



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: June 30, 2011

CBCA 1143

RYLL INTERNATIONAL, LLC,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Marlene Ryll, President of Ryll International, LLC, Texas City, TX, appearing for Appellant.

Rayann L. Speakman, Office of Division Counsel, Western Federal Lands Highway Division, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STEEL**, and **KULLBERG**.

**STEEL**, Board Judge.

On July 13, 2007, Ryll International, LLC (Ryll) entered into contract DTFH70-07-P-00101 with the Federal Highway Administration (FHWA) to crush and stockpile 5750 cubic yards (cy) of select borrow and 12,700 cy of surface course aggregate in Katmai National Park (Katmai or Park), Alaska. The contract was a firm fixed price commercial services contract in the amount of \$1,085,250. When Ryll was not able to complete the work within the period specified, its contract was terminated for cause. Ryll appealed the termination for cause, contending that its failure to perform was excusable and that the termination should be converted to one for the convenience of the Government.

### Findings of Fact

Initially, FHWA had intended to award this project under the Small Business Administration's (SBA) 8(a) set-aside program. However, after receiving quotes and determining the prices were too high, the agency restructured the procurement to be a competitively bid firm fixed price commercial services contract. Various clauses were changed from those appropriate to a construction contract to those required for a commercial services contract.

Earlier in the acquisition process, and for the 8(a) solicitation, FHWA showed the project site as being available between June 15 and September 20, 2007. After restructuring the procurement, the June 19, 2007, solicitation informed prospective bidders that they could not perform any work, in particular the clearing and grubbing work, before July 16, 2007, but they could mobilize and set up equipment at the Moraine Pit from which the borrow and aggregate were to be taken as soon as the conditions permitted. The contract was awarded to Ryll on July 13, 2007. All work was to be completed by October 31, 2007.

The contract was administered by FHWA's Western Federal Lands Highway Division (WFLHD) out of Vancouver, Washington. Around August 23, 2007, the initial contracting officer (CO), Patricia Mahurin, was replaced by a more experienced CO, Elizabeth Firestone. Ms. Firestone has worked at FHWA for approximately twenty years administering construction contracts, including crushing contracts, as a project engineer and contracting officer. She worked out of the WFLHD in Vancouver, as did Steven Hinz, the construction operations engineer and contracting officer's technical representative (COTR).

In order to save funding, FHWA decided not to have contracting personnel working at the Park's job site. James Gavin, the National Park Service's (NPS) Facilities Manager for the Park, was the only Government representative in the Park on a day-to-day basis. Mr. Gavin was the chief of maintenance for the Park and in charge of all the in-house NPS Park projects. He had approximately twenty-five years experience working on NPS projects in the Park. Ryll was instructed to work with Mr. Gavin, and Mr. Gavin was tasked with helping coordinate communications between Ryll and the WFLHD contracting personnel. Mr. Gavin, however, was not delegated any authority to administer or change the contract. Mr. Gavin responded to Ryll's inquiries regarding all aspects of the undertaking, including sending geotechnical information, well in advance of Ryll's bidding the project. Mr. Gavin testified that access to the Park was available by commercial aircraft starting in mid-May.

Marlene Ryll was one of the owners and the president of Ryll, and her husband, Alan Dodd, was both an owner and Ryll's operations manager. Ms. Ryll and Mr. Dodd managed the contract via telephone calls and e-mail messages from outside Alaska, apparently making

only three contract-related visits to Alaska, none of which occurred after the actual work began. James Chalker was Ryll's on-site administrative manager; however, he did not give direction or make decisions about the work.

The contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions - Commercial Items (Sept. 2005). In pertinent part, that clause stated:

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

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(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.

48 CFR 52.212-4(f), (m) (2007). Clauses relating to environmental protection of the Park were also included in the contract. One such clause, Construction Activities Outside Construction Limits, provided that when Ryll anticipated ground disturbance, occupation, or clearing activities outside the areas delineated on the plans, it was required to submit a description, schedule, and location of the proposed activities to the CO for approval and allow twelve days to receive the approval from the CO.

The contract also provided:

Access to the project is by barge up the Naknek River from King Salmon, Alaska. Water depths vary and access is limited during certain portions of the year.

Do not perform any work, in particular clearing and grubbing, before July 16<sup>th</sup>, 2007. Complete work by October 31<sup>st</sup>, 2007. Mobilization, survey work, and set up of equipment in Moraine Pit may be allowed earlier, if conditions permit.

Coordinate mobilization and de-mobilization of equipment with Jim Gavin, NPS Facilities Manager . . . . This will help to ensure a smooth transition into and out of the Park, with minimal impact on wildlife and visitors. Brown bears are known to frequent the area of entry into the Park. Provide 48 hour advance notice of all activities at this area, and coordinate efforts with the NPS to minimize impact on the bears.

The Park and Moraine Pit are remotely located. All equipment and supplies had to be brought into the Park by barge and driven or hauled onto the work site.<sup>1</sup> Getting the equipment and supplies into the Park and onto the work site was one of the most challenging aspects of the contract. Access for equipment and supplies to Katmai Park was via barge across open ocean to Naknek, Alaska. From Naknek, equipment and supplies needed to be driven or hauled to King Salmon, Alaska, and then on to Lake Camp, approximately twenty-five miles from Naknek. At Lake Camp, the equipment and supplies had to be loaded and barged up the Naknek River and across Naknek Lake to Brooks Camp in Katmai. From there, equipment and supplies had to be driven or hauled to Squirrel Camp,<sup>2</sup> and, if needed at the work site, on to the Moraine Pit.

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<sup>1</sup> Equipment included, among other things, trucks, a bulldozer, a backhoe, a crusher, and sieves. Supplies included, among other things, tents, food, cots, heaters, piping, tanks, fuel, propane, and water.

