ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Bulova Technologies Ordnance Systems LLC	)	ASBCA No. 59089
	)	
Under Contract No. W15QKN-11-A-0527	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Bulova Technologies Ordnance Systems LLC (BTOS) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) final decision terminating for cause an order issued to it by the U.S. Army under a blanket purchase agreement (BPA) for the delivery of nonstandard weapons and related items to Afghanistan. After a six-day hearing and extensive briefing, for the reasons set forth below, we deny the appeal.[1]

FINDINGS OF FACT

Company Background

1. On 1 January 2009, Bulova Technologies Group, Inc. (BTG) acquired BTOS (ex. G-65; gov't proposed finding of fact (PFF) ¶ 2).[2] BTG is a public corporation with a number of wholly-owned subsidiaries, including BTOS and Bulova Technologies (Europe) LLC (Bulova Europe) (ex. G-55 at 5; tr. 3/177, 4/15). Stephen L. Gurba is BTG's president and chief executive officer (CEO) and is the sole managing member of

[1] Although BTOS filed a request for equitable adjustment (REA) and the Army mentioned excess reprocurement costs, no such affirmative claim by either one is before us.

[2] The cited government's PFFs are not disputed, unless otherwise indicated.

BTOS (tr. 4/14-15; gov't PFF ¶ 3). He used BTOS, a small business, which was registered in the government's database,[3] to bid on government contracts due to its past experience working with the military (tr. 2/135, 4/36-37, *see* tr. 5/65-66).[4] Under BTOS' business sector at issue, it acted as a broker to supply nonstandard weapons and ammunition not produced in the United States (tr. 4/25-26). The Army had a recurring need for nonstandard weapons to train forces overseas (tr. 1/9, 105).

BPA and Call Order No. 3

2. On 3 February 2011 the Army Contracting Command–Picatinny Contracting Center, Picatinny Arsenal, New Jersey, issued the subject BPA to BTOS at a Mayo, Florida, address for the period 29 October 2010 to 28 October 2015, to obtain commercial nonstandard and U.S. obsolete weapon systems in support of the government's testing/training mission. CO Morgan Ross [5] signed the BPA. Deborah Renne was the contract specialist (tr. 1/172). Orders to acquire specific weapons were to be competitively awarded among BPA holders, with an order limitation of $6.5 million.[6] There were about ten or more BPA holders (tr. 1/105). The subject BPA's scope included the acquisition of Russian and former Soviet Bloc weapons such as the "DShK" and its variants. Inspection and acceptance were to be at destination. (R4, tab 1 at 1, 3-5, 8) The BPA stated that:

> The overarching intent of this program and procurement action is to establish a source that can reach around the world at any given moment and gather and provide multiple types of foreign munitions/weapons for testing/training purposes.

(*Id*. at 5)

[3] The government's database was "CCR" when the BPA and Order No. 3 were awarded. The name later changed to "System for Award Management (SAM)." (*See* tr. 1/124; finding 4)

[4] Although BTOS was the contractor, it was not careful to segregate itself from other entities. For example, the Army received communications from individuals not directly associated with BTOS and correspondence, which was usually on BTG letterhead, sometimes referenced Bulova Europe. (*See* tr. 2/66) The parties often referred to the contractor and other entities as "Bulova." For ease, we use "BTOS," unless otherwise indicated.

[5] By the time of the hearing, CO Ross' surname had changed to Ziatyk (tr. 1/103).

[6] Modification No. P00002 (Mod. 2), effective 13 February 2013, decreased the order limitation to $150,000 (ex. G-18 at 22-23).

3. The BPA incorporated Federal Acquisition Regulation (FAR) clauses 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (JUN 2010) (Commercial Items clause); and 52.243-1, CHANGES–FIXED-PRICE (AUG 1987) (Changes clause). It also incorporated Department of Defense FAR Supplement clause 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) (10 U.S.C. § 2410) (Equitable Adjustment clause). (R4, tab 1 at 13, 17)[7]

4. The Commercial Items clause provided:

> (b) *Assignment.* The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727)....
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> ….
>
> (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….The Contractor shall notify the [CO] 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 [CO] of the cessation of such occurrence.
>
> ….
>
> (i) *Payment.*-(1) *Items accepted*. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.
>
> ....

[7] We apply the clauses and regulations in effect as of award of Call Order No. 3 on 23 September 2011 (finding 15).

(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. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

....

(t) *Central Contractor Registration (CCR).*
(1) ...[T]he Contractor is responsible during performance and through final payment of any contract for the accuracy and completeness of the data within the CCR database, and for any liability resulting from the Government's reliance on inaccurate or incomplete data. To remain registered in the CCR database after the initial registration, the Contractor is required to review and update on an annual basis...its information in the CCR database to ensure it is current, accurate and complete. Updating the information in the CCR does not alter the terms and conditions of this contract and is not a substitute for a properly executed contractual document.

(2)(i) If a Contractor has legally changed its business name, "doing business as" name, or division name (whichever is shown on the contract), or has transferred the assets used in performing the contract, but has not completed the necessary requirements regarding novation and change-of-name agreements in FAR subpart 42.12, the Contractor shall provide the responsible [CO] a minimum of one business day's written notification of its intention to (A) change the name in the CCR database; (B) comply with the requirements of subpart 42.12; and (C) agree in writing to the timeline and procedures specified by the responsible [CO]. The

> Contractor must provide with the notification sufficient documentation to support the legally changed name.

5. The Equitable Adjustment clause provided in part:

> (a) The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change.... All indirect costs included in the request shall be properly allocable to the change in accordance with applicable acquisition regulations.

6. By letter to BTOS of 2 August 2011 (the contemplation letter), the Army requested a proposal in contemplation of awarding a call order for delivery of 220-290[8] DShK, 12.7 x 108 mm caliber, heavy machine gun weapon systems in new or unissued condition to Afghanistan, with accessories in variable quantities, in new or unissued condition and related items. The accompanying SOW was dated 26 July 2011. The items were to be used to train the Afghan National Police. (R4, tab 2 at 2; tr. 1/108) The delivery schedule was to contain "the number of days after receipt of signed EUC [End User Certificate] and export licenses"; "an explanation of the milestones (permits, licenses, etc.) required and when they will be applied for with an estimated number of days for processing each"; and "the number of elapsed days from receiving the signed [EUC] until delivery of materiel to the final destination" (R4, tab 2 at 3). An order was to be competitively awarded (*id*. at 11).

7. The proposal was to contain evidence of the availability of funds necessary to finance the call order, including proof from a bank that it would grant a letter of credit and confirmation from the supplier/manufacturer that it would accept one if necessary. Special payment terms were not acceptable. (R4, tab 2 at 3) According to CO Ross, the Army would also accept other funding evidence (tr. 1/107-08) (testifying about the same availability of funds language in Call Order No. 2, held by BTOS, and in all contemplation letters for nonstandard weapons (tr. 1/151, 155, 158, 168)). The CO was satisfied with the funding information BTOS provided (tr. 1/158-59, 200).

8. The Army requested a delivery schedule commencing from the contractor's receipt of a signed EUC because it could not accurately predict the amount of time it would take to process the EUC (tr. 1/106-07). The contracting officer's representative (COR), Jeffrey Gould (tr. 1/11), explained:

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[8] The letter stated 200-250 DShK but the Statement of Work (SOW) sought 220-290 (R4, tab 2 at 5).

> [T]o be fair to people bidding and providing quotes, they have control over the situation once the Government provides them the signed EUC.
>
> So, from that point, it's their responsibility to finish getting export licenses, et cetera.

(Tr. 1/24)

9. Department of Defense (DoD) Directive No. 2040.3, dated 14 November 1991, prescribes procedures for EUC execution when necessary to facilitate purchases of foreign products (ex. G-31 at 2). It defines an EUC as "a written agreement in connection with the transfer of military equipment or technical data to the United States that restricts the use or transfer of that item by the United States" (*id.* at 1).

10. SOW Section 1, "DELIVERABLES," listed weapons and supplies cited in the Army's 2 August 2011 contemplation letter (R4, tab 2 at 5-6). Section 2, paragraph 2.1, "REQUIREMENTS," required proposals to include: an itemized listing of weapons and accessories; suppliers' names; manufacture date; the original manufacturer's country; certification that the items were in a "new or unissued condition"; delivery schedule; and past performance information (*id.* at 9). The following documentation had to be submitted:

> 2.2.1. **Manufacturer's Acceptance Data** – showing what tests were performed and the results of those tests to include Proof House data certifying that the weapon was manufactured to safely and reliably fire live ammunition.
> 2.2.2. **Serial Number** – also see section 3.3 as it relates to serial numbers and marking of weapons.
> 2.2.3. **Manufacturer's Quality Acceptance Plan** – submit 30 days after award of contract in contractor's format.
> 2.2.4. **Export and Transportation Plan** – submit 7 days after award of contract. The plan shall address how the Contractor will transport the weapons from supplier to point of transfer of possession to the U.S. Government in Afghanistan. The plan shall also address each source country's export requirements and processes.

(*Id.*)

11. On 16 August 2011 BTOS submitted its proposal, identifying itself as "a member of the U.S. Armies BPA Small Business sources for Non-standard Weapons" (R4, tab 3 at 1). The proposal provided that BTG's Integrated Product Team for Foreign and Standard Weapons, consisting of personnel from BTOS, Bulova Europe, and Tri Gas & Oil Trade, S.A. (TGT), would manage performance. The proposal gave BTOS' address as Clearwater, Florida. (R4, tab 3 at 1, 3, 8, 13, 47) The proposal referred to "DShK" machine gun systems (*e.g.*, *id*. at 3, 9) and stated that "[***a***]***ll items are new production***" (*id*. at 25). It included a 4 August 2011 certification from C.N. Romtehnica S.A. (Romtehnica) of Romania that the weapons to be furnished were the "DShKM" model, newly manufactured in 2011 (*id*. at 27). COR Gould considered this to be a commitment letter (tr. 1/35-36).

12. BTOS' proposal stated that the delivery schedule would be estimated in an unspecified number of days after receipt of a fully-executed EUC. Its delivery schedule table showed minimum and maximum delivery dates measured from EUC receipt. (R4, tab 3 at 8, 25, 29) BTOS described EUC requirements as follows in part:

> In order for an international supplier or manufacturer to export material, they will need an original [EUC] from the End User. Once the final, accurate EUC is received, the supplier/manufacturer will apply with their in country export authorities in order to receive the necessary export licenses. Once the export licenses are received, the supplier/manufacturer requests in country ground transit permits so that the goods can be moved to the sea port or airport of export. This entire process takes 30 to 60 days depending on the country....
>
> ....
>
> There is little flexibility with regard to the precise language that must accompany the [EUC].… Romania has the strictest requirements.

(*Id*. at 20) BTOS provided a sample EUC with its proposal (*id*. at 21).

13. BTOS' proposal stated that GovFunding, LLC (GovFunding) would provide financing to satisfy Romtehnica's payment terms and it submitted a letter of commitment from that firm (R4, tab 3 at 32, 35). The proposal did not include the requested representations about a bank letter of credit. It contained past performance information, which disclosed that BTOS' contract for delivery of weapons as foreign military sales (FMS) to Iraq had been terminated for default and BTOS had appealed to

the Board[9] (*id*. at 48). The proposal did not disclose an 18 August 2011 final decision by the CO of the Army's Contracting Command – Aberdeen Proving Ground asserting a $12,023,616.68 claim under that contract for overpayments (gov't PFF ¶ 41; ex. G-81). Mr. Gurba deliberately left that claim out of BTOS' proposal because he did not think it was accurate (tr. 4/183).

14. On 6 September 2011 the Army amended its contemplation letter, increased quantities to 300-350 DShK machine guns, and directed revised proposals (R4, tab 18 at 4). On 9 September 2011 BTOS submitted its revised proposal, again giving its address as Clearwater, Florida (R4, tab 4 at 2). BTOS updated its delivery schedule, its certification from Romtehnica, and its pricing. The revised proposal stated that "[t]he current schedule critical path is the receipt of the EUCs" and it again measured delivery days from receipt of the EUC (*id.* at 6). Romtehnica's certification, covering newly manufactured weapons from a 2011-2012 production, again referred to the DShKM model (*id*. at 5). The five technically-acceptable proposals each named Romtehnica as supplier (tr. 1/108-09). The actual weapons would not come from Romtehnica but from its supplier (tr. 3/29-33).

15. On 23 September 2011 CO Ross awarded Call Order No. 3 to BTOS for delivery of 350 DShK weapons and related items at a firm-fixed-price of $4,784,961.50. The contractor's address was given as Mayo, Florida. (R4, tab 5 at 2-7).[10] BTOS was required to complete delivery of the items to Afghanistan within 140 days after receipt of a signed EUC and export license (*id.* at 8). BTOS' proposal was not incorporated into the contract (tr. 1/127, 168, 3/142-43). The Army "really needed" the weapons at issue to support the new Afghan government, specifically the police (tr. 2/112). BTOS understood that the weapons "were needed as soon as possible" (R4, tab 46 at 3).

16. Neither the BPA nor Order No. 3 identified who was responsible for obtaining an EUC but the parties agree that BTOS was responsible for providing a draft EUC to the Army. BTOS would obtain the necessary language from its subcontractor/supplier. The government would then obtain the necessary signature from the end user. (R4, tabs 1, 5, 7; tr. 1/54, 59, 61-62, 72, 120, 144, 183, 6/12, 56-57, 71) BTOS' proposal included a critical path chart stating that it would provide draft EUC language and updates as required within ten days of award (R4, tab 3 at 10

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[9] On 28 January 2014, the Board denied the appeal in part and sustained it in part. *Bulova Technologies Ordnance Systems LLC*, ASBCA No. 57406, 14-1 BCA ¶ 35,521, *recon. denied*, 14-1 BCA ¶ 35,802.

[10] The order referred to the 26 July 2011 SOW (R4, tab 5 at 4), but CO Ross testified that this was an error (tr. 1/129). A 10 August 2011 SOW increased prior quantities by 47 DShK machine guns. The parties do not dispute that a total of 350 were required. (*See* ex. G-37 at 3; gov't PFF ¶ 35)

(nos. 42, 46)). Elsewhere, the proposal stated that BTOS would prepare and deliver the EUC language for Romtehnica to the CO five days after contract award (*id*. at 40).

17. On 26 September 2011 COR Gould inquired of contract specialist Renne and the CO why Order No. 3 was awarded with a delivery schedule of 140 days after receipt of a EUC and export license when BTOS did not include a contingency for the export license in its proposal (ex. G-39 at 2). On 29 September 2011 he elaborated:

> Export licenses are often required and the contractor should be able to estimate the time it takes to receive them. This varies depending on the source country and the vendor is responsible for being knowledgeable of the source country's process.
> The application for permits/licenses and the turn-around time are to be reflected in the timeline they are required to provide with their proposals.
> The only way we can evenly weigh two proposals for schedule is if the quoted delivery for each proposal is from the time the [government] returns the signed EUC. This is a fair starting point and allows us to evaluate the total elapsed time until delivery for each proposal.
> If we evaluated schedule based on days after "EUC + Export License" we would not be able to differentiate between a proposal from Romania with a quick export process, a proposal from Bulgaria with a much longer export process, and a proposal from Russia with an extremely long process (up to a year or more).

