

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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DODS, Inc. ) ASBCA No. 57667  
)  
Under Contract No. SPM4A7-09-M-B426 )

APPEARANCE FOR THE APPELLANT: Mr. David Storey  
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
DLA Chief Trial Attorney  
Edward R. Murray, Esq.  
Trial Attorney  
DLA Aviation  
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE CLARKE  
PURSUANT TO RULE 12.3

DODS, Inc. (DODS) appeals the Defense Logistics Agency's (DLA) termination for default of its Contract No. SPM4A7-09-M-B426.<sup>1</sup> The Board has jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. Because the Government waived and failed to reestablish a delivery date while providing conflicting communications and encouraging performance, we sustain the appeal.

FINDINGS OF FACT

1. On 9 June 2009, Defense Supply Center Richmond (DSCR)<sup>2</sup> issued request for quotations No. SPM4A7-09-Q-A299 for four "aircraft formers" (R4, tab 3 at 3, 6). The solicitation identified the applicable drawings and specifications (R4, tab 3 at 5-6) and required DODS to completely research these manuals, specifications and standards and fully understand the requirements necessary for manufacture of component parts and assemblies (R4, tab 3 at 3). A first article (FA) sample was required to be submitted for first article testing (FAT) within 30 days after award (R4, tab 3 at 2).

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<sup>1</sup> In their briefs both parties mistakenly refer to this appeal as a "Rule 12.2 small claims expedited proceeding." On 8 December 2011 DODS, Inc. elected a Rule 12.3 accelerated procedure.

<sup>2</sup> Now "Defense Logistics Agency Aviation."

2. DODS was awarded Contract No. SPM4A7-09-M-B426 (B426) effective 22 July 2009 in the amount of \$6,400.00 (R4, tab 1). Although the government used a DD Form 1155, Order for Supply or Services, the “Purchase Order” block was checked as was the block requiring DODS to sign indicating acceptance of the order (*id.*). Mr. Storey, DODS President, signed the DD 1155 on 21 July 2009 (*id.*). The contract included the 30 day delivery for the first article sample and contract line item number (CLIN) 9906 FAT (R4, tab 1 at 2, 8) which meant it was due on 21 August 2009. The contract incorporated by reference FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (R4, tab 1 at 14). The contract incorporated FAR 52.246-11, HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (FEB 1999) (*id.* at 11).

3. DODS did not deliver the first article sample by 21 August 2009. The government included a “Contract Report”<sup>3</sup> in the record that shows that one DODS employee, Mr. Scott Schexnayder, worked twelve days in August 2009 commencing on 3 August 2009, one day in September 2009 and six days in October 2009 primarily doing drawing for tooling (R4, tab 37). The last day worked by Mr. Schexnayder was 30 October 2009 (*id.*). According to the report nobody else worked on the contract until Ms. Ashley LeBlanc worked one hour on 25 May 2011 to “Print and organize specs needed” (*id.*).

4. In its opening brief DODS states that “[b]etween the beginning of August 2009 and end of March 2010, DODS sent five requests for extensions due to missing prints in the TDP” (app. br. ¶ 4).<sup>4</sup> Also in its opening brief, DODS states, “April 2010, the complete TDP was received by DODS, Inc. The engineering phase proceeded.” (App. br. ¶ 5)

5. On 1 April 2010 Mr. Webber, DCMA, QA Representative, emailed Mr. Storey stating in part:

Subject: RE: FA8103-07-M-0343 and FA8103-08-M-0004

....

Products that have been completed, without affording the government the opportunity to plan its involvement

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<sup>3</sup> In its “Response to ‘Respondent’s Answer’ dated September 01, 2011” paragraph 5, DODS refers to the Contract Report (R4, tab 37) as “Time Sheets” and included the document as Exhibit B.

<sup>4</sup> We considered documents submitted by DODS in its complaint dated 21 July 2011 and its Response to Respondent’s Answer to be in the record as if they were part of the Rule 4 documents.

(especially those with an ISO or “Higher-Level” quality requirement), will be rejected and corrective action requested. This applies to all of your “aged” contracts.

(R4, tab 14 at 5-6)

6. Also on 1 April 2010, Mr. Storey forwarded Mr. Webber’s 1 April 2010 email to Mr. Anderson, DCMA, requesting that Mr. Webber be removed and that a new QAR be assigned to DODS (R4, tab 14 at 5). There is nothing in the record indicating that a response was provided by DCMA. Mr. Webber continued to be assigned to DODS’ contracts.