<sup>2</sup> Squirrel Camp was the area in which the workers ate, lived, and slept. It was located at a tented area and had cooking and hot shower facilities. Set-up of the camp began around August 7, 2007. Squirrel Camp was inspected by the Government on September 12, 2007, and found to be sufficient for its purposes.

Ryll prepared its bid based on its experience and by contacting suppliers;<sup>3</sup> it did not visit the site prior to bidding. Ryll estimated that it would take twenty to twenty-three days to perform the actual rock crushing, and as few as five days, given good weather conditions and no other delays, to mobilize to the site. The only comprehensive written quote Ryll received prior to bidding was from S&S General Contractors & Equipment Rentals, Inc. (S&S), which submitted a quote to perform the crushing and stockpiling work, including mobilization, clearing, grubbing, stripping, crushing, and gradation testing. S&S quoted a lump sum price of \$875,000, and Ryll based its bid, in part, on this quote. The record indicates that Ryll did not execute any paperwork committing S&S to its quoted price.

Ryll got off to a rocky start with prospective suppliers in getting them to sign on to the job. Upon being contacted by Ryll after award, the owner of S&S, Tim Eddy, told Ryll he had made a mistake and had failed to account for the cost of barging.<sup>4</sup> He increased S&S's quoted price to Ryll by approximately \$50,000. Price negotiations ensued, but ultimately, Mr. Eddy decided that he did not want to do the project; he stopped returning Ryll's telephone calls and did not show up for Ryll's scheduled visit on August 18, 2007.

Ryll contacted Drake Brothers Trucking, Inc. (DBT) to lease the crushing equipment and perform the crushing work, but did not enter into a rental agreement with DBT until August 16, 2007. DBT's equipment sat for approximately thirteen days, until September 1, at Homer, while Ryll attempted to work out the details of the rental agreement and secure barging for the equipment to Naknek with Helen Drake, DBT's owner and president. Ryll also started negotiating with BC Contractors, Inc. (BCC) to provide barging services. Ultimately, Ryll decided not to contract with BCC for barging services because it got a better price from Igiugig Transport Service (Igiugig) and because Igiugig offered its services on credit.

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<sup>3</sup> In this contract, and during its administration, the terms "supplier" and "subcontractor" appear to have been used interchangeably.

<sup>4</sup> Mr. Dodd speculates that S&S's Mr. Eddy decided to withdraw from the job because Ryll had won the contract in a competition against an Alaskan firm. At the start of the contract, NPS' Mr. Gavin also expressed concern about Ryll's ability to obtain a subcontract with BCC and other suppliers because the sympathy of the contracting community in the area was with BCC, the local, unsuccessful bidder. Mr. Gavin expressed to COTR Hinz, "Sometimes using local contractors and knowledge is wise even though they are not the low bid." According to Mr. Dodd, another subcontractor that Ryll wanted to use for clearing and grubbing told him that he would not submit a quote because "I have to live here and try not to step on any toes."

During the time that it was attempting to find suppliers, Ryll spoke to the initial CO, Ms. Mahurin, about cash flow. Since Ryll was unfamiliar to Alaskan suppliers and the contract did not require contractor bonding, many of the suppliers Ryll contacted were unwilling to work with Ryll without a partial or complete payment. The contract provided that payment would not be made until the work was completed, but in an effort to assist Ryll with its cash flow problems, the CO offered to make a payment after mobilization.

Ryll had not found a subcontractor to perform the crushing work when Ms. Ryll and Mr. Dodd visited the site for the first time on August 18, 2007, and met with NPS' Mr. Gavin. On August 22, 2007, Ryll requested an extension of the contract completion date, alleging that it had experienced unusual delays and cost increases in entering into subcontracts. Ryll asked for additional time to provide its own barges to facilitate work. The new CO, Ms. Firestone, denied the request on August 27th, stating that there was no basis for the Government to extend the contract completion date and no way to compensate Ryll for the increase in prices it was experiencing.

Although by August 13, 2007, Ryll had an early offer for the lease of a bulldozer and backhoe from L&M Equipment, Inc. (L&M), Ryll did not execute an agreement with L&M. After working out its difficulties in securing local barging transportation, on August 23, Ryll again contacted L&M, attempting to enter into a lease on the previously quoted equipment. L&M provided Ryll with a revised lease proposal on August 27; however, because Ryll had decided to use Igiugig instead of BCC for barging, L&M required a certificate of insurance to barge its equipment.<sup>5</sup> On September 7, 2007, L&M told Ryll it would not lease the dozer and backhoe because Ryll did not have sufficient insurance.

On September 11, 2007, the first load of equipment was barged from Lake Camp to Brooks Camp by Igiugig. Ryll rented a dozer and backhoe from Bristol Alliance Fuels, out of Dillingham, Alaska, on September 14, 2007. The dozer and backhoe did not arrive at Brooks Camp until September 17, and the rest of the equipment needed to complete the contract work did not arrive there until September 22.

Ryll brought in Herman McConniel from Florida to be a working superintendent and to operate the backhoe and bulldozer on the project. As the working superintendent, Mr. McConniel testified that he was responsible for getting the equipment mobilized to the work site and into operation. Mr. McConniel was told by Mr. Dodd "to do whatever Dan

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<sup>5</sup> At the time, David Lax was the chief operating officer of BCC and the president of L&M. Mr. Lax was not willing to allow L&M equipment to be barged without a certificate of insurance unless it was being barged by BCC.

Drake [of DBT] needed to get the equipment in place.” Mr. McConniel considered Mr. Drake to be a professional crusher and as such, the individual responsible for doing the crushing part of the job. Mr. McConniel told Mr. Drake to set up his crushing equipment and begin crushing by October 1, but he noted that Mr. Drake did not appear to be in a hurry to set up his equipment at the work site and frequently stated that “there’s no point in setting it up . . . because the weather’s going to get us.”

From Brooks Camp, there were more delays getting the necessary equipment to Moraine Pit because the road was too narrow to accommodate some of the equipment. Ryll made up to eleven requests for modifications to the road. The original requests, such as the one on August 20, 2007, dealt with cutting down 50-100 trees. The number of trees was later reduced to seven to ten, while later requests on September 3 and September 14, 2007, increased the scope of the modifications by seeking either to add aggregate or widen the road surface. The September 3 request for a contract modification to remove trees along the access road to Moraine Pit was granted on September 5. The September 14 request for temporary modifications to the access road was approved by NPS on September 19. During this dispute, Ryll alleged that access issues delayed the project, but at other points, Ryll stated that delay in mobilizing to the pit had nothing to do with issues associated with the access road.

Once all of the equipment was at Moraine Pit, however, crushing still could not begin because of problems with the backhoe and the 988 loader’s steering box. Despite having concerns about DBT’s general willingness to perform,<sup>6</sup> Mr. Dodd visited the job site on September 27, left before any crushing began, and did not return. Finally, by September 29, 2007, the backhoe and loader were fixed, and DBT had finished setting up the crushing equipment.

DBT began crushing material on Monday, October 1, 2007. Mr. Drake testified that he was not pleased with the quality of the gravel and felt there was too much dirt and silt in it to meet the contract’s specifications. After crushing began, the backhoe broke down again. According to Mr. Drake, without an operating backhoe, material could not be moved to the crusher and DBT could not safely crush material. Mr. McConniel disagreed, testifying that DBT was not stopped from crushing and that he was able to move sufficient material with his bulldozer to the crusher for DBT to continue its crushing efforts. On October 2, Mr. Drake stopped crushing and did miscellaneous repair and maintenance work on the

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<sup>6</sup> During September, Mr. Drake was complaining on behalf of himself and another worker, Dusty Fultz, about the poor conditions at Squirrel Camp and threatening to quit if camp conditions were not improved.

crusher while waiting for the backhoe to be fixed. From October 3 through 5 it rained and no work was performed. Mr. Drake spoke to Mr. Dodd about the backhoe repair problem and the rain:

And it didn't get done [the backhoe repair], it didn't get done, it didn't get done. I got tired of waiting. And I told Alan, I'm going to go. And that's when Alan brought up – he said that there was a federal inspector . . . [who] was going to come out Wednesday . . . or the following week. And he wanted me to stay there for that deal. And by then, dealing with all Alan's stories, I got down to where I didn't believe Alan anymore. I mean it just didn't get done. I was tired of waiting. And I told him I was going to go home. And he says, no, I'll pay you to stay there. And I said, okay, if you're going to pay me, I want 10 hours a day to sit here and watch the raindrops come down. And he said, okay.

Ultimately, Ryll and DBT were not able to come to terms with how much Mr. Drake should be paid to stay on the job if he was not crushing material, and on October 4, 2007, Mr. Drake informed Mr. Dodd that because the backhoe was not fixed, his men were not working, and the conditions in the camp were not good, he was going home.

Mr. Drake left the Park on October 6, 2007. He stated that “the rain was killing us” and “you can't crush muck.” Before leaving, Mr. Drake discussed the situation with Mr. Gavin, who agreed that the work site was “a mess” and that DBT might be better off coming back in the spring to do the work. Mr. Gavin believed that the fall of 2007 was exceptionally wet, and he stated to Mr. Drake that “[i]t really looks stupid for you to stay here and just keep making a bigger mess.” However, Mr. Gavin cautioned Mr. Drake that he had no authority to tell Mr. Drake what to do or not to do. As Mr. Drake was leaving the Park, he asked Mr. Gavin to store DBT's truck in the Park until he could retrieve it. Mr. Gavin drove DBT's truck from where it was left and parked it at an appropriate place in the Park. Ryll also left equipment at the Park until it could retrieve the equipment the next spring.

Ryll terminated its agreement with DBT on October 7, 2007, asserting that, among other things, DBT's failure to perform put it in breach of the two firms' agreement. In its termination notice Ryll set forth a litany of reasons DBT was in default, including the poor condition of the crusher equipment, Messrs. Drake's and Fultz's refusal to take direction, failure to cooperate, failure to be motivated, and essentially “dragging their feet on the job.” Ryll blamed DBT for delays in unloading and moving equipment, setting up equipment, creating a negative and stressful work environment by complaining daily and persistently to other Ryll personnel, and threatening to “walk off the job.” Once DBT left the project, Ryll

decided to shut down its operations for the winter.<sup>7</sup> From October 7, 2007, Ryll's equipment operators and cooks left the project site.

From the time it began crushing on October 1, until it shut the project down on October 7, Ryll produced approximately 373 cy of crushed material. The material produced did not meet the specifications included in the contract, but was close to meeting the specifications, and according to COTR Hinz, would likely have been accepted by the Government.

The next day, October 8, 2007, Ryll requested a contract modification seeking a twenty calendar day time extension to June 1, 2008, on the ground that it had encountered unusually severe weather on a daily basis from September 18 through October 7, 2007. It represented that:

Given the capacity of equipment we have mobilized to the site to perform the work and given the quality of the pit materials requiring crushing we anticipate that required quantities of surface course aggregate and select borrow material can be provided within a twenty day time frame.

Ryll submitted documentation in support of its request on October 9, 2007. That same day, Ron Jones, a FHWA project inspector, visited the site and opined that the weather had cleared for a while and the contractor could be crushing material. However, according to COTR Hinz, Mr. Jones noted that even on a "clear and sunny day," the bottom of Moraine Pit was "wet and freezing."

Ryll informed FHWA that the agency might begin receiving calls from its suppliers regarding the date Ryll would receive payment, and urged FHWA to pay Ryll at the earliest possible date.<sup>8</sup> FHWA made its first payment to Ryll earlier than required by the contract. Payment was made for mobilization costs in the amount of \$504,596 on about October 7, 2007. Shortly thereafter, on October 9, 2007, Ryll sent a notice to its suppliers stating that it was suspending payments to those suppliers.

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<sup>7</sup> Also, on or about October 6, Ms. Drake e-mailed Ryll asking about a rumor that Ryll was trying to find someone else to operate the crusher it had rented from DBT. She told Ryll that DBT never rents the crusher without Mr. Drake as the operator.

<sup>8</sup> Under the contract, payment was not due until after delivery. 48 CFR 52.212-4(I) (2007).

Assuming that this contract required Ryll to carry bonds, Ms. Drake frequently contacted CO Firestone to request her assistance in getting paid. DBT also retained an attorney to help it collect from Ryll. After DBT's termination by Ryll, Mr. Drake contacted CO Firestone on October 9 and 10, explaining he had spoken with another supplier who told him that, based on a conversation that the supplier had with Ryll, Ryll would not be paying DBT because DBT had stopped crushing and was in breach of contract. On October 10, 2007, CO Firestone notified Mr. Dodd that she had received phone calls from Mr. Drake and other suppliers about being paid. Mr. Dodd explained that he was talking to the suppliers and "trying to work things out."

A review of e-mail messages exchanged between Ryll and DBT around October 11, 2007, shows that significant disagreements existed between the companies. For example, DBT took the position that payment for rental of the equipment was accruing until Ryll returned the equipment to DBT's yard in Sterling, Alaska. Ryll alleged promissory fraud, asserting that DBT intentionally slowed the work and prevented Ryll from completing the crushing operations while weather was permitting, and left Ryll with equipment that was inoperable and without a crusher operator or a remedy to hire alternate operators. DBT countered that Ryll had failed to perform since September 18, 2007.

To analyze whether Ryll encountered unusually severe weather from September 18 through October 7, CO Firestone used weather records from the National Oceanic and Atmospheric Administration (NOAA) and worked with COTR Hinz to analyze the weather conditions. The NOAA data was reviewed to see if the weather encountered during the period at issue was "more severe than the ranges of weather reasonably anticipated for the project location." CO Firestone determined that the NOAA data for the period of September 18 through October 7 showed, *inter alia*:

The amount of precipitation was 147% of the ten year average.

The number of days with measurable precipitation was 116% of average.

The number of days with rain over ½ inch was 100% of average (one day).

There were nine days where the rain amount was higher than the ten year average for that date (September 18, 20, 24, 26 through 28, 30, October 4 and 5).

There were eleven days when the rain amount was lower than the ten year average for that date (September 19, 21, 22 through 25, 29, October 1 through 3).

Seven of the days with higher than average precipitation (September 18, 20, 24, 26 through 28, and 30) were prior to Ryll's commencement of its crushing operations on October 1, 2007.

After commencement of the crushing operations on October 1 until DBT left the site on October 6, two of the days [October 4 and 5] had higher than average precipitation and five days [October 1 through 3, 5, and 6] had lower than average precipitation.

As a result of the NOAA data review, CO Firestone concluded that the weather was not more severe than the range of weather reasonably anticipated and that the weather did not actually cause Ryll's failure to complete the project. CO Firestone also determined that, based on the ten year averages, the weather conditions for July and August of 2007 were more favorable than normal, with precipitation at 71% and 51% of the ten year average, respectively. The number of days of measurable precipitation were only 83% and 74%, respectively.

The weather conditions for September 2007 were less favorable than normal, with the amount of precipitation 9% over the most recent four year average. However, the weather conditions for October 2007 were more favorable than normal, with precipitation at 96% of the ten year average and the number of days of measurable precipitation at 93%. A review of Ryll's test results from the material sampled during crushing operations also led CO Firestone to conclude that "precipitation did not hinder Ryll's ability to crush since there were not too many fines on the smallest sieve." In CO Firestone's opinion, Ryll's continued downtime after what it claimed was severe weather was unreasonable, since from October 8 through 20 the precipitation was only twenty-nine percent of the ten year average and the number of days with measurable precipitation was sixty-five percent of the average. The CO summarized:

It was not reasonable to start crushing on October 2, 2007, and to stop crushing on the very next day when the contract was awarded on July 13, crushing was permitted to begin on July 16, and the work was to be completed by October 31. In my view, if Ryll was going to wait until so late in the season to crush, it should have been prepared to crush in the rain and freezing temperatures. The normal weather pattern is to have rain and freezing temperatures at night from October 8 . . . through the end of October.

On or about October 18, 2007, CO Firestone determined that the weather did not support a claim for unusually severe weather. In a phone conference with Ryll held on October 19, 2007, CO Firestone and COTR Hinz explained that the data did not support

Ryll's claim for unusually severe weather and a contract extension was not supportable on the grounds proffered by Ryll. Apart from weather delay, the parties discussed other options for a contract extension that would allow Ryll to complete the contract in the spring of 2008. Since there was crushing equipment already on site, FHWA believed that Ryll would be able to complete the work in the spring, when the crushed material was needed for two upcoming Park projects. Ryll represented that it could complete the crushing by June 15, 2008. As consideration for the proposed contract extension, Ryll agreed to crush the select borrow to a different material specification.

From October 15 through 30, DBT sent frequent e-mail messages and made numerous phone calls to CO Firestone, primarily complaining about the poor camp conditions and nonpayment issues it had with Ryll. In a telephone conversation held on October 30, Ms. Drake stated to CO Firestone that she would be charging equipment rental fees through the winter based on the terms of her agreement with Ryll. Mr. Drake claimed he was going to contact the Department of Labor about Ryll's poor camp conditions. Also on October 30, Ms. Drake emailed CO Firestone a copy of the rental agreement between DBT and Ryll.

CO Firestone notified Ryll more than once that DBT and other suppliers had contacted her regarding non-payment. In an October 30 conference call, CO Firestone again raised the issue. Ryll represented to her that it did not need DBT to complete the contract work because it could have another subcontractor crush the material. Despite this representation, Ryll knew, based on the terms of its subcontract with DBT, that it could not operate DBT's crushing equipment without Mr. Drake. During the October 30 conference call CO Firestone verbally agreed to a contract modification to extend the completion date to June 15, 2008.

CO Firestone first learned that Ryll terminated the DBT contract about one month after that termination had occurred and not from Ryll. On November 8, CO Firestone received information from the office of Senator Ted Stevens that indicated Ryll had terminated its contract with DBT on October 7, 2007.

After learning that DBT's contract had been terminated and Ryll no longer had access to DBT's crushing equipment, CO Firestone notified Ryll that she was no longer willing to issue a contract modification extending the contract completion date to June 15, 2008. She explained that, based on the representations made by Ryll, without the use of the DBT crushing equipment, it appeared that Ryll would not be able to complete the contract by June 15, 2008, even if an extension was granted. Asking it to show cause why the contract should not be terminated for cause pursuant to FAR 52.212-4(m), CO Firestone wrote Ryll on November 8 referring to the conversation she and COTR Hinz had with Ryll about completion of the project:

During this discussion [held on October 30, 2007] you indicated that your crusher was in place and you would be ready to crush in May 2008 and be finished with the crushing in early June 2008. You also stated that the earliest any other contractor would be able to barge in a crusher would be in mid to late July. We expressed our concerns as to your being able to operate the crusher without Dan Drake. You told us that you had the right to operate the crusher with your own personnel and did not need to have Dan Drake operate the crusher. As a result of your assurances we verbally agreed to extend the contract to June 15, 2008.

As it turns out on October 7, 2007, you sent a letter to [DBT] where you terminated your rental agreement for the crusher. This is critical information, which you withheld from our knowledge. With the rental agreement terminated, it does not appear that you have any legal right to use the crusher. Further, you have told us that you cannot get another crusher into the site until mid to late July 2008. Without access to a crusher and with no possibility of getting another crusher until July 2008, extending the time period to June 2008 does not make any sense.

As a result of this letter, Ryll began to negotiate a new rental agreement with DBT on or about November 9, 2007. Negotiations continued back and forth about monies already owed. While the record indicates that DBT contacted CO Firestone during these negotiations, there is no evidence that CO Firestone provided information or assistance to DBT. Her e-mail messages to DBT acknowledged DBT's frustration but were noncommittal about her views of the situation. Ms. Drake e-mailed CO Firestone, explaining that she wanted to keep CO Firestone abreast of the negotiations. Ryll also informed CO Firestone that it was negotiating with DBT, and it provided her with information from the negotiations.

Ryll represented that its request to continue work on the project to completion was premised on, among other things, "adequate assurances of performance based on promises made by Drake Brother [sic] . . . to return to work in May. Modifications to a finalized agreement are being worked out between the two companies in conjunction with legal counsel." *Id.* As support for this assurance Ryll provided CO Firestone with a copy of DBT's November 15, 2007 offer. DBT's offer did not indicate that the parties had reached an agreement, but did indicate they were negotiating.

CO Firestone told Ryll that she "would need to see a signed copy of an agreement [between Ryll and DBT] that shows there is an unconditional commitment to perform the work." E-mail communications continued in which it appears CO Firestone attempted to

broker a working relationship between DBT and Ryll so that Ryll could finish the work in the spring of 2008. CO Firestone asked Ms. Drake to continue to try to negotiate a solution with Ryll whereby DBT would finish the work.

On November 18, 2007, DBT contacted Ryll, stating that its counter-offer was unacceptable and that DBT expected one month's rent immediately before it would consider returning to the negotiations, because Ms. Drake was upset that DBT had not been paid despite the release of funds from the Government. She did not trust Ryll to pay and wanted money put in escrow for future payments. Soon thereafter, Ryll responded, claiming that all it could come up with was \$35,010. On November 19, 2007, DBT responded to Ryll that it was willing to accept a reduced payment of \$39,950, with the remaining balance to be paid before it remobilized. DBT stated it was unwilling to renegotiate the basic terms of the contract; it required more assurances regarding transport of its equipment after the work was done, but was willing to enter into an agreement based on Ryll's representations.

During the November 2007 negotiations with DBT, Ryll stated, as a condition for the issuance of a modification, FHWA demanded an unconditional guarantee of performance by DBT and Ryll. Ryll offered an up-front payment of \$40,000 upon execution of the contract modification, and payment of the rest of the monies agreed to upon mobilization to the site.

On November 23, 2007, Ryll e-mailed DBT and stated that the only issue remaining was liability insurance for the equipment and personnel, which it could not obtain. CO Firestone offered to help reach an accommodation by participating in a joint conference call between Ryll and DBT. On November 30, Ryll sent an entirely new proposal to DBT, proposing to use Ryll's own operators for the crusher and paying only equipment rental fees to DBT. Ryll contended to DBT that the new proposal would allow Ryll to provide the unconditional performance guarantee demanded by the FHWA. DBT responded by asking for the correspondence from FHWA showing a requirement for an unconditional performance guarantee, but later that day DBT e-mailed Ryll, ending negotiations and stating that it would no longer correspond with Ryll.

Ryll understood that DBT's unwillingness to negotiate had made it essentially impossible for Ryll to complete the contract, and for several days in early December 2007, Ryll attempted to convince DBT to resume negotiations. Ryll sent new proposals, made attempts to contact DBT, and told DBT that Ryll could not complete the contract without its cooperation. On December 5, 2007, Ryll requested a meeting with CO Firestone and explained that DBT had decided not to participate in the planned conference call.

Ryll and FHWA met in Vancouver, Washington on December 14, 2007. Ryll placed the blame for its current conditions on DBT by claiming DBT had cut off negotiations and

communication. Ryll accused DBT of stalling, delaying, leaving the project, and conspiring with everyone else against Ryll. A possible no-cost termination for convenience was discussed, but Ryll claimed it had lost \$200,000 to \$250,000 on the project and was unwilling to agree to a no-cost termination.

On December 18, 2007, Ryll followed up the Vancouver meeting with a letter to CO Firestone citing an “overall thrust of local [Alaskan] contractors to interfere with contracts awarded to outsiders”; detailing the difficulties it had encountered with obtaining local bargaining transportation, with equipment rental, and with DBT; and alleging that the “deliberate overt and covert actions” of others to derail this project prevented it from completing the work. Ryll accused Mr. Drake of leaving the job site despite repeated requests to move forward with work, insisting that weather conditions precluded further work efforts until the spring, and forcing Ryll to shut down operations and remove all personnel. Ryll also accused DBT of stalling work through various strategies. Ryll noted that it had been unsuccessful in obtaining an unconditional commitment from DBT to complete the work in the spring of 2008, but did not mention weather or government interference as being delaying factors. Ryll requested that the Government issue a “termination for convenience with costs,” with the Government paying Ryll its costs of \$118,032.74 in addition to the \$504,596 already paid. CO Firestone rejected Ryll’s proposal on December 19, 2007, stating that the Government would only accept a proposal for a no-cost termination for convenience; without such a proposal, she saw no option other than a termination for cause.

In a January 7, 2008, letter to FHWA, Ryll again requested a termination for convenience with costs. Among the reasons given, Ryll asserted that it could not absorb “the loss of both the amounts it had expended and not been reimbursed by the government of approximately \$180,000 and realistic value of materials and services provided in the approximate amount of \$120,000.” In closing, Ryll wrote that its “financial difficulties had been caused by the apparent collusion of certain companies and are not the fault of the Government.” (emphasis added).

In deciding how to proceed with this contract, CO Firestone considered various factors in determining whether terminating Ryll’s contract was in the best interest of the Government. Her review included the factors set forth in FAR 49.402-3(f). Among other things, she evaluated when the work needed to be completed and, given its location, how it could be completed. Further, on January 9, 2008, CO Firestone contacted DBT about completing the work, but DBT stated it could not complete the work because it did not have bonding capacity. CO Firestone reviewed the reasons Ryll gave for its failure to perform the work and decided they did not excuse its default. Finding that Ryll’s failure to perform the work was not excusable, on January 10, 2008, CO Firestone terminated Ryll’s contract for cause. As grounds for termination for cause, she cited Ryll’s “failure to complete the

contract by the contract delivery date or to adequately assure the government of future performance (propose an acceptable plan to complete the contract).” She told Ryll to remove all its equipment from Moraine Pit to designated pullouts by April 30, 2008, and then to remove its equipment from the Park as a whole by July 31, 2008.

On April 7, 2008, Ryll appealed the termination for cause to the Civilian Board of Contract Appeals, and a hearing was held in March of 2010.

### Discussion

The contract between Ryll and FHWA provides that if the contractor fails to comply with the contract or give adequate assurances of future performance, the Government may terminate the contract for cause. An exception is enunciated: if the contractor’s nonperformance is caused by an occurrence beyond the contractor’s reasonable control and without its fault or negligence, the contractor may not be liable for default. Ryll has offered several grounds to rebut the Government’s position that the termination for cause was proper, including that: 1) the specifications were defective; 2) the contractor’s delays were excusable because of a) unusually severe weather and b) the Government’s failure to provide permits, delaying access to the site; 3) the Government failed to share its superior knowledge about access and that BCC had previously bid on the project; and 4) government employees, acting in bad faith, hindered Ryll’s performance. Ryll has not proven any of these allegations. Ryll, having terminated the subcontract of its crusher, DBT, was unable to complete the contract in a timely manner or assure the CO that it would be able to do so even with a twenty-day extension.

The window of performance for the contract, July 16 to October 31, 2007, was adequate. Ryll’s unsuccessful performance of the contract and its troubled relations with its Alaska subcontractors appears to have been primarily the result of insufficient preparations prior to bidding on the contract and unfamiliarity with the Alaskan locale and conditions. Ryll had significant problems lining up subcontractors in order to acquire the necessary equipment and transportation. It did not make a comprehensive effort to obtain suppliers prior to bidding. For example, when it chose not to execute the written quote by S&S, it was left scrambling for suppliers.

Ryll finally contracted with DBT for the necessary equipment to complete the contract. The relationship between these two firms was not smooth, however. Mr. McConnel, Ryll’s working superintendent, reported that Mr. Drake of DBT was in no hurry to set up his equipment and was fatalistic about incoming bad weather. In September, Mr. Drake complained about poor conditions at Squirrel Camp. However, Squirrel Camp was inspected by the Government on September 12, 2007, and was found to be sufficient for its

purposes. DBT finally left the site after a dispute over pay. It does not appear that the camp conditions and weather or the dispute over pay hours gave DBT license to abandon the subcontract. The Alaska Department of Labor agreed; its investigation determined that Drake had “left the jobsite without good reason.” DBT, of course, was Ryll’s chosen subcontractor. Its actions cannot be attributed to FHWA.

Had DBT not walked off the job, the contract potentially could have been completed before the expiration date. The weather substantially improved later in October, and while the 373 cy of completed crushed material did not meet the contract’s specifications, they came close. Mr. Hinz, the COTR, believed that the material would have been accepted by the Government. Thus, it was DBT’s abandonment that was the proximate cause of the contract breach. What followed were extensive, painstaking negotiations mediated by CO Firestone that ultimately broke down. FHWA and Ryll discussed a termination for convenience in which neither side would pay any additional money, but Ryll demanded a termination for convenience with the Government paying additional costs. On January 10, 2008, CO Firestone rejected Ryll’s request and terminated the contract for cause.

The question presented by this appeal is whether the Government properly terminated Ryll’s contract for cause. A termination for cause is the equivalent of a termination for default, so we apply the same legal standards to both types of cases. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,990. The Government bears the burden of proving by a preponderance of the evidence that the termination for cause was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). If the Government establishes a *prima facie* case that its termination was proper, the burden shifts to Ryll to rebut the Government’s case. *Keeter Trading Co. v. United States*, 79 Fed. Cl. 243, 253 (2007). Here, the contract required Ryll to produce 5750 cy of select borrow and 12,700 cy of surface course aggregate by October 31, 2007, which it failed to do. This failure to complete the contract established a *prima facie* case that the termination for cause was justified and is the “good grounds” and “solid evidence” necessary for termination. *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969).

We examine now the assertions Ryll makes in an effort to rebut FHWA’s reason for terminating the contract.

### Defective Specification

The performance period for the crushing project was from July 16, 2007 to October 31, 2007. Appellant argues that the specification defining the contract performance period was defective because the performance period specified represented to the contractor that it

was feasible to perform work through the end of October, and Alaska's construction season is generally considered to end in late September or early October.

The contract completion date is not a warranty by the Government guaranteeing completion within the specified performance period. *American Ship Building Co. v. United States*, 654 F.2d 75, 78-79 (Ct. Cl. 1981). A prospective contractor, before agreeing to perform, must examine the complexity of the contract requirements and its own capabilities, and then make a business judgment as to whether it could complete the work within the time allowed by the contract. *Id.* For appellant to place this burden on the Government is inappropriate.

Appellant has acknowledged that Mr. Gavin, as the Government's local expert, responded to Ryll's inquiries regarding all aspects of the undertaking, including sending geotechnical information, well in advance of Ryll's bidding the project. As a contractor starting a project in a new location, Ryll should have known either to ask Mr. Gavin when the Alaskan construction season was expected to end, or to conduct such simple research itself.

Appellant's contract performance period ran for 108 days. Ryll estimated that it would take twenty to twenty-three days to perform the actual rock crushing. Appellant has further stated that while it took fifteen days to mobilize the equipment, given good weather conditions and no other delays, only five days should have been required to mobilize to the site. Even if appellant needed a full fifteen days each for mobilization and demobilization, along with twenty-three days for crushing, that adds up to only fifty-three days. This would have left Ryll with an additional twenty-four days before the end of September to contract with suppliers, an action which already should have been in an advanced stage through pre-bid consultation and negotiation, and to move supplier equipment to Naknek. That would still leave the thirty-one days of October for finishing work and demobilizing the equipment from Katmai if the contract fell behind schedule. Even if adverse weather was a problem in September, the specification defining the contract performance period was not defective.

#### Adverse Weather

Ryll asserts that it is entitled to have its termination for default set aside because of the provision for "unusually severe weather" contained in the excusable delay clause of the contract. Appellant insists that despite the challenges it faced during mobilization, it was positioned to complete the work within the contract period, but was thwarted by bad weather and the subsequent saturated condition of the materials to be crushed. Ryll states that it is "undisputed" that it encountered significant adverse weather conditions between

September 18, and October 7, 2007, during mobilization and performance of the contract work.

Unusually severe weather is construed to mean adverse weather which at the time of year in which it occurred is unusual for the place in which it occurred. *Broome Construction Inc. v. United States*, 492 F.2d 829, 835 (Ct. Cl. 1974). Unusually severe weather is determined based on a comparison of the conditions experienced by the contractor and the weather conditions of prior years. *Edge Construction Co. v. United States*, 95 Fed. Cl. 407, 420 (citing *Cape Ann Granite Co. v. United States*, 100 Ct. Cl. 53, 71–72 (1943)). A review of the ten year average of weather conditions for October demonstrates that while precipitation for September 2007 in Katmai was above normal, in October 2007 it was slightly below. This analysis is more comprehensive and compelling than Ryll's more anecdotal analysis, and was further confirmed by DOT's Inspector, Ron Jones, who visited the site on October 9, 2007, and noted that the weather had cleared and that the contractor could have resumed crushing.

Between October 1 and October 7, 2007, Ryll produced 373 cy of crushed material that almost met the material specifications included in the contract. Had DBT stayed at the camp, it is entirely possible that later in October, when the weather had cleared, Ryll would have been able to complete crushing the material to adequate specifications within the time frame of the contract. The adverse weather earlier in the time period afforded Ryll for performance was not severe enough to warrant a finding of excusable delay.

#### Site Access Delays

Ryll asserts that its project work was delayed by the failure of the Government to timely provide permits for cutting trees and modifying the access road to Moraine Pit. The Government must not only refrain from hindering the contractor's performance; it must also act in cooperation with the contractor. *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977); *George A. Fuller Co. v. United States*, 69 F. Supp. 409, 411-12, (Ct. Cl. 1947).

Ryll alleges that it was the Government's delay in granting permits and authorization for the alterations that caused Ryll's delay, since without guarantee of access it could not afford the risk of signing contracts with suppliers. Mr. Dodd testified that he made at least eleven specific communications between July 18 and September 19, 2007, requesting authorization to make road alterations. Moreover, Ryll asserts that it could not move preparatory equipment for clearing and grubbing until it had assurances that all project equipment and supplies could be moved to the site. This assertion is strongly belied by the record: Ryll signed a rental agreement with DBT on August 16, 2007, and had equipment shipped to Naknek on September 1, 2007. Appellant's first load of equipment arrived in

Brooks Camp on September 11, 2007, and on September 14, 2007, Ryll secured all the equipment required for the project.

The import of eleven requests to the Government over the course of two months is lessened because the requests did not follow contract procedure and changed over time from cutting down trees to adding aggregate. It appears that each request made by Ryll was resolved by the Government well within the contractual time limit. In two e-mail messages, appellant admitted that the delay in mobilization was unconnected to issues with the access road. The record generally demonstrates that the Government made a sincere effort to comply with appellant's requests and did not hinder or impede appellant's full mobilization.

### Superior Knowledge

Under the superior knowledge doctrine, a contractor can recover for breach of contract based upon the failure of the Government, as a party to the contract, to disclose vital information concerning the performance of the contract. *Hardwick Brothers Co., II v. United States*, 36 Fed. Cl. 347, 386 (1996), *aff'd*, 168 F.3d 1322 (Fed. Cir. 1998) (table). Appellant alleges that the Government knew or should have known of difficulties regarding site access, but withheld that knowledge, impeding Ryll in completing its work. Undisclosed superior knowledge is negated when the contractor could have obtained such information from a pre-bid site visit that it chose not to make, or made without sufficient care. *See Ambrose-Angusterfer Corp. v. United States*, 394 F.2d 536 (Ct. Cl. 1968). Mr. Gavin testified that access to the Katmai site via commercial aircraft was possible by mid-May. Thus, this allegation fails because Ryll could have visited the site, examined the road, and drawn its own conclusions.

Appellant also states that the Government failed to inform it of the critical fact that a local contractor, BCC, had bid on the project, was highly motivated to acquire the award, and was the primary supplier of equipment and barging that Ryll needed to perform the contract. However, other suppliers were clearly available; this is known because Ryll eventually contracted with them. Finally, the Government's knowledge of the "mood" of the locale does not constitute vital knowledge. If this was as obvious a factor in Ryll's problems as the contractor alleges, it must have been common knowledge available to anyone who made reasonable inquiry into local conditions.

### Government Bad Faith

An implied provision of every contract, including one between an individual and the Government, is that neither party will do anything to prevent performance by the other party or will hinder or delay the other party in its performance. *Lewis-Nicholson*, 550 F.2d at 32.

Contractors who allege bad faith on the part of government officials, as appellant does here, must prove their assertions through clear and convincing evidence. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002).

Appellant asserts that its work was impeded by the actions of government employees, such as Mr. Gavin, the onsite representative, because he supported DBT's effort to leave the work area. However, there is no evidence that Mr. Gavin engaged in favoritism towards DBT or any other contractor, at the expense of Ryll, nor is there evidence that he attempted to sabotage or delay Ryll. Further, Mr. Gavin was not responsible for the road access delays. Appellant's allegations of collusion are simply unsupported by the facts.

Appellant asserts that CO Firestone acted in bad faith when she denied Ryll's requests for an extension of performance time in August or a termination for convenience with costs. Ryll argues that CO Firestone did not investigate Ryll's complaints of price gouging. There is sharp disagreement between Mr. Dodd and Mr. Eddy of S&S as to whether local barging up the Naknek River to Brooks Camp was taken into account in the quote Ryll used in its contract bid. Regardless, Ryll did not execute a subcontract based on the S&S quote. In fact, it appears that Ryll did not have a firm plan in place upon award of the contract, and was left scrambling to engage subcontractors. The CO's decision to deny appellant's August 2007 time extension request was justified.

Appellant next argues that CO Firestone improperly inserted herself into the conflict between Ryll and DBT. To the contrary, we find that the CO extended herself to defuse tensions between the two firms. She listened to complaints, showed concern, and remained neutral. She offered to help the parties communicate. In the interest of completing the project, she indicated her desire that they reconcile and did not take sides.

Ryll further accuses the CO of bad faith in failing to make payment in response to Ryll's second payment application in October 2007. However, it was the COTR, Mr. Hinz, acclaimed by Ryll in its brief as an "honest witness, who could not be cajoled into falsely testifying for the government," and who "had no agenda," who informed Ryll that he could not approve its second invoice for payment.

Appellant next argues that the e-mail message from Senator Stevens' office was the proximate cause of CO Firestone's retraction of her verbal agreement with Ryll for a contract extension. Appellant's generalized and unsupported accusations of political pressure fail to demonstrate lack of independent judgment, especially since CO Firestone still allowed Ryll an additional month to demonstrate that it could complete the project.

Finally, Ryll asserts that CO Firestone sabotaged negotiations between Ryll and DBT by requiring an unconditional commitment to complete the job. But the remote location of the site in Katmai was such that another subcontractor could not be easily engaged by Ryll to take over crushing operations. Requiring an unconditional commitment from DBT was reasonable in light of the difficulties between Ryll and DBT.

We conclude that CO Firestone had a reasonable, contract-related basis to support termination for cause. Ryll failed to complete the contract despite the CO's best efforts to mediate negotiations between appellant and its subcontractors. It is notable that in Ryll's January 7, 2008, letter to FHWA requesting a termination for convenience with costs, the contractor wrote that its "financial difficulties have been caused by the apparent collusion of certain companies and are not the fault of the government." While Ryll's problems with its subcontractors were highly unfortunate, the responsibility for those problems does not lie with the Government.

Decision

Ryll's appeal is **DENIED**.

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CANDIDA S. STEEL  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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H. CHUCK KULLBERG  
Board Judge