and services conform to the prescribed requirements.

(Supp. R4, tab 66 at 105) Section 4.1.2.4, Test Data, required appellant to record measured parameters required to demonstrate the acceptability of the item, using test data sheets as the record of such inspections. Appellant was required to annotate sheets containing automatically recorded data with identification and verification, to record information pertaining to the item, test method, test set-up and test data with explanation along with validation signature and date by the test technician, a quality assurance witness, and government representative when available. Section 4.2 set out the requirements for quality conformance inspection. Inspection was required with results verified to ensure that the parts, materials, and processes have been used to fabricate and

assemble the item in accordance with the drawings, parts lists, and other documentation listed in the engineering drawings. Section 4.2.3 described the visual and mechanical inspection requirements for workmanship examination.

19. Appellant's subcontractor, VDH, did not maintain acceptable inspection reports that adequately documented the inspections at the various inspection points assuming that it even performed such inspections. Inspection documents which should have been available were not because in some cases they had to be scanned or reproduced, ostensibly because of wear and tear of the original papers. (R4, tabs 29, 31, 36, 38; supp. R4, tabs 66, 83, 84; tr. 1/137-39, 144-53, 161-65, 170-71, 175, 2/15-16, 17-22, 27-30, 33-42, 48-52, 132-36) The major deficiencies in these inspection papers included: information provided was too general and inspections could not be verified; names of individuals who signed documents were misspelled; there were inconsistencies between documents that were represented to present the same information; there were references to documents that were intended to support the results of particular inspections, but those documents were unavailable; it was impossible from examination of "shop routers," which were in-house documents created by appellant's subcontractor, VDH, that were so cryptic and difficult to read, to determine what was going on at each step of the fabrication and inspection process, dates of inspections appeared to have been changed.

20. One of the government's engineers responsible for monitoring the contract performance on this contract conducted a site visit at VDH on 18 October 2007 (tr. 2/12-13). His purpose was to witness the installation of the seals, but did not do so since one mast had the seals installed before he arrived at the plant, and the other two masts did not have the seals installed while he was there. During this visit, he observed that the mast which had just been tested on 1 October showed some scraping of paint (R4, tab 29 at 16; tr. 13-14). There were 3 masts that had been painted, and 12 that were not painted. He asked for the inspection paperwork and was told that VDH could not provide it because it needed to compile it as some of it was dirty from the fabrication process and that VDH had to retrieve the information from its computer system. (R4, tab 27; tr. 2/16)

21. Appellant submitted acceptance test procedures to the contracting officer on 14 November 2007 (supp. R4, tab 80). Included in this submission was a letter from the contracting officer, which was dated 14 November 2007. This letter stated that the requirement for the implementation of the UID requirement was cited in the revised SOW "which Matrix previously accepted." (*Id.* at 48)

22. Appellant addressed both the UID issue and issue concerning possible shipment of the GFE in its corrective action report of 21 November 2007 (supp. R4, tab 81). By letter dated 6 December 2007, the contracting officer repeated the

government's previously stated objections to appellant's acceptance test procedures and the government's dissatisfaction with inspection papers, and addressed the matter of GFE and UID implementation (R4, tab 26). The contracting officer informed appellant that the government "will not provide the Government furnished equipment (GFE) that Matrix had requested until Matrix first provides the inspection papers identified" in the letter. The contracting officer further stated that in consideration for the GFE, the government "desires" that appellant implement the UID requirement as identified in DFARS 252.211-7007 which was to be added through a contract modification approving GFE. The clause, DFARS 52.211-7007, REPORTING OF GOVERNMENT-FURNISHED EQUIPMENT IN DOD ITEM UNIQUE IDENTIFICATION (IUID) REGISTRY (NOV 2008) was not incorporated in the contract, which was dated 20 June 2005, nor was it incorporated in any modification to the contract. Nevertheless, appellant informed the government on 10 December 2007 that it had implemented the UID requirement identified by DFARS clause 252.211-7007. (Supp. R4, tab 82 at 5, 6) In any event, neither the revised SOW nor the UID requirement were ever incorporated into any modification of the instant contract (tr. 4/31).