7. On 27 May 2010 Mr. Webber emailed Mr. Storey stating:

Subject: RE: Paradrouge Assembly

Mr. Storey, I understand your frustration. However, please remember during our meeting of April 22<sup>nd</sup>, I informed you (then) that my participation on all First Articles is 100%. If you’ve forgot [sic] then please use this as a reminder. Also, please take this as official notification that I request copies of any PO, make/ or buy list and the Bill of Material when they are finalized and released for any contract. Awaiting your submittal of the requested information.

(R4, tab 14 at 7)

8. On 14 September 2010 Contracting Officer Gloria Williams sent a show cause notice to Mr. Storey listing 17 delinquent contracts including contract B426 (R4, tab 7). CO Williams informed Mr. Storey that she was considering terminating the contracts for default and asked Mr. Storey to identify the basis for the failure to perform within ten days of receipt of the notice (*id.*). The notice ended with, “[a]ny assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract” (*id.*).

9. On 24 September 2010 Ms. Janneke Beniest of DODS responded to the show cause notice by email stating “Material in house. Waiting on QAR.” (R4, tab 9)

10. On 29 September 2010, Mr. Justin Thompson, DCMA ACO, sent Mr. Storey a letter, Subject “Corrective Action Request, Level III – Systemic Quality Control

Deficiencies” listing twenty contracts<sup>5</sup> including contract B426 (R4, tab 8). The letter identified deficiencies in “bonding, heat treatment, and cable manufacturing processes” and “planning product realization” (*id.*). Mr. Storey was requested to respond within ten days “as to the corrective actions to be taken” (*id.*).

11. On 21 January 2011 Mr. Ulrich Torrence, DCMA, emailed Mr. Storey stating in part:

Subject: DODS contract SPM4A710M1756 CLIN 9906<sup>[6]</sup>

...Presently, the DODS Quality Manual is not rejected and the production of CLIN 9906 should proceed per contract requirements.

(R4, tab 10 at 3, tab 14 at 4)

12. On 4 February 2011 Mr. Webber emailed Mr. Storey stating:

Mr. Storey, DCMA has completed its CTR (Contract Technical Review) for the contracts currently active at DODS. This is notification that for the next several weeks, we will conduct QA Only Post Awards on all active DODS contracts (14). These Post Awards will start on February 10<sup>th</sup> and continue (possibly 2 visits per week) until completed....

(R4, tab 25 at 22)

13. On 18 February 2011, DODS submitted a “Delay Notice Request Form” to the contracting officer requesting a 150-day extension because of government-caused delay (R4, tab 10). DODS alleged that its quality system “has been on hold since August 2010 by DCMA QAR and have recently been informed in January 2011 DODS, INC’s Quality System is not on hold” (*id.*). Attached to the Delay Notice was the 21 January 2011 DCMA email by Mr. Torrence sent to Mr. Storey, subject DODS contract SPM4A710M1756 CLIN 9906 (*id.* at 3).

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<sup>5</sup> The contracts were with TTF, LLC and DODS. TTF is another company owned by Mr. Storey (app. br. ¶ 6(a)).

<sup>6</sup> Although this email relates to a different contract, CLIN 9906 is the CLIN used for the first article in the B426 contract and appears to be a standardized CLIN for first articles.

14. On 29 March 2011 Ms. Wynne, DCMA, emailed Ms. Beniast, DODS, stating the following:

Please note that no one in DCMA has ever delayed production at TTF. All production delays are cause [sic] by and the responsibility of the contractor. Steve Webber visited your facility on 13 December. You were never told to stop production, you have always been requested to notify DCMA when processes are to be performed so that we have the OPPORTUNITY to review your processes.

(R4, tab 25 at 29)

15. Mr. Torrence responded to the Delay Notice Request Form by email to Mr. Storey on 31 March 2011 stating:

Your reply to the subject Corrective Action Request (CAR) was reviewed and found unacceptable. In your reply, my email of 1/21/2011 is attached several times as an exhibit to support the claim that DCMA has delayed DODS Inc. from delivering product according to contract requirements. As stated in the email, the DODS Inc. Quality Manual is not rejected or on hold by DCMA QA and DODS Inc. should proceed with the contracts.

(R4, tab 11) With respect to the B426 contract Mr. Torrence stated, “[o]nce again, the DODS Inc. Quality Manual is not rejected or on hold by DCMA QA and DODS Inc. should proceed with the contracts” (*id.* at 2).

16. On 29 April 2011, CO Williams specifically rejected DODS’ request for a 150-day extension noting that DODS’ quality system had never been on hold and that “you have had well over 30 days since you unquestionably became aware of your ability to ship on January 21, 2011; and still have failed to ship the first article” (R4, tab 12). She closed with “[t]he Government has not and will not waive or extend the delivery schedule. You are in default.” (*Id.*)

17. Also on 29 April 2011 CO Williams asked Mr. Torrence if DODS had scheduled an inspection of its finished first article (R4, tab 13). He responded that DODS had not (*id.*).

18. On 4 May 2011 Mr. Storey responded by letter to Ms. Williams' 29 April 2011 email. Mr. Storey stated in part:

QAR, Mr. Webber, put a hold on TTF's Quality System and informed us that since TTF is on hold, DODS's [sic] Quality System will also be on hold until the issues identified with TTF have been resolved. He also instructed that all work performed would be rejected as the Quality System is unacceptable. In an email dated January 21, 2011 from Mr. Ulrich Torrence, he contradicts DODS's [sic] assigned QAR and states that DODS's [sic] Quality Manual is not rejected and production of CLIN 9906 should proceed per contract requirements (see email dated January 21, 2011 attached).

Since this is a First Article, Mr. Webber informed us that all work performed without affording him the opportunity to plan and insert GMIPs during Post Awards would be rejected and a Corrective Action Report issued (see email dated April 01, 2010 attached) and that his participation of First Articles is 100% (see email dated May 27, 2010 attached). Mr. Webber informed us that Post Awards would be performed for all DODS contract starting February 01, 2011. To date, only 5 of the 19 contract [sic] in-house have had Post Awards performed on them. We at DODS feel that we have been given these instructions from DCMA and have followed them and performed as much work as we can on each contract, stopping at a point where we know DCMA will want to come in and witness a process. As noted in the instructions from DCMA, if we were to have proceeded, the First Article would have been rejected and a CAR issued.

After expressing this concern to Ms. Wynne, she informed us on March 29, 2010 that DCMA can never hold up production. We were told that we are supposed to give DCMA an opportunity (7 day notice) to witness a process, and if this opportunity is missed by DCMA, we are to continue with production. After being given this instruction we are now able to proceed with the knowledge that the work performed cannot be rejected due to DCMA missing an inspection point....

(R4, tab 14)

19. On 5 May 2011 Mr. Webber emailed CO Williams stating in part:

Ms. Williams, as you know (I'm sure), this contractor has (on numerous occasions) accused me of placing a "hold" on either his production, or his ability to get contracts into production. Now, to clarify matters, TTF's Quality System was deemed noncompliant to the ISO 9001-2000. This decision was based on an extensive audit of most of his Quality System where I found numerous instances of noncompliance and some were of a systemic nature. Having a noncompliant Quality System does not stop production however, if it remains noncompliant, product can (and will be rejected) when presented for acceptance. First Articles are critical, this contractor has a history of building the product (without knowledge of the DCMA Rep) and then presenting it for acceptance at the end. I did inform this contractor that I am imposing "Hold Points" on several key processes of his, "Plating", "Heat Treating" and "Composite/Metallic Bonding" to name a few. He was informed of this on May 26, 2010 via email. Since that date, the contractor has ceased production on all of his contracts and has begun claiming that the DCMA QAR has "put a hold on him".

This contractor also has a history of circumventing, avoiding or somehow escaping DCMA oversight of his internal manufacturing processes. Recently, we've begun un-announced visits to his facility and as of this date, there is no work going on and the plant lights are always out, even though he has a number of active contracts at this time. When asked, he states he is now "outsourcing" the work, but we rarely receive Purchase Orders for the outsourced work (which we have requested on numerous occasions in the past so we can make delegation determinations).

There is no "hold" on DODS, and there is no "hold" on TTF either. There never was.

(R4, tab 15)

20. On 6 May 2011, CO Williams emailed DODS in response to a question on another contract explaining that the government used a 1939 date "to load drawings when

the tech data division feel [sic] they cannot read the proper original date of the drawing” (R4, tab 31 at 2).

21. On 13 May 2011 Mr. Storey emailed Mr. Webber stating, “TTF will proceed with sending you a request of the open contracts for your review to determine if DCMA wants a post award review so that TTF may proceed without further delays. We appreciate the one week notice in advance as mentioned.” (R4, tab 42) Mr. Webber responded the same day stating that the decision to hold post award reviews was based on “certain specific factors” and that the next review date would be 26 May 2011 and that he would provide notice of the contract involved a week before the meeting (*id.*).

22. On 17 May 2011 Ms. Beniast, DODS, emailed Mr. Webber a proposed schedule for post award reviews of twelve contracts including contract B426 (R4, tab 43). Mr. Webber replied back the next day, “let me reiterate, QA Only Post Awards are not automatic and are not performed at the request of contractor. They are based on the QAR’s review of the contract and its complexity and the performance history of the contractor.” In the email Mr. Webber listed a post award that was scheduled for two contracts that did not include contract B426 (*id.*).

23. On 8 June 2011, Ms. LeBlanc emailed a letter dated 6 June 2011 to CO Williams stating, “the engineering department has been working on this contract and has come across missing documents and discrepancies in dates on contract documents provided to DODS, INC” (R4, tab 17).<sup>7</sup> Two discrepancies were listed for contract B426, “160D414012 (Jan 1, 1939) Have Jan 11, 1974” and “LE160Y4100 (Aug 25, 1978) Have Jan 8, 1976” (*id.*).

24. On 13 June 2011 CO Williams signed a Memorandum for Record recommending that contract B426 be terminated for default (R4, tab 18). In this memorandum she presented a chronology and made the following recommendation:

Recommend Termination for Default (T4D) in accordance with FAR 52.249-8 which is incorporated into the contract. DODS is delinquent, has failed to demonstrate that it is performing the contract, and failed to offer any legitimate reasons for excusable delay. The contract time to produce the FA is 30 days. DODS has had numerous 30 day periods to complete the FA but has repeatedly failed to do so. It does not currently have an inspection scheduled with DCMA for

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<sup>7</sup> This letter was one of seventeen similar letters sent to Ms. Williams between 6 and 8 June 2011 concerning separate contracts (R4, tab 30).



the FA and is apparently making no progress toward performing the contract.

(*Id.* at 2)

25. On 13 June 2011, Ms. Perkins, Terminating Contracting Officer (TCO), sent a letter to Mr. Storey terminating contract B426 for default (R4, tab 19). Unilateral Modification No. P00001 implementing the termination was signed the same day (R4, tab 2).

26. Also on 13 June 2011, DODS sent "Delay Notices" for nine contracts including contract B426 (R4, tab 20).

27. DODS appealed the termination by letter to the Board dated 23 June 2011 and the appeal was docketed as ASBCA No. 57667 on 28 June 2011.

### DECISION

The government bears the burden of proof in a termination for default case. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). DLA contends that it has met its burden of proving a *prima facie* case for default based on the undisputed fact that DODS failed to deliver a first article in accordance with the contract and that DODS now has the burden to prove its failure to deliver was excusable. We agree that this is the general rule. *New Era Contract Sales, Inc.*, ASBCA No. 56661 *et al.*, 11-1 BCA ¶ 34,738 at 171,022 (New Era's failure to make timely delivery of the parts establishes a *prima facie* case for default termination. The burden then shifts to New Era to demonstrate that its failure to deliver the parts was excusable.). However, as discussed below, the government waived its right to terminate.

