TRINITY INSTALLERS, INC.,	)	**AGBCA No. 2004-139-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
David R. Talbot, President	)	
Trinity Installers, Inc.	)	
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Silverton, Oregon 97381	)	
	)	
Representing the Government:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

February 8, 2005

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate opinion by Administrative Judge VERGILIO, dissenting.

This timely appeal arises out of Contract No. 50-05K3-3-018, between the U. S. Department of Agriculture, U.S. Forest Service, Gifford Pinchot National Forest (FS or the Government), and Trinity Installers, Inc., of Silverton, Oregon (Appellant or Trinity). The contract, awarded July 28, 2003, required Appellant to remove an existing roof and furnish and install a replacement metal roof on the Mt. Adams Machine Shop. In a decision dated November 7, 2003, the Contracting Officer (CO) terminated Appellant's right to proceed with contract work for cause, and this appeal ensued. The parties elected to present the appeal on the record, pursuant to Board Rule 11. The record consists of the Appeal File (AF), Supplemental Appeal File (SAF), pleadings and briefs. Neither party presented affidavit testimony or additional evidence of any kind with their briefs.

The Board's jurisdiction to decide the appeal derives from the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1 On June 17, 2003, the FS issued solicitation No. R6-GIP-3-027 for the removal of existing metal roofing and associated appurtenances and the furnishing and installation of new pre-formed metal roofing to include panels, ridge cap and flashing/trim. The solicitation incorporated by reference FAR 52.212-1, "Instructions to Offerors - Commercial Items"; FAR 52.212-4, "Contract Terms and Conditions - Commercial Items"; FAR 52.212-3, "Offeror Representations and Certifications - Commercial Items"; and FAR 52.212-5, "Contract Terms and Conditions Required to Implement Statute or Executive Orders - Commercial Items" (AF 125). Appellant bid a lump sum of $49,779 and was awarded the project (SAF 2).

2. FAR 52.212-5(m), Termination for Cause, incorporated by reference, provides:

> 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 or 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.

3. The solicitation contained 11 drawing sheets, and specification sections 01150, Measurement & Payment; 01300, Submittals; 01630, Product Options & Substitutions; 06100, Rough Carpentry; 07110, Waterproofing; 07412, Preformed Metal Roof Panels; and, 07900, Sealants. (SAF 5-44). Appellant alleges that at award the FS added specifications which had not been included in the solicitation. The Government states that upon award the FS provided Appellant with additional guidelines to facilitate the work. Neither party specifically identified the documents or pages alleged to be additional.

4. Drawing sheet 10 of 11 provides a photographic detail of desired dormer valleys, of which there were four (4). Descriptive text reads: "Example valley located on adjacent Fire Office. 26 Gauge Min. Thickness. Baked-on, paint finish to match roofing panels. Minimize the number of pieces used to make valley; one-piece valley is desired." Specification section 3.02 Installation, C., Flashing & Trim, reads as follows:

1. Provide Flashing for:
   - a. Main Ridge
   - b. Dormer Ridge Caps
   - c. Valleys
   - d. Gable & Eave Edge Trim
   - e. Vent Pipes
   - f. Chimney Crickets & Jacks

2. Shop fabricate items where possible
3. Accurately reproduce profiles
4. Valley flashing to be custom fabricated from 4 foot by 10 foot metal sheets, and installed so exit at bottom of valley is wider than. [sic] See example on other building at site.
5. Cut groove into chimney and embed new custom counter flashings into sealant as approved by manufacturer.

5. The contract provided for a performance period of thirty (30) days from receipt of Notice to Proceed (NTP) (AF 183). The record contains no copy of the NTP. An internal FS e-mail dated September 10, 2003, states that the NTP had been issued effective September 15, 2003 (AF 286). The earliest contract daily diary in the record is dated September 16, 2003, and recites a contract completion date of October 15, 2003 (AF 224).

6. During contract performance, the FS sent several notices of non-compliance to Appellant. On October 4, 2003, Appellant was advised that valley flashing, as constructed, did not conform to plan sheet #10 (AF 222). Notice of non-compliance No. 3, dated October 9, 2003, advised that flashing on both east dormers did not extend to the edge eave trim in both directions; a new panel cut line was "wavey"; workers had walked through the east dormer valley; building contents were not being satisfactorily protected from rain; and security fencing was not maintained on a few occasions. More attention to these items was needed. (AF 220.) By notice dated October 15, 2003, the FS advised that heavy rains had entered the lunch room through the north chimney's unfinished chimney jack and soaked the carpet and several boxes of copy machine paper. Ceilings were stained. The combined bathroom vent, installed October 11, had not been sealed. (AF 219.) The next day, October 16, 2003, the FS directed that unspecified action be taken in regard to water damage in several listed areas. The order stated that although the contractor covered exposed roof with plastic, water was still running into several areas. (AF 218.) On October 17, 2003, the FS issued a notice of non-compliance advising that work on the east dormer - west valley and the west dormer - east valley did not conform to contract requirements and might result in rejection (AF 216).

7. Two notices of non-compliance were issued on October 21, 2003. Notice No. 7 (dated October 21, 2003) again advised that work was not in conformity with contract requirements and might result in rejection. The notice stated that "given recent work efforts, this work order reflects current valley construction issues." It went on to list specific deficiencies with both east and west valleys on the east dormer and both east and west valleys on the west dormer. The East Dormer - East Valley was noted as being deficient as follows: (1) roof panel cut lines are not straight; (2) bottom valley flashing does not extend to the edge of the eave trim; and, (3) gable trim shall not protrude into valley, where it will prevent snow slide. Noted deficiencies on the East Dormer - West Valley were (1) roof panels are not cut off evenly at the hi-lok seams; (2) the lower flashing does not extend to the edge of the eave trim on both sides; (3) the lower flashing, on both sides, was returned downward beyond the eave trim and screwed to an added piece of custom fabricated trim. We believe the flashing should have either terminated at the edge of the eave trim or if returned, done so back to the building's wood facia, without the addition of the added tube-shaped structural member; (4) gable trim shall not protrude into valley where it will prevent snow slide. The West Dormer -

East Valley was shown with the following deficiencies: (1) roof panel lines are not cut straight; (2) bottom valley flashing does not extend to the ridges of the eave trim; (3) gable trim protrudes into valley, which will prevent snow slide. (AF 215.) Listed deficiencies for the West Dormer - West Valley were: (1) roof panel lines not cut straight; (2) bottom valley flashing does not extend to the edge of the eave trim; (3) gable trim protrudes into valley, which will prevent snow slide. (AF 215.)

8. The final notice, No. 8 (dated October 21), also advised of non-conforming work which could be rejected and outlined on-going issues with "existing/potential water damage and work schedule." The first set of three items indicated that measures had not been taken to prevent water running in around the chimney jacks and ridge cap. A lunch room carpet stain was getting larger and while the upstairs smoking room carpet had been wet vacuumed, no other measures had been taken to dry underlayment. Regarding the work schedule, the notice pointed out that although Appellant had advised it would be complete by October 22, no official daily schedule had been received. The FS estimated the work to be 80% complete, exclusive of valley and water damage repair work. While Appellant had assured the FS that they would be on site as of October 16, no one was on site when the FS inspected at 1:00 p.m. on October 16; the contractor worked on Friday and Saturday, October 17 and 18; and no work was performed on Sunday and Monday, October 19 and 20. (AF 214.)

9. Meanwhile, throughout performance, the FS was preparing contract daily diaries. The record contains such diaries for the period from September 16 through November 3, 2003. These were prepared by FS project engineer, Greg Neely. Block 20 of each diary provides an indication of whether or not the work was deemed acceptable. In each case, the preparer indicated that the work was acceptable. The diary for October 14, 2003, showed the completion date to be the next day, October 15. Nonetheless, it also indicated that 102% of the contract time had been used and that the work was 70% complete. (AF 262.) On October 20, the work was shown as 80% complete and the time used as 120% (AF 268).

10. The following day, October 21, 2003, the CO issued a cure notice. The CO informed Appellant that the Government considered its failure to complete the contract within contract time or to make necessary arrangements to protect Government property from rain damage as a result of uncompleted work to be a condition endangering performance of the contract. Unless the condition was cured within 10 days of receipt of the notice, the Government might terminate for cause and Appellant would be liable for any excess reprocurement costs and damages to the Government caused to the Government by Appellant's failure to complete the work in a timely manner. The copy in the AF does not indicate how the cure notice was transmitted to Appellant or when it was received by Appellant. The cure notice did not establish a new completion date. (AF 1.) In an e-mail dated October 28, 2003, the project engineer estimated that all work could be completed within the 3 days between that date and October 31. He estimated that come October 31, the amount of remaining work would be such a small amount that it would probably be in the interest of the Government to "stay the course." (AF 308.)

11. The October 30, 2003 daily diary, showing work completed at 90%, also contains a notation indicating that if an invoice were received that day, the project engineer would recommend retaining

$9,500 for contract work and $3,800 for estimated water damage. The $9,500 estimated recommended retainage for contract work was for work associated with three valleys; 2 crickets; 2 chimney jacks and trim; cleanup and disposal. The $3,800 for water damage was for carpet damage ($800) and content damage ($3,000). The block indicating work was acceptable was checked. (AF 276-77.)

12. The contractor continued to work and on November 3, 2004, the work was shown as 92% complete and acceptable although the narrative report stated that only one of the valleys was acceptable and that the chimney crickets and jacks which had been installed the previous Friday had poor workmanship and color mismatch. The diary for that date contains a notation that if an invoice were received that day the project engineer would recommend holding back $7,100 for contract work (including $500 for clean-up) and an estimated $1,300 to $4,300 for water damage. The range was explained by an estimate of $3,000 for replacement of lunch room carpet, if needed. (AF 278.) There is no evidence the contractor was provided a description of necessary corrective work. The Contractor was not informed of the date and time of, or asked to attend, the final inspection.

13. By a decision dated November 7, 2003, the CO terminated Appellant's right to proceed with work under the contract for cause. She referenced the October 21, 2003 cure notice, stating it had outlined the reasons the Government was then considering terminating the contractor's right to proceed under the contract for cause. She reported that Appellant had called on November 3 to say the work was complete. Appellant had also provided a plan to correct the water damage (AF 210-11).[1] She reported that she had toured the project for the purpose of final inspection on November 6, 2003. Her decision reported that she found unprofessional work, a work site in disarray and water damage. She concluded that the work failed to pass contract inspection, did not meet specifications and did "not meet the intent to have a professionally installed weather tight metal roof on the building." No further details were enumerated. She terminated Appellant's right to proceed with work under the contract for cause and expressed the Government's intent to reprocure "the remaining contract work" including correcting water damage and general cleanup from another contractor. (AF 2, 3.)

14. Appellant submitted a request for payment in the amount of $27,378 on September 19, 2003. This invoice was approved for payment September 26, 2003. (AF 316.) The record does not contain a copy of a second pay request. As of October 20, 2003, the project engineer said that he had not seen a pay request (AF 300). However, a November 4, 2003 e-mail message from the

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[1]Appellant's plan to correct water damage included professional carpet cleaning scheduled for November 7, 2003. The record does not indicate whether this had taken place prior to the decision to terminate dated the same day. (AF 210-11.)

project engineer to the CO made reference to holding "Trinity's payment request until after the final inspection." The message also estimated the costs of completion of the work as $7,100 for contract work and $1,300 to $4,300 for water damage. The range for the water damage work was explained by the assertion that $3,000 would not be incurred if Appellant were successful in removing a stain from the lunch room carpet. (AF 310.) At that time the unpaid contract balance was $22,401.

15. The record contains no evidence that the Government has reprocured contract work. In a letter to the Board dated June 29, 2004, Government counsel stated that "the budget process has hindered the reconstruction of the roof." The Government's brief originally stated that the building "has not been and cannot be occupied until the job is redone, probably by removing the roof constructed by Appellant and installing a new one." The record, however, contains no evidence of any evaluation of work completed; the extent to which it was or was not acceptable; work necessary to correct the defective work nor an estimate of the cost of corrective work. A subsequent letter to the Board dated November 9, 2004, states that the building is in use as a machine shop and storage facility.

DISCUSSION

Termination for default is a drastic sanction that should be imposed upon a contractor for good cause in the presence of solid evidence. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987), quoting J. D. Hedrin Construction Co. v. United States, 408 F. 2d 424, 431 (Ct. Cl. 1969). The Government has the burden to prove the termination for default was justified. Id. The CO also has the responsibility to take steps to ensure the propriety of a proposed termination action. FAR 49-402-3. It is not necessary that the CO mechanically record consideration of every factor. The CO must, however, demonstrate an active and reasoned consideration of available and sometimes contradictory information. Various factors must be evaluated and the totality of circumstances must be weighed by the CO in arriving at a decision which has serious consequences for a contractor. Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, 94-1 BCA ¶ 26,405.

In soliciting this work, the CO employed a contract for commercial items. The scope of work, however, included work of a construction nature, and a construction wage decision was made a part of the contract. Despite the terms of the contract drafted by the Government, the contract was administered as a construction contract. Throughout performance of the contract, the FS recorded the progress of the project on contract daily diary forms.

Without exception, the daily reports indicate that the work performed was acceptable. In addition, the same documents provide a record of the project engineer's assessment of the percent of work under the contract deemed to be complete. At the time of termination, the work was shown as being 92% complete. (Finding of Fact (FF) 12.) We recognize that during the same period, the FS issued notices of non-compliance (FF 6-8). Of particular note were those detailing deficient work on dormer valleys and water damage. A notice of non-compliance issued October 21, 2003, enumerated defects on all four dormer valleys (FF 7). By November 3, the project engineer considered one valley compliant (FF 12.) The contract requirements for construction of valleys do

not, however, provide a great deal of detail (FF 4). They are to some extent open-ended using such terms as "are desired"; "if possible" and "see other building." It is also difficult to determine whether and how many of the defects on the report of non-compliance No. 7 are aesthetic ("wavy" and "not straight"), as opposed to functional ("will prevent snow slide"). (FF 7.)

The cure notice, dated October 21, 2003, warned the contractor that it was in danger of termination because of its failure to complete the contract on time and failure to protect the project from water damage (FF 10). The termination decision referenced the cure notice and stated that the CO's inspection of the project had revealed unprofessional work; a work site in disarray; water damage; and the work that failed to pass inspection did not meet specifications and did not meet the intent of a professionally installed weather tight metal roof (FF 13). While the cure notice cited failure to complete in a timely manner as a condition which might cause termination of the contractor's right to proceed, the CO did not cite that as a reason for the termination. The CO also did not specifically enumerate the particulars in which the work performed failed to meet specifications. The record indicates that Appellant's work was mediocre at best, but it does not sufficiently provide a comparison of the work performed to contract requirements, for us to conclude that the contractor failed to comply with any particular terms or conditions, as set out in the Termination for Cause clause of the contract. Moreover, the claim of defective work relied upon by the Government was the result of an inspection to which the contractor was not invited. In an internal e-mail, dated October 28, 7 days after the cure notice was issued, the project engineer described the work as able to be corrected within 3 days. (FF 10.) According to the daily diaries, an additional 2% of project work was completed between the e-mail and the date of termination bringing the project from 90% to 92% complete (FF 12). While the record clearly identifies work that would need correction, the record raises questions concerning the materiality of defects outstanding at the date of termination and to what extent they were cosmetic and not clearly covered by the contract (FF 4, 7). Finally, the Government submitted no affidavit or other evidence clearly explaining the basis for the CO's decision to employ the drastic sanction of termination for cause.

Appellant argues that because the daily diary for November 3, 2003, called the work 92% complete and acceptable, it should be paid 92% of the total contract price and at best should forfeit the remaining 8%. The pro se Appellant does not use the term "substantial completion" but his argument raises the issue whether the project was substantially complete at the time of termination. We choose not to ignore the issue. The substantial completion doctrine has at times been successfully invoked to avoid the consequences of termination by contractors who have undertaken considerable efforts but have failed to complete all of the specified work by the due date. It does not, however, eliminate the Government's right to terminate a contractor's right to proceed when a contractor has not performed its contact. The better rationale for invoking the "substantial completion" in construction contracts is to avoid a forfeiture where a contractor has made permanent improvement to Government property. See generally John Cibinic, Jr. and Ralph C. Nash, Jr., Administration of Government Contracts, at 919-20 (3rd Ed. 1995). The test of whether the doctrine of substantial completion should be invoked to invalidate a termination for cause is whether the deficiencies in a contractor's performance constitute only minor departures from what had been contractually promised. See Franklin E. Penny Co. v. United States, 207 Ct.Cl. 842, 524 F.2d 668

(1975).

Here, the work performed required some correction. Notwithstanding the deficiencies, however, the new roof had been installed; it was functional and could be, and is being, used for its intended purposes (FF 15). The Government continues to hold almost 45% of the contract price while (1) having assessed the work at 92% complete during performance; (2) having indicated that defects could have been corrected in a short period of time; (3) having presented no detailed estimate of the value of work in place or of necessary corrective work; (4) having made no attempts to reprocure the terminated work; and (5) using the building as a machine shop and storage facility. The sparse record and the failure of the Government to reprocure the defaulted work leave open the likelihood of forfeiture. The fact that the Government is using the building as modified under the project for its intended purpose leads to the conclusion that it is substantially complete and that the termination for default has likely caused a forfeiture of the value of work performed by Appellant.

The dissent finds Appellant's performance untimely and inadequate and the termination for default, therefore, justified. That conclusion is at odds with our view of the law, including the burden of proof, and with the factual record. In its cure notice, the FS cited Appellant's failure to complete performance within the contractual period, stating that if the condition were not cured within 10 days, Appellant might be terminated for cause, making Appellant liable for any excess reprocurement costs. The cure notice did not set a new completion date and when the 10-day cure period had elapsed, the FS did not immediately terminate Appellant's right to proceed, but allowed Appellant to continue to work.

When the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice. A fact situation of this type has been popularly, if inaccurately, described as a "waiver" of the Government's right to terminate a contract for default. DeVito v. United States, 413 F.2d 1147 (1969). The purpose of the "waiver doctrine" is to protect contractors who are led to believe that time is no longer of the essence and undertake substantial efforts after the performance date specified in the contract has passed. State of Fla., Dept. of Ins. v. United States, 81 F.3d 1093 (2004); Olson Plumbing & Heating Co. v. United States, 221 Ct.Cl. 197, 602 F.2d 950 (1979). Here, notwithstanding the fact that the cure notice cited untimely performance, the FS did not base its decision to terminate on failure to complete within the contract period, perhaps recognizing that it had not established a new completion date nor terminated promptly after the 10-day cure period had elapsed. Instead, the FS terminated the contractor's right to proceed because it concluded that the work was unprofessional and the work site untidy.

We acknowledge the well settled principle that a termination for default may be sustained on grounds other than those cited by the CO in the termination notice even it they were not known to the CO at the time of termination. Empire Energy Management Systems, Inc. v. Roche, 362 F.3d 1356, (Fed. Cir. 2004), and cases cited therein. Here, however, we find the "timely completion" ground relied on by the dissent invalid because of the "waiver" and forfeiture situation discussed

above. We must therefore return to the reasons cited by the CO - unprofessional work and an untidy work site. Clearly, the work performed under this contract was far less than ideal. However, the FS's own records are contradictory on the question of whether the work crossed the line between minimally acceptable and unacceptable. We cannot ignore the facts that the only estimates of the value of the work remaining are far less than the funds withheld and that the FS has found the facility usable as constructed by Appellant and without reprocuring to correct deficiencies or to complete the work. We also cannot ignore the fact that the FS chose not to provide written or oral testimony to supplement the record. This is a close case. It is close on the "waiver" question because of the relatively short amount of time the contractor was allowed to work after the end of the cure period. It is close on the question whether work was non-conforming, or merely mediocre. Were the facility not capable of being used or had the FS found it necessary to correct Appellant's work, we may well have decided this appeal differently. The Government had the burden to tip the balance of the evidentiary scales. It failed to do so.

DECISION

The Government has the burden to prove the propriety of the termination. The Government has failed to meet that burden. The termination for cause is overturned and converted to a termination for the convenience of the Government. The CO is to contact Appellant to request a termination for convenience settlement proposal.[2]

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[2]The parties are encouraged to effect a settlement by negotiation. See FAR 49-103. The general burden of proof on a termination for convenience settlement is the contractor's. For guidance regarding treatment of defective work, see Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); The Swanson Group, Inc., ASBCA No. 52109, 02-1 BCA ¶ 31,836; D.E.W., Inc., ASBCA Nos. 50796, 51190, 00-2 BCA ¶ 31,104 at 153634, modified on recon., 01-1 BCA ¶ 31,150; Goetz Demolition Co., ASBCA No. 39129, 90-3 BCA ¶ 23,241, motion for recon. denied, 91-1 BCA ¶ 23,937; Ayden Corp., EBCA No. 355-5-86, 89-3 BCA ¶ 22,044; Air Cool, Inc., ASBCA No. 32838, 88-1 BCA ¶ 20,399; New York Shipbuilding Co., ASBCA No. 15443, 73-1 BCA ¶ 9852. These decisions differ on whether the Government is allowed to recover for defective work under a termination for convenience settlement but make clear that if it may so

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge
Administrative Judge VERGILIO, dissenting.

I write in dissent because I conclude that the termination for default is well-supported by the existing record. The contractor did not complete performance within the contract or cure period; the actually accomplished work was flawed in various respects, inconsistent with the commercial products and services purchased. The record does not support a conclusion that a basis exists to excuse the performance. Whether one considers that the Government contends that it would be required to expend approximately $8,000 to $11,000 to obtain a completed project (approximately 15% of the contract price would be needed to complete contract work, and $1,300 to $4,300 to repair damage caused by the contractor's performance), or the contractor's statement that it was complete with the project, yet billed for 85% of the work, the amount remaining is not insignificant when compared to a $50,000 contract price. The majority's opinion compels the Government to accept inadequate, late performance at variance with the terms and conditions of the contract, while obligating the Government to be liable for termination for convenience costs. Such a result does a disservice to Government contracts-- not only the Government (which clearly did not obtain what it bargained for), but also those contractors who can and do perform satisfactorily, but may not be awarded a contract when a lower-priced contractor gets the award and performs as did this contractor.

As of the contract completion date in mid-October, the contractor had not completed performance. The Government issued a cure notice, thereby explicitly preserving its right to terminate for default, as it sought to ensure project completion no later than early November. By letter dated November 3, the contractor informed the Government that the project was complete, but for inspection and potential punch list items, and various matters of clean-up from rain damage. The contractor submitted an invoice seeking 85% of the contract price. The project was not complete or acceptable. The Government issued a termination for default. The Government has satisfied the initial burden of proof by demonstrating that the termination for default was justified; that is, there existed cause

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recover, the Government has the burden to prove the value of defective work.

for the default. Namely, the contract completion date (as well as the date established by the cure notice) arrived and the contract remained incomplete and certain completed work was not acceptable under the terms and conditions of the contract. The contractor has not satisfied its burden to avoid the default; the record does not demonstrate that a basis exists to excuse the default.

Accordingly, I deny the appeal, finding that the termination for default is fully justified on the existing record, that does not substantiate an excusable basis for the failure to perform.

Untimely and inadequate performance

The factual record contains the contemporaneous daily diaries of a contracting officer's representative. By an "x" in the initial block, the daily diaries each indicate that "acceptable" work was performed:

: Acceptable 9 Unacceptable - *Explain in narrative*

(Appeal File (AF) at 224-78). As detailed below, the explanations or narrative reports found in the diaries indicate various troubles; photographs document many of the noted areas of inadequate performance. There is no indication that these diaries were passed on to the contractor for reliance on the "acceptable" performance checkmark; to the contrary, the documents are in the appeal file under a section captioned "internal correspondence." The reviews are expressly for the benefit of the Government, and do not alter the obligations of the contractor (AF at 193 (¶ E.3)). The record does not demonstrate that the contracting officer deemed performance to be acceptable. Further, beginning with October 1, 2003, the notation in every diary until the termination (with the exception of one, which has no box checked) indicates that the work is not on schedule. The contractor's actions revealed an inability to accomplish performance within the initially prescribed performance period.

The simple "x" should not be read in isolation, without regard to the narrative. The narrative reports detail inadequate and unacceptable performance (AF at 248-49 ("the roof is stripped and not protected in case of rain" (Oct. 1, 2003)), 257 ("I also told [the contractor's on-site representative] the exposed roof must be covered and that it is insufficient to cover just the contents" (Oct. 8, 2003)), 259 ("I received a fax from [the contractor] acknowledging receipt of WO #3, which advised on several non compliance areas. [The contractor] said they would address the deficiencies, however protection from the rain and downed security fence were observed today." Also, "I will issue another Noncompliance order in regards to the unfinished chimney & bathroom vent pipe flashings and the security fencing." (Oct. 10, 2003)), 264 ("I discussed the status of the contract with [the contracting officer] in regards to: . . . "Water damage resulting from the [contractor's] negligence and contractor liability, . . . The contractor's lack of adherence to their contract schedule, . . . Noncompliance in valley construction, . . . [and] Given Trinity's failure to meet some specs, it may become nec[essary] to have another party finish the work." (Oct. 16, 2003)), 277 ("Non-compliance associated with three of the valleys has not yet been corrected. . . . The chimney jacks

have not yet been completed either, along with small amount of [eave]/gable trim." (Oct. 30, 2003)). Keeping in mind that the contractor viewed the project as complete as of this date (AF at 210), for November 3, 2003, the narrative report states:

> Only one of the four valleys is acceptable.
>
> The chimney crickets & jacks were installed Friday. They are [sic] have poor workmanship & color mismatch.
>
> Tentative Punchlist (To be reviewed by . . .):
>
> 1) Chimney jacks were pieced & screwed together versus being professionally manufactured.
> 2) Valley flashing color does not match the roof panel color, at both crickets.
> 3) East Dormer -- East Valley
> a. Bottom flashing is not flush with [eave] trim,
> b. Bottom flashing does not lay flat against the underlying sheathing,
> c. Roof panels have not been cut in a straight line,
> d. [Eave] & Gable trim have not been completed, and
> e. Valley flashing does not lay flat.
> 4) East Dormer -- West Valley
> a. Bottom flashing has a split in the valley invert,
> b. Roof panels have not been cut in a straight line,
> c. Gable trim protrudes into the valley limits and will obstruct snow-slide, and
> d. Valley flashing does not lay flat.
> 5) West Dormer -- East Valley
> a. Bottom flashing has a split in the valley invert,
> b. Roof panels have not been cut in a straight line,
> c. Valley flashing does not lay flat.
> 6) West Dormer
> a. Valley flashing does not lay flat.
> 7) Project cleanup
> a. Remove & dispose of all debris
> b. Rake & remove all metal trimmings & fasteners embedded in the soil surrounding the building.
> 8) Water Damage: . . . .

(AF at 278-79.) The entry concludes with the statement that if an invoice were received today, the contracting officer's representative would recommend holding back $7,100 for itemized contract work and $1,300 to $4,300 for itemized estimated water damages (AF at 279).

The Government expressed its views of unacceptable performance to the contractor throughout the

contract period. On October 4, 2003, the Government issued a work order indicating non-compliance, and on October 9, 15, 16, and 17, 2003, it issued notices of non-compliance (AF at 216-22). The Government issued a cure notice on October 21, 2003 (AF at 107). Also on October 21, the Government issued two notices of noncompliance, each identifying specific work being performed that does not comply with the contract requirements and may result in rejection (AF at 214-15).

The cure notice, dated October 21, 2003, states:

> You are notified that the Government considers your failure to complete the contract within contract time or to make necessary arrangements to protect Government property from rain damage as a result of your uncompleted work a condition that is endangering performance of the contract. Therefore, unless this condition is cured with[in] 10 days after receipt of this notice, that is to say, unless the contract work is completed and acceptable, within 10 days of receipt of this notice, the Government may terminate for cause and you will be liable for any excess reprocurement costs, as well as damages caused to the Government by your failure to complete the work in a timely manner.
> You had 30 days to complete this contract, we allowed you extra time by not issuing the Notice to Proceed before your submittals. You should have started work at the beginning of business on 9/15. Work should have been completed by 10/15. You have repeatedly failed to show up on the job site when you promised to be there, you have left work undone or improperly done, thereby leaving Government property exposed to the elements. I am out of patience with your delays and excuses and will consider your failure to act immediately reason to terminate your right to proceed with the contract work.

(AF at 1.)

By letter dated November 3, 2003, the contractor informed the Government that it has "completed the Roofing Job Subject to INSPECTION and possible PUNCH LIST ITEMS." An "attached invoice REFLECTS 85% complete the Balance of $3360.00 will be held by the USDA until all work has been completed and accepted by the customer including repairs." (AF at 210-11) (the stated attachments are not with the document in the record; it is not apparent how the contractor arrived at the 85% complete figure).

By e-mail dated November 4, 2003, the contracting officer's representative informed the contracting officer of cost estimates, "what we would expect to pay another contractor to complete the unfinished work[.]" The contract work is itemized and priced at $7,100; the estimated cost to correct water damage is itemized and priced at $1,300 to $4,300, with the notation, "The $3,000 cost will not be incurred i[f] Trinity is successful in removing the stain from the lunch room carpet." (AF at 310.) The contracting officer's representative provided other input to the contracting officer, who inquired before issuing the notice of termination. The e-mail input discusses the unprofessional workmanship of the contractor, notes that most of the noncompliance is related to flashing, states

that the contractor has "reworked the valleys several times and [is] unable to do the simplest of correction, like cutting a straight line"; and expresses the concern "that countless on site discussions, 7 written noncompliance orders and a Cure Notice did not previously motivate" the contractor. (AF at 314.)

In a letter dated November 7, 2003, a Friday, to the contracting officer, the contractor states:

> This will confirm our phone conversation on Thursday afternoon. regarding the work at Mt. Adams. You were very unhappy justifiably so!. You stated that you would call me in the morning to let me know. I still feel very strongly that we can complete the work to your satisfaction. I feel that I should at least have the opportunity to review the Punch List and Photo's and address them. It has been my experience that the final walk through that the contractor would have the opportunity to be present and involved.
>
> Furthermore, it was my understanding that one always had the opportunity to correct the ITEMS on the Final Punch List.
>
> Please give us one final chance to correct this PROBLEM! We can fix it.

(AF at 113). The contractor's recognition that the contracting officer is justifiably very unhappy and that work is still incomplete with a problem to be corrected persuasively supports the view of the Government that the contract remained incomplete with unacceptable work remaining to be corrected.

By letter dated November 7, 2003, the contracting officer terminated the contractor's right to proceed with performance, stating in pertinent part:

> On October 21, I issued you a Cure Notice, outlining the reasons why the Government was considering terminating your right to proceed with the contract work for cause. You had 10 days from receipt of that letter to complete the work in an acceptable manner. On November 3, you called me to report that the work was completed. In addition, you faxed me a letter outlining your plan to correct the water damage caused by your failures under the contract.
>
> Yesterday, accompanied by [the contracting officer's representative, a district engineer, and an inspector], I toured the construction site and we did what should have been the final inspection of the contract work.
>
> I have seldom seen such unprofessional work and a worksite left in such disarray. In addition, I viewed the water damage caused by your performance failures, and it appears to me that you have so far provided two boxes of computer paper out of the five that were damaged and tore out the carpet in the upstairs room. In short, your work failed to pass contract inspection, it does not meet specifications and it clearly

> does not meet the intent to have a professionally installed weather tight metal roof on the building.
>
> Therefore, your right to proceed with the contract work is terminated for cause and the Government intends to reprocure the remaining contract work, including correcting the water damage and the general cleanup of the area, from another contractor. You will be charged for any excess reprocurement costs, along with any incidental or consequential damages incurred because of this termination.

(AF at 2.)

In a memorandum to the contract file, dated November 13, 2003, the contracting officer observes: "After inspection of the defects in the finished product, I have determined that the work was essentially not completed and much of what has been done will have to be replaced and redone." Further,

> Because I can see no way to determine how much [money] is due the defaulted contractor until the work is completed satisfactorily by a replacement contractor, I have decided to hold all funds until completion of the contract. I will then, after completion of the work, release any remaining funds to the terminated contractor.

(AF at 4.)

In a letter to the Board dated May 6, 2004, the contractor addresses the Government's findings of inadequate performance: "It is our contention that these areas can readily be corrected." This acknowledges that work needed to be corrected. The contractor goes on in the letter to state that the type of flashing installed is not warranted by the metal manufacturer. This raises an otherwise unaddressed area. The contract dictates: "Payment is for a fully complete, preformed metal roof system, with warranties." (AF at 142.) As noted, a fully complete roof system was not provided. By suggesting that the Government did not obtain a warranted roof system, the contractor's letter supports the notion that the Government obtained significantly less than substantial performance and what it bargained for under the terms of the contract.

Unlike the majority, when reading the record as a whole, I conclude that the contractor did not complete performance by the contract completion date and the date extended by the cure notice. The completed work was unacceptable, in part. The contractor's contemporaneous correspondence with the Government and submittals to this Board support the conclusions of the Government and do not demonstrate an inaccuracy in the accessment of the unacceptable or incomplete work. The Government has substantiated the bases underlying the termination for default.

<u>No basis to excuse performance</u>

The contractor bears the burden of proof to demonstrate a basis excusing the default. In its complaint, the contractor raises various bases to support the excusability of the incomplete and

unacceptable performance (AF at 6).

First, the contractor maintains that there were a lot more detailed requirements in the full set of specifications that were not available for the bidding process (AF at 6 (¶ 1)). The suggested change in specifications is not borne out by the record. With reference to the supplemental appeal file, the contractor contends that there are different versions of the contract. The referenced versions differ in terms of format, but there is no difference in terms of content. Moreover, the contractor has not identified any particular requirement that was not in the solicitation, but which the Government incorporated into the contract and which required the contractor to expend additional time or expense to attain acceptable performance.

Second, the contractor states that during "construction the required items that needed adjustments or changes were different requirements between the two men who were inspecting the work as we progressed" (AF at 6 (¶ 2)). The contractor's suggestion that different inspectors imposed different requirements on the contractor is not supported by the record. The contractor has not identified any instance, and I have found no instance, where the contractor indicated that it was required to do anything contrary to either the terms and conditions of the contract or the prior communications of a Government inspector or a contracting officer's representative. The daily diaries indicate a constistent interpretation and application of the requirements.
Third, the contractor states that this "was a difficult project due to the extreme pitch of the roof" and age of the building (AF at 6 (¶ 3)). The difficulty of the project does not seem to be other than as described in the contract, including the eleven sheets which identify the building and steepness of the roof.

Fourth, the contractor states that it is not ducking the issues, as it provides with the complaint communications between the parties (AF at 6 (¶ 4)). The correspondence--the cure notice and notices of noncompliance--reveals the contractor's knowledge during performance of the Government's position that the work was being performed in an unacceptable manner. There is no indication that the cure notice or any notice of noncompliance was issued incorrectly or unnecessarily. The contractor's silence or express agreement with the various assessments supports the conclusion that work was performed in an unacceptable manner.

Fifth, the contractor states that it completed work by October 31, 2003, but billed the Government only "for 85% complete because we knew that a Final Inspection would take place and a punch list to correct items would be forthcoming" (AF at 6 (¶ 5)). The contractor also faults the Government for inspecting the project without the contractor's presence, for not providing a punch list of final items and an opportunity to correct items, and for not paying the 85% complete invoice (AF at 6 (¶ 6)). The completion date and cure period passed and work was not complete. The contractor is not entitled to a punch list and extra time to complete the work once the performance period passes. The contract required a completed, finished roof within the performance period, not a roof substantially complete, or complete but for punch-list items. The contractor and majority read out of the contract the thirty-day timeframe for performance.

From the fact that the Government is currently occupying the building and other indicia referenced by the majority, I do not draw the conclusion that the contract was substantially complete--a topic

not raised or specially addressed by either party. Given the unacceptable work around eaves and in the valleys of the roof, which may lead to damage to the building, I would not conclude without more that the project was substantially complete.

_____
JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
February 8, 2005