(*Id.* at 1)

18. On 30 September 2011 and 5 October 2011, BTOS notified the Army that it was delaying submission of the Export and Transportation Plan and draft EUC because of negotiations with TGT and Romtehnica. It stated that it was committed to its proposed delivery schedule of partial shipments in 26 days and 114 days after receipt of an acceptable EUC and export license. (R4, tabs 10, 13 at 6-7) Bilateral Mod. No. 1 to Order No. 3, effective 5 October 2011, adopted BTOS' split schedule, which the Army had overlooked at award (R4, tab 14; ex. G-39 at 1).

19. On or about 11 October 2011 the Army received BTOS' export and transportation plan, which detailed the processes for securing permits and licenses to export items from Romania to Afghanistan (R4, tab 15 at 9-19).

20. On 25 October 2011 BTOS requested the Army's approval to change its supplier to Montenegro Defence Industry (MDI), stating it would maintain the current delivery schedule, at a minimum; supply unissued or refurbished "to like new" weapons; it expected to deliver earlier; but using Romtehnica would result in late deliveries due to a backlog there (R4, tab 17).

21. On 26 October 2011 the CO denied BTOS' request to use MDI on the ground that the weapons' condition was not technically acceptable (R4, tab 18). Mr. Gurba responded that BTOS had exhausted its efforts to reach an acceptable cost and delivery schedule with Romtehnica and BTOS would lose more than $360,000 if it proceeded with that company. It offered the Army a contract price reduction and to deliver four additional weapons systems at no cost if it accepted the alternative supplier. (R4, tab 20) The Army refused to deviate from the specifications. It indicated a willingness to modify the delivery schedule but did not agree to BTOS' subsequent request for a $362,638.50 price increase in exchange for performance using Romtehnica. (*See* R4, tabs 21-22, 25-26)

22. On 22 December 2011 BTOS proposed another supplier, Joint Stock Company "Rosoboronexport" (ROE), a Russian company. DShKs originated from Russia. BTOS advanced ROE as a better alternative because it could complete deliveries earlier than Romtehnica and was within BTOS' budget. (R4, tab 27 at 4; tr. 4/46-47) Mainly, it was "much cheaper" (tr. 4/47, 52). There was an advantage to BTOS in working with ROE because they had become partners under a Mortar Exchange Program in which BTOS would repair and sell refurbished mortars and, under a partnership agreement, BTG would represent ROE in the United States for all nonstandard weapons and ammunition for the next three years. According to Mr. Gurba, this is the reason ROE ultimately agreed that BTOS could pay it when it got paid by the Army. (Tr. 4/40-41, 89-90, 155-57; exs. G-93, -153)

23. On 26 January 2012 BTG and ROE entered into "CONTRACT No. P/128400613 0/3/" for the delivery of 350 DShK weapons under Order No. 3 (R4, tab 100 at 15, 22, 26; *see* ex. G-93; tr. 4/287). Contract Annex No. 1 listed 350 "12[.]7 mm machine gun 'DSHK' of 1938-1946 years pattern," with price unspecified (R4, tab 100 at 26). Annex No. 2 listed a "DShK, 12.7x108mm Machine Gun," in the quantity of 350, in "[n]ew or unissued condition manufactured within the last 5 years," and accessories (*id*. at 25). There was no delivery schedule. The agreement provided that BTOS was to provide ROE with original EUCs within 15 days of contract signing (*id.* at 23). ROE's 26 January 2012 weapons condition certification stated that it would provide the items to the U.S. Government upon receipt of a confirmed purchase order from BTG. The parties disagree whether the agreement was a binding contract due to the lack of a price among other things. In its REA (below) BTOS advised the Army that the Russian Ministry of Defence (MoD) did not allow ROE to enter into a firm-fixed-price contract without an approved EUC but that ROE had estimated the

price at $2.1 million. (*Id.* at 14; *see also* ex. G-73) Mr. Gurba hoped to negotiate a lower price, based upon other work BTOS might award to "our Russian partner" (ex. G-106 at 2). We find that the price was to be set after ROE received an EUC (*see* ex. G-220 at 10 (2/20/13 email between ROE and Mr. Gurba); finding 53).

24. On 27 January 2012 BTOS gave ROE's commitment letter and weapons condition certification, both dated 26 January 2012, to the Army. The latter stated:

> **Subject:** Acquisition of Foreign Weapons
> **Item:** Quantity 350 DShKM, 12.7 x 107mm Machine Gun....
>
> **End User:** USG/Afghanistan
> We hereby certify our intent to provide 12.7 x 108mm DShK Machine Guns, passed through the export presales in 2011 – 2012, unissued/unused....to the US Gov't upon receipt of a confirmed purchase order by [BTG].

(R4, tab 30 at 3) (Emphasis added) The commitment letter stated that ROE would provide "DSHK" machine guns "of 1938-1946 years pattern" with the duration of the commitment to be "90 days from the date of the Contract signing subject to the payment receipt" (*id.* at 4). We infer that "Contract" refers to BTG's and ROE's 26 January 2012 agreement.

25. In a 30 January 2012 letter to contract specialist Renne, Mr. Gurba confirmed that weapons manufacture occurred in Russia in 2011-2012 (R4, tab 31 at 2). In a 31 January 2012 letter to the CO, he confirmed that the change of suppliers to ROE would be at no additional cost to the Army (ex. G-25).

26. On 3 February 2012 Ms. Renne asked BTOS to submit a draft EUC, transportation and quality assurance plans, and a delivery schedule, to set a firm delivery date (ex. G-26). The Army approved the change to ROE on or about 3 February 2012 (tr. 1/115). The CO approved the change based upon ROE's commitment and information BTOS provided, including the place and year of manufacture and the weapons' condition (tr. 1/115, 191).

27. On 6 February 2012 "Bulova Technologies Combat Systems LLC"[11] gave the Army a first draft EUC package, which contained an EUC document that required the signature of a cognizant official of the Ministry of Defense of Afghanistan (Afghan

[11] Bulova Technologies Combat Systems LLC changed its name in December 2010 to Bulova Europe, but the company continued to use the former name, among others, during Order No. 3's administration (ex. G-194; gov't br. at 38 n.22).

EUC), and an EUC document entitled "DECLARATION OF END USE TO THE GOVERNMENT OF THE RUSSIAN FEDERATION" (U.S. EUC). Both the Afghan and U.S. EUCs listed 10 items for the inventory of the National Army of Afghanistan and identified BTOS as the party delivering them. (R4, tab 32) CO Ross expressed concerns to BTOS about the draft package submitted, including that the weapons were for the Afghan National Police, the difficulties inherent in obtaining some of the particular signatures BTOS sought, and that BTOS, not the government, was responsible for securing a signature from the Russian Embassy in Afghanistan. This acquisition was unique compared to other nonstandard weapon buys her office had done because Russia required an EUC from both Afghanistan and the United States. Normally only the Afghan EUC was required. (R4, tab 34; ex. G-27; tr. 1/118-20)

28. On 9 February 2012 BTOS advised the CO that the U.S. EUC was mandatory for exporting weapons originating in Russia when the United States would not be the end user and it would require the signature of a cognizant United States official, witnessed by representatives of the United States Department of State and the Consular office of the Russian Federation in the United States (R4, tab 34). Both the Afghan and U.S. EUCs required accurate translations and authenticating signatures from cognizant Afghan and Russian officials in Afghanistan and the United States (ex. G-30 at 9, 14, exs. G-104, -105 at 1, exs. G-107, -108 at 6).

29. On 24 February 2012 BTOS proposed the following to the CO: submission of a Manufacturer Quality Acceptance Plan no later than 5 March 2012 (31 days) and an Export and Transportation plan by 9 March 2012 (35 days); receipt of a signed EUC package from the government by 4 May 2012 (91 days); and delivery of the weapons and other items to Afghanistan by 4 June 2012 (122 days) (R4, tab 38). The timeline did not specify when BTOS would obtain the export license and other approvals from the Russian Federation. BTOS ultimately submitted the paperwork required by the SOW except for an Export and Transportation Plan (tr. 1/116).

30. On 2 March 2012 Ms. Renne asked BTOS to confirm that the guns would be received by 4 June 2012 so that a modification could provide a firm delivery schedule. She stated that "[t]he government is aware of the possibilities of delays caused by DCMA [Defense Contract Management Agency] inspections or receipt of signed EUC and will be considered as the responsibility of the government and not Bulova." On 7 March 2012 BTOS confirmed the 4 June 2012 date but stated that it hoped for an expedited EUC so it could deliver earlier. (R4, tab 40 at 8)

31. Mr. Gurba testified as follows, regarding Order No. 3, about what was necessary to obtain the export of weaponry from Russia:

> A Yes, we would need to have an [EUC] approved from Afghanistan and one approved from Russia,

and a Presidential Decree. Although the words sounds like a big deal, it is really not. It is just someone in the Kremlin signing off. And you need an Export License.

Q Now, the first two items you mentioned, the [EUC] and the Declaration of End Use to the government of Russia, are they together in your mind, constitute the [EUC]?

A Yes.

Q It is not just necessarily one piece of paper[?]

A No, it is many.

Q And did you know what was necessary to be done within Russia, once those documents were received in order for Russia to issue an export license?

A Well, I depended on my subcontractor [ROE] but, as explained to me, once we gave them the documents, they would then review them and forward into the Kremlin for approval.

Q And with respect to the Export License, did it concern you as to how many days it might take within Russia to obtain an Export License?

A Well, yes, I mean after the Aberdeen contract scenario, I was certainly aware that Export Licenses can take longer than they are supposed to. So, I had a concern but not having done any work there before and not having our help – Picatinny really hadn't done anything there before, we were kind of in the dark as to how long it would take to get an export license, although I am sure [ROE] would have expedited that as much as possible. It was in their best interest to get the Export License completed also so that they could ship.

(Tr. 4/67-69) Mr. Gurba believed that neither BTOS nor ROE could accurately predict the estimated date of the presidential decree and export license (tr. 4/126).

32. The Afghan EUC approval process involved coordination with the government's technical team and Afghani authorities (tr. 1/117). Per COR Gould, once a draft EUC was received, it was typical for the government, rather than the contractor, to obtain the signature from the end user (tr. 1/59). BTOS stated that it would get a signature from the Russian Embassy when the Afghan EUC was executed by the cognizant Afghani official. Once the Army received the signed EUC from Afghanistan, it planned to provide it to BTOS. (R4, tab 35 at 1)

33. On 15 March 2012, just over a month after BTOS had submitted its draft, it received the Afghan EUC from the Army (R4, tab 39 at 1; ex. G-105 at 1). In addition to Afghani signatories, it was signed on behalf of the United States by "Naren Halder, LT, SC, USN, FMS Officer, Security Assistance Office" and dated 14 February 2012 (R4, tab 39 at 4). BTOS was to get the Afghan EUC authenticated but had difficulties and sought the government's assistance, which ultimately resulted in a second Afghan EUC being routed for approval (*see, e.g.*, finding 41).

34. Bilateral Mod. No. 4 to Order No. 3, effective 26 March 2012, set a 4 June 2012 delivery date for all 350 DShK weapons and other items. It designated inspection at source and acceptance at destination. (R4, tab 40)

35. By letter to the CO dated 16 April 2012, Mr. Gurba confirmed that the draft EUC was correct and contained "the exact language" required by the Russian Federation (ex. G-29 at 2).

36. Once the Army received a draft EUC package, the normal process included the contracting office's and COR Gould's review, preparation of an endorsement memorandum, and reviews by the legal and local policy offices. CO Ross was authorized to edit the draft EUC documents to prepare them for execution. She did not have prior experience in obtaining a signed EUC from the Army Acquisition Executive (AAE). (Tr. 1/120-21, 133, 188-89)

37. On 23 April 2012 Ms. Renne transmitted the endorsement memorandum and U.S. EUC package to the Deputy Assistant Secretary of the Army (Procurement), seeking approval from the AAE of a Category III EUC in accordance with DoD Directive No. 2040.3 (R4, tab 42; *see also* ex. G-31 at 3). The memorandum requested a waiver from the Under Secretary of Defense (Acquisition) (USD) to acquire weapons from ROE under Order No. 3 due to limitations imposed by the exporting country, the Russian Federation. The memorandum stated in relevant part:

> In accordance with the regulations of The Russian Federation, the granting of an export license to [BTOS] is dependent on the approval of this EUC along with the attached signed EUC from the Islamic Republic of

> Afghanistan. This Declaration of End Use is mandatory when cooperating with Russia in cases where the U.S. Army is the buyer and not the End User. It is required that the End User Certificate from the U.S. Government declare that the military use products to be imported from The Russian Federation shall be used for the declared purposes only, and shall not be re-exported or transferred to any third country other than the Islamic Republic of Afghanistan without the approval of The Russian Federation. In addition, as per legislation of The Russian Federation, the EUC should be presented for legalization with attested copy in Russian only. Accuracy of translation is to be validated by officials of the Consular office of The Russian Federation in Washington D.C.

(R4, tab 42 at 5)

38. In the U.S. EUC attached to the memorandum, the word "Ordnance" in BTOS' name was misspelled as "Ordinance." The government accepts responsibility for the error, which it did not catch. (Gov't br. at 133) CO Ross also did not recognize that a Clearwater, Florida, address BTOS gave on its draft EUC was erroneous because it had used that address in its proposal and in correspondence. By the time of award of Order No. 3, however, BTOS' address had changed to Mayo, Florida. The Army corrected BTOS' mistaken reference in its draft EUC to the "Afghan National Army" rather than the correct "Afghan National Police." (*See, e.g.*, R4, tab 3 at 1, tab 4 at 2, tab 42 at 7; tr. 1/123-24, 132-34, 4/54-55)

39. A waiver from the USD was necessary in order to acquire an item requiring a Category III EUC, justifying why it is in the best interests of the United States to accept limitations imposed by the exporting country (ex. G-31 at 2, 3, 5). A Standard Operating Procedure (SOP), dated 9 January 2007, issued by the Office of the Deputy Assistant Secretary of the Army (Policy and Procurement), implemented the Directive and gave guidance on EUC processing (ex. G-32). The AAE was authorized to execute EUCs (*id.* at 1; tr. 1/118, 121-22). The Directive, the SOP, the BPA and Order No. 3 did not give a timeframe in which EUC processing was to be completed.