23. On 11 December 2007, the contracting officer informed appellant that the government was not satisfied with the inspection papers observed during the government's site visit to VDH on 18 October 2007, with the fact that 12 masts were still unpainted and unassembled, and the concerns raised regarding the acceptance test procedures that remained unresolved. (R4, tab 27) By letter dated 3 January 2008, the contracting officer again expressed his dissatisfaction with appellant's responses regarding possible resolution of the outstanding issues and requested appellant to acknowledge the requests contained in the letter not later than 11 January 2008 (R4, tab 29). These included the failure of the one mast to pass the acceptance testing procedures, the lack of assurance that the masts had been produced in accordance with the specifications and within the specified tolerances, the lack of information provided in inspection documentation, the reference to cancelled manuals or standards, and the requirement for inspection of each mast and not an inspection of the lot, or group of 15 masts.

24. The contracting officer held a telephone conference call with appellant and government representatives on 5 February 2008 to address the continued absence of the required inspection paperwork (R4, tab 31; tr. 2/22-23). The contracting officer, on 5 February 2008, forwarded to appellant the comments from the government's engineer which memorialized that telephone conference. At this time, the government engineers had been dissatisfied with what appellant had presented in the nature of documentation and, because of the test failure on 1 October 2007, did not want to proceed with further testing until all the inspection documentation was in order. (Tr. 1/61-62, 70-71, 77-84) Indeed, the government engineers and principals involved wanted the government to terminate the contract because after two and a half years, the masts had still not been

delivered, and the inspection paperwork was so inadequate that there was no assurance as to the adequacy of the fabrication of the masts and of VDH's inspection system. The contracting officer concurred with the comments of the engineer, and informed appellant that the government required a response with all the information requested not later than 15 February 2008. (R4, tab 31)

25. Appellant responded to the contracting officer's message of 5 February 2008 by message dated 15 February 2008, providing copies of the Production Evaluation Report, the Welding Certification, and a package of VDH shop routers (supp. R4, tab 85). This was essentially an update on the production paperwork and was inadequate for all the reasons previously addressed by the government (finding 18; tr. 2/24-30). While there was a certificate for the welder, there was none for the welding inspector. The dates on the certification did not bear any relationship to when the inspection must have been performed and when the production of the masts occurred. The dates of production and inspection of shop routers reflected inspection and acceptance of the item before the item had been processed. There was no indication of what type of process was performed, what inspection had been made, what results were obtained from the inspection, and who performed the inspection and on what date.

26. The contracting officer, on 17 March 2008, issued unilateral contract Modification No. P00008 as appellant declined to sign it (R4, tab 37; tr. 1/36-39, 52-54). The contracting officer issued this modification to reestablish a delivery schedule that required appellant to deliver the 15 masts by 1 May 2008. Although appellant had sought an additional 126 days to complete performance and deliver the masts, the contracting officer and government engineers concluded that 45 days from the date of the modification was sufficient time for appellant to complete the delivery of the 15 masts. Government representatives had spoken with appellant a number of times over the course of the performance period during which appellant had assured the government that it was between 90 percent and 95 percent completed with the fabrication of the masts, and that it could complete the delivery quickly once it had cleared up the issues with the paperwork. The modification also called for the delivery of the Production Evaluation, the welding certification, adequate documentation regarding appellant's shop routers, and adequate documentation on First Article Inspection Record, Quality Conformance Inspection, Data Sheet No. 2, and for successfully passing the acceptance testing in full compliance with the Acceptance Test Procedures. The modification stated that it was a result of appellant's failure of the initial acceptance test, and subsequent repeated failures to provide accurate and complete submissions of the required documentation. Further,

> If after issuance of this modification, Matrix delivers the proper documentation, and it is acceptable to the Government, the Government will release the requested Government

Furnished Equipment (GFE) that Matrix is requesting, but is not provided for in the contract.

There was no price adjustment authorized by this modification.

27. Appellant responded to the government's issuance of contract Modification No. P00008 by message dated 19 March 2008 (R4, tab 38; tr. 1/39-43). In its response, it objected to Modification No. P00008 as unacceptable, and stated that appellant would not sign the modification. Although it appeared that the dispute regarding the documentation continued, appellant submitted some of the documents specified by the government in the modification, and stated that appellant had requested on numerous occasions to test the three masts which had been at Wyle Laboratories since 16 October 2007. Appellant also stated that it had been informed by the Administrative Contracting Officer (ACO) in St. Petersburg, Florida, that there would be no more progress payments without the contracting officer's consent. The ACO in St. Petersburg had no recollection of such a conversation, and indeed, denied approving or denying any progress payments to appellant, and denied that the contracting office would have been involved in approving progress payments. (Tr. 3/8-10, 12-13) While there is no evidence that the government actually denied progress payments, appellant admitted that the conditions regarding lack of progress on the delivery of the masts was due to actions of the subcontractor, but that nevertheless, it was still appellant's responsibility and that as a result, appellant was reluctant to request more progress payments until it shipped at least one unit. (Tr. 3/48-49)

28. According to appellant's proposed schedule dated 18 March 2008 which was attached to this response, appellant proposed completion of 12 masts by 8 September 2008, which was an additional 126 days from 17 March 2008 (R4, tab 38 at 90). The government rejected this proposal as unreasonable (tr. 1/39-40, 49-50). The contract had been awarded almost three years earlier with a delivery date of 210 days after the date of award, or 16 January 2006 for the masts. Appellant had stated that it was 90-95 percent complete, and the government had not only offered to help appellant, but had also had numerous conversations instructing appellant how to correctly submit the documentation that was required by the contract, which appellant repeatedly agreed to submit. Yet the documentation that was submitted was never correct. The government had granted time extensions and offered to provide some GFE which was not provided under the contract, to help appellant complete the testing. Therefore, the contracting officer concluded that the 45 additional days offered appellant in contract Modification No. P00008 was reasonable and adequate to complete the contract based on what appellant had represented.

29. A further exchange between the parties on 26 March 2008 and 2 April 2008 regarding specifically identified deficiencies in appellant's response to contract

Modification No. P00008 resulted in the contracting officer's reaffirmation of the final delivery date of 1 May 2008, the rejection of appellant's proposed delivery schedule, continued debate over the adequacy of appellant's submissions, and disagreement over the production schedule and delivery date (R4, tabs 39, 40). Moreover, according to appellant:

> Matrix has already tested One Each MAST (Using Non-metallic Tubing, 600LBs, No Aid of Wire/Ropes) at Wyle Labs, this preliminary test have [sic] proved to the Manufacturing Engineer, Lab Engineers and Matrix that the MAST are [sic] made in Conformance and are Deemed Safe for Government use.

(R4, tab 40)

30. Following further exchanges between the parties, on 15 April 2008, the contracting officer issued a cure notice to appellant asserting that the government considered appellant's failure to provide the government with all of the accurate and complete submissions of all documentation for both acceptance testing and delivery in accordance with contract Modification No. P00008 a condition affecting performance of the contract (R4, tabs 41-43). Therefore, absent correction or curing of these conditions within 10 days of receipt of the notice, the government may terminate the contract for default. Appellant continued to submit documentation required by the contract following its receipt of the cure notice, however, none of these submissions were ever accepted by the government. (R4, tabs 44-59; tr. 1/43-44)

31. The contracting officer issued the government's termination for default of the contract for the undelivered balance of the contract on 28 May 2008, almost a month after the specified, extended delivery date (R4, tab 60). The stated basis for the termination was appellant's failure to make progress on the contract for the units under SLIN 0002AA (the 15 masts), failure to provide complete and accurate documentation as required by the contract, and failure to respond to the requirements set forth in the cure notice. Nevertheless, the time for delivery of the masts and completion of the contract as specified in contract Modification No. P00008 had passed and appellant had failed to deliver the masts by 1 May 2008.

