ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Gargoyles, Inc.	)	ASBCA No. 57515
	)	
Under Contract No. W912ER-11-C-0012	)	

APPEARANCE FOR THE APPELLANT: Kenneth A. Martin, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE THRASHER

Appellant, Gargoyles, Inc. (Gargoyles), appeals the termination for cause of its commercial items contract to deliver 56 light armored vehicles (LAVs) to Victory Base Complex (VBC), Camp Wolfe, Baghdad, Iraq, 10 days after award of the contract. Gargoyles requests that we convert the termination for cause to a termination for convenience, alleging the government waived the delivery schedule, failed to issue a 10-day cure notice, and government actions constituted excusable delay. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We deny the appeal.

FINDINGS OF FACT

The Solicitation

1. On 24 November 2010, the U.S. Corps of Engineers (USACE) Gulf Region District (GRD) issued Solicitation No. W912ER-11-R-0035 (the solicitation) for a firm fixed-price commercial items contract to acquire transportation services for the USACE mission in Iraq.[1] The solicitation Performance Work Statement (PWS) stated the

[1] The solicitation cover sheet was Standard Form 1449 prescribed by FAR 53.213 for commercial item solicitations. The solicitation also included the FAR commercial item evaluation solicitation clauses and contract clauses, 52.212-1 and 52.212-2 (R4, tab 1 at 66-86 of 168).

awardee would provide transportation services to include LAVs, routine maintenance, major, minor and emergency repairs, washing, general cleaning, and recovery and towing services of disabled vehicles throughout Iraq. (R4, tab 1 at 3, 66-86 of 168) In addition, the solicitation PWS required that services were to be provided at five locations in Iraq and that the awardee would provide a fleet of vehicles designated by USACE to execute the transportation services requirements of GRD. The solicitation specified the required vehicle fleet was to consist of 2007 or newer LAVs Sport Utility Vehicle (SUV) style. (*Id.*) The period of performance was for a three-month base period with one three-month option period (R4, tab 1 at 3, 6 of 168).

2. The solicitation set forth specific performance deadlines. Although the general phase-in period was 30 days, Section 3.0 "REQUIREMENTS" of the PWS specified that the awardee was required to deliver at a minimum, 56 LAVs to VBC 10 days after award of the contract (R4, tab 1 at 4 of 168). Section 7.0 "TRANSPORTATION SERVICES" reiterated that the awardee was required to deliver a minimum of 56 LAVs to VBC within 10 days after award (R4, tab 1 at 6-7 of 168). Section 4.0 "DELIVERABLES" of the PWS specified that the awardee was required to deliver its: Phase-In Plan; Vehicle Operations Plan; and, Quality Control Plan 10 days after award (R4, tab 1 at 6-7 of 168). Ms. Betty Rogers, the contracting officer (CO) who conducted market research and issued the solicitation, testified the 10-day delivery requirement was to ensure continuity of services because of the imminent phase out of the incumbent contract, stating, "it was critical that this 10-day timeline be met in order to ensure that our folks could go to the project sites and utilize the security services provided at this site" (tr. 1/36). Although the 10-day delivery schedule was an aggressive requirement, none of the 16 offerors, including Gargoyles, questioned the requirement (tr. 1/34, 41).

3. Special contract requirement 1.0, "DEPLOYMENT PROCESSING," requires all contractor personnel to process through the CONUS Replacement Center (CRC) or an alternate center approved by the CO before they can deploy to Iraq (R4, tab 1 at 40 of 168). Pursuant to contract requirement 2.0, contractor personnel require issuance of a Letter of Authorization (LOA) to process through the CRC (R4, tab 1 at 41 of 168).

Gargoyles Proposal

4. The solicitation was amended four times (R4, tab 1). The proposal due date, after the issuance of Amendment No. 0002, was extended from 8 December 2010 to 15 December 2010 at 04:00 pm EST (R4, tab 1). Ms. Carol Bradbury, a Gargoyles employee who helped prepare Gargoyles proposal, testified that the requirements of this contract were different from all previous contracts Gargoyles had bid on because of the tight time requirements for delivery of the initial 56 vehicles but Gargoyles considered the 10-day requirement to be tight but achievable (tr. 3/51, 74). Gargoyles submitted its initial proposal on 15 December 2010 (ex. A-4). That proposal, at Section 2.1.1 "Phase-In Plan," states that Gargoyles "will deliver 56 LAVs (at a minimum) to VBC

within 10 days after contract award. The [vehicle delivery plan] will also detail the method for an additional four (4) LAVs each day until the ceiling of 180 vehicles is met." (Ex. A-4 at 5) Also, Section 2.2.1, "LAV Fleet," states that "[t]he Gargoyles Team will have 56 LAVs ready for use on Day One of contract performance at the VBC and Camp Wolfe, in Baghdad, Iraq" (ex. A-4 at 6). In addition, Gargoyles proposal at Section 3.1, "PROVIDING VEHICLES IN REMOTE AND NON-PERMISSIVE ENVIRONMENTS," lists examples of Gargoyles' experience in providing vehicles to installations and remote locations in Iraq and Afghanistan (*id.* at 14). At Section 3.2, Gargoyles' proposal explained its experience with deploying personnel to the Iraqi theatre stating:

> The Gargoyles Team has deployed numerous personnel to Iraq in support of commercial client requirements.... This was achievable because the Gargoyles Team has established experience and knowledge with Iraqi travel and Visa requirements as well as a network of agents and associates in Iraq to expedite the process. It is worth noting that deployment of personnel on behalf of commercial entities is a much more challenging task at times than deploying personnel for U.S. Government clients as commercial clients do not enjoy the same level of local government support that is afforded by the U.S. Government to its contractors.

(Ex. A-4 at 14)

5. After the issue of solicitation Amendment Nos. 0003 and 0004, revised proposals were due by 31 December 2010 at 03:00 pm EST (R4, tab 1). Gargoyles' revised proposal, dated 30 December 2010, also stated in Section 2.1.1 "Phase-In Plan" that Gargoyles was prepared to deliver 56 LAVs within 10 days of contract award. In addition, Gargoyles's proposal stated it would provide a "Phase-In Plan" within 10 days. (R4, tabs 6, 7) Furthermore, Section 2.2.1 "LAV Fleet" again stated that Gargoyles would have 56 LAVs ready by the first day of contract performance (R4, tab 6 at 8). The 30 December 2010 proposal was the proposal evaluated for award (tr. 1/115).