40. On or about 30 April 2012, in connection with a different solicitation and BTOS' effort to become a Basic Ordering Agreement (BOA) holder in order to have an opportunity to submit proposals for "future Foreign and Non-Standard Weapons, Parts and Accessories requirements," DCMA completed a Pre-Award Survey. DCMA recommended that the government not award a BOA to BTOS. DCMA's review covered Fiscal Years (FYs) ending September 2009-2011, and FY 2012 through 31 December 2011. It concluded that BTOS' $12,000.00 working capital was

insufficient to support a potential contract award under the BOA. It stated that BTOS was operating but there was not enough capital available to combat any severe hardship. DCMA noted that its no-award recommendation did not mean that the company could not or would not perform but that entering into a BOA would be at high risk. (*See* R4, tab 125 at 3-4; gov't PFF ¶ 166)

41. By letter to the CO of 9 May 2012, Mr. Gurba stated:

> 1. On 15 March 2012, you have delivered the main document of EUC. Bulova has translated, authenticated, and obtained documents with an Apostille from the Russian Consulate as required by the Russian Government.
>
> 2. The U.S. Army has not delivered the "Declaration of End User" which is still pending its signature in the Pentagon. The timeframe remains unknown for this pending signature or when we will receive it so we may proceed with the translation and authentication by the Russian Consulate in Washington, D.C.
>
> 3. The EUC delivered has to be completed and signed by the Ministry of Foreign Affairs in Afghanistan and authenticated by the Russian Embassy in Afghanistan. Bulova was given this task to complete in Afghanistan and tried to assist during this procedure. It has proven nearly impossible to attain signatures from the Afghanistan Ministry of Foreign Affairs. Bulova has requested the PM-NSW Program Office...to assist you in this process. The U.S. Army contact in Afghanistan is being requested to undertake the task and return the signed EUC Authentication to our personnel in Kabul for further processing by the Russian Consulate (Authentication of the signatures).
>
> After completing the above processes in respect of the EUC, we will proceed with the required program tasks necessary to obtain an Export License at the country of origin.
>
> It is mandatory to have available the required documents for the foreign Governments to approve the export and

> delivery and effect final delivery of the 350 DShK Machine Guns. Further, the Bulova subcontractor will not conduct final inspection and ballistic tests without all of the proper documentation being provided.

(Ex. G-105 at 1)

42. When BTOS had not received a signed EUC package from the Army by the 4 June 2012 weapons delivery date, on 4 and 7 June 2012 it suggested that the Army pay it $2,392,480, 50% of Order No. 3's value, in lieu of its filing a claim (R4, tabs 46, 100 at 29). BTOS alleged that the weapons "have been sitting on the shipping dock of our subcontractor for 3 months awaiting only the required documents which will permit shipment" and that BTOS was incurring additional costs due to the delays (R4, tab 46 at 3).

43. By letter dated 27 June 2012, CO Ross responded that it was unforeseen and not standard that a U.S. EUC would be required in addition to the Afghan EUC completed in February 2012. She stated that BTOS was aware of the EUC approval process and time required; the 4 June 2012 delivery date under Mod. No. 4 was predicated upon BTOS' receipt of an executed EUC package from the government; and any delay costs would start as of 4 June 2012. She asked for a detailed proposal to support BTOS' claim of additional incurred costs and requested testing and serial number data for the items BTOS stated were ready for shipment. CO Ross acknowledged that her position in June 2012 was that the contractor was entitled to compensation for the government's delay in the EUC process. (R4, tab 63 at 4; tr. 1/195)[12] At DoD, "a serious backlog due to attrition" was delaying EUC processing (R4, tab 49 at 1). A DoD-wide furlough also contributed to the delay (tr. 2/112-13).

44. On 5 July 2012 Mr. Gurba responded on BTG letterhead and as president and CEO of BTG that, while he was sure that ROE would confirm that the product was ready for inspection, it would not supply the test data and serial numbers without receipt of EUC documents; the company would provide support for its costs, which exceeded $150,000 per month beginning on 4 June 2012; Bulova was a small business and could not afford to finance the Army; and it wanted payment of its invoices for 50% of the contract's value. He also alerted the CO that ROE might sell the weapons to another customer and charge Bulova for another production run at a higher price. (Ex. G-106 at 6)

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[12] The record, at Rule 4, tabs 47 and 63, includes two letters from CO Ross dated 27 June 2012. She testified that the tab 47 letter was an unsent draft and the tab 63 letter was sent. (Tr. 1/198-99) There are no material differences between the two except that the tab 47 letter explicitly states that the government was culpable for delays after 4 June 2012.

45. The Army rejected BTOS' invoices (exs. G-30, -43, -106 at 6, ex. G-126 at 2; gov't PFF ¶¶ 191-92, 196, 198).

46. The AAE executed the U.S. EUC on 13 July 2012 (R4, tab 57 at 3) but translations were required. BTOS received a completed EUC package from the government on or about 20 August 2012 (R4, tab 52). On 30 August and 10 September 2012 Frank Taylor, identified as BTG's "President-Europe Operations," notified the Army that BTG had sent the documents to ROE and was waiting for EUC package approval by the Russian MoD and issuance of a Presidential Decree from the Kremlin (R4, tab 53 at 1, 4, tab 54). On 12 October 2012 BTG sent copies of the EUC documents it had sent to Russia to the CO. BTG stated that it was told that the DShK machine guns would be released for shipment once the decree was received. The Afghan EUC, dated 24 February 2012, contained a signature block in which the typewritten name of LT Naren Halder, under the signature line, was crossed-out; the name Benjamin J. Derry was handwritten in its stead; and Mr. Derry signed as FMS Officer (R4, tab 57).

47. In October 2012 administrative duties under Order No. 3 were transferred to CO Louisa Melendez (tr. 1/137, 2/8). Her first line supervisor, CO Donna M. Apgar, was also involved in contract administration (tr. 2/9, 3/55-56). Contract specialist Renne continued to assist with processing the EUC documents (tr. 2/20, 42).

48. On 23 October 2012 the U.S. Small Business Administration (SBA) determined not to issue a Certificate of Competency (COC) to BTOS regarding another solicitation due to schedule delays under current and past contracts and the company's failure to provide requested financial information to substantiate that capital resources were available for contract performance (*see* R4, tab 125 at 2).

49. On 5 November 2012, Mr. Taylor notified the Army that the complete EUC package had arrived at ROE on 24 August 2012 but due to the delay in receipt of the fully-executed EUC package from the government, there was a backlog at the Kremlin of documents requiring a Presidential Decree (R4, tab 59 at 4-5).

50. On 3 December 2012 BTG notified CO Melendez that the Russian Federation had rejected the EUC package because the Declaration of End User misspelled "Ordnance"; it gave an incorrect address for BTOS; and the list of contractually-required items was incomplete. The Russian Federation would accept only a complete listing or a reference to the contract number and BTOS' subcontract number. Also, the EUC package BTOS had submitted to the government had an incomplete listing of items and the Russian Federation would not accept its crossed-out signature block and handwritten insertion of Mr. Derry's name. (R4, tab 58) According to Mr. Gurba, BTOS was unaware of the mistakes prior to the Federation's

rejection of the EUC (tr. 4/54-55). Appellant acknowledges that "despite good faith efforts by both parties, errors were made by each party that independently would have caused the EUC to be rejected by the Russian Federation" (app. br. at 19, ¶ 175).

51. Between 4 December 2012 and 2 January 2013 the parties worked to correct the EUC package. ROE reiterated to BTOS that the U.S. EUC required the signatures of the authorized representatives of the Army and the United States Department of State, and the signature and stamp of the consular office of the Russian Federation in Washington, DC. The Afghan EUC required coordination with ROE and an accurate translation validated by officials of the consular office in Afghanistan. (R4, tabs 59-62; exs. G-213, -217, -220 at 11-12) As of 2 January 2013 BTOS had provided a revised draft EUC to Ms. Renne and had advised her that its Russian supplier had verified that it was acceptable (R4, tab 60 at 1; *see* ex. G-220 at 1). On 2 January 2013 Ms. Renne submitted the EUC package to the Office of the Deputy Assistant Secretary of the Army (Procurement) (ex. G-215 at 4).

52. By letter of 30 January 2013, Mr. Gurba notified the Army that, due to the government's delays in providing an acceptable signed EUC package, ROE could no longer guarantee that previously available weapons, currently stored in ROE's warehouse, would continue to be available even if an acceptable second EUC package were received. Mr. Gurba asserted that BTOS was entitled to incurred costs associated with the delays from 4 June 2012 pursuant to CO Ross' 27 June 2012 letter and that, if weapons were not available, an estimated 120 days would be needed to manufacture new weapons, resulting in increased costs. (R4, tab 63 at 2)

53. On 20 February 2013 ROE advised Mr. Gurba that a Presidential Decree had been denied due to the absence of an EUC and, without it, "refurbishing" of the DShK and definition of the ultimate price could not be accomplished. However, ROE continued to work "in this direction" and awaited the EUC. (Ex. G-220 at 10)

54. On 27 February 2013, CO Melendez responded to Mr. Gurba's 30 January 2013 letter as follows:

> I apologize for the inordinate amount of time these EUC packages are taking. Your continued patience and understanding is requested.
>
> For planning purposes, please answer the following questions: (a) How long will [ROE] keep the weapons in their warehouse? (b) Assuming the weapons are no longer available and need to be produced, what is the length of time, after receipt of the signed EUC packages, needed to produce all 350 weapons?

(R4, tab 65 at 3) CO Melendez assumed that the weapons were not available and new ones must be manufactured (tr. 2/69-70).

55. On 5 March 2013 ROE informed Mr. Taylor:

> We know that the US Army is proceeding with EUC because we received a call from Pentagon, they...assured us that the documents will be performed and presented in the nearest future.
>
> At the same time...I'd like to draw your attention to the fact that DShK issue is a very tough one here in Russia.... The material belongs to the Ministry of Defence and can be obtained only from warehouses of the Russian Army. The Russian Army reserves certain number of items for sale but the time of the offer validity is three months only. When this period is expired they can (and they have the full right to do it as per Russian laws) to deliver the staff [sic] all around the world without ROE participation.
>
> ...[W]e cannot give you 100% guaranty that the material will be in place when we finally are in position to take it.
>
> Besides, since we miss EUC, we cannot start to prepare the documents for Presidential/Government Decrees. This will also take some time and this will be beyond the control of ROE.
>
> After Presidential/Government Decrees issue DShKs will be bought back from the Russian Army, delivered from different places of units stationing of our huge country to one of military plants to perform a complex presale preparation and this will also take some time.
>
> However we think that everything will be fine and we will be able to work it out.

(Ex. G-130 at 2) Based upon this communication about a "complex presale preparation" and ROE's earlier statement about "refurbishing" (finding 53), the government contends

that ROE intended to provide refurbished weapons (gov't PFF ¶ 114), contrary to Order No. 3. Appellant disagrees (app. PFF ¶ 114). There is not enough evidence for the Board to make a finding in this regard.

56. On 8 March 2013, Mr. Gurba notified the CO that previously available items had been acquired by the Russian Army and that, after receipt of a EUC package, ROE would need to purchase the weapons from the Russian Army's inventory because the manufacture of new weapons was cost prohibitive. He stated that, due to the government's delay in supplying an EUC package, "BTG" estimated that contract performance costs, including shipping costs, would increase to about $7.9 million, of which it had incurred about $2.6 million to date. (R4, tab 67 at 3-4) Mr. Gurba stated that, considering the risks involved with ROE due to the EUC delays, his company had sought quotes from Romtehnica, but Order No. 3 must be modified to provide for full payment prior to shipment regardless of whether the weapons were obtained from ROE or Romtehnica. Once a fully-executed and approved EUC package was received, it would take 120 days for the weapons to be ready for inspection. (*Id.*) He asserted that his company stood ready to perform the contract upon receipt of the required EUC documents but he referred to "finalizing" Order No. 3 (*id*. at 4). Mr. Gurba acknowledged that, although he requested full payment from the Army prior to shipment, he did not believe ROE would require advance payment (tr. 4/96).

57. On 13 March 2013 the CO asked BTOS to provide supporting documentation for its claimed delay costs (R4, tab 69). On 28 March 2013 Mr. Gurba responded that delays in receiving an acceptable EUC package had increased performance costs and BTOS would need new quotes from suppliers. He attached a cost estimate from contract inception through 8 March 2013, totaling $2.9 million for labor, consultants, subcontractors, ROE's storage costs from May 2011 to January 2012, and other costs, including indirect costs. TGT was listed under "Subcontractors," with the notation "Agreement with TGT to support the DShK program." (R4, tab 70 at 1, 3) Mr. Gurba stated that, while ROE would not manufacture new weapons, ROE could reprocure the sold weapons from the Russian MoD. He would not guarantee a schedule. (*Id.* at 2)

58. On 5 April 2013 the CO notified BTOS that the Army was considering terminating Order No. 3 for cause under FAR 52.212-4(m) due to BTOS' failure to comply with it. Among things pertaining to BTOS' alleged costs, the CO questioned its representations about the weapons, ROE and the Russian Federation and asked that, by 15 April 2013, BTOS submit adequate assurances of future performance. She attached proposed bilateral Mod. No. 6 to Order No. 3, which set a new 30 August 2013 delivery date at no additional cost to the Army. (R4, tab 72 at 1-8) The CO considered the date to be reasonable because she based it upon BTOS' past timeframe adopted in bilateral Mod. No. 4, plus what she felt were enough days for the new EUC package to be signed by the government and delivered (tr. 2/151-53).

59. On 9 April 2013 Mr. Gurba asked for a meeting. He contended that the Army was liable for delays and increased costs; the contract required that it provide an acceptable EUC before a delivery date was fixed; and BTOS could not perform without receiving an acceptable EUC package. He stated that BTOS would not sign a modification fixing a new delivery date without a schedule contingent upon receipt of an approved EUC and he would not agree to a no-cost modification. (R4, tab 74)

60. BTOS continually requested a meeting with the Army throughout the course of Order No. 3. The Army never agreed to meet. (*See, e.g.*, R4, tab 89 at 2-3; tr. 3/65, 4/83-85) CO Melendez felt that a meeting would waste time when what the Army needed was actions and documentation from BTOS, not words (tr. 2/160-62). There is no evidence that the lack of a meeting affected appellant's contract performance. There is also no evidence of bad faith on the part of the government.

61. By letter to BTOS of 22 April 2013, CO Melendez asserted that Mod. No. 4 had set a firm delivery date of 4 June 2012 but BTOS had failed to provide required test data or serialization information, claiming an EUC was necessary. She stated that an EUC "that was found to be in a fully compliant format accepted by [ROE] and the Russian Federation previously," had been provided to BTOS on 20 August 2012 and it was not until 3 December 2012 that BTOS had notified the Army that the EUC had been rejected. (R4, tab 77 at 1) The CO alleged that, throughout the contract, the company had repeatedly failed to cooperate with the government by "failing to provide timely, fully supported, information" and these failures were endangering contract performance. She demanded various "Formal Documentation" pertaining to BTOS' allegations by 6 May 2013, including certified cost and pricing data in support of any REA. (*Id.* at 2) To CO Melendez' recollection, she had not previously dealt with ROE or the Russian Federation (tr. 2/142). The basis for her assertion about a compliant EUC in a previous matter involving them is not of record.