32. In his notice of termination and final decision, the contracting officer issued a demand for the return of unliquidated progress payments in the total amount of $151,028.45. At the time the government terminated the contract for default, appellant had received seven progress payments totaling $151,028.45.

DECISION

The Default clause of the contract provided in pertinent part that the government may terminate the contract, in whole or in part, by written notice to the contractor, if the contractor fails to deliver the supplies within the time specified in the contract, or fails to make progress so as to endanger performance of the contract.

As we have held, default termination is a "drastic sanction" and should be imposed only on the basis of "good grounds and on solid evidence." *ABS Baumaschinenvertrieb GmbH*, ASBCA No. 48207, 00-2 BCA ¶ 31,090 at 153,509-10 *citing J.D. Hedin Construction Co. v. United* States, 187 Ct. Cl. 45, 57, 408 F.2d 424, 431 (1969); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Moreover, although the Default clause does not require the government to terminate the contract upon a finding of default, it does give the government discretion to do so, and that discretion must be exercised reasonably. Indeed, it is well-settled that a contracting officer possesses authority to terminate the contract. *Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987); *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702, 707-08 (1968). The government has the burden of proving that the termination for default was justified. *Lisbon Contractors, supra.* Once the government establishes that appellant was in default, appellant has the burden of producing evidence that would tend to establish excusability for that default. *Centurion Electronics Service*, ASBCA No. 48750, 00-1 BCA ¶ 30,642 at 151,325.

It is clear from the record and, indeed there is no dispute that appellant never delivered the 15 masts, and that it was only those masts and the required inspection and test documentation which remained outstanding at the time of the termination for default. Appellant's defense, as we understand it, is based on its continued disagreement with the government engineers concerning the adequacy of the documentation supporting appellant's inspection and testing at VDH. Appellant further continues its debate with the testimony of the government engineers regarding the cause of failure of the test of one of the masts at Wyle Laboratories, Inc.

Indeed, appellant's primary defense to the termination for default is based on its contention that the government engineers inhibited appellant from proceeding with the acceptance testing, the government's introduction of the UID requirement which was not in the original contract, the government's denial of progress payments, and the government's promise of GFE, which was somehow withdrawn (app. reply br. at 12). We have reviewed the records relating to appellant's inspection reports and submissions regarding its test procedures, and have found no evidence that government engineers inhibited appellant from proceeding with the acceptance testing, notwithstanding the differences with respect to the adequacy of that documentation. Indeed, as set forth in our findings, we have observed inconsistencies and deficiencies in the preparation of the

documentation, and primarily in the way the inspections may have been performed and recorded. Further, as we have found, there was no requirement in the contract for the UID implementation, and no evidence that the government ever actually promised appellant any GFE, or that it withdrew such a promise.

By appellant's own admission, the lack of progress on the masts was due to the actions of appellant's subcontractor, VDH. Not only had appellant failed to make progress as of the date of termination, and had failed to take action consistent with the cure notice, appellant was in default on 1 May 2008, the revised and reasonable date for delivery of all 15 masts.

We note here that the contracting officer sought return of the unliquidated progress payments in the same final decision in which he terminated the contract for default. Appellant appealed both the termination for default and the demand for unliquidated damages at the same time and in the same notice of appeal. Although neither party argued the matter of the government's demand for return of the unliquidated progress payment, we hold that under the Progress Payment clause, paragraph (h), the contractor shall pay to the government, on demand, the amount of unliquidated progress payment. *Sach Sinha and Associates, Inc.*, ASBCA No. 50640, 00-2 BCA ¶ 31,111 at 153,658.

Accordingly, we hold that the government's termination of the contract was proper, and that the appeal is denied. We further hold that the government is entitled to the repayment of unliquidated progress payments, and deny that appeal.

Dated: 22 June 2011

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56430, 56431, Appeals of Matrix Research, Inc., rendered in conformance with the Board's Charter.

Dated:

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