The record contains numerous communications between DCMA and DODS upon which we base our decision. Work commenced on Contract B426 on 3 August 2009 (finding 3). DODS failed to deliver the first article on the original delivery date of 21 August 2009 (finding 3). DODS requested extensions of the delivery date due to missing prints which were received by April 2010 (finding 4). On 1 April 2010 Mr. Webber, DCMA, informed DODS that he would reject products that had been completed without "affording the government the opportunity to plan its involvement..." (finding 5). Based on this e-mail Mr. Storey asked that Mr. Webber be removed as QAR (finding 6). The record does not include any response to this request. On 27 May 2010 Mr. Webber informed Mr. Storey that his "participation on all First Articles is 100%" (finding 7). This is confusing at best but could reasonably be interpreted as a requirement that Mr. Webber be present during first article production. In the e-mail, Mr. Webber stated he was "[a]waiting your submittal of the requested information" (*id.*). On

14 September 2010 CO Williams sent DODS a show cause letter ending with the assertion that government did not “condone any delinquency” or “waive any rights the Government has under the contract” (finding 8). DODS responded, “Material in house. Waiting on QAR” (finding 9). On 29 September 2010 the ACO sent Mr. Storey a corrective action request and requested that he respond within ten days (finding 10). On 21 January 2011 Mr. Torrence, DCMA, emailed Mr. Storey stating that the quality manual was not rejected and directing DODS to “proceed per contract requirements” (finding 11). On 4 February 2011 Mr. Webber informed DODS that quality assurance post award meetings would be held on all fourteen of DODS’ active contracts (finding 12). On 18 February 2011 Mr. Storey requested a 150-day extension based on Government caused delay (finding 13). On 29 March 2011 Ms. Wynne, DCMA, emailed DODS stating that the DCMA had not delayed DODS’ performance (finding 14). On 31 March 2011 Mr. Torrence, DCMA, emailed Mr. Storey reiterating that DODS’ quality manual had not been rejected and directed DODS to “proceed with the contracts” (finding 15). On 29 April 2011 CO Williams rejected the 150-day extension request and stated that DODS had had “well over 30 days” to deliver the first article (finding 16). CO Williams did not set a new delivery date. Mr. Storey responded listing his assertions of government interference and stating that it was only recently that he learned that the first article would not be rejected if DCMA missed an inspection point (finding 18). In a 5 May 2011 letter to CO Williams, Mr. Webber stated that during a recent un-announced visit to DODS it appeared that the plant was closed (finding 19). When asked about this fact, Mr. Storey stated DODS was outsourcing work (*id.*). On 17 May 2011 Ms. Beniast, DODS, emailed Mr. Webber with a proposed schedule for post award reviews including one for Contract B426 (finding 22). Mr. Webber responded stating that post award reviews were discretionary (*id.*). This directly contradicts Mr. Webber’s 4 February 2011 email stating that he would conduct post award review on all of DODS’ active contracts (finding 12). On 8 June 2011 Ms. LeBlanc notified CO Williams of two discrepancies in drawing dates on the B426 contract (finding 23). Contract B426 was terminated for default on 13 June 2011 (finding 25).

We conclude that this series of communications between the government and DODS was confusing, contradictory and consistently encouraged DODS to continue performance while at the same time failing to reestablish a firm delivery date. Mr. Storey never manifested an unequivocal and definite intent not to continue performance of Contract B426 such that DODS could be found to have anticipatorily repudiated the contract. *Scott Aviation*, ASBCA No. 40776, 91-3 BCA ¶ 24,123 at 120,726 (In order to exercise its common law right to terminate the contract, “[t]he Government must prove that the contractor manifested to it, a definite and unequivocal intention not to render the required performance.”). Even if DODS’ production facility had closed, it would not be enough under these circumstances to establish anticipatory repudiation. *Fairfield Scientific Corp.*, ASBCA No. 21151, 78-1 BCA ¶ 13,082 at 63,908, *aff’d on recon*, 78-2 BCA ¶ 13,429 (Discovering appellant’s plant closed did not support a finding of an

unequivocal manifestation of repudiation). At all times the government had the ability to set a delivery date and terminate if delivery was not made on that date. The government was in control of this situation but inexplicably failed to act to protect its right to terminate. The rules in this regard are well known.

Notwithstanding its assertions to the contrary, the fact that the government failed to reestablish a delivery date, waited 21 months to terminate while at the same time encouraging performance causes us to conclude that the government waived its delivery date and its right to terminate Contract B426. We find that DODS remained sufficiently engaged in Contract B426 to minimally establish detrimental reliance. *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969) (failure to terminate within a reasonable time and reliance by the contractor results in waiver of default).

### CONCLUSION

The appeal is sustained. The termination for default is converted to a termination for convenience.

Dated: 11 June 2012



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CRAIG S. CLARKE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57667, Appeal of DODS, Inc., rendered in conformance with the Board's Charter.

Dated:

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