62. On 24 April 2013 BTOS notified the CO that it would use its best efforts to meet her 6 May 2013 deadline to supply the information requested but it could not guarantee a response time from the Russian entities involved. BTOS asked for the status of the second EUC package. (R4, tab 78)

63. On 6 May 2013 the CO directed BTOS to submit requested information and documentation by 20 May 2013, alleging that its failure to do so was hampering the government's efforts to provide the second EUC package (R4, tab 79 at 1-2).

64. On 7 May 2013 BTOS gave the CO a 9 November 2012 letter to Mr. Gurba from ROE's deputy general director, which stated in part:

> I would like to convey you my respects and inform you that presented end user certificates (EUCs) of Department of the Army of the USA and Ministry of Interior of the Islamic Republic of Afghanistan for the delivery of DSHK machine guns have been considered by JSC "Rosoboronexport" and Federal Service for Military and Technical Cooperation [FSMTC].
>
> Due to discrepancies in the name of the company indicated in EUC and in its articles of association and due to violation of Russian Federation procedure of execution and legalization of such type of documents the mentioned above EUCs can't be accepted.
>
> The forms of the EUCs for the delivery of DSHK machine guns with recommendations on their execution and legalization are annexed to the future contract so that they could be executed properly.
>
> Let me also inform you that the new original of solicitation of "Bulova Technologies Ordnance Systems LLC" for the delivery of DSHK machine guns presented to JSC "Rosoboronexport" on 2012, Oct. 24th has been sent to FSMTC for registration.

(R4, tab 80 at 4) Earlier, on about 28 October 2012, ROE had advised TGT that the EUC had been issued for "a daughter company of Bulova" but the registration documents had been issued for "the mother company." Either the EUC had to be changed or a new set of documents had to be duly registered. (Ex. G-116 at 3) BTOS contended that the government never provided an acceptable EUC package and that BTOS was working on submitting the other documentation requested. Also on 9 November 2012 Mr. Gurba, as president and CEO of BTG, wrote to ROE requesting a meeting. He stated that the project had been managed by its senior vice president, Vlassis Cambouroglou (of TGT), who had recently passed away, and that "we need to finalize all open issues related to this contract, price, delivery terms, and deliver the goods ASAP." (Ex. G-113 at 5-6; tr. 4/39)

65. On 13 May 2013 BTOS submitted what it described as certified cost and pricing data to support its $2.9 million REA for alleged delay costs (R4, tab 81).

66. On 15 May 2013 BTOS submitted documents in response to the CO's requests, which included an ROE letter to CO Melendez dated 15 May 2013 stating that the EUC package it had received in August 2012 was unacceptable because:

US EUC:

-Wrong address of “Bulova Technologies Ordnance Systems LLC” was stipulated;

-Denomination of company in EUC (“Bulova Technologies Group, Inc”) does not correspond to that one (“Bulova Technologies Ordnance Systems LLC”), mentioned in the articles of association presented for accreditation in the Russian Federation;

-There was an incomplete listing of the contracted items;

-The required signature for [LT Halder] was crossed out and the name [Mr. Derry] was handwritten beside it with his signature;

-“Ordnance” was misspelled;

Afghani EUC:

-Incorrectly legalized, notably: the EUC is to be sealed by a rectangular stamp with an attesting name, signed by an official person (signature and full name), registration number and an imprint of a round official stamp of the Russian consular office.

2. If the EUCs of [A]ugust 2012 had been properly issued and accepted, the material could have been shipped in the possibly shortest time after the relevant Decrees of the Government and the President of the Russian Federation.

As per Russian regulative documents the material stored of the Russian Ministry of Defence can be reserved for JSC “Rosoboronexport” for a period of time up to 6 months. When the time is expired the material can be used according to discretion of the Russian Ministry of Defence.

3. As per the Russian legislation export of any material can be effected only after the issue of relative Decrees of the Government and the President of the Russian Federation. The material cannot be shipped before the release of the mentioned documents.

4. Due to delay in preparation of necessary documents by the American Party the offer of the Russian Ministry of Defence has expired.

> In conclusion I'd like to confirm that we provided to "Bulova" serial numbers of items and information regarding the material tests that could have been shipped subject to availability of properly issued EUCs.
>
> ....
>
> We stand ready to complete this contract.

(R4, tab 100 at 49-50)

67. By letter to BTOS of 21 May 2013, CO Melendez stated that the government anticipated providing the second EUC package by 24 May 2013. She requested clarification and documentation regarding the following, *inter alia*:

> a) Although Bulova provided Formal Documentation from ROE or the Russian Federation that the EUC provided to Bulova on 20 August 2012 was unacceptable, the documentation was dated 09 November 2012. The US Government was not notified of the rejection until 03 December 2012. Please explain the lapse in time between receipt of rejection and notification to the US Government.
> b) Formal documentation from ROE or the Russian Federation explaining the status of the weapons. The US Government requests from your company to include assurances that the weapons are available and have been earmarked for this order. The US Government would like to ensure that the delivery will not be delayed once an EUC package containing both EUCs is provided to [BTOS].
> c) [Request for serial numbers and material test data said by ROE to have been supplied to "Bulova"].
> d) Formal Documentation, including all correspondence or memoranda concerning or supporting the actions that transpired between Bulova and ROE/Russian Federation between 20 August 2012 and 03 December 2012.
> e) The US Government has received Bulova's Certified Cost and Pricing Data.... However, the...information...is not in compliance with FAR 15.408 which prevents the US Government from performing an analysis of the

submitted data. Bulova is required to provide further information as listed below:

a. The [REA] proposal needs to be submitted in accordance with FAR 15.408, Table 2.
b. The Proposal as submitted, contains summary information and needs to include:
    i. Pricing Assumptions
    ii. Basis of Estimates
    iii. Supporting documentation and calculations for percentages worked and rates (direct and indirect)
    iv. Supporting documentation (i.e. purchase orders and/or written quotations) for consultant costs and subcontract costs.

(R4, tab 82 at 1-2) The CO also asked BTOS to address a 24 October 2012 sale of its assets (*see* finding 103). Prior to May 2013 the CO had not been aware of the sale (tr. 2/60). BTOS was also to correct inconsistent name and address information in the government's databases (R4, tab 82 at 2-3). The CO asserted:

> Any 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*. at 3) The Army continually included this disclaimer in its correspondence with the contractor thereafter.

68. Effective 23 May 2013 CO Melendez unilaterally executed Mod. No. 6 to Order No. 3. It set a 20 September 2013 delivery date for all end items, changed the country of origin from Romania to Russia, and incorporated the executed second EUC package. (R4, tab 87 at 3-8, 11-22)

69. On 24 May 2013 BTOS and ROE engaged in the following email exchange concerning the second EUC package:

BTOS:

> *1. What is the amount of time needed for you to confirm the attached EUCs from the US Government are acceptable?*

ROE:

> From the office of the General Director the documents will be forwarded to the reginal [sic] Department which is responsible in our Organization for EUC and everything related to them. They are to inform you whether everything is OK with EUC.

BTOS:

> *2. What is the amount of time needed for you to obtain the relevant Decrees of the Government and the President of the Russian Federation?*

ROE:

> This question is beyond the sphear [sic] of ROE activity and, as you understand, the time needed to obtain Decrees depends on dicision [sic] of High Authorities of our country.

BTOS:

> *3. The availability of the weapons.*

ROE:

> The material is available.

BTOS:

> *4. Updated pricing.*

ROE:

> When the relevant Decrees are issued the updated prices for the material will be determined by the Russian Ministry of Defence and will be agreed with ROE.

(R4, tab 103 at 25-26) BTOS provided a copy of this email exchange to the government on 20 August 2013 (*id.* at 1).

70. On 3 June 2013, Mr. Taylor responded to the CO's 21 May 2013 letter. He stated that the lapse in time between BTOS' receipt of notification that the first EUC package had been rejected and its notice to the Army was due to transmission time and time needed for analysis by BTOS and ROE. He claimed that the weapons were no longer available so testing and serial number data were irrelevant. He declined to provide correspondence between BTOS and ROE on the ground that it was proprietary and irrelevant. He stated that BTOS would revise its REA; the sale of its assets did not affect contract performance except that administrative functions had been transferred to its Tampa, Florida, office; and BTOS still existed and was performing the contract. Mr. Taylor asserted that the Army was trying to avoid liability for its failure to provide acceptable EUCs. (R4, tab 91)

71. On 8 July 2013 BTOS responded to the CO's inquiry about the second EUC package. BTOS stated that ROE had approved the revised documents and Russian Federation approval was estimated to take 90 days. ROE estimated that an additional 90 days would be needed thereafter to re-purchase the weapons from the Russian military. ROE advised that its price would increase "due to the over one year delay in receiving correct EUCs" and BTOS intended to charge the Army for that increase, along with its increased costs due to the delay. (R4, tab 97)

72. On 10 July 2013 CO Apgar warned BTOS that the Army would not agree to a change in Order No. 3's fixed price and she referred to REA procedures. She asked for formal documentation from ROE that confirmed its approval of the revised EUC documents and the timeline in BTOS' 8 July 2013 letter, and she asked BTOS to submit substantially the same information requested in the government's 21 May 2013 letter. (R4, tab 98)

73. On 26 July 2013 CO Melendez directed BTOS to submit its responses to the Army's 21 May 2013 and 10 July 2013 letters by 1 August 2013. She warned that its failure to submit the requested information could be viewed as an indication that it could not meet Order No. 3's requirements and she referred to a potential termination for cause. (R4, tab 99 at 1-3)

74. On 1 August 2013 Mr. Taylor responded and submitted a new REA. He alleged that the Army's refusal to meet evidenced a lack of cooperation in effecting contract completion. He reiterated that the Army had failed to timely provide the EUC documents and asserted that its unilaterally-imposed schedule was ill advised, unreasonable and could not be met, through no fault of the contractor. Mr. Taylor reported that ROE expected to deliver the items under Order No. 3 by December 2013 once an export license and presidential decree were issued, but there was no guarantee. Further, the Russian Federation had not yet issued the required export license. Mr. Taylor asserted that BTOS was diligently proceeding with contract performance and noted that Mr. Gurba had recently gone to Russia to ensure that performance was

continuing. (R4, tab 101) Among other things, Mr. Taylor included a July 2013 letter from ROE to Mr. Gurba, which gave the following estimated schedule:

> The electronic copy of EUC forwarded to [ROE] is acceptable. Our company will be forwarded the mentioned above documents to FSMTC of Russia for issue of Decrees of the President of Russian Federation and Government of Russian Federation after receiving the original copies.
>
> Preliminary period of issuing the corresponding Decree is 3 months from the date of receiving the EUC.
>
> At the present time the equipment is located at deport [sic] of Ministry of Defence of Russian Federation and will be pick out for preshipment preparation immediately after issuing the mentioned above Decrees.
>
> Preliminary period of preshipment preparation is 2-3 months after receiving the equuipmrnt [sic] from the Deport of Ministry of Defence.
>
> More precise period of readiness of equipment for delivery will be informed additionaly [sic].

(*Id.* at 12)

75. In its REA BTOS sought an unspecified delivery schedule extension and an increase in Order No. 3's value to $7,609,914, citing additional performance costs due to alleged government-caused delays in providing acceptable EUCs, including an ROE price increase. BTOS estimated that it would cost $3.4 million to reprocure the weapons from the Russian Army. (R4, tab 100 at 2-5) BTOS' potential schedule assumed EUC package approval by the Russian Federation and issuance of an export license by 30 September 2013; delivery of the end items by 31 December 2013; and BTOS and the Army reaching an REA settlement before shipment (*id*. at 5).

76. By letter to BTOS of 7 August 2013 the Army cited the contract's termination provisions and asked for assurances of future performance. It stated that, upon receipt of information previously requested, it would be willing to negotiate a bilateral modification to establish a new delivery date, at no cost to the Army, with the understanding that BTOS had submitted an REA. (R4, tab 102)

77. On 20 August 2013 BTOS notified the Army that the December 2013 delivery date was uncertain. The Russian MoD had advised ROE that all DShK weapons had already been used. BTOS asserted that this was not ROE's fault but was due to the Russian Federation's sovereign act and ROE had now proposed an alternative called the "DShKM." BTOS stated that it could feasibly deliver the DShKM by December 2013, or it could obtain the DShK weapons from a non-Russian

source such as Romtehnica, which could be available 165 days after receipt of an EUC, albeit at a higher price. (R4, tab 103 at 2, 54)

78. On 22 August 2013 CO Melendez asked BTOS to provide dates to establish a new delivery date bilaterally and to provide the serial numbers of the "DShKM" weapons proposed for delivery (R4, tab 104).

79. On 26 and 29 August 2013 ROE alerted BTOS that the proposed "DShKM" weapons reserved for delivery would require a new EUC package because, under Russian law, it could not deliver the items without an EUC package that specifically identified the "DShKM" model and an export license could not be issued. ROE stated that it would provide BTOS with the proper language to avoid further delivery issues. It claimed that all accessories and tools for the DShKM were the same as for the DShK and met its subcontract requirements. (R4, tabs 106, 108) On 30 August 2013 ROE provided BTOS with the serial numbers of the items reserved for delivery. However, ROE advised that the Russian MoD could use the items and other equipment could be substituted. (R4, tab 110)

80. On 30 August 2013 BTOS notified the Army that a new EUC package was needed and it could no longer commit to a December 2013 delivery date (R4, tab 111).

81. On 4 September 2013 CO Apgar contended that BTOS' request for a new EUC package was unnecessary, unreasonable and burdensome. She claimed that the denominations "DShK" and "DShKM" were interchangeable in the industry, and the "DShKM" or "DShK 1938/46" model was the only one in production as of 1946. She noted that ROE had used both denominations interchangeably in prior correspondence. She stated that the Army was open to other suppliers, but added that, in practicality, only the "DShK(M)s" could meet contract requirements. (R4, tab 112 at 1-2)

82. On 12 September 2013 CO Melendez notified BTOS that the Defense Contract Audit Agency found its August 2013 REA to be inadequate (R4, tab 113). Among other things, BTOS failed to certify its REA properly and to produce sufficient supporting documents (ex. G-8 at 3-5). CO Melendez stated that if the deficiencies were not corrected, the Army would deny the REA (R4, tab 113).

83. On 13 September 2013 BTOS supplied the Army with a Romtehnica quote to deliver "DShKM" weapons by the estimated date of 1 April 2014 (R4, tab 114 at 1-5). BTOS also provided a 10 September 2013 letter from ROE disputing the Army's assertion that "DShK" and "DShKM" were interchangeable:

> As per Russian Law a name, a designation, letter and numeric symbols of the delivered items in a EUC, a Contract, Order, Customs, Shipping Documents and in an

> Export License are to match completely, otherwise the license for the delivery of the material will not be issued even in case of availability of permission document from the President and the Government of the Russian Federation.

(*Id.* at 9-10) BTOS asserted that it might suffer financial consequences if it were to terminate its relationship with ROE and requested the Army's guidance on how to proceed (*id.* at 1). On 17 September 2013 BTOS notified the Army that its choice of subcontractors would affect its REA (R4, tab 115).

84. In an 18 September 2013 letter to Mr. Gurba, CO Melendez questioned ROE's insistence upon a new EUC package, contending that its July 2013 letter identified the weapons for delivery as "DShKM" and that ROE had confirmed that the second package was acceptable. She also questioned why the Army was not alerted earlier that the EUCs were unacceptable. Concerning Romtehnica's quote, she asked BTOS to submit the manufacturer's acceptance data, serial numbers, and export and transportation plan as well as to provide proof of its financial ability to meet Romtehnica's advance payment terms. (R4, tab 116)

85. BTOS did not make any deliveries under Order No. 3 by Mod. No. 6's 20 September 2013 due date (gov't PFF ¶ 358).

86. On 25 September 2013 BTOS responded to the CO that it intended to deliver "DShK" weapons and that consideration of "DShKM" weapons did not arise until August 2013. It had thought ROE's references to "DShKM" in its July 2013 letter were typographical errors because there had been no prior discussion of the DShKM. BTOS stated that it relied upon ROE's advice to secure the export license. It asserted that its REA should be settled prior to shipment but, regardless, it remained capable of completing the contract. It stated that, based upon a quote from Romtehnica, the total cost to the government would be $8,214,581.77. BTOS stated that it would pay 30 percent down upon order placement and the balance against shipping documents. It submitted an export and transportation plan detailing EUC requirements for Romtehnica and estimated delivery in May 2014. BTOS asked for the Army's direction on whether it should insist that ROE deliver the DShKM without a new EUC or terminate its subcontract with ROE and place an order with Romtehnica for the DShK. (R4, tab 118)

87. On 26 September 2013 ROE notified BTOS:

> In July 2013 ROE used to have intensive negotiations with the [MoD] regarding the delivery of the material. That time MoD did not provide us with concrete data which

> type of the machine gun would be delivered, either DShK or DShKM.
>
> Non officially ROE was informed that DShKM would likely be offered, but due to absence of the new MoD resolution (for DShKM) an old one for DShK was hold.
>
> In this connection your observation regarding ROE letter of July is absolutely well grounded – we should have stipulated both types of machine guns DShK/DShKM.
>
> In September 2013 MoD officially informed us that DShK machine guns were not available (due to delay with the EUC issue they were sold) – that is why we found it possible to mention the denomination DShKM as a single alternative for the delivery.

(Ex. G-12 at 2)

88. On 17 October 2013 CO Melendez informed BTOS that the government would accept weapons from Romtehnica, as per its original award to BTOS prior to BTOS' request to change to ROE. The price was to be the original fixed price of $4,784,961.50, with an estimated delivery date of 15 May 2014, but BTOS could submit an REA based upon current circumstances. (R4, tab 119) On 25 October 2013 BTOS responded that a change to Romtehnica would entitle it to compensation under the contract's Changes clause. If the Army would not agree to a price increase, BTOS would await an amended EUC permitting it to secure the export of DShKM guns from ROE and BTOS would supply draft language. (R4, tab 120 at 1-2)

89. On 12 November 2013 BTOS advised the Army that it was committed to supplying weapons from ROE; BTOS would provide a draft EUC; it would proceed once the government gave it a correct EUC; and new delivery dates would be keyed to the receipt of an acceptable EUC. BTOS represented that BTG's major shareholders intended to finance contract performance and asked the government to let it know if there was anything more specific it needed. (R4, tab 124 at 1-2)

90. By letter to BTOS of 19 November 2013, CO Melendez alleged that it had repeatedly failed to comply with the Army's requests for performance and financial assurances and the Army was not confident in its ability to complete Order No. 3 (R4, tab 125). She stated that, after award, new information cast doubt upon BTOS' financial situation and the Army was considering terminating the Order for cause. Among other things, the CO cited the 30 April 2012 pre-award survey; the SBA's denial of a COC to BTOS; the default termination of another BTOS contract; and the

government's affirmative claim for return of performance-based payments under that contract (findings 13, 40, 48). The CO also noted that BTG's Securities and Exchange Commission (SEC) Form 10-Q filing for the quarterly period ending 30 June 2013 showed an unaudited working capital of negative $2,472,334 and that DCMA had advised that all Order No. 3 proceeds had been assigned to Keehan Trust Funding LLC (Keehan Trust). The CO asked BTOS to provide evidence of financial capability, including proof from a bank that it would grant a letter of credit and confirmation from the supplier/manufacturer that it would accept one. (R4, tab 125 at 2)

91. The CO also asked BTOS for assurances that ROE could commit to providing weapons, stating:

> The prior contract between Bulova and ROE…dated January 26, 2012 with an expiration term of ninety (90) days…expired and is not valid. A current and valid contract between Bulova and ROE has not been provided as a proof of ROE's commitment. Bulova also needs to provide a date for when this new contract or commitment expires. The [Army] requires a clarification surrounding the version of the design that is contemplated to be provided by ROE under this order. As per the expired contract…, ROE refers to a DShK 1938-1946 pattern. The [Army] requires a configuration post 1946 design change. The post 1946 version commercially has been referred to as the DShK 1938/46 or as the DShKM. The earlier model can be referred to as a DShK1938. The [Army] needs clarity of what Bulova plans to provide in order to assure items meet contract requirements. The [SOW] requires the weapons to be manufactured within the last 5 years. The [Army] requests from your company a new contract or commitment from ROE to provide the weapons, the definition of the configuration and the year of manufacture to assure compliance with the SOW. In addition, the [Army] requests Bulova to provide the required exact [EUC] language and any supporting documentation proving that the language provided will be acceptable to ROE and the Russian Federation. Please also provide the [Army] with a delivery schedule for the weapons to be delivered in days after a signed EUC is provided to Bulova.

(R4, tab 125 at 2-3) The CO required a response by 26 November 2013 (*id.* at 3).

92. By letter to COs Melendez and Apgar of 26 November 2013, BTOS contended that the Army's reliance upon the pre-award survey was misplaced because the potential value of the BPA involved far exceeded the value of Order No. 3; BTG and BTOS had reduced their debt by more than $20 million since the survey; and a new major shareholder had invested in the "family of Bulova Technologies companies" in February 2013, which enabled additional financing (R4, tab 128 at 2). BTOS stated that it had shareholder financing arrangements with Keehan Trust, GovFunding, and the Shapiro Family Trust for contracts including Order No. 3; the assignment to Keehan Trust did not affect performance; it did not rely upon bank financing nor did ROE require a letter of credit; it would forward ROE's commitment to the Army but it would be subject to a price increase and a new acceptable EUC; BTOS would furnish the "DShKM" weapons and delivery would be "in accordance with the original contract schedule, meaning x number of days after correct EUC" (*id.* at 4); and it would get clarifications from ROE on other of the Army's questions.

93. On 5 December 2013 BTOS provided the COs with ROE's commitment letter, effective for 90 days from contract signing, which stated that its commitment included "12.7 mm machine guns" of "DShKM of 1938-1946 years pattern," which would fulfill requirements for the intended weapons system (R4, tab 131 at 3). The letter did not give payment terms or a delivery schedule. No contract was included. BTOS stated that it was now in a position to sign a contract with ROE and would provide draft EUC language as soon as it received it. (*Id.*)

94. By memorandum dated 6 December 2013 CO Melendez recommended termination of Order No. 3 due to BTOS' alleged failure to comply with it and to provide adequate assurances of future performance (ex. G-5). She essentially reiterated the reasons given in her 19 November 2013 letter to BTOS. The CO also cited a 7 July 2012 BTOS invoice for a 50 percent payment prior to delivery under Order No. 3 as contrary to the BPA and Order No. 3 and as evidence of BTOS' inability to finance the Order. She determined that ROE's 5 December 2013 commitment letter was insufficient because it did not define the design pattern or give the year of manufacture to assure compliance with the SOW. Also, BTOS did not provide the exact EUC language, commitment to provide the weapons, or delivery schedule. The CO concluded that BTOS had not provided adequate assurances of future performance or financial capability. (Ex. G-5 at 23)

95. On 6 December 2013 CO Apgar issued her final decision terminating Order No. 3 for cause under FAR 52.212-4(m). She cited the contractor's failure to comply with Order No. 3's terms and conditions and to provide the government with adequate assurances of future performance, which the accompanying unilateral Mod. No. 7 described as a contract breach. (R4, tab 133 at 2, 5) CO Apgar acknowledged that she would not have terminated the contract solely for BTOS' failure to update its entries in

SAM or for submitting an incorrect invoice, although submission of an invoice without entitlement to do so raises a red flag (tr. 3/163).

96. The government did not terminate Order No. 3 earlier because it hoped that it and BTOS would succeed in obtaining the weapons, which the government needed. The government was also attempting to support a small business. (Tr. 3/45, 59)

97. BTOS received the termination notice on 6 December 2013 (gov't PFF ¶ 401). On 20 December 2013 it timely appealed to the Board.

Additional Findings on Dissolution

98. On 22 August 2005 BTOS was formed as a limited liability company in Florida (ex. G-189; gov't PFF ¶ 2). The "First Amended and Restated Operating Agreement of [BTOS]," effective 18 October 2005, identified Mr. Gurba and Craig Schnee as responsible for BTOS' management and operations. They could not dissolve or wind up the company without the express consent of all members. (Ex. G-82 at 1, 4-5, 7) The agreement named "Bulova Technologies LLC" as a "Member" having a 100% "Percentage Interests" (*id*. at 9, ¶ 7.1). Concerning dissolution, the operating agreement stated:

> **11.1 Events of Dissolution. [BTOS] will** continue until dissolved upon the earliest to occur of the following events (the "Events of Dissolution"):
>
> **(i)** December 31, 2020;
>
> **(ii)** the sale, exchange, or other disposition by [BTOS] of all or substantially all of [BTOS'] assets;
>
> **(iii)** the unanimous decision of the Members (other than Defaulting Members) to terminate and dissolve [BTOS];
>
> **(iv)** upon the Bankruptcy of the Manager, or one or more of the other Members.
>
> **11.2 Liquidating Distributions.** Upon an Event of Dissolution, a Person designated by a Manager or a Person designated by a Member (the "Liquidated Trustee") shall take full account of the assets and liabilities of

> [BTOS] as of the date of an Event of Dissolution and will proceed with reasonable promptness to liquidate [BTOS'] assets and terminate its business.

(*Id.* at 13-14)

99. Under a second amendment to BTOS' operating agreement, effective 10 September 2012, BTG acquired 100% of the membership interest in BTOS and Mr. Gurba was designated as the company's sole manager (ex. G-110).

Additional Findings on BTOS' October 2012 Sale

100. BTOS, and to a limited extent Mr. Gurba, entered into an Asset Purchase Agreement, dated 17 August 2012, with "L.C. Bowman, and/or Assigns," in which BTOS agreed to sell, transfer, convey, assign, and deliver substantially all of its assets including equipment, certain government contracts and real property located in Mayo, Florida, to the purchaser (ex. G-148 at 2). The combined price for business assets and real property was $11,200,000 ($3,500,000 and $7,700,000, respectively). The purchase price included the buyer's assumption of certain liabilities. (*Id*. at 5; *see also* ex. G-62 (BTG's SEC Form 8-K, Current Report, dated 17 Aug. 2012))

101. On 10 September 2012 DCMA administrative contracting officer (ACO) Diane Wheeler advised Mr. Gurba that a Preliminary Information Statement posted by BTG had identified a possible sale of BTOS' assets and, if a decision to sell or transfer assets had been made, BTG must submit a written request to her as ACO for execution of a novation agreement. A determination was required whether it was in the government's interest to recognize a proposed successor in interest. She listed the documents required to be submitted per FAR 42.1204(f). (Ex. G-109)

102. In its amended Definitive Information Statement on Schedule 14C filed with the SEC on 20 September 2012, BTG reported that its Board of Directors and the majority of its voting shareholders had approved the sale of substantially all of BTOS' assets and the sale and closing of BTOS' operations would relieve BTG of further capital investment, reduce burdensome high interest debt currently in default, and provide working capital to ensure growth (ex. G-65 at 1, 4, 8-9).

103. The sale of substantially all of BTOS' assets was completed on 24 October 2012 for $7,700,000 (ex. G-147 at 5). BTOS executed a Facility and Employee Lease agreement with the buyer, effective that day, in which BTOS agreed to continue performance on certain executory contracts transferred as part of the sale until the buyer could obtain licenses required to perform under the contracts. At that point the contracts would be novated and assigned to the buyer. Orders under the BPA, including Order No. 3, were excluded from the sale. (Ex. G-114 at 8; tr. 3/198)

104. In a 13 November 2012 email to government personnel including CO Ross, ACO Wheeler stated that many of them had been advised that "[BTOS] CAGE 4DHW8" had sold "part of its assets," but "Bulova" had not presented the information required to evaluate whether the government should acknowledge the sale (ex. G-207 at 1). She stated that she had asked "Bulova Technologies Ordnance, LLC CAGE 4DHW8," which had a substantial workload spread over the Army and Navy and multiple commands within each service, to address the asset sale. The ACO noted that Mr. Gurba had indicated he would do so and "Bulova representatives" had indicated their understanding that no piecemeal or partial changes were to be made in the CCR/SAM database. (*Id*.)

105. On 8 April 2014, "[BTOS] (Cage Code 4DHW8)" submitted a Novation Proposal Package to ACO Wheeler for the novation of two Army contracts and two Navy contracts to "Bulova Tech Ordnance LLC (Cage Code 6VUA5) as a result of the sales of the property and assets required to perform these production contracts from [BTOS] to Bulova Tech Ordnance LCC on 23 October 2012" (ex. G-74 at 1, 3). The contract at issue and two others were excluded and were "to remain assigned to [BTOS] (Cage Code 4DHW8) since neither the assets nor the property required to execute these 'brokerage' based contracts have been sold or assigned to Bulova Tech Ordnance LLC" (*id*. at 1). By letter to BTOS of 9 September 2014, ACO Wheeler denied the novation request and stated that BTOS remained contractually obligated to the government for the continued performance of all of its open contracts (ex. G-80).

Additional Findings on Financing

106. By letter of 19 January 2012, Keehan Trust notified ACO Wheeler that proceeds under Order No. 3 had been assigned to it pursuant to the Assignment of Claims Act of 1940. On 3 May 2012 the ACO notified CO Ross and contract specialist Renne about the assignment. (R4, tabs 43, 125 at 15-16)

107. The Assignment of Claims, effective 19 January 2012, gave BTG access to credit for its working capital in exchange for BTOS' assignment to Keehan Trust of its rights in all claims, proceeds and money due or to become due under Order No. 3. BTOS guaranteed a contemporaneous promissory note to secure a loan from Keehan Trust. (R4, tab 125 at 17) Keehan Trust, BTG, and BTOS executed a Satisfaction Agreement, dated 24 October 2012 (ex. G-115 at 1). At the time, Bulova owed Keehan Trust over $1,875,000 on the promissory note (*id.* at 3). Amendment No. 1 to the Satisfaction Agreement, effective 15 April 2013, amended the note's payment terms and stated that payments were due no later than 30 September 2013 (ex. G-134 at 279).

108. David J. Keehan, vice president of sales and marketing of Advanced Polymer Coatings and a representative of Keehan Trust, testified credibly that he would provide additional financing under Order No. 3 if it were required (tr. 5/74, 76).

109. Gary L. Shapiro is the chairman and founding principal of National Financial Companies (NFC), a merchant banking business in Wellington, Florida, that represents investment families and makes loans to and equity investments in smaller companies. As of the hearing, NFC had loaned about $5.5 million to BTG. NFC made its initial investment, a $400,000 loan, in the first quarter of 2013. (Tr. 5/42-46) In its 1 March 2013 SEC Form 8-K filing, BTG reported that it had borrowed $400,000 and executed a secured promissory note with NFC on 25 February 2013 (ex. G-69 at 2, 18-19; gov't PFF ¶¶ 289, 292). NFC made a further loan of $100,000 to BTG on 26 August 2013 (*see* ex. G-177).

110. Frank W. Barker, Jr., a certified public accountant, was BTG's chief financial officer (CFO) from July 2011 to November 2012 (ex. G-55 at 457, ex. G-67; tr. 3/172, 176). He began working with BTG as a consultant in 2009 and continued working as a consultant after leaving his CFO position (tr. 3/175-76, 4/166; gov't PFF ¶ 274). BTG's financing sources included Messrs. Gurba, Keehan, Shapiro and GovFunding. Consistently with his prior experience with them and commitments they had expressed, Mr. Barker was confident that they would be available to provide the funds necessary to fund Order No. 3. (Tr. 3/180, 188-89, 194-95, 206) In his view there was "never a doubt" that the contractor had the ability, whatever resources it had to draw upon, to accomplish Order No. 3 (tr. 3/206).

111. For the FY ending 30 September 2011, BTG reported audited total current assets of [redacted] and total current liabilities of [redacted], resulting in a working capital of about [redacted] (ex. G-55 at 13). For the three months ending 31 December 2012, BTG reported unaudited total current assets of [redacted] and total current liabilities of [redacted], resulting in a working capital of about [redacted] (ex. G-68 at 4). For the three months ending 30 June 2013, BTG reported unaudited total current assets of [redacted] and total current liabilities of [redacted], resulting in a working capital of about [redacted] (R4, tab 125 at 31). For the FY ending 30 September 2013, BTG reported audited total current assets of [redacted] and total current liabilities of [redacted], resulting in a working capital of about [redacted] (ex. G-70 at 21). Thus, BTG's financial condition, based upon working capital, improved from the time of award of Order No. 3 in September 2011 through 30 June 2013. It declined somewhat as of 30 September 2013, but it was still better than it had been at the time of award. (*See, e.g.,* tr. 3/204-06)

112. In its SEC Form 10-K Annual Report for the FY ending 30 September 2013, BTG reported that it had formed a new business segment in July 2012 and was involved in both government contracting and commercial sales (ex. G-70 at 14, 33). By 30 September

2013 BTG's continuing operations generated a revenue increase of about [redacted] compared to the FY ending on 30 September 2011; its gross profit increased by [redacted] when compared to the FY ending on 30 September 2012; and its net income from continuing operations increased when compared to the net loss for the FY ending on 30 September 2012 (*id.* at 15-16). BTG also obtained non-cash financing through the issuance of shares of stock in the company as conversion of debt (*id.* at 26-27).

113. As of 30 September 2011, BTG's sources of liquidity were new debt and shareholder loans. It had about [redacted] in outstanding debt related to continuing operations and [redacted] in indebtedness to shareholders. Reported long-term debt included loans from GovFunding and Keehan Trust. (Ex. G-55 at 433, 436, 452-54, ex. G-70 at 42-44) From 2011 to 2013, Mr. Gurba executed financing instruments to secure loans from entities associated with Mr. Keehan and GovFunding (*see* exs. G-181, -186, -197, -201, -203). A "Schedule of Notes Payable," dated 30 September 2013, shows that BTG had a total debt of about [redacted] from loans during 2008-2013 from various entities including GovFunding, Keehan Trust, NFC, and the Shaprio Family Trust (ex. G-181 at 189-90). Also, Keehan Trust and GovFunding held stock shares and restricted securities authorized by Mr. Gurba in 2012 and 2013 (*see* exs. G-155, -159, -160, -162, -168, -171).

114. According to Mr. Gurba, BTOS did not require additional financing because it did not need to make payments to ROE until delivery, and a letter of credit was unnecessary (tr. 4/154-55, 168).

115. William Colburn, a member of GovFunding, testified as a rebuttal witness for the government (tr. 5/99). He served as BTG's CFO from 2 November 2012 until he resigned in February 2013. When he resigned, he was no longer willing to loan money to BTG. (Tr. 5/105) In Mr. Colburn's opinion, during his term as CFO, issues with BTG were "not an ability [or, inability] to pay back the loans. But rather a lack of willingness to pay back the loans." (Tr. 5/109, *see also* tr. 5/118)

116. CO Melendez testified that she was informed of financing arrangements with Keehan Trust, the Shapiro Family Trust, and GovFunding but did not receive any supporting documentation or commitment letters from them (tr. 2/175, 177).

Additional Findings on "DShK" and "DShKM"

117. In addition to being the COR under Order No. 3, Mr. Gould was "General Engineer" and served as the program technical lead (tr. 1/8, 11-12). To his knowledge, there was no current production of the original 1938 design or "true DShK" model (tr. 1/36-38). The revised, modernized, design was referred to as "DShK 1938/1946" or "DShK" with "M in parenthesis" (tr. 1/37). According to Mr. Gould, the denominations "DShK" and "DShKM" were used interchangeably in the industry

(tr. 1/36-37) and "the term 'DShK' today generally means the DShKM" although the DShKM has physical characteristics that the 1938 DShK did not have (tr. 1/96). Mr. Gurba testified similarly that the DShK and the DShKM were "the same thing" (tr. 4/33-34) but there were different revision levels (tr. 4/34-35) and that "added to some of the confusion in terms of actually getting to the final document that would be necessary to get an export license" (tr. 4/35).

118. Mr. Gould was concerned about acquiring weapons from ROE because he was surprised "that in 2012…they would be in production of a weapon system that had been replaced twice in their inventory" (tr. 1/69). He acknowledged that, if the weapons were in production, they would have met SOW requirements (tr. 1/70).

DISCUSSION

I. Standing and Jurisdiction

The government contends that appellant lacks standing to pursue this appeal, which we must therefore dismiss for lack of jurisdiction. It asserts that BTOS ceased to exist under the terms of its operating agreement when it sold substantially all of its assets on 24 October 2012, and that under Florida law, it continued to function for the sole purpose of winding up its business operations (gov't br. at 123-25). Appellant counters that the sale could not operate as a dissolution without the express consent of the members of BTOS, which did not occur, and that it was not administratively dissolved by the Secretary of State of Florida after the sale. Appellant further alleges that, even if it were dissolved, it could still prosecute and defend civil, criminal, or administrative actions and proceedings under Florida law. (App. br. at 44) The government concedes that BTOS "continued to exist as a legal entity" after the sale, but it maintains that BTOS, as dissolved, was a shell company that could not perform Order No. 3 and that BTG transferred contract administration to Bulova Europe, which lacked the licenses required to perform the contract (gov't reply at 17).

Any consent of BTOS' members to dissolution was, de facto, the consent of its parent company BTG, which possesses a 100% membership interest (findings 98-99). However, the operating agreement provides that dissolution happens upon "the earliest to occur" of the "sale, exchange, or other disposition by BTOS of all or substantially all" of its assets or the consent of BTOS' members (finding 98). The sale was the "earliest to occur," particularly as appellant represents that there was no consent to dissolution. Moreover, Article 11 of the operating agreement states that "the sale, exchange, or other disposition by [BTOS] of all or substantially all of [BTOS'] assets" is a dissolution event (*id.*). Therefore, the October 2012 sale triggered BTOS' dissolution in accordance with the operating agreement.

Appellant has the burden to prove standing, a jurisdictional prerequisite. It involves an inquiry into "whether the [claimant] constitutes the type of person or party that may submit the case or controversy proffered for consideration." *SWR, Inc.*, ASBCA No. 56708, 12-1 BCA ¶ 34,988 at 171,945 (citation omitted). To determine what rights and powers of BTOS survived post-dissolution, we apply the laws of the State of Florida, where it was organized. *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001) (court looked to Texas law to determine rights of dissolved Texas corporation); *TPS, Inc.*, ASBCA No. 52421, 01-1 BCA ¶ 31,375 at 154,916 (on issue of capacity, Board examines law of the state of incorporation). When this appeal was filed, the Florida Limited Liability Company Act, which governed the formation and operation of LLCs, provided that "[a] dissolved limited liability company continues its existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs." FLA. STAT. § 608.4431 (2013). Under Section 608.4431(2)(b), dissolution did not "[p]revent commencement of a proceeding by or against the limited liability company in its name." That Act was superseded by the Florida Revised Limited Liability Company Act, §§ 605.0101-605.1108, which governs all LLCs on or after 1 January 2015 (§ 605.1108(2)). The current statute provides that, in winding up a company's affairs, an LLC may "[p]rosecute and defend actions and proceedings, whether civil, criminal, or administrative." FLA. STAT. § 605.0709(2)(b) (2017).

Under the pertinent statutory provisions, as a dissolved company, BTOS continued to exist with the power to prosecute or defend proceedings in its name under either the former Florida Limited Liability Company Act or the current Florida Revised Limited Liability Company Act. Therefore, appellant has the legal capacity to prosecute this appeal. *DCO Construction, Inc.*, ASBCA Nos. 52701, 52746, 02-1 BCA ¶ 31,851 at 157,403 (under Florida law, corporation had capacity to file appeals notwithstanding that it was administratively dissolved when notices of appeal were filed); *TPS*, 01-1 BCA ¶ 31,375 at 154,916 (under Florida law, dissolved corporation's appeal to Board was part of winding up its affairs). The government's argument that appellant could not perform after its dissolution goes to the merits of the dispute and not to the issue of standing.

Thus, BTOS had standing to bring this appeal and the Board has jurisdiction to entertain it.

II. Termination for Cause

A. The Parties' Contentions

The Army asserts that the CO properly terminated Order No. 3 because appellant did not comply with the Order, including the SOW; it failed to deliver 350 DShK machine guns and accessories within the time specified by the contract; it did not submit timely and accurate EUC packages with language that was acceptable to its

chosen supplier, ROE, and to the Russian Federation; it did not timely obtain the export licenses required for contract performance; it failed to submit its Export and Transportation Plan and Manufacturer's Quality Acceptance Plan for ROE as required by the SOW; contrary to Order No. 3, it intended to provide the government with refurbished weapons; contrary to the contract, it submitted invoices seeking 50 percent of the contract's value prior to making any deliveries; it did not disclose information about the sale of substantially all of its assets and its outstanding debt; and it failed to update the SAM database and to novate contracts after the sale. The Army further alleges that appellant did not provide it with adequate assurances of future performance. For example, it did not have a binding contract with ROE or the financing necessary to perform the contract.

Appellant contends that the default termination was not reasonable or justified. It asserts that it complied with the contract, including the SOW; it worked with the Army in good faith to provide timely, acceptable EUC packages; the government was as much at fault for problems with the EUC packages as was BTOS; and BTOS could not have obtained an export license without an EUC acceptable to the Russian Federation. Further, the termination was not justified by BTOS' alleged failure to update the SAM database and novate contracts, because it continued to perform out of its Mayo, Florida, location, nor by BTOS' submission of invoices, which it deems to have been at the CO's request in connection with its REA. It asserts that it did not intend to provide refurbished weapons; it gave the Army all requested assurances of future performance; and it had the requisite financing. Appellant also contends that it had a binding contract with ROE, even though pricing was not set, citing the Uniform Commercial Code's (U.C.C.'s) provisions regarding open price terms.

Appellant further alleges that, if it was in default, the default was excused by the government's delay in providing valid EUCs, the Army's failure to cooperate with it by ignoring its requests to meet, and the Army's unreasonable refusal to cooperate in obtaining an EUC for weapons with the changed designation from DShK to DShKM. Appellant adds that, if the default were not excused, the government waived it by not terminating the contract until 77 days after the last set delivery date and by encouraging appellant to perform during that period.

B. Termination for Cause Standards

Default termination principles also apply to a termination for cause. *Gargoyles, Inc.*, ASBCA No. 57515, 13 BCA ¶ 35,330 at 173,412. It is fundamental that a default termination is a drastic sanction that should be imposed only upon good grounds and solid evidence. *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). While the CO's discretion to determine whether a contract should be terminated for default is broad, the CO's default decision will be overturned if it is arbitrary, capricious or an abuse of discretion. *McDonnell Douglas Corp. v. United*

States, 182 F.3d 1319, 1326 (Fed. Cir. 1999); *accord Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343-44 (Fed. Cir. 1999).

The government bears the initial burden of proving, by a preponderance of the evidence, that the termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987). The Commercial Items clause's default provisions do not require a termination upon default but give the government discretion to terminate. That discretion must be exercised reasonably. *Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987). If a CO's articulated reasons for a default termination are not valid, the termination can still be sustained if there was another ground for termination that was justified by the totality of the circumstances at the time of termination, even if unknown to the CO. *Empire Energy Management Systems, Inc. v. Roche*, 362 F.3d 1343, 1357 (Fed. Cir. 2004); *AEON Group, LLC*, ASBCA Nos. 56142, 56251, 14-1 BCA ¶ 35,692 at 174,752.

C. The Government Properly Terminated Order No. 3 for Cause

The Commercial Items clause gives the government the right to terminate a commercial items contract 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" (finding 4, FAR 52.212-4(m)). Referring to FAR 52.212-4, FAR 12.403(c)(1) states that the CO "shall send a cure notice prior to terminating a contract for a reason other than late delivery." *See Brent Packer & Myrna Palasi v. Social Security Administration*, CBCA Nos. 5038, 5039, 16-1 BCA ¶ 36,260 at 176,899 (although commercial item termination provision, unlike standard Default clause, does not refer to cure notice, FAR 12.403 imposes that requirement). No cure notice is required when a contractor has not delivered on time. *AEON Group*, 14-1 BCA ¶ 35,692 at 174,752.

The CO's termination decision cited the contractor's failure to comply with Order No. 3 and to provide the government with adequate assurances of future performance as the reasons for termination (finding 95). The latter reason appears to have been key. The Board addressed a contractor's failure to provide such assurances in *Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719, when it denied a contractor's appeal from the government's termination of its commercial items contract for cause. The contractor had contended, among other things, that the government had not met EUC requirements. The Board stated in part:

> In *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001), the Federal Circuit said that "[t]he law applicable to a contractor's failure to provide assurances of timely completion is a branch of the law of anticipatory repudiation." Thus, in

> the law of government contracts, the contractor is required to give reasonable assurances of performance in response to a validly issued cure notice. *Id*. at 1338. While the promisor's renunciation of a "contractual duty *before* the time fixed in the contract for...performance" is a repudiation, such a repudiation "ripens into a breach prior to the time for performance...if the promisee 'elects to treat it as such.'" *Franconia Associates v. United States*, 536 U.S. 129, 143 (2002). *FFR-Bauelemente + Bausanierung GmbH*, ASBCA No. 52152 *et al*., 07-2 BCA ¶ 33,627 at 166,557 ("in order for a default termination to be sustained, the CO need only be found to have been 'justifiably insecure about the contract's timely completion.'").
>
> A refusal to perform in the future without a change to the contract has been held to be anticipatory repudiation: [citing cases where, *inter alia*, a contractor's refusal to perform a fixed-price contract without a price increase, including due to subcontractor and other issues, was an anticipatory breach or repudiation].

Id. at 170,954; *see also National Union Fire Insurance Co.*, ASBCA No. 34744, 90-1 BCA ¶ 22,266 at 111,855 ("Unlike a cure notice, this right to demand assurance need not spring merely from a performance or progress failure, but may be asserted whenever reasonable grounds exist to believe a breach will be committed."), *aff'd*, *National Union Fire Insurance Co. v. United States*, 907 F.2d 157 (Fed. Cir. 1990) (table).

Here, the government properly terminated Order No. 3 for cause. As discussed below, BTOS was in default under Order No. 3; the government did not waive its right to terminate for default; BTOS' failure to perform was not excusable; and the termination decision was not arbitrary, capricious or an abuse of discretion.

1. The Termination for Default was Justified

The Army awarded the Order to BTOS on 23 September 2011, calling for it to deliver DShK weapons at the fixed price of $4,784,961.50. Delivery was due within 140 days of BTOS' receipt of a signed EUC and export license. The government "really needed" the weapons, as BTOS acknowledged. (Finding 15) The BPA and Order No. 3 did not identify who was responsible for obtaining an EUC but the parties agree that BTOS was to provide a draft to the Army, with the necessary language obtained from its subcontractor/supplier, then the Army would secure the necessary

signature from the end user (finding 16). Although not incorporated into the contract, BTOS' proposal indicated that it would provide draft EUC language within 5 or 10 days after award (findings 15-16). It also stated that BTOS would provide newly manufactured DShKM weapons supplied by Romtehnica of Romania (finding 11). Neither of those events occurred.

Virtually from the outset, BTOS' execution of Order No. 3 did not proceed smoothly, due to its time-consuming change of suppliers; its failure to supply draft EUCs promptly; its failure to provide accurate EUC drafts; its changing representations about ROE's provision of the weapons; and its repeated requests for payment of more than the Order's fixed price. In September and October 2011 it notified the Army that it was delaying submission of its export and transportation plan and draft EUC because of negotiations with TGT and Romtehnica (finding 18). One month after award of Order No. 3, BTOS asked the Army for approval to change its supplier from Romtehnica to MDI. The CO denied the request because the weapons' condition was not technically acceptable. BTOS stated that it could not reach an acceptable cost and delivery schedule with Romtehnica and offered the Army a price reduction if it accepted MDI. The Army declined to deviate from its specifications, although it was willing to modify the delivery schedule. However, BTOS requested a $362,638.50 price increase in exchange for using Romtehnica, the supplier it had originally proposed. (Findings 20-21) This became a pattern throughout the course of Order No. 3. BTOS repeatedly sought to increase the Order's fixed price and the Army repeatedly declined, although it was willing to entertain an REA.

Three months after award, BTOS sought to use another supplier, ROE, with which it had a business relationship, mainly because it was "much cheaper" (finding 22). On 26 January 2012 BTOS entered into a signed agreement with ROE for the delivery of DShK weapons, to be in effect for 90 days after signature, subject to payment to ROE. No payment amount or delivery schedule was specified. BTOS gave the Army ROE's commitment letter and weapons condition certification and thereafter confirmed to the CO that the change to ROE would be at no additional cost to the Army. (Findings 23-25) Contrary to appellant's contention regarding the U.C.C., without payment or delivery terms, BTOS' agreement with ROE was not a binding contract with respect to ROE's provision of DShK weapons. While we sometimes look to the U.C.C. for guidance, it is not part of the federal common law. *Kemp v. United States*, 124 Fed. Cl. 387, 393 (2015).

On 6 February 2012, over four months after award, BTOS gave the Army a first draft package of Afghan and U.S. EUCs (finding 27). The Army gave BTOS the Afghan EUC just over a month after BTOS had submitted its draft. BTOS was to get it authenticated but had difficulties and sought the government's assistance, which ultimately resulted in a second Afghan EUC being routed for approval. (Finding 33)

Bilateral Mod. No. 4, effective 26 March 2012, set a 4 June 2012 delivery date for the DShK weapons (finding 34). On 23 April 2012, over two months after BTOS submitted its draft, the Army gave the U.S. EUC package and related materials to the appropriate official for approval (finding 37). There were errors in the EUC packages attributable to both parties (findings 38, 66). On 16 April 2012, over six months after contract award, Mr. Gurba confirmed that the draft U.S. EUC was correct and contained the "exact language" required by the Russian Federation (finding 35).

In June 2012, when BTOS had not yet received a signed EUC package from the government, it sought $2,392,480 or 50% of Order No. 3's value in lieu of filing a claim (finding 42). At the time the CO thought that BTOS was entitled to some compensation. However, when the CO asked for a proposal to support the claim, along with testing and serial number data for the weapons said to have been sitting on ROE's shipping dock for three months, BTOS responded that ROE would not supply the data until after receipt of an EUC; BTOS' costs exceeded $150,000 a month; and it wanted payment of its invoices, which amounted to 50% of the contract's value. It also asserted that ROE might sell the weapons to another customer and charge BTOS for another production run at a higher price. (Findings 43-45)

BTOS received a completed EUC package from the government on about 20 August 2012, about four months after BTOS had submitted the second U.S. EUC draft (finding 46), and after Mod. No. 4's delivery date had passed. Attrition, a serious backlog at DoD, and a DoD-wide furlough contributed to the delay (finding 43). Also, the requirement for two EUCs was unique compared to other non-standard weapons acquisitions the CO's office had done (finding 27). As appellant recognized in briefing, "[n]either party had experience obtaining EUCs from the Russian Federation and cooperated to figure out the process" (app. br. at 49). However, BTOS had sought the switch to ROE for its own business reasons and was responsible for that choice and for obtaining the correct EUC language.

The EUC problems continued, despite appellant's assurances that it had provided the "exact language" required by the Russian Federation. In December 2012 BTG notified the CO that the Federation had rejected the EUC package due to errors and omissions (finding 50). In early January 2013 BTOS provided a revised draft EUC to the Army and advised that ROE had verified that it was acceptable. However, at the end of January, BTOS notified the Army that, due to the government's delays in providing an acceptable EUC package, ROE could not guarantee that previously available weapons would continue to be available even if an acceptable second EUC package were received. BTOS asserted that it was entitled to delay costs from 4 June 2012 and that, if weapons were not available, an estimated 120 days would be needed to manufacture new weapons, increasing costs. (Findings 51-52) On 20 February 2013 ROE advised that a Presidential Decree had been denied due to the lack of an EUC and, without it, "refurbishing" of the DShK and definition of the ultimate price

could not be accomplished (finding 53). The government apologized "for the inordinate amount of time these EUC packages are taking" and asked for BTOS' "continued patience and understanding" (finding 54).

On 8 March 2013, BTOS notified the CO that, after receipt of a EUC package, ROE would need to purchase the weapons from the Russian Army, which had acquired the previously available items, because the manufacture of new weapons was cost prohibitive. BTOS claimed that, due to the government's delay in supplying an EUC package, it estimated that contract performance costs would increase to about $7.9 million, of which it already had incurred about $2.6 million. BTOS stated that Order No. 3 must be modified to provide for full payment prior to shipment regardless of whether the weapons were obtained from ROE or Romtehnica. BTOS asserted that it stood ready to perform the contract upon receipt of the required EUC documents but referred to "finalizing" Order No. 3, and it would not guarantee a delivery schedule. (Findings 56-57)

On 5 April 2013 the CO notified BTOS that the Army was considering terminating Order No. 3 for cause. She questioned some of BTOS' representations and asked that it submit adequate assurances of future performance. She proposed a bilateral modification setting a 30 August delivery date at no additional cost to the Army. BTOS responded that the Army was liable for delays and increased costs and that BTOS could not perform without an acceptable EUC package. It would not agree to a new delivery date that was not contingent upon receipt of an approved EUC and would not agree to a no cost modification. (Findings 58-59)

In April and May 2013 the government requested documents and information from BTOS and disclaimed that any assistance given to it on the contract or acceptance of delinquent goods or services would condone any delinquency or waive the government's rights under the contract (*e.g.*, findings 61, 63, 67, 72-73). For example, on 21 May 2013, the CO sought assurances that the weapons were available and had been earmarked for Order No. 3; she asked for their serial numbers and test data; and she asked BTOS to address a 24 October 2012 sale of its assets, of which she had not been aware prior to May 2013 (finding 67).

Unilateral Mod. No. 6, effective 23 May 2013, incorporated the second executed EUC package and set a 20 September 2013 weapons delivery date (finding 68). On 24 May 2013 ROE had no definite answer for BTOS concerning how long it would take to confirm that the second EUC package was acceptable and to obtain the necessary decrees. ROE stated that the weapons were available and, when the decrees were issued, the MoD would determine updated pricing. BTOS did not convey this information to the CO until 20 August 2013. (Finding 69) In any case, on 3 June 2013, BTOS notified the CO that the weapons were no longer available and said that testing and serial number data were irrelevant (finding 70).

On 8 July 2013 BTOS informed the CO that ROE had approved the revised documents; Russian Federation approval was estimated to take 90 days; and an additional 90 days would be required thereafter to re-purchase the weapons from the Russian military. ROE had advised that there would be a price increase and BTOS intended to charge the Army for that increase and its increased costs due to the EUC delay. (Finding 71) The CO directed that BTOS respond to earlier inquiries or be subject to a potential termination for cause (finding 73).

BTOS responded that the unilateral schedule imposed by the Army was unreasonable and could not be met. ROE expected to deliver the weapons by December 2013 once an export license and presidential decree were issued but there was no guarantee. BTOS claimed that it was diligently proceeding with contract performance and ROE had advised that the second EUC was acceptable. In a revised REA, BTOS sought an unspecified delivery schedule extension and to increase Order No. 3's value to $7,609,914, almost $3 million more than its fixed price of $4,784,961.50. It projected delivery of the weapons by 31 December 2013, with the Army and BTOS settling its REA before shipment. (Findings 74-75)

On 7 August 2013 the Army asked BTOS for assurance of future performance. It was willing to negotiate a new delivery date but at no cost to the Army. (Finding 76) However, about two weeks later, BTOS informed the Army that the December 2013 delivery date was uncertain. The MoD had advised that all DShK weapons had been used. ROE had proposed an alternative, the DShKM. BTOS stated that it could feasibly deliver the DShKM by December 2013 or it could obtain the DShK from a non-Russian source, such as Romtehnica, which could be available 165 days after receipt of an EUC but at a higher price. (Finding 77)

More EUC and performance frustrations ensued. The CO asked BTOS for dates to establish a new delivery date bilaterally but ROE notified BTOS that the DShKM weapons reserved for delivery would require a new EUC package. It also advised that the MoD could use the items and other equipment could be substituted. BTOS informed the Army that a new EUC package was needed and it could no longer commit to a December 2013 delivery date. (Findings 78-80)

BTOS asserted that switching to Romtehnica would cost the government $8,214,581.77. This was over $3 million more than Order No. 3's fixed price. BTOS now estimated delivery in May 2014, two years and eight months after contract award. On 18 September 2013 the CO asked BTOS to provide proof that it was financially able to meet Romtehnica's advance payment terms. BTOS asserted that its REA should be settled prior to weapons shipment but that, regardless, it remained capable of completing the contract. However, it asked for the Army's direction on how to proceed with its own subcontractor arrangements. (Findings 83-84, 86) The CO

advised that the Army would accept weapons from Romtehnica, per the Army's original award to BTOS, at the original price, with estimated delivery on 15 May 2014, but BTOS could submit an updated REA. BTOS responded that, if the Army would not agree to a price increase if it used Romtehnica, BTOS would supply the language for an amended EUC allowing it to export DShKM machine guns from ROE. New delivery dates would be keyed to receipt of an acceptable EUC. BTOS represented that BTG's major shareholders intended to finance contract performance. (Findings 88-89) CO Melendez was informed of financing arrangements with Keehan Trust, the Shapiro Family Trust, and GovFunding but the government did not receive supporting documentation or commitment letters from them (finding 118).

On 19 November 2013 the CO sent BTOS what was tantamount to a cure notice. She sought assurances from BTOS. (Findings 90-91)[13] She stated that BTOS repeatedly had failed to comply with the Army's requests for performance and financial assurances and the Army was not confident in its ability to complete Order No. 3 and it was considering terminating it for cause. Among other financial concerns, she cited the 30 April 2012 pre-award survey and the SBA's denial of a COC to BTOS. She also cited the default termination of another BTOS contract and the government's affirmative claim for return of performance-based payments under that contract, which BTOS had purposely omitted from its proposal (finding 13).

The CO sought the following assurances from BTOS by 26 November 2013: (1) proof of financial capability to perform; (2) proof of a valid contract or commitment with ROE; (3) exact EUC language acceptable to ROE and the Russian Federation; and (4) a delivery schedule in days after a signed EUC was provided to BTOS (finding 91). On 26 November 2013 BTOS responded that it had shareholder financing and its assignment of claims did not affect its performance. It stated that ROE's commitment would be subject to a price increase and a new EUC and BTOS would furnish the "DShKM" weapons, with delivery "x number of days after correct EUC." (Finding 92) On 5 December 2013 BTOS provided ROE's commitment letter, effective for 90 days from contract signing, to provide DShKM machine guns. It did not set a payment amount or a delivery schedule and no contract was included. (Finding 93) Although appellant contends that the CO was unreasonable in giving BTOS only a week to respond, the 19 November 2013 letter essentially cumulated prior requests for assurances from the government, such as the CO's 21 May 2013 letter, which expressed concern about the sale of BTOS' assets, among other things (finding 67).

[13] Although, as noted, no cure notice is required when a contractor has not delivered on time, there was no clear delivery date at this point. Despite unilateral Mod. No. 6's 20 September 2013 due date (finding 68), the government was working toward establishing a new date.

CO Melendez concluded that BTOS had not provided adequate assurances of future performance or financial capability and CO Apgar terminated Order No. 3 for cause on 6 December 2013 (findings 94-95), over two years after contract award.

The government contends, *inter alia*, that appellant failed to provide adequate assurances of future performance by not providing a current and updated binding contract with ROE that contained payment and delivery terms; an export and transportation plan detailing EUC requirements; and supporting documentation for its claims of sufficient financing through its shareholders to pay subcontractors and suppliers and meet debt obligations (gov't br. at 138, 141-42). Appellant counters that it adequately responded to the government's requests. With respect to financial capability, appellant argues that BTG's financial condition showed improvement after the pre-award survey; BTG had financing arrangements with major shareholders including Keehan Trust and GovFunding; and payment to ROE was not required until performance under Order No. 3 was completed (app. br. at 54, 57). With respect to its commitment to deliver, appellant contends that it communicated to the government its intention to deliver the machine guns under Order No. 3 in accordance with the original contract schedule, i.e., a designated period after receipt of the EUC, and it provided a 5 December 2013 commitment letter from ROE (*id.* at 57).

Under the circumstances, the government had reasonable concerns that appellant had not provided adequate assurances of future performance. First, regarding financing, a contractor is responsible for possessing sufficient financial resources to perform. *Truckla Services, Inc.*, ASBCA Nos. 57564, 57752, 17-1 BCA ¶ 36,638 at 178,447, *aff'd*, No. 2017-2080, slip op. (Fed. Cir. July 10, 2018). While appellant presented credible testimony at the hearing concerning its financing sources (*e.g.*, findings 108, 110), it did not present this specific evidence contemporaneously to the CO by sworn statements or documentation. Moreover, the SBA's denial to appellant of a COC, appellant's prior default, the substantial government claim for overpayments, and BTOS' sale of its assets were legitimate bases of concern.

Regardless of financing issues, however, there were enough other grounds for the government to be "justifiably insecure" about contract completion. *FFR-Bauelemente*, 07-2 BCA ¶ 33,627 at 166,557. As with financing issues, BTOS tended to respond to the government's inquires with generalities. A contractor that fails adequately to supply requested information or responds with largely unsubstantiated information runs the risk of facing a default termination for lack of reasonable assurances of due performance. *See RFI Shield-Rooms*, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 at 61,732 (when schedules requested and contractor responds with generalities and disclaimer of its ability to provide requested information, it risks that CO could reasonably conclude that lack of schedule meant contractor could not timely complete performance); *L&M Thomas Concrete Co.*, ASBCA Nos. 49198, 49615, 03-1 BCA ¶ 32,194 at 159,123 (contractor

failed to provide items requested in cure notice); *DODS, Inc.*, ASBCA Nos. 57746, 58252, 14-1 BCA ¶ 35,677 at 174,626 (vague and largely unsubstantiated response).

Appellant's response to the government's 19 November 2013 cure notice, that it "intend[s] to deliver the weapons in accordance with the original contract schedule, meaning x number of days after correct EUC" (finding 92) was inadequate. In order to complete its performance obligations, appellant was responsible for securing licensing and approvals once it received a completed EUC package from the government. Appellant's inability to forecast a schedule evidenced a lack of knowledge of the Russian Federation's export requirements and processes, which was confirmed by Mr. Gurba, who stated that appellant was "kind of in the dark as to how long it would take to get an export license" (finding 31).

Despite receiving a completed, correct, second EUC package from the government, appellant and its subcontractor ROE failed to deliver any items under Order No. 3 by either Mod. No. 6's unilaterally established delivery date of 20 September 2013 (finding 85) or thereafter and would not guarantee any delivery date (finding 74), a regular refrain (findings 52, 55, 57, 62). ROE's commitment letter, provided to the government on 5 December 2013, that specification-compliant items would be available for 90 days from the date of contract signing was inadequate. It did not state when the items would be delivered to Afghanistan; did not give payment terms or a delivery schedule; and did not include a contract. (Finding 93) Appellant's apparent unwillingness to provide a schedule demonstrated a lack of commitment. Additionally, appellant requested the processing of a third EUC package from the government to deliver alternative "DShKM" items to be supplied by ROE (finding 79). Finally, as detailed above, appellant repeatedly tied its performance to an increase in Order No. 3's fixed price (*see, e.g.*, findings 56-57, 71, 75, 86, 92), which evidences an anticipatory breach or repudiation. *Free & Ben*, 11-1 BCA ¶ 34,719 at 170,954.

The foregoing reasons justified a termination for cause for lack of adequate assurances pursuant to FAR 52.212-4(m). Because appellant's failure to provide adequate assurances of future performance was sufficient to sustain the termination, we need not address the government's alternative grounds to support the propriety of the termination raised in its post-hearing brief.

2. The Government did Not Waive its Right to Terminate for Default

The government can waive its right to terminate a contract for default. Waiver is an affirmative defense, which appellant bears the burden to prove. To prove waiver, appellant must show:

> (1) [F]ailure to terminate within a reasonable time after the default under circumstances indicating forbearance, and

> (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

DeVito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969); *see MIC/CCS, Joint Venture*, ASBCA No. 58242, 14-1 BCA ¶ 35,612 at 174,434-35. Concerning criterion (2), to constitute detrimental reliance, a contractor's activities after the contract's delivery date has passed must amount to productive performance or tangible progress on the contract. *DayDanyon Corp*., ASBCA No. 57681, 15-1 BCA ¶ 36,073 at 176,153.

Appellant contends that, because the CO did not terminate Order No. 3 for cause until over two months after the last set delivery due date, the government waived its right to terminate. Although the Army remained willing, prior to termination of Order No. 3, to extend its delivery schedule if appellant provided adequate assurances of performance, including a firm schedule, appellant did not do so. On 5 April 2013, the Army warned BTOS that it was considering a termination for cause. On 7 August 2013 the Army cited the contract's termination provisions and asked for assurance of future performance. (Findings 58, 76)

Beginning on 21 May 2013, the Army continuously included a disclaimer in its correspondence with BTOS that, in attempting to assist it and to mitigate damages, it was not condoning delinquency or waiving its contract rights (finding 67). Therefore, BTOS could not reasonably have relied upon the government's failure to terminate Order No. 3 sooner than it did. Moreover, BTOS made no productive performance or tangible progress after the last set delivery date had passed.

Thus, the government did not waive its right to terminate Order No. 3 for cause.

3. Appellant's Failure to Perform was Not Excusable

If the government substantiates its default termination, the burden shifts to the contractor to prove that its failure to perform was beyond its control and without its fault or negligence or that of its subcontractors or suppliers. *Shubhada Industries, Inc*., ASBCA No. 54016, 08-1 BCA ¶ 33,733 at 167,017. It must show that its nonperformance was excusable or due to the government's material breach, or that the CO's decision was arbitrary, capricious, or an abuse of discretion. *Pyrotechnic Specialties, Inc.*, ASBCA No. 57890 *et al*., 17-1 BCA ¶ 36,696 at 178,691. In determining whether a CO's decision is arbitrary, capricious or an abuse of discretion we consider: (1) whether there is evidence of subjective bad faith by the CO; (2) whether the CO had a reasonable, contract-related basis for the decision; (3) the amount of discretion given to the CO; or (4) whether there was a violation of a statute or regulation. *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 622,

630 (Ct. Cl. 1982); *Empire Energy Management Systems, Inc.*, ASBCA No. 46741, 03-1 BCA ¶ 32,079 at 158,553, *aff'd*, 362 F.3d 1343 (Fed. Cir. 2004).

Appellant contends that it was legally unable to perform Order No. 3 without an acceptable EUC package and the government's unreasonable delays in providing the first and second EUC packages amounted to a breach of its implied duty to cooperate. Appellant argues that, had the government provided acceptable EUC packages within a reasonable period of time, it would have completed delivery of weapons reserved for shipment. (App. br. at 60-61; app. reply at 1, 11-12)

With respect to the first EUC package, appellant asserts that it waited an unreasonable 126 days to receive the signed EUC package from the government; the government admitted it was liable for delays; and errors in the EUC documents could have been corrected sooner had appellant received the documents timely (app. br. at 62; app. reply at 12-13). With respect to the second EUC package, appellant contends that, by 30 January 2013, it had waited 28 days for a completed package from the government; it was reasonable for its subcontractor ROE to sell the reserved weapons to the Russian military due to the lack of an acceptable EUC package; and, similarly to the first EUC package, the government acknowledged the delays (app. reply at 13; app. br. at 61-62). Appellant alleges that the failure to identify both the "DShK" and "DShKM" weapon types in the EUC documents were not negligent acts by ROE because the government's delays were unforeseeable and "DShK" weapons were available when it submitted the draft second EUC package to the government (app. reply at 13-14).

The government counters that personnel staffing issues and government-wide sequestration contributed to the delays in processing the EUC packages. It asserts that, even with these delays, the Russian Federation rejected the first EUC package due to erroneous documents provided by appellant and miscommunication by appellant and its subcontractors to properly register BTOS in Russia (finding 64). The government maintains that it provided appellant with an acceptable second EUC package, and appellant's inability to deliver was caused by ROE's actions and inaction, including the failure to stipulate both weapon types in the EUC documents and providing documents that incorrectly contained references to "DShKM" although it intended to furnish "DShK" weapons. (Gov't reply at 20-24)

Appellant's obligation to deliver under Order No. 3 was conditioned upon its receipt of a signed EUC package from the government (findings 16, 43, 68). Appellant appears to contend that its failure to deliver was excused by the government's material breach of its implied obligation to reasonably cooperate in providing an acceptable EUC package in a timely manner. "The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir.

2005). The failure to fulfill this duty is tantamount to a breach of contract. *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988). The duty to cooperate is part of a contracting party's implied duty of good faith and fair dealing. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). It imposes an affirmative obligation on a contracting party "to do what is reasonably necessary" to enable the other party's performance. *American Ordnance LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,791. Determination of a breach of the duty involves a reasonableness inquiry in which we examine the nature and scope of the government's obligation to cooperate "from the particular contract, its context, and its surrounding circumstances." *Id.* at 169,791-92 (quoting *Commerce Int'l Co. v. United States*, 338 F.2d 81, 86 (Ct. Cl. 1964)). Appellant cannot prevail just by proving it suffered a delay; it must prove that the delay in its receipt of the signed EUC documents was tied to the government's breach of its obligation to reasonably cooperate. *Commerce Int'l*, 338 F.2d at 86.

The government provided two EUC packages to appellant prior to the termination. There is no dispute that the government failed to timely provide a completed first EUC package to appellant in accordance with the parties' bilateral Mod. No. 4. However, appellant has not proven how this delay negatively affected its ability to perform or that it was due to wrongful actions or conduct by the government "to do what is reasonably necessary" to enable appellant's performance. *See Commerce Int'l*, 338 F.2d at 87 (contractor failed to prove that delays actually hobbled performance); *cf. Seven Sciences, Inc.*, ASBCA No. 21079, 77-2 BCA ¶ 12,730 at 61,877 (whether contractor had a legal right of avoidance depended on the nature of and the impact of the government's breach upon the contractor's ability to perform). The root cause for appellant's nonperformance after its receipt of the executed first EUC package was due to deficiencies and errors in the EUC documents that were unacceptable to the Russian Federation and were attributable to both parties (findings 38, 50, 64, 66). Appellant's argument that it could have corrected the deficiencies and fully performed had it received the package promptly is speculation, particularly in view of ROE's demonstrated dependence upon the MoD's or Russian Federation's requirements at any given time (*see* findings 23, 55, 66, 69, 71, 74, 77, 79, 87).

The government provided an executed second EUC package to appellant on 23 May 2013 as part of unilateral Mod. 6 (finding 68). The government had received the draft package from appellant on 2 January 2013 (finding 51). Appellant alleges that this length of time was unreasonable and unforeseeable. Unlike with the first EUC package, the parties were not operating under an agreed schedule. The government had an obligation to provide the second package within a reasonable period of time. What is reasonable is determined by "the reasonable expectations of the parties in the special circumstances in which they contracted." *Commerce Int'l*, 338 F.2d at 87; *see also Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000). Appellant maintains that weapons were available for delivery until

30 January 2013 when it notified the government that ROE could no longer guarantee their availability (finding 52). However, this was only 28 days after the government had received appellant's draft package on 2 January 2013. Appellant could not reasonably have anticipated that the government could process the second EUC package during this short period of time. The record demonstrates that obtaining signatures from cognizant officials for both the U.S. and Afghan EUCs involved a complex and time consuming process, involving coordination with multiple parties and entities outside of the control of the contracting office (*see* findings 32, 36-37, 39, 51). Appellant has not shown that the government could have accomplished execution of the second EUC package within 28 days or earlier.

Additionally, even with the government's acknowledgement in February 2013 that processing the second EUC package was taking longer than anticipated (finding 54), appellant has not demonstrated that this delay impacted its ability to perform. A day after appellant's receipt of the executed package from the government on 23 May 2013, ROE confirmed to appellant that the weapons were available (finding 69). Appellant had communicated to the government in March 2013 that ROE could reprocure weapons sold to and acquired by the Russian military and would need 120 days to be ready for inspection upon receipt of a fully executed and approved EUC package, although appellant would not guarantee a schedule. (Findings 56-57)

Lastly, we address appellant's contention that the second EUC package was unacceptable. The evidence is to the contrary. Appellant confirmed to the government when it submitted the draft package that ROE had verified that it was acceptable (finding 51). After receipt of the executed second EUC package, ROE further confirmed in July 2013 that the documents were satisfactory (finding 74).

Appellant could not deliver any items under Order No. 3 because ROE failed to reprocure previously available weapons from the Russian military and was prohibited, according to ROE, under Russian laws from delivering alternative "DShKM" weapons without a new EUC package (finding 79). A subcontractor's unexcused actions and performance failures are attributed to the prime contractor. *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1365 (Fed. Cir. 2008), *reh'g denied and opinion supplemented*, 527 F.3d 1375 (Fed. Cir. 2008). The government fulfilled its obligations when it provided appellant with an executed second EUC package. ROE acknowledged that it should have provided for both DShK and DShKM weapons in its draft EUCs (finding 87). Appellant made a business decision to change suppliers from Romtehnica to ROE and cannot now escape the consequences of its subcontractor's unexcused failures.

The evidence is that, far from breaching its duty to cooperate, and as appellant has recognized, the government worked with appellant to attempt to secure delivery of the weapons at issue under Order No. 3 (*see, e.g.*, findings 50-51). The fact that the

government did not agree to meet with appellant does not rise to the level of a contractual breach of the duty to cooperate. There is no evidence that the lack of a meeting affected appellant's contract performance and no evidence of bad faith on the part of the government. (Finding 60)

For the foregoing reasons, appellant's nonperformance was not excusable and the government did not commit a material breach prior to terminating Order No. 3 for cause.

4. The CO's Termination Decision was Not Arbitrary, Capricious, or an Abuse of Discretion

A CO's decision to terminate a contract for default will be set aside if the decision was arbitrary, capricious, or constitutes an abuse of discretion. *Darwin Constr. Co. v. United States*, 811 F.2d 593, 598 (Fed. Cir. 1987). The record lacks any evidence of bad faith or violation of a statute or regulation or arbitrary action by the COs. The termination decision was clearly related to appellant's failure to perform under Order No. 3. Therefore, the termination was not arbitrary, capricious, or an abuse of discretion.

DECISION

The appeal is denied.

Dated: August 30, 2018

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

OWEN C. WILSON
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. 59089, Appeal of Bulova Technologies Ordnance Systems LLC, rendered in conformance with the Board's Charter.

Dated:

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