The Contract

6. The GRO Transportation Services Contract No. W912ER-11-C-0012 was awarded to Gargoyles on 10 January 2011, and notice of award was provided to Gargoyles on that date (R4, tabs 9, 10). The contract was a firm fixed-price commercial items contract valued at time of award at $11,115,156 (R4, tab 10 at 1 of 162). Gargoyles acknowledged receipt of the notice of award on 11 January 2011 (R4, tab 9 at 2). The awarded contract included six item numbers for the base period of performance, the two pertinent to this appeal were:

ITEM NO 0001 SUPPLIES/SERVICES

....

Mobilization & Phase-In
FFP
The Contractor shall provide service in accordance with PWS para 3.1.2. to include...4) deliver the required vehicles in accordance with para 3.1.2. PHASE-IN Period of Performance is thirty (30) days.

....

ITEM NO 0005 SUPPLIES/SERVICES

....

DBA Insurance
FFP
In accordance with Contract requirements. Period of Performance ninety (90) days.

(R4, tab 10 at 3, 5 of 162)

7. Although Item No. 0001 and Section 3.1.2 included a thirty (30) day phase-in period, the "Phase-In requirements" of the PWS also specified that Gargoyles was required to deliver, at a minimum, 56 LAVs to VBC 10 days after award of the contract as well as deliver a phase-in plan to the CO no later than 10 calendar days after contract award (R4, tab 10 at 7 of 162). Section 7.1.1. "LAV Fleet" reiterated that Gargoyles was required to deliver a minimum of 56 LAVs to VBC, Camp Wolfe, Baghdad, Iraq within 10 days after award (R4, tab 10 at 9 of 162). In addition, Section 4.1.1. "One Time Reports" specified that Gargoyles was required to deliver various reports 10 days after award including, a Phase-In Plan, Vehicle Operations Plan, and a Quality Control Plan (R4, tab 10 at 8, 9 of 162). Given these requirements, the contract established a delivery date no later than 20 January 2011 for delivery of the first 56 LAVs (tr. 1/109).

8. Pertinent to this appeal, the contract included FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010). The clause provides, in part, as follows:

> (f) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence

> beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.
>
> ....
>
> (m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance.... If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 10 at 61, 65 of 162) In addition, the contract included in full text FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) – ALTERNATE 1 (APR 1984) (R4, tab 10 at 121 of 162).

Special Contract Requirements

9. Special contract requirement 1.0, "DEPLOYMENT PROCESSING," required all contractor personnel to process through the CRC or an alternate center approved by the CO before they can deploy to Iraq (R4, tab 10 at 32, 33 of 162). Per special contract requirement 2.0, contractor personnel required issuance of a LOA to process through the CRC (R4, tab 10 at 33 of 162). If employees have already processed through the CRC training and are in theatre, they do not have to repeat the training (tr. 1/41). The LOA, among other things, validates the employee's contract employment and their authority to process for deployment at the CRC. The CO is required to provide the LOAs to the contractor personnel through the Synchronized Pre-Deployment & Operational Tracker (SPOT) system. (*Id.*)

Finalizing and Issuing Gargoyles Employee LOAs and Vehicle End User Certificates (EUCs)

10. On 10 January 2011, via email, the government provided Gargoyles of notice of award and required submittal of a vehicle listing spreadsheet by 13 January 2011 (app. supp. R4, tab 9). Gargoyles responded on 13 January "The challenge we have is that we do not have permission to access Victory or be in theatre." The government responded with an email requesting assurances that the 56 vehicles would be delivered to Camp Wolfe no later than 20 January 2011. (App. supp. R4, tab 19 at 3 of 17) The following day, on 14 January 2011, a post-award teleconference was held between the government and Gargoyles representatives (tr. 2/154)[2] Among the topics discussed, was the need for the government's assistance in finalizing actions necessary to mobilize to perform the contract including the issuance of Gargoyles employee LOAs and EUCs for the vehicles as soon as possible and the actions taken by Gargoyles to meet the 10-day vehicle delivery schedule (ex. A-7). During that telephone conversation, Gargoyles indicated that it was uncertain of whether it would produce the minimum number of vehicles to Camp Wolfe at VBC within 10 days after contract award (R4, tab 11). In response, by letter that same day, the government demanded adequate assurance of Gargoyles' ability to have 56 vehicles delivered to VBC by 20 January 2011 (*id.*). Gargoyles responded to the government's letter of concern on 14 January 2011 by providing a list of Vehicle Identification Numbers (VINs) and requested EUCs for the vehicles identified in its letter (ex. A-1). Gargoyles' response stated in part, "The attached Vehicle Identification Number listing outlines the 56 vehicles that will be available for use by USACE personnel in theatre. We will immediately begin delivery of these vehicles onto Victory base Complex, with appropriate access." (*Id.*) The government provided the signed EUCs that same day for the 60 vehicles Gargoyles had included in its VIN list (R4, tab 16 at 25 of 36). Ms. Bradbury of Gargoyles testified that obtaining the EUCs was never a problem with performing the contract (tr. 2/207).

Request to Deliver LAVs Outside VBC Gate

11. MAJ Jodi Smith participated on the 14 January post-award teleconference (ex. A-7; tr. 2/105). MAJ Smith testified she had been in theatre for about eight months at the time of the call and was the intelligence officer in charge of deciding, in conjunction with the GRD commander, if the security environment outside VBC would allow personnel to go outside the base (tr. 2/111, 118-19). During the teleconference MAJ Smith asked Gargoyles what steps they had taken to register the vehicles within country and to confirm how many vehicles would be on the ground by 20 January,

[2] Participating on the call: for the government were Ms. Betty A. Rogers, Ms. Yolanda F. Brown, MAJ Jodi Smith, Ms. Robin McDonald and Mr. Byron Barnhardt; for Gargoyles were Mr. John F. Curran, Ms. Jennifer Traurig, Ms. Vicki Lamb, Mr. Joe Valarde, Ms. Carol Bradbury and Mr. Dan Voss (ex. A-7).

expressing concern they could not meet the schedule if they had not already registered with the appropriate Iraqi ministries (tr. 2/159; ex. A-7 at 2 of 4). A Gargoyles employee, Mr. Voss, asked MAJ Smith if Gargoyles could deliver the vehicles to the VBC gate rather than bringing them onto the base for acceptance (tr. 2/161; ex. A-7 at 3). MAJ Smith immediately responded no (tr. 2/105, 161). She testified her response was based upon her determination the security environment would not allow personnel to go off the base to accept the vehicles because of the security risk to those personnel (tr. 2/110-11). We find that at the time of the call MAJ Smith did not have any contracting authority to change the terms of the contract, only the authority to allow personnel outside the gate (tr. 2/133). However, CO Rogers was on the phone call as well and rejected the request based upon the fact the contract required delivery at Camp Wolfe within VBC, stating, "[t]hat the contractor needed to adhere to the terms and conditions of the contract, which required delivery at Camp Wolfe in Victory Base (tr. 1/57).

Transportation into Theatre

12. Normally contractor personnel process through the CRC to deploy to Iraq using military chartered aircraft. However, the contractor is warned at clause 952.225-0011, GOVERNMENT FURNISHED CONTRACTOR SUPPORT (JUL 2010), that this support is provided only on an "as available" basis (R4, tab 10 at 45 of 162). In addition, the contractor may seek a waiver from the CO to "allow the contract personnel to travel via commercial air to meet urgent schedule and support requirements." If the contractor is granted a waiver to use commercial air, the cost of using commercial air will be allowable for reimbursement under the contract. However, if the contractor chooses to send employees commercially without a government waiver, such costs are not reimbursable. (R4, tab 10 at 33 of 162)

13. On 15 January 2011, Gargoyles emailed CO Rogers requesting authorization to arrange travel on commercial flights to transport Gargoyles personnel (R4, tab 18). On 15 January 2011, CO Rogers responded to Gargoyles' email stating that Gargoyles was responsible for the costs associated with mobilization to execute the contract, including transporting personnel stating, "Airfare is not paid separately by the Government and is considered to be included in the mobilization and phase-in CLIN. No approval is required by the Contracting Officer, as these costs will not be separately paid." (R4, tab 18) On 17 January 2011, Gargoyles again requested authorization to use commercial flights in lieu of military chartered flights, stressing the urgency of such authorization (R4, tab 16 at 23 of 36). That same day, CO Rogers reiterated that government approval was not required, as Gargoyles was responsible for all costs associated with mobilization (R4, tab 16 at 22-23 of 36). Gargoyles considered CO Rogers' responses to be authorization to use commercial flights and responded that its personnel would be leaving by commercial air carrier on the 17th for Baghdad (ex. A-5 at 4 of 6; R4, tab 16 at 22 of 36). However, on 21 January 2011, Gargoyles stated in an

email that its personnel were on standby, "in UAE, an exempt country from the DBA requirement, until we receive the documents" (R4, tab 16 at 5). The record is unclear why Gargoyles personnel were waiting on standby in UAE, i.e., whether Iraq required proof of insurance for entry, the commercial airlines required proof of the DBA policy, or Mr. John F. Curran, appellant's president, made the management decision not to expose his company to the liability risk. Ms. Traurig, the Gargoyles employee responsible for booking commercial flights for the company, testified that the only commercial airline flying from Kuwait into Iraq at that time was Gryphon Airlines. Mr. Curran[3] asked her, "Did Gryphon Airlines require a formal evidence of coverage before they would allow us to reserve seats?" Her answer was, "They required physical paperwork with every travel order." (Tr. 3/23)

14. The contract placed responsibility upon the contractor to take all necessary steps to obtain authorization to enter installations in Iraq. The PWS at Section 14.0, "FACILITIES ACCESS," states that the government will coordinate access to specific facilities where contractor personnel are required to perform the services listed within the contract (R4, tab 10 at 35 of 162). However, at Section 15.0, "INSTALLATION ACCESS," it states: "The Contractor shall be responsible for assuring all Contractor personnel authorized to perform work under this contract obtain installation access as required by AR 190-12" (R4, tab 10 at 35-36 of 162). In addition, Section 6.0, "PASSPORT, VISAS, AND CUSTOMS," states: "The Contractor is responsible for obtaining all passports, visas...and other documents necessary for Contractor personnel to enter and exit any area of operation" (R4, tab 10 at 34 of 162).

Proof of Defense Base Act Insurance Coverage

15. CLIN 0005, DBA Insurance, provided for a 90-day period of performance (R4, tab 10 at 5 of 162). Gargoyles could not obtain an LOA without proof of DBA Insurance coverage. The contract includes contract clause FAR 52.228-3, WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT) (APR 1984) which sets forth the basic requirement that the contractor is responsible to procure DBA insurance coverage before commencing performance under the contract (R4, tab 10 at 87 of 162). In addition, the WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT)—SERVICES (OCT 2009) clause supplements the FAR 52.228-3 clause, and provides further details on proof of coverage (R4, tab 10 at 48, 49 of 162). Specifically, the clause states, in part, in paragraph (b) the following:

> The contractor agrees to procure Defense Base Act (DBA) insurance pursuant to the terms of the contract between the U.S. Army Corps of Engineers (USACE) and **CNA Insurance** unless the contractor has a DBA self-insurance

[3] Mr. Curran appeared *pro se* at the hearing.

> program approved by the Department of Labor. Proof of this self-insurance shall be provided to the Contracting Officer....

The clause at paragraph (g) also states:

> Failure to comply and purchase [DBA] Insurance in accordance with FAR Clause[] 52.228-3...from the U.S. Army Corps of Engineers mandatory Insurance Carrier/Broker (CNA Insurance/Rutherfoord International)...shall be considered a material breech [sic] and could cause your contract to be terminated for default/cause.

(R4, tab 10 at 48, 49 of 162)

16. The government's 10 January 2011 letter of award stated: "Within the next 15 days, please submit proof that Defense Base Act (DBA) insurance has been provided for all prime and subcontractor employees under this contract" (R4, tab 9). Gargoyles acknowledged the notice and executed the contract on 11 January 2011 (R4, tabs 9, 10). Gargoyles used the services of Mr. John Carter, of the Center of Insurance, to obtain the DBA Insurance (tr. 3/81). On 13 January 2011, Gargoyles filed its application for DBA insurance coverage, requesting a coverage effective date of 11 January 2011 (R4, tab 16 at 18 of 36).[4]

17. On 14 January 2011, Ms. Payne of Rutherfoord sent an email to CO Rogers and Gargoyles acknowledging Gargoyles application and stated that the coverage would be effective 20 January 2011. In addition she stated that policy documents would be processed within 10 working days. (R4, tab 16 at 17 of 36) CO Rogers testified that an email notification of insurance coverage, such as the one from Rutherfoord, is typically sufficient proof of insurance under this type of contract and she was not aware of any requirement for a hard copy of the policy (tr. 1/42, 104).

18. Among other items, the SPOT system requires entry of the contract employer's DBA policy number as proof of employee coverage before an LOA may be issued (tr. 1/55). During the 14 January post-award teleconference, Gargoyles raised the issue of their inability to enter the DBA policy number into SPOT since CNA required at least 10 days to issue the policy paperwork with the policy number (ex. A-7 at 1). CO Rogers advised Gargoyles that she considered Rutherfoord's email acknowledging Gargoyles application and statement of coverage to be adequate to allow entry of Gargoyles' information into SPOT and that the government would assist them and enter zeros into the SPOT system to issue the LOAs and once the policy number was issued the

[4] Although the application was backdated to 11 January 2011, it was signed and dated 13 January 2011 (tr. 1/115-16).

LOAs could be amended (tr. 1/55-56). With the government's assistance, all Gargoyles' LOAs were generated by later that same day, 14 January 2011 (ex. A-5 at 4 of 6). On 15 January 2011, Gargoyles emailed CO Rogers thanking her and her staff for their efforts, "given the holiday weekend," in obtaining the LOAs and subsequent CAC cards for travel (R4, tab 16 at 29). We find that by 14 January 2011 Gargoyles met the contract requirement to provide the CO proof of DBA insurance coverage and had received its required LOAs and CAC cards.

19. On 16 January 2011, CO Rogers transferred day-to-day administration of the contract over to CO McDonald, who had deployed to Iraq to administer the contract (tr. 1/5, 124). On 18 January 2011, CO McDonald directed Gargoyles to provide information of the status of delivery of the vehicles onto VBC by 20 January 2011 (ex. A-5 at 1-2 of 6). Gargoyles responded that same day by email with an attached status report stating, for the first time, it was waiting for "bound DBA coverage" before it could proceed with the delivery (ex. A-5). The cover email stated in part:

> We have been securing vehicles since contract award, upon authorization to be aboard VBC is received as a contractor we will begin a delivery schedule which will be communicated with you and your staff....
>
> We are awaiting the bound DBA coverage with an anticipated date of 20 January as provided by USACE's contracted vendor.... As we both are aware the DBA requirement is a requirement we are awaiting, unfortunately this supersedes us both and is a precursor we must have in place before proceeding.

(*Id.* at 1 of 6) The attached status report explained: "[T]hat both the administrative staff of USACE and Gargoyles were successful in getting approval of coverage and appropriate backdating to the award of the contract." However, delivery of the vehicles would be conditioned upon receipt of a "bound DBA policy" stating that proof of a "bound" policy was required by "an authority higher than either USACE or Gargoyles" for contractor to enter a government facility. (Ex. A-5 at 4-5 of 6) However, Gargoyles did not specify the higher authority that required proof of a bound DBA policy for camp entry stating only, "It is unclear, at the time of this report's writing if that higher authority is CENTCOM or VBC base Command, if USACE staff is able to facilitate a waiver to this requirement for proof of coverage then Gargoyles can begin to bring personnel onto VBC upon receipt of the waiver" (*id.* at 5 of 6).

20. On 20 January 2011, Nikki Houngmany of Rutherfoord informed Gargoyles' insurance broker, Mr. Carter, copying Gargoyles, that Rutherfoord would take 10 days to process policy documents but that the email confirmation from Ms. Payne was evidence

of coverage that had been accepted by the CO (R4, tab 16 at 14 of 36). In addition, CO McDonald spoke with Ms. Payne via telephone who verified that Gargoyles would be covered retroactively from the date of application to the date when the contract was signed (tr. 1/197-98).

21. Gargoyles also emailed CO McDonald on 20 January 2011 at 2:00 AM stating that it made application for DBA coverage for its subcontractors but, as of that date, had not received a response as to the effective date of their coverage and reminded the CO that "Federal law" and the contract required both Gargoyles and its' subcontractors, "must be able to demonstrate evidence of coverage at every tier prior to specific performance" (R4, tab 16 at 16). The email went on to explain Gargoyles had begun performance and had done everything possible short of physically being on the ground in Iraq and would continue to identify tasks it could accomplish until it received "evidence of coverage and bound policy documents":

> The liability for Gargoyles and its subcontractors, and perhaps USACE itself, is something that is too great to ignore. Should something happen to one of our employees prior to the effective date of the policy, while in Iraq or any other foreign nation, the event makes Gargoyles and its officers personally liable. Given the nature of the work to be performed in Iraq, this becomes a daily possibility. If you have the expectation that we will ignore the federal law and specifically perform in Iraq then I must reassert my position to you that we will not do so. I have also received a similar expectation, in writing, that I again must reassert our intent to execute our specific performance under this contract in accordance with federal law. This is not a requirement that neither you nor I have the ability to waive or ignore, regardless of the mission tempo. [T]he only acceptable waiver is done so by the Secretary of Labor.

(R4, tab 16 at 16) Later that same day at 11:04 PM, Gargoyles emailed CO McDonald stating that the insurance policy documents were required for Gargoyles to be on site stating:

> I can only reiterate our desire to obtain the policy documents as quickly as possible in order to begin our specific performance IAW with this contract. I obviously understand your frustration and I can only reiterate that the absence of this proof of policy exposes both the USACE and Gargoyles to significant and unnecessary risk, aside from the violation

> of Federal law if Gargoyles begins the specific performance in the absence of such proof of insurance.

(R4, tab 16 at 7) A delivery schedule was attached to the email that showed delivery of the vehicles on the 10th day from "DBA Policy Documents Rec'd" (R4, tab 16 at 9).

22. On 21 January 2011, Mr. Curran emailed Ms. Payne at Rutherfoord acknowledging proof of coverage but asking when he would receive the policy documents, stating:

> The policy documents are what is needed to demonstrate coverage throughout all of the tiers of the command structures we must be in compliance, once we are on the ground in Iraq to perform on our contract with USACE. The email notice you sent identifying the effective date met the needs of the Contracting Officer at USACE, the proof of insurance via policy documents is what is needed to meet the requirements to all of the other command structures. Our contract with USACE obligates us to do so. Our personnel are standing by in UAE, an exempt country from the DBA requirement, until we receive documents.

(R4, tab 16 at 4-5) Ms. Payne responded by email that same day and again emphasized that Gargoyles had received Rutherfoord's "confirmation of coverage" email, which is all that was required to enter information into the SPOT system and obtain LOAs for Gargoyles' employees (R4, tab 16 at 4 of 36). She stated that no other DBA documentation was needed to perform under the contract (*id.*).

23. Gargoyles responded that same day stating it understood Rutherfoord's email confirmation was sufficient to meet the requirements of the contract but stated:

> If your email has the value as you imply, I would respectfully request that you contact the CENTCOM HQ office to provide me with the same acceptance as received by the Contracting Officer. Unfortunately, merely having your email in our personnel's possession does not provide the proof of coverage required by Federal law.

Mr. Becker-Welts, the government's contract legal counsel, was copied on the email and he forwarded it to CO Rogers and CO McDonald. (R4, tab 16 at 2-3 of 36)

24. Gargoyles did not deliver any vehicles of any type to Camp Wolfe at VBC, Iraq, on 20 January 2011 (R4, tab 13; tr. 1/129). In addition, Gargoyles did not submit a

Phase-In Plan, Vehicle Operations Plan, or Quality Control Plan by 20 January 2011 (*id.*). On 21 January 2011, CO McDonald sent a Cure Notice to Gargoyles concerning Gargoyles' failure to deliver the minimum number of vehicles to VBC by 20 January 2011 as specified in the contract or to deliver its Phase-In Plan, Vehicle Operations Plan, and Quality Control Plan and stated in pertinent part:[5]

> Pursuant to Section 3.1 of the Contract, (Phase-In Requirements), you were required to "provide 56 LAVs to be delivered to Victory Base Complex (VBC), 10 days after the award of the contract." This was set out as a *minimum* requirement. This contract was awarded to you on 10 Jan 2011, making delivery of the minimum quantity of vehicles due by 20 Jan 2011. In response to our letter to you January 14, 2011 seeking adequate assurances of your ability to timely deliver those vehicles, you provided us with a list of vehicle identification numbers and your assurances that those identified vehicles would be delivered to Victory Base, Iraq, by 20 Jan 2011. Your misrepresentation and failure to deliver leaves us no choice but to consider your actions a repudiation of the contract.
>
> ....
>
> You are hereby notified that the Government considers your failure to perform the services required within the time specified in the contract as a material breach, subject to immediate termination for default in accordance with FAR 52.249-8(a)(1)(i)—Alt I.
>
> Without waiving any of its rights, the Government will permit you the opportunity to continue performance, provided that you provide the minimum requirement of 56 LAVs to Victory Base Complex, Iraq, plus the Phase-In, Vehicle Operations and Quality Control plans by 1600 hrs - Iraq time - on January 22, 2011, time being of the essence. Should you fail to meet these requirements in full by that time and date, I will immediately begin evaluation for termination of your right to proceed.

(R4, tab 13)

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[5] The 21 January letter was titled a cure notice but was really a show cause letter since Gargoyles was in default having not delivered any vehicles or plans by the delivery date of 20 January. *See* FAR 49.607.

25. Gargoyles responded to the 21 January 2011 Cure Notice by letter that same day but did not directly address the government's revised schedule. Instead, Gargoyles proposed an alternative delivery date of 61 LAVs "onto VBC by 31 January 2011 or sooner." The letter went on to explain that:

> The earliest we are able to get personnel into Iraq is Monday the 24th. This based upon the Gryphen [sic] flight schedule of flights on Sunday, Monday, Wednesday and Friday and makes an assumption that the Sunday schedule is fully booked. Our personnel could arrive as early as Sunday, with a subsequent modification to our schedule of accelerating delivery to the 30th.

(R4, tab 14) Regarding the required reports, Gargoyles' letter stated:

> The reports identified in section 4.1.1 of the PWS which include the Phase-In, Vehicle Operations and Quality Control Plans have been initiated as drafts. It remains our intent to finalize these documents once on the ground at VBC. Once we are on the ground those finalized documents will be submitted NLT than 28 January 2011.

(*Id.*) Gargoyles also provided a schedule attached to its letter which indicated the first group of vehicles would not be delivered until 26 January 2011 and the promised 61 vehicles until 31 January 2011. The letter did not directly provide any excuses for the late deliveries but did mention the DBA insurance issue and stated, "It is clear that there is a disagreement regarding the DBA Insurance policy and the interpretation of its requirements." However, Gargoyles rationale was not that the policy documents were required for entry to VBC but instead was the risk of liability stating:

> As a Veteran Owned Small Business it is our intent to manage the risk associated with not having appropriately demonstrated coverage in effect prior to having our personnel on VBC. I did not have the confidence that an email from the insurance agency identifying an effective date properly protected not only Gargoyles and its personnel, but also USACE from the potential liability of the absence of appropriate coverage. Similar firms to Gargoyles are no longer in business from the failure to adhere the procurement of coverage in this capacity.

(R4, tab 14 at 1)

26. CO McDonald discussed Gargoyles' 21 January 2011 proposed revised delivery schedule with the deputy commander at Camp Wolfe who provided feedback that the revised schedule was unacceptable (tr. 1/137-38; R4, tab 16 at 1 of 36). In addition, she consulted her legal counsel, reviewed the factors at FAR 49.402 and consulted CO Rogers (tr. 1/60, 138, 141). As a result, CO McDonald determined Gargoyles' response to the 21 January 2011 show cause letter was unacceptable (*id.*). On 22 January 2011, via serial letter 11-C-12-0001, CO McDonald terminated Gargoyles contract for default, stating the basis for her decision:

> The Government is in receipt of your response to the Cure Notice dated 21 Jan 2011 regarding your failure to deliver the minimum requirements of the contract within the time specified in the contract and determined it to be nonresponsive and unacceptable. The Government cannot accept an unexcused and unwarranted extension to the vehicle delivery requirements as you request. Accordingly, your failure to make delivery of the vehicles and perform the transportation services within the time specified in the contract is unexcusable [sic] and your right to continue performance under the contract is hereby terminated for default. Additionally, your failure to provide timely and adequate Phase-In, Vehicle Operations and Quality Control Plans leaves the Government with no confidence in your ability to perform the requirements of the contract.
>
> In your response dated 21 Jan 2011, you requested an extension to the delivery schedule of vehicles from 20 Jan to 31 Jan 2011. However, in your response to the Government's notice on 14 Jan 2011 regarding the need for adequate assurances of your ability to provide the vehicles within the time specified, you responded with a list of identified vehicles indicating to the Government that you had a plan in place to perform the contract requirements. You made no indication when you provided those assurances that you would be unable to deliver the 56 LAV's to Victory Base Complex, Iraq, by January 20, 2011. Based on your newly-proposed extended delivery schedule, it now appears that you had neither the capability nor the intention of delivering 56 LAV's within ten days of contract award, as required by the contract. Your misrepresentation of your ability to deliver the minimum requirements of the contract within the time

specified is determined to be a material breach subject to immediate termination for default.

(R4, tab 15) CO Rogers issued contract Modification No. P00001 terminating the contract for cause pursuant to FAR clause 52.212-4(m) of the contract on 22 January 2011 (R4, tab 17).[6]

27. Gargoyles responded to the 22 January 2011 termination modification on 24 January 2011 requesting the government reconsider the termination for cause based upon "additional factual information" (app. supp. R4, tab 23). In addition to repeating its alternative delivery schedule proposed in its 22 January 2011 letter, Gargoyle's request outlined what it considered excusable delays justifying the government's reconsideration of the termination. Gargoyle asserted that physical possession of its DBA Insurance policy documentation was required before it could begin performance because they were required to "gain access to the place of performance" and the period of time required to obtain physical possession constitutes a government caused excusable delay. In addition, Gargoyles stated it could not begin performance until it received a notice to proceed, which it had not yet received, and was not provided a 10-day cure notice, which was required by the contract. (R4, tab 23) There is no evidence that the government responded to Gargoyles' request for reconsideration.

28. Gargoyles appealed the CO's final decision to the Board on 3 February 2011 which was docketed as ASBCA No. 57515.

DECISION

APPLICABLE TERMINATION PROVISION

The CO terminated the contract on 22 January 2011 because appellant had failed to deliver the 56 LAVs or provide the required plans within the delivery date (finding 26). The government has the burden of proving that the termination for default was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987).

To determine if the termination for default was justified, we first determine which contract termination provision controls the government's actions. The contract includes both FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010), paragraph (m) Termination for Cause, and FAR 52.249-8, DEFAULT (FIXED-PRICE

[6] Although Ms. McDonald was the procuring contracting officer at the time of termination, CO Rogers issued the termination modification because CO McDonald was in Iraq and did not have access to contract writing system (tr. 1/60).

SUPPLY AND SERVICE)—ALTERNATE 1 (APR 1984) (finding 8). In addition, the show cause letter issued on 21 January 2011 refers to immediate termination for default in accordance with FAR 52.249-8(a)(1)(i) and the subsequent termination notice issued on 22 January 2011 does not reference a specific clause but refers to the action as a termination for default (findings 24, 26). The 22 January 2011 modification terminating the contract, however, refers to the action as a termination for cause pursuant to the authority of FAR clause 52.212-4(m), Termination for Cause (finding 26). Also confusing is the fact that both parties exclusively rely upon FAR clause 52.249-8 for their arguments in their post-hearing briefs.

Since the solicitation was issued and the contract was awarded as a commercial items contract we conclude the controlling clause for the government's termination is found in clause 52.212-4 of the contract (findings 1, 6, 8). Pursuant to FAR 12.403(a), the requirements of FAR part 49 do not apply when terminating contracts for commercial items. However, COs may use FAR part 49 as guidance to the extent that its provisions do not conflict with FAR 12.403 and the provisions of FAR 52.212-4.[7] We have held that the principles governing terminations for default also apply to terminations for cause. *Genome-Communications*, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 at 170,889. Therefore, based upon the provisions of paragraph (m) of clause FAR 52.212-4, the government has the right to terminate for cause in the event of "any default" by appellant, or upon appellant's failure "to comply with any contract terms and conditions," or upon appellant's failure to "provide...adequate assurances of future performance."

CONTENTIONS OF THE PARTIES

The government contends that appellant's contract was properly terminated for default because appellant did not deliver the 56 LAVs within the contractual delivery date and appellant has not proven any facts excusing its default (gov't reply br. at 6). Appellant does not dispute there was a failure to deliver within the delivery date but counters by arguing the termination was improper and premature because: (1) the government waived the 10-day delivery schedule by issuing the cure notice on 21 January 2011; (2) the government failed to issue a 10-day cure notice; and (3) its failure to meet the delivery was excusable due to the government's actions (app. br. at 16-23). We will address each argument in turn.

[7] FAR 12.403(a) explains that the provisions of the commercial item termination clause contains some concepts which differ from the terms contained in the termination clauses prescribed in FAR part 49. Consequently, the requirements of FAR part 49 do not apply when terminating commercial items contracts.

(1) *Waiver of Delivery Schedule*

Appellant argues the government waived the 10-day delivery schedule when it issued it cure notice on 21 January 2011 extending the delivery date and then encouraged Gargoyles to continue performance without establishing a new contract delivery date and without affording Gargoyles a reasonable amount of time to cure any defects in its performance (app. br. at 22-23). Appellant relies upon the "waiver rule" established in *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969). The government counters that appellant's argument is "neither factually accurate nor supported by the record" (gov't reply br. at 5). We agree with the government. The *DeVito* waiver rule requires an election by the government to waive default in delivery under a contract evidenced by a (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor and continued performance under the contract, with government knowledge and implied or express consent. *DeVito*, 413 F.2d at 1154.

The facts before us do not support a finding under this rule. There is no evidence of government forbearance nor appellant's reliance. The government's letter of 21 January 2011 specifically stated it was issued "without waiving any rights" and, despite its failure, provided appellant an opportunity to deliver by "16:00 hrs - Iraq time - on January 22, 2011, time being of the essence" (finding 24). Appellant responded that same day, but instead of providing assurances it would perform in a timely manner, proposed a revised schedule for delivery of 31 January 2011 (finding 25). We conclude the government did not waive the delivery schedule.

(2) *Failure to Permit a 10-Day Cure Period*

Appellant also contends that the government prematurely terminated the contract because Gargoyles was entitled to a 10-day cure notice (app. br. at 18). The government's notice of 21 January 2011 was titled "Cure Notice" and both parties have consistently referred to it as such. However, the delivery date had already passed when it was issued. As a result, the letter was not a cure notice as contemplated by the FAR but was instead a show cause notice. *See* FAR 49.607. The government is not required to issue a show cause notice in the case of a termination for cause under FAR clause 52.212-4 or for default under FAR clause 52.249-8.

To avoid this fact, appellant's argument relies upon the language of FAR 52.249-8, contending that the controlling performance period is stated in CLIN 0001 allowing a 30-day "Mobilization & Phase-In" period not the requirement to deliver the vehicles within 10 days. Consequently, the failure to deliver the vehicles under the 10-day delivery date was, at worst, a failure to make progress under FAR 52.249-8(a)(1)(ii), which requires a 10-day cure notice period, rather than a failure to deliver under FAR 52.249-8(a)(1)(i). As a result, the government's action to terminate

was premature. *(Id.)* The government counters by arguing the termination was proper under FAR 52.249-8(a)(1)(i) and nothing in the record suggests there was acceleration of the delivery schedule or that anyone, including Gargoyles, ever questioned the 10-day requirement so as to require issuance of a 10-day cure notice (gov't reply br. at 4-5). We agree a 10-day cure notice was not required. Although the PWS contains a general 30-day "Mobilization & Phase-In" period, we conclude the PWS language unambiguously established a 10-day delivery date for the initial 56 LAVs, 20 January 2011 (finding 7). The controlling termination provision is FAR clause 52.212-4(m) and it does not require a cure notice for failures to deliver in a timely manner. *See* FAR 12.403(c)(1). In addition, even if FAR clause 52.249-8 were controlling, we agree with the government this termination would be the result of a failure to deliver under FAR 52.249-8(a)(1)(i), which also does not require a cure notice be issued prior to termination. Therefore, we conclude no cure notice period was required, much less a 10-day period.

(3) *Excusable Delay*

Based upon the foregoing, we conclude the government's action terminating the contract for cause was justified based upon Gargoyles failure to deliver the 56 LAVs within the delivery schedule. Given that the government has satisfied its burden in this regard, appellant has the burden of proving that its nonperformance was excusable. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). FAR clause 52.212-4(f), Excusable Delays, states that the contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence (finding 8). Appellant argues the failure to deliver the LAVs to VBC within 10 days of award was the result of 2 excusable delays that were not the result of any fault or negligence on Gargoyles' part: (A) the requirement to obtain DBA Insurance prior to performance and (B) the government actions that prevented Gargoyles' timely performance (app. br. at 18-22). We address each argument in turn.

(A) *The DBA Insurance Requirement*

The crux of appellant's argument is that it could not deploy its personnel to Iraq using military chartered aircraft or enter VBC until Rutherfoord provided DBA coverage, which appellant asserts was 20 January 2011 due to the government's failure to assist it in obtaining coverage (app. br. at 20-22). Furthermore, the government knew prior to award that Rutherfoord routinely took 10-15 days to issue a policy and, as a result, knew that without "extraordinary and accelerated efforts by Gargoyles" there was no chance of delivering the 56 LAVs in the time required. Despite this knowledge, the government hindered Gargoyles performance by doing nothing to facilitate insurance coverage even though prior to award Gargoyles provided the government with all the information Rutherfoord needed to issue coverage. In addition, Rutherfoord failed to issue coverage until 20 January 2011 even though Gargoyles applied for coverage immediately after

award. (App. br. at 19-22) In summary, appellant argues the combination of the DBA Insurance requirement with the 10-day delivery requirement resulted in excusable delays: (1) rendered the 10-day delivery schedule impossible, (2) accelerated appellant's performance period, (3) prevented appellant from deploying its personnel, (4) and caused appellant to be denied entry onto VBC. We address each argument in turn.

(1) *Impossible 10-Day Delivery Schedule Requirement*

The basis of appellant's argument is proof of DBA coverage requires issuance of the physical insurance policy and without the "bound policy" appellant could not begin performance under the contract, which did not routinely occur for 10 days after application. The facts, however, lead to the opposite conclusion. The CO told appellant she considered the email notice from Rutherfoord to be valid proof of coverage for purposes of contract compliance. In addition, with the government's help, appellant was able to obtain LOAs and CAC cards from the SPOT system on 14 January 2011 to allow deployment. (Finding 18) Appellant even acknowledged insurance policy documents were not required to comply with the contract but insisted such documents were required for entry to VBC (finding 23). Furthermore, appellant's email on 20 January 2011 contradicts its argument stating it had begun performance and done everything possible short of physically being on the ground in Iraq until it received "evidence of coverage and bound policy documents" (finding 21). Therefore, we reject appellant's argument and conclude possession of the physical insurance policy or the "bound policy" was not required for contract compliance or for appellant to begin performance.

(2) *Gargoyles' Performance Accelerated*

Appellant's argument that the 30-day Phase-In period was controlling over the 10-day requirement such that appellant's performance was accelerated is not persuasive. The controlling period of performance for delivery of the first 56 LAVs was unambiguously stated in the PWS in the solicitation as 10 days from contract award (finding 7). Appellant's proposal indicates it understood the 10-day delivery requirement to be an independent requirement and promised it would deliver the 56 LAVs within the 10 days and, in its final proposal, even went as far as promising it would have 56 LAVs ready on the first day of performance (findings 4, 5). In addition, like the other 15 offerors, appellant did not question the 10-day requirement (finding 2). Furthermore, the testimony of its own employee involved in the proposal preparation, Ms. Bradbury, clearly indicates Gargoyles believed the 10-day delivery requirement to be a separate requirement, that it was aggressive but achievable and represented to the government in its proposal that it would meet the requirement (finding 4). Consequently, we reject the argument that appellant's performance was accelerated.

(3) *Prevented from Deploying Its Personnel into Theatre*

Appellant argues there is excusable delay because the lack of a DBA "bound policy" prevented it from deploying its workforce to Iraq in a timely manner because it could not obtain LOAs which denied the use of military chartered aircraft and resulted in failure to gain entry to VBC (app. br. at 20). Contrary to appellant's assertions, the record establishes appellant obtained the necessary LOAs and CAC cards for deployment by 14 January 2011 with the assistance of the government. During the 14 January post-award conference, appellant raised the question of obtaining LOAs from the SPOT system without entering the DBA insurance policy number, which would not be available until the actual policy documents were issued. In response, the government told appellant it considered the contractual requirements for proof of DBA coverage to have been met and assisted appellant in obtaining LOAs from the SPOT system to facilitate deployment. On 15 January 2011, appellant thanked the government for its assistance and verified it had obtained the LOAs and subsequent CAC cards for travel. (Finding 18) In fact, by 17 January, appellant represented to both CO Rogers and CO McDonald that its people would be leaving for Baghdad by commercial air that same date. On 21 January, however, appellant stated by email that its workforce was on standby in the UAE, an exempt country from DBA requirements. (Finding 13) It is unclear from the record whether it was denied entry by the Iraqi government, the airline flying into Iraq or just the management decision made by Mr. Curran. In any event, the contract placed the responsibility on the contractor for obtaining all necessary passports, visas, etc. for entry into the country (finding 14). In addition, appellant represented in its proposal that it was experienced in deploying employees into this theatre of operations (finding 4). Appellant has not presented any evidence of the specific instances where possession of the physical DBA policy documents were required for proof of insurance to deploy its personnel or the basis for such a requirement. Ms. Traurig, the Gargoyles employee that booked commercial flights for the company, testified that the only commercial airline flying from Kuwait into Iraq at that time was Gryphon Airlines. Mr. Curran asked her, "Did Gryphon Airlines require a formal evidence of coverage before they would allow us to reserve seats?" Her answer was, "They required physical paperwork with every travel order." (Finding 13) It is unclear from this exchange what type of paperwork would be required. Even if it was the case that such policy documents were required to book its personnel, it was appellant's responsibility to conduct due diligence and take steps necessary to meet the delivery date. We conclude that appellant has failed to prove any such failure was an excusable delay.

(4) *Denied Entry onto VBC*

Appellant's brief also asserts "it could not gain entry into the VBC to deliver 56 LAVs there" because USACE denied Gargoyles access to the VBC (app. br. at 20). Appellant argues the government knew it would take 10-15 days for the insurance

company to issue a DBA policy and the government hindered appellant's performance by doing nothing to facilitate insurance coverage even though appellant provided it with all the information it required to do so (app. br. at 19-22). The implication from appellant's argument is that the government possessed superior knowledge of the application process and did nothing to facilitate appellant's application and coverage, even though it possessed the information to do so. We reject both assertions.

There is no evidence that the government possessed superior knowledge it kept from appellant. On the contrary, the solicitation clearly specified the Rutherfoord contact information where appellant could have inquired about the coverage process prior to award, including the time to obtain proof of coverage. The contract placed responsibility for taking the necessary steps to obtain access to installations upon the contractor (finding 3). In addition, appellant represented in its proposal that it possessed experience and was knowledgeable of the requirements to operate in this theatre of operations (finding 4).

The record is also devoid of evidence supporting the argument that the government could have facilitated appellant's coverage and did not do so. The only information provided prior to award was the information required by the solicitation DBA fill-in provisions. That information was used for purposes of evaluation, not for policy application. The solicitation explained and the contract required the contractor to apply for DBA insurance coverage and to present proof of coverage. (Finding 3) There is no record of what, if any, steps appellant took to research this aspect of the contract requirement. After award, appellant did not apply for insurance coverage until the third day after award (finding 16). The contract places responsibility on the contractor for obtaining entry into the installation (finding 15). Appellant stated in its proposal that it was experienced and knowledgeable of these requirements (findings 3, 4). On 14 January 2011 appellant raised the issue of DBA coverage in the context of obtaining LOAs from the SPOT system but it was not until 18 January, two days prior to the delivery date, in response to a request from the CO on the status of the deliveries, that appellant first took the position that it was awaiting "bound DBA coverage" before it could proceed with deliveries. An attached status report explained that proof of a "bound" policy was required by a higher authority than USACE or Gargoyles to gain access to a government facility. However, the report went on to state it was unclear whether that authority was "CENTCOM or VBC base Command, if USACE staff is able to facilitate a waiver to this requirement for proof of coverage then Gargoyles can begin to bring personnel onto VBC upon receipt of the waiver." (Finding 19) This is the only evidence in the record of appellant ever requesting help from the government on this issue prior to the delivery date.[8] In addition, there are no documents in the record or

[8] Appellant did request Rutherfoord, Ms. Payne, to contact CENTCOM on this issue, copying the government's legal counsel. However, this was not until 21 January 2011, the day after Gargoyles was required to deliver the vehicles. (Finding 23)

testimony presented at the hearing specifying what entity at VBC denied access or identified any specific regulatory authority for what proof of DBA coverage was required by the authorities at VBC. Furthermore, appellant's statement on 21 January 2011 indicates appellant made a management decision not to deploy its employees and deliver the LAVs because it believed it required "bound policy" documents to prevent potential exposure to extensive liability (finding 25).

Based on the entire record before us, we conclude appellant's arguments related to DBA Insurance coverage have failed to prove that its failure to perform was caused by an occurrence beyond its reasonable control and without its fault or negligence so as to constitute an excusable delay.

(B) *Impossibility of Performance Due to the Actions of the Government*

Appellant also argues that it made an attempt to perform by (1) requesting permission from the CO to use commercial aircraft in lieu of military chartered aircraft and (2) to deliver the LAVs outside the gate at VBC. As a result of the government improperly denying these requests, appellant argues its performance was rendered impossible (app. br. at 21). We address each argument in turn.

(1) *Denial of Waiver to Use Commercial Aircraft to Deploy Workforce*

Appellant argues that the CO's refusal to grant a waiver to use commercial air flights in lieu of military chartered flights rendered its timely performance impossible (findings 20-21). We disagree. The usual procedure is for a contractor to use military chartered flights to deploy its personnel in theatre. However, as the contract warned appellant, military chartered flights are only available on an "as available" basis. The contractor may use commercial flights to deploy in lieu of military charters but will only be reimbursed for the costs of those flights if it first obtains a waiver from the CO. (Finding 12) Gargoyles requested a waiver on 15 January 2011 and the CO denied the request the same day stating Gargoyles was responsible for all costs of mobilizing to execute the contract. Gargoyles made its request a second time on 17 January 2011 and again the CO denied the request and explained that approval was not required to use commercial flights but that Gargoyle would be responsible for the costs of such flights. Gargoyles considered this as authorization to use commercial flights and responded its personnel would be leaving on the 17th for Baghdad. Appellant's workforce, however, was on standby in the UAE on 21 January awaiting the insurance policy documents. (Finding 13) We conclude that the CO's denial of appellant's request to use commercial flights in lieu of military chartered flights to deploy its workforce does not render performance impossible so as to excuse appellant's failure to deliver the 56 LAVs in a timely manner.

(2) *Request to Deliver LAVs Outside VBC Gate Denied*

Mr. Voss, a Gargoyles employee, asked MAJ Smith during the 14 January 2011 post-award conference call whether Gargoyles could deliver the LAVs outside the gate rather than bringing them on base for acceptance. MAJ Smith quickly rejected the request because it would require government personnel to exit outside the gate to accept the vehicles. MAJ Smith testified that as intelligence officer she was responsible for determining which personnel could exit the base based upon a threat assessment of the risk outside the base perimeter in conjunction with the GRD commander. MAJ Smith did not have contracting authority to change the place of delivery under the contract but CO Rogers, was also on the call and testified her response to the question, "[t]hat the contractor needed to adhere to the terms and conditions of the contract, which required delivery at Camp Wolfe in Victory Base" (finding 11). Appellant argues because of this decision it was unreasonable for the government not to have allowed more time to deliver (app. br. at 21-22). We disagree; both parties agree the delivery requirement was Camp Wolfe inside VBC and we conclude the CO decision was reasonable given MAJ Smith's assessment of the threat environment. Therefore, we conclude the government's decision not to change the location for delivery of the vehicles does not constitute an excusable delay under the terms of the contract so as to excuse appellant's failure to deliver the 56 LAVs in a timely manner.

CONCLUSION

We conclude the termination of appellant's contract for failure to deliver within the time specified by the contract was proper and appellant has failed to prove its failure to perform was caused by an occurrence beyond its reasonable control and without its fault or negligence. Accordingly, the appeal is denied.

Dated: 28 May 2013

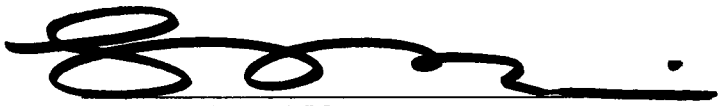
JOHN J. THRASHER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur



PETER D. TING
Administrative Judge
Acting 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. 57515, Appeal of Gargoyles, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals