UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED;
APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED:
August 29, 2025

CBCA 8034

ALL PHASE SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Lawrence J. Sklute of Sklute & Associates, Potomac, MD, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

All Phase Services, Inc. (APS) appealed the termination for default issued by the contracting officer for the Department of Veterans Affairs (VA). The parties filed cross-motions for summary judgment on various aspects of their respective burdens of proof. VA asks that we find that, based upon the undisputed facts, APS was in default when VA terminated the contract. We find that the contracting officer properly reestablished the contract completion date (CCD) and based his termination of the contract on APS's failure to make progress on the contract to meet that date. APS failed to establish that the CCD was

later in time or that VA failed to consider its request to use a different roofing product. On the basis of these findings, we grant VA's motion for partial summary judgment asking us to find that it has established a *prima facie* case of default and deny APS's motion. With the *prima facie* case of default now established, APS's evidence and arguments as to why its failure to perform should be excused will be the focus of the hearing scheduled for October 2025.

Background

I. Contract Award and Relevant Terms

In October 2020, VA awarded to APS a contract to replace fifty-five roofs at the VA Medical Center located in Buffalo, New York. Exhibits 7 at 2074; Respondent's Statement of Undisputed Material Facts ¶ 16. The period of performance was 730 days measured from the notice to proceed issued at the contract kick-off meeting. Exhibit 7 at 2074, 2105.[1] The parties convened the kick-off meeting on November 12, 2020, which made the CCD November 12, 2022. Exhibit 9 at 2156. The parties later modified the contract and added thirty days to the performance period of the contract, pushing the CCD to December 12, 2022. Exhibit 39 at 2655.[2]

The contract incorporated by reference two clauses relevant to the Board's consideration of the parties' motions: (1) Default (APR 1984) clause, Federal Acquisition Regulation (FAR) 52.249-10 (48 CFR 52.249-10), which provides, in part, "[i]f the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension . . . the Government may, by written notice to the Contractor, terminate the right to proceed," Exhibit 7 at 2118; and (2) Permits and Responsibilities (NOV 1991) clause, FAR 52.236-7, which provides, in part, that "[t]he Contractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire work." *Id*. The contract did not include a provision allowing VA to assess liquidated damages.

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[1] "Exhibit XX at XXXX" refers to the exhibits in the appeal file and the bates page numbers applied by the parties.

[2] This exhibit incorrectly states that the CCD was November 12, 2022. Respondent's Statement of Undisputed Facts at 4 n.3. APS objects to this proposed finding, but does not object to the finding that the original CCD was November 12, 2022. Appellant's Statement of Genuine Issues, ¶ 26. If one adds 30 days to the original CCD, the new CCD would be December 12, 2022.

The contract contained two clauses which delegated contract administration functions to the contracting officer's representative (COR) but also limited the COR's authority to certain functions—Veterans Affairs Acquisition Regulation (VAAR) 852.242-70, Government Construction Contract Administration (APR 2019) (Exhibit 7 at 2126), and VAAR 852.270-1, Representatives of Contracting Officers (JAN 2008) (Exhibit 7 at 2129). Pursuant to VAAR 852.270-1, the contracting officer issued a memorandum defining the limits of the COR's authority which included a limitation that the COR could not "encourage the contractor by words, actions, or a failure to act to undertake new work or an extension of existing work beyond the contract period." Exhibit 8 at 2153. The memorandum further advised that any unauthorized commitment made by a COR was not a binding commitment on behalf of the Government. *Id*. The president of APS acknowledged receipt of this memorandum in November 2020. *Id*. at 2155.

The contract contained specifications for the submittals requesting approval of products to be used on the contract. Exhibits 2 at 178-81, 7 at 2084. These specifications included the requirement for a transmittal form, and, if the transmittal was a request for a deviation, the submittal was to include "a side by side comparison of [the] item being proposed against [the] item specified." Exhibit 2 at 180. The specification further advised that incomplete submittals would be returned without review. *Id*. at 179. VA kept a log for all submittals. Exhibits 7 at 2084, 104 at 4049.

II. Extension of the CCD

The parties agree that VA did not enforce the CCD of December 2022, but dispute what date was agreed to as the new CCD. APS asserts that the VA contracting officer approved an extension to July or October 2025. VA maintains that the parties agreed that the CCD would be October 2024. We set forth here the facts that underlie the parties' contentions.

On September 22, 2022, APS submitted to the COR a proposed schedule showing performance through June 2025. Exhibit 220 at 3127-31. On September 26, 2022, the COR responded indicating that the schedule was approved. *Id*. at 3125. Similarly, on October 24, 2022, the COR approved another schedule update showing performance through June 2025. Exhibit 222 at 3319-28. The contracting officer was included on both of the COR's emails.

On October 28, 2022, APS submitted its request for a contract extension to July 3, 2025, to the contracting officer. Exhibit 75 at 3666.[3] By email the same day, the VA contracting officer responded and disagreed with APS's explanations of the need for an extension. *Id.* at 3665. He also suggested that APS revise its extension request. *Id*.

On January 5, 2023, APS submitted a request for a contract extension to October 3, 2025. Exhibit 143 at 4574, 4585-86. After a further exchange of emails regarding the status of APS's efforts to hire a new roofing subcontractor, on January 26, 2023, the contracting officer stated that he was willing to allow the contact to proceed and requested that APS submit a "request for contract extension since this [s]chedule extends into 2024 when the original stated the project would be completed in 2022."[4] Exhibit 88 at 3795. The contracting officer further stated that "[f]or the contract [period of performance (POP)] extension request I will attach what was sent by [APS's former project manager] and our comments in response. I need this right away to develop a modification to the contract. Complete this POP request ASAP and send to [COR] and I for review." *Id*. To the email, the contracting officer attached APS's previous request for an extension to October 3, 2025, with an accompanying schedule. *Id*. at 3810-12.[5]

By letter dated January 30, 2023, APS submitted to the contracting officer a POP extension request, seeking an extension to October 10, 2025. Exhibit 147. On March 7, 2023, the contracting officer issued a cure notice pursuant to FAR 52.211-10, Commencement, Prosecution and Completion of Work (APR 1994). Exhibit 92. The contracting officer stated that the proposed schedule extension to October 10, 2025, was not

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[3] APS disputes that this letter was a request for an extension because the COR had already approved the requested extension. Appellant's Revised Statement of Genuine Issues, ¶ 56. APS's contention is contradicted by the text of the letter itself wherein APS "requests an extension to July 3, 2025." Exhibit 75 at 3666.

[4] APS noted that the contracting officer's email did not accord with their request. In an email to the COR the following day the president of APS noted that the contracting officer had said the schedule went to 2024, but their request was for 2025. Exhibit 146 at 4647.

[5] Exhibit 145 contains the same email exchanges between the contracting officer and APS and appends the schedule showing the proposed completion date of October 2025. Exhibit 145 at 4640-41. But, this exhibit accords with the contracting officer's note that he was attaching the previous request for an extension through July 3, 2025, and VA's previous response. *Id*. at 4642-44.

acceptable to the VA. *Id*. at 3848. Instead, the contracting officer directed APS to submit a revised schedule with a CCD of October 10, 2024. *Id*. at 3849.

By letter dated March 17, 2023, APS responded to the cure notice and submitted a schedule showing final inspection in October 2024. Exhibit 93 at 3850-51, 3908-09. APS described the construction schedule as part of its "plan of action" and did not object to the contracting officer's direction that it assemble the schedule based upon a CCD of October 10, 2024. *Id*. at 3851.

III. Contracting Officer's Termination Decision

On December 12, 2023, the contracting officer issued a decision terminating the contract for default because APS had "failed to diligently pursue the remaining work on the contract in order to ensure completion." Exhibit 123 at 4252. The contracting officer terminated the contract after issuing two cure notices in which the contracting officer sought assurances of APS's ability to perform. Exhibits 92, 109. At the point the contract was terminated, APS had performed thirteen percent of the work on the contract. Respondent's Statement of Undisputed Material Facts ¶¶ 117, 123 (citing Exhibit 123 at 4259). At termination, APS had not finalized a contract with a subcontractor to complete the roofing work. *Id*. ¶ 124 (citing Exhibit 184 at 3404). At termination, APS had not completed the punch list on the seven roofs on which it had worked. *Id*. ¶¶ 64, 125 (citing Exhibit 185 ¶ 14). At termination, APS had not begun work on forty-eight of the roofs to be re-roofed in performance of the contract. *Id*. ¶ 126 (citing Exhibit 185 ¶ 16). APS does not dispute any of these proposed material facts. Appellant's Statement of Genuine Issues ¶¶ 64, 117, 123-126.

IV. Evidence of Workmanship Defects/Issues

VA asserts that the evidence of poor workmanship by APS on the roofs that it completed provides another basis for the default termination. In support of this allegation, VA cited to emails and contract reports that discuss damage to roofs thirty-six and forty. Respondent's Supplemental Statement of Undisputed Material Fact ¶¶ 35, 48, 50-54, 154; Exhibits 68, 177-179. In response, APS provided a declaration of its project superintendent explaining that the issues related to roofs thirty-six and forty were fixed by APS. Exhibit 296 at 6834.

V. Request for Consideration of Use of Kemper Products

Because it was having difficulty obtaining a subcontractor that was certified to use the already-approved Tremco roofing products, APS, in response to the second cure notice,

offered to switch to Kemper roofing products. Exhibit 164 at 4822. As part of its response, APS offered a single sheet listing, for comparison purposes, the properties of both the Tremco and Kemper roofing materials. APS indicated that the sheet was provided for the contracting officer's "review and approval." *Id*. APS does not cite to any other documentation that it provided for VA's review and approval of its request to switch to Kemper products. The submittal log does not list a submittal for use of the Kemper products. Exhibit 104.

Discussion

Standards for Review

APS seeks to overturn the contracting officer's termination of its contract for default. Termination for default is a drastic sanction. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). VA bears the burden of establishing a *prima facie* case that the contractor was in default, and, if VA satisfies that burden, APS bears the burden of establishing that its failure to perform should be excused. *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,971 (citing *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,742).

"In deciding a motion for summary judgment, we initially determine if there are material facts in dispute; we will not weigh the facts and evidence. Only when there are no material facts in dispute do we look to whether the movant is entitled to judgment as a matter of law." *Centex Bateson Construction Co.*, VABCA 5166, et al., 97-2 BCA ¶ 29,196, at 145,252. While "[a]ny doubt as to the existence of a disputed issue of material fact must be resolved against the non-moving party," *Campos Construction Co.*, VABCA 3019, 90-3 BCA ¶ 23,108, at 116,012, the non-moving party "must present sufficient evidence, by pointing to some part of the record or additional evidence, indicating that the facts differ significantly from the way the non-movant has presented them." *Centex Bateson*, 97-2 BCA at 145,252.

The Contract Completion Date Was October 10, 2024

VA terminated the contract based upon APS's failure to make progress and concern that APS would not complete the contract on time. To decide this issue, we first need to determine the CCD. *See Omni Development Corp*., AGBCA 97-203-1, et al., 05-2 BCA ¶ 32,982, at 163,433 ("Since the endangerment issue is tied to final completion and occupancy, we need to determine how much time [the contractor] had remaining for performance at the time of termination.").

The parties do not dispute that VA did not enforce the original CCD. In January 2023, more than a month past the December 2022 CCD, the contracting officer told APS that he was willing to allow APS to continue with the contract. "Where 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 to be given." *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969).

The parties disagree as to the date of the new CCD. APS urges the Board to find that the new CCD was either in July or October 2025, based upon the contracting officer's purported approval of APS's extension requests. For the July 2025 date, APS recites facts regarding the COR's efforts to help APS develop the schedule and then his communications indicating that he approved the schedule submissions. Pursuant to the terms of the contract, the COR did not have the authority to approve such a schedule extension. APS demonstrated its understanding of this limitation when it submitted the July 2025 schedule extension request to the contracting officer. Moreover, while the fact that the contracting officer was included on the emails between the COR and APS regarding his "approval" of the schedule extensions may constitute knowledge of the COR's actions, APS cannot establish ratification by the contracting officer because he rejected the subsequent schedule extension request. *See Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007) ("Ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority.").

For the October 2025 schedule extension request, APS relies upon the fact that the contracting officer attached to his email the schedule showing performance through October 2025. But, this attachment does not comport with the text of the contracting officer's email which requested a schedule with a CCD in 2024. And, the contracting officer asked for a proper extension request, which APS submitted based upon the October 2025 date, and the contracting officer rejected the request. This record does not provide a basis for us to find that the contracting officer is somehow bound to an October 2025 performance extension due to an inadvertent attachment.

VA asserts that the contracting officer set the new CCD of October 2024 in the first cure notice. VA further asserts that APS agreed to this date by submitting a schedule that complied with the new CCD date. Bilateral agreement on a new schedule date has been found when the contracting officer requests a new date from the contractor, the contractor supplies a new date in a proposed schedule, and the contracting officer adopts the schedule as the one for the contract. *ASC Systems Corp.*, DOTCAB 73-37, et al., 78-1 BCA ¶ 13,119, at 64,137.

APS challenges this assertion, claiming that APS only submitted the schedule based on the October 2024 CCD under threat of termination, a form of economic duress. To establish economic duress, APS has to establish that (1) it involuntarily accepted VA's date, (2) the circumstances permitted no alternative, and (3) the circumstances were the result of VA's coercive acts. *Fortis Industries, LLC v. General Services Administration*, CBCA 7967, 24-1 BCA ¶ 38,668, at 187,969. To establish that VA's actions were coercive, APS would have to show "a wrongful action by the Government that was illegal, a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or a breach of the implied covenant of good faith and fair dealing." *Id*. The contracting officer properly reset the CCD in a cure notice issued pursuant to the Default clause. "The proper way thereafter for time to again become of the essence is for the Government to issue a notice under the Default clause setting a reasonable but specific time for performance." *DeVito*, 413 F.2d at 1154; *see also id.* at 1155 (noting that the contracting officer would have been well-advised to issue a cure notice setting a reasonable time for performance). Asking APS for a schedule to reestablish the CCD on the contract did not violate the terms of the contract or the implied covenant of good faith and fair dealing. APS has failed to rebut VA's showing that the CCD was established as October 10, 2024.

VA Has Established a *Prima Facie* Case That APS Was In Default

The contracting officer terminated the contract because APS had failed to make sufficient progress on the contract to ensure timely completion. A termination for default for failure to prosecute the work requires "a reasonable belief on the part of the contracting officer that there was 'no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.'" *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *RFI Shield-Rooms*, ASBCA 17374, et al., 77-2 BCA ¶ 12,714, at 61,735). The agency is not required to prove that performance was impossible. *RFI Shield-Rooms*, 77-2 BCA at 61,735. Instead, the termination will be upheld where "a demonstrated lack of diligence indicates that [the agency] could not be assured of timely completion." *Id*.

At the time the contract was terminated, with one roofing season left to complete the contract, APS had not started work on forty-eight of the fifty-five roofs that it was to complete on the contract and had not completed the punch list on the seven roofs on which it had worked. APS also did not have a subcontractor to perform the roofing work. Based upon these undisputed material facts, VA has established that the contracting officer had a reasonable belief that APS would be unable to complete the contract within the time remaining.

"Once the Government establishes the existence of default," as VA has done here, "the burden shifts to the contractor to prove that there were excusable delays under the terms of the default provision of the contract that render the termination inappropriate . . . or that it was making sufficient progress on the contract such that timely contract completion was not endangered." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,553. APS did not include in its motion any grounds for why its failure to make progress should be excused. This issue will be the focus of the hearing scheduled for October 2025.

VA Has Not Established That the Roof Leaks Provide an Alternate Basis for Termination

VA terminated APS's contract based upon APS's failure to make progress. Since the appeal was filed, VA has offered an alternate basis for the termination—poor workmanship by APS led to leaks in the roofs that APS worked on. "[I]t is well-settled that a default termination can be sustained 'if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason.'" *1-A Construction*, 15-1 BCA at 175,554 (quoting *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994)). Poor workmanship can be a proper basis for a default termination. *M.C. & D. Capital Corp. v. United States*, 948 F.2d 1251, 1256 (Fed. Cir. 1991).

As evidence of the poor workmanship, VA provides proposed findings based upon emails detailing leaks in two roofs in the 2021 and 2022 timeframe. APS rebuts these findings with evidence that states these leaks were repaired. On this record, applying the standards for summary judgment, the Board is unable to find that the alleged workmanship failures provided an alternate basis for termination.

APS Has Not Established That VA Failed to Consider a Proper Request to Use Kemper Products

APS alleges that VA violated the duty of good faith and fair dealing not to interfere in the performance of the contract by failing to investigate the use of Kemper roofing products on the contract. VA responds that APS failed to make a proper submission for VA to consider.

As noted above, the contract contains specific requirements regarding the submittal of information for the approval by VA. As support for its contention that VA failed to consider the Kemper product, APS points to its response to the second cure notice wherein it stated that it was providing, for the contracting officer's review and approval, a single sheet that compared the properties of the Tremco and Kemper products. VA counters that this

single sheet does not comport with the contract requirements for submittals. APS has not shown on the current record that it made a proper submission for VA to consider.

Decision

VA's motion for partial summary judgment is **GRANTED**, and APS's motion is **DENIED**. The parties' presentations at hearing in October 2025 will be limited to the evidence and arguments regarding why APS's failure to perform should be excused.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge