

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
FFR-Bauelemente + Bausanierung GmbH) ASBCA Nos. 52152, 54563, 54808
) 54809, 55017
Under Contract No. DACA90-98-C-0039)

APPEARANCE FOR THE APPELLANT: Norbert Noll
Agent for Administrator in
Bankruptcy
Huttenberg, Germany

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE HARTMAN

In these appeals, appellant seeks review under the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, of final decisions by a contracting officer which (1) terminated its contract for default, (2) assessed excess procurement costs against it, (3) denied claims for return of monies collected under its “performance bond,” and (4) assessed liquidated damages against it. We conducted a five-day hearing on the propriety of the contract’s default termination and on entitlement, which are the only issues before us for decision.¹

FINDINGS OF FACT

I. Appellant’s contract

On 9 September 1998, the Army Corps of Engineers, Europe District, awarded to appellant, FFR-Bauelemente + Bausanierung GmbH (FFR), a contract, No. DACA90-98-C-0039, for the restoration of building 8246, Smith Barracks, Baumholder, Germany, in the amount of Deutsche Marks (DM) 3,747,678.00. Contract work included asbestos abatement, demolition of existing interior walls and floors, replacement of interior walls and floors with a “1 plus 1” sleeping room and bathroom

¹ Judge Steven Reed who conducted the hearing in these appeals has retired.

configuration, restoration of common areas in the attic and basement, and related mechanical and electrical work. (R4, ASBCA No. 52152 (52152), tab 3 at 2; R4, ASBCA No. 54809 (54809), tabs 5A, 8, 9; tr. 119-20)

The contract contained various standard clauses, including Federal Acquisition Regulation (FAR) 52.211-10 COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (APR 1984), 52.211-12 LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984), 52.236-13 ACCIDENT PREVENTION (NOV 1991), 52.243-4 CHANGES (AUG 1987), 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984), and 252.225-7041 CORRESPONDENCE IN ENGLISH (JUN 1997). The Work Commencement clause stated:

The Contractor shall be required to (a) commence work under this contract within 15 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than 270 CALENDAR DAYS. The time stated for completion shall include final cleanup of the premises.

The Liquidated Damages clause provided that the contractor was “required to complete the work within the time specified in the contract, or any extension,” and must pay the Corps “DM 340.00 for each day of delay.” The Accident Prevention clause stated, in pertinent part, as follows:

(c) If this contract is for construction, dismantling, demolition or removal of improvements with any Department of Defense agency or component, the Contractor shall comply with all pertinent provisions of the latest version of the U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 385-1-1, in effect on the date of the solicitation.

The Correspondence clause provided that “Contractor shall ensure that all contract correspondence that is addressed to the United States Government is submitted in English or with an English translation.” The parties’ contract additionally contained a standard “local clause,” No. 52.0000-4061, requiring a contractor furnish the contracting officer (CO) “[w]ithin SEVEN calendar days after the date of the contract” a “Bank Letter of Guaranty for the performance of the work in the amount of ten percent (10%) of the maximum contract value.” (R4, 52152, tab 3 at 58-59, 77-78, 83, 93, 97-98, 109)

The contract included 21 pages of “Special Technical Requirements,” which stated with respect to accident prevention:

The Contractor shall comply with the Safety and Health Requirements Manual EM 385-1-1.

a. Before initiation of work at the job site, an accident prevention plan, written by the Contractor for the specific work and hazards of the contract and implementing in detail the pertinent requirements of EM 385-1-1, will be reviewed and found acceptable by designated Government personnel. Specific requirements for development of the accident prevention plan are found in sections 01.A and Appendix A of EM 385-1-1.

(R4, 52152, tab 5 at 18). Special Technical Requirement (SR) 9 stated, in part, with respect to contractor quality control:

b. Quality Control Plan. The Contractor shall furnish for review by the Government, not later than five (5) days after receipt of Notice to Proceed the proposed Contractor Quality Control (CQC) Plan. The plan shall identify personnel, procedures, control, instructions, records, and forms to be used. Construction will be permitted to begin only after acceptance of the CQC Plan or acceptance of an interim plan applicable to the particular feature of work to be started. Work outside of the features of work included in an accepted interim plan will not be permitted to begin until acceptance of a CQC Plan or another interim plan containing the additional features of work to be started.

1. The CQC Plan shall include, as a minimum, the following to cover all instruction operations, both on site and off-site, including work by subcontractors, fabricators, suppliers and purchasing agents:

(i) A description of the quality control organization

(ii) The name, qualifications (in resume format), duties, responsibilities, and authorities of each person assigned a CQC function.

(iii) A copy of the letter . . . signed by an authorized official of the firm which describes the responsibilities and

delegates sufficient authorities to adequately perform the functions of the CQC System Manager

(iv) Procedures for scheduling, reviewing, certifying, and managing submittals

(v) Control, verification and acceptance testing procedures for each specific test

(vi) Procedures for tracking preparatory, initial, and follow-up control phases and control, verification, and acceptance tests

(vii) Procedures for tracking construction deficiencies

(viii) Reporting procedures

(ix) A list of definable features of work . . . [that] will be agreed upon during the coordination meeting.

2. Acceptance of Plan. Acceptance of the Contractor's plan is required prior to the start of construction. . . .

. . . .

c. Coordination Meeting. After the Preconstruction Conference, before start of construction, and prior to acceptance by the Government of the Quality Control Plan, the Contractor shall meet with the Contracting Officer or Authorized Representative and discuss the Contractor's quality control system. During the meeting, a mutual understanding of the system details shall be developed, including the forms for recording the CQC operations, control activities, testing, administration of the system for both on-site and off-site work, and the interrelationship of Contractor's Management and control with the Government's Quality Assurance.

(R4, 52152, tab 5 at 8-11)

Section 2A.3 of the contract's specifications set forth "special requirements" regarding asbestos abatement work, which included the following:

2A.3.1.2 Within fifteen (15) calendar days after the date of contract, the Contractor shall furnish the Contracting Officer a certificate of training for each worker and supervisor who will participate in the execution of the asbestos abatement work of this contract, from any firm or individual providing a training course in asbestos abatement practices and procedures in accordance with TRGS 519, Enclosure 3.

....

2A.3.2.1 The Contractor shall attend a preconstruction meeting scheduled by the Contracting Officer's Representative. The Contractor must submit the following documents at this meeting.

2A.3.2.1.1 Documented evidence that the asbestos abatement contractor has successfully completed five similar asbestos abatement projects. This shall include names and addresses of clients, place of work, as well as evidence of air sampling for asbestos.

2A.3.2.1.2 Certificate of Compliance: Certificate of the Manufacturer, that vacuum cleaners, ventilation equipment, and other equipment required for retention of airborne asbestos fibers meet the requirements of ZH 1/134, ZH 1/487, and ZH 1/616.

2A.3.2.1.3 Description of approved respirators that will be available at the site. Manufacturer and model of the equipment shall be stated.

2A.3.2.1.4 Evidence that each worker has been briefed on the hazards of asbestos, respirator use, decontamination, and proper fitting of approved respirator face pieces.

2A.3.2.1.5 The contractor shall also submit, for each worker who will be on the job site or enter the work area, an original copy of the standard Certificate of

Worker's Acknowledgment, listing all dangers and possible results due to exposure of asbestos, including the multiple danger due to smoking on the job. Such a certificate must be dated and signed by the worker.

2A.3.2.1.6 Medical certificates documenting compliance with VBG 100 for each worker.

2A.3.2.1.7 Written evidence that all the required permits and agreements have been obtained for the transport and disposal of the asbestos-containing materials, including evidence that the dump site for asbestos disposal is approved by the responsible authorities.

2A.3.2.1.8 Detailed description of work procedures to be used (Work Schedule) for removal of asbestos-containing materials. Ensure that this description includes the following:

- Description of all asbestos abatement methods to be used
- Work sequence and progress schedule
- Description of final cleaning procedures
- Type of wetting agent to be used
- Disposal Schedule
- Description of the procedure to be used to prevent environmental pollution.

(R4, 52152, tab 4 at 2A-1 through 2A-3)

Section 2A.4 of the contract's specifications described the asbestos abatement work to be performed, in relevant part, as follows:

2A.4.3 Removal of vinyl asbestos floor tile on wood subfloor:

The vinyl asbestos flooring shall be removed in sheets with the wood subflooring attached. The resulting sheets shall be wet-wiped and placed on two large sheets of 0.20mm polyethylene. The sheets shall be wrapped and tightly welded or sealed with appropriate adhesive tape.

....

2A.4.7 Removal of vinyl asbestos floor tiles on concrete floor

2A.4.3.1 [sic] Vinyl floor tiles shall be heated with infra-red heating elements until pliable and no longer brittle. They shall then be separated from the heated and softened adhesive by means of a special blade, vacuuming at the same time by means of an attached K-1 industrial vacuum with HEPA filter. This procedure shall ensure complete removal of all adhesive and removal of any asbestos fibers which might possibly be released.

2A.4.3.2 [sic] Removed tiles shall be sprayed with a fiber binding agent before cooling and packed and sealed in marked, rip resistant, double layered polyethylene bags, which in turn should be packed in high tensile plastic bags.

2A.4.3.3 [sic] The bags shall be marked as containing material with asbestos, and shall be transported to an approved disposal site.

2A.4.3.4 [sic] Following removal of the tile, all the floor areas shall be vacuumed using a K-1 vacuum cleaner to remove any loose bits of adhesive. Afterwards, the area shall be sprayed with a fine film of fiber-binding agent as a precautionary measure to bind any fine dust particles that may remain after vacuuming. . . .

(R4, 52152, tab 4 at 2A-6 through 2A-8; R4, 54809, tab 8 at 2A-6 through 2A-8)

Section 26.4 of the contract's specifications described the concrete work to be performed, in relevant part, as follows:

26.4.34 Construct interior concrete foundations

Construct cast-in-place reinforced concrete foundations to support the steel profile columns and concrete pillars between doors.

....

26.4.37 Exterior ramp reinforced concrete slab

Construct cast-in-place concrete for the exterior ramp slab, reinforced using normal concrete B25, 20 cm thick, work included preparation of the subgrade.

(R4, 54809, tab 8 at 26-7 through 26-8)

Section 28 of the contract's specifications described the cast stone work to be performed. It stated that the contractor was to "[s]upply and install cast stone window sills" both on the exterior and interior of the new windows to be installed. (R4, 54809, tab 8 at 28-1)

II. Appellant's Contract Performance

By letter dated 9 September 1998, the Corps' CO, Patricia Hill, advised FFR that its proposal dated 26 May 1998 and final revised proposal dated 7 August 1998 had been accepted by the Corps, it was awarded a contract in the amount of DM 3,747,678.00, and it was required to submit a "Bank Letter of Guaranty" under clause 52.0000-4061 "within seven (7) days of this award notification" (R4, 52152, tab 6). In a letter dated 17 September 1998, CO Hill advised FFR that she had scheduled the contract's Pre-Construction Conference for 1 October 1998 and it should submit the items required by the asbestos abatement specification section (§ 2A) at that time (R4, 52152, tab 7). In another letter of the same date, Elizabeth Burkhart, the CO's representative (COR), who was located at the project's site, advised FFR that, before starting work, it must submit for review and approval: asbestos abatement training certificates for each worker and supervisor pursuant to specification § 2A.3.1.2; all of the items set forth in specification §§ 2A.3.2.1.1 through 2A.3.2.1.8 pursuant to specification § 2A.3.2.1; an Accident Prevention (AP) plan pursuant to SR 12; and a CQC plan pursuant to SR 9b (R4, 52152, tab 8). In a third letter of the same date, COR Burkhart further advised FFR the Corps was considering changing the contract to require "removal of additional layers of asbestos-contaminated flooring in Building 8246" and asked FFR to submit a proposal, including any contract performance extension deemed necessary, for the performance of extra work described as follows:

Specification Section 2A.4.3 "Removal of vinyl asbestos floor tile on wood subfloor" shall be modified to state:

Bedrooms on the first and second floors: The floor consists of a top layer of vinyl asbestos tile glued to particle board approximately 2.5 cm thick. Beneath this is a layer of granulate soundproofing less than 3 cm thick. A second layer of vinyl asbestos tile glued to particle board is below the soundproofing, directly on top of the original hard wood floor.

Attic: The floor consists of a top layer of vinyl asbestos tile glued to particle board approximately 2.5 cm thick. Beneath this is a layer of tar paper on top of granulate soundproofing less than 3 cm thick placed directly on top of the original hard wood floor.

The asbestos-contaminated material shall be removed and disposed of in the most suitable and economic manner.

(R4, 52152, tab 9)

About three weeks after contract award, on 28 September 1998, CO Hill advised Norbert Noll, FFR's chief manager and owner, in a letter sent by telecopier:

This letter is to notify you of my concerns regarding your interest in, and your ability to perform the subject contract.

This contract was awarded on 9 September 1998 and your firm received notification by fax the same day. . . . The B[ank]L[oa]nG[uaranty (BLG)] is required 7 days from award notice. . . . As of this date, 19 days after award notification, I have not received your BLG.

Secondly, . . . I requested a meeting for 16 September 98 and stressed the importance of your attendance. In fact, I delayed and rescheduled the meeting with your firm, until 22 September 1998, because of your inability to attend the previous week. It is apparent that you did not understand the significance of this meeting, since you did not attend. Instead, you sent as your spokesperson Dr. Gerr, who is not a direct employee of your firm, nor does he . . . have authority to speak for your firm.

. . . I cannot issue a Notice to Proceed until receipt and approval of [your BLG]

(R4, 52152, tab10; *see id.*, tab 13; tr. 1/63) After several telephone calls to FFR and CO Hill's 28 September letter, FFR submitted a BLG to the Corps on 30 September 1998, 14 days late (tr. 3/37-39, 41; R4, 52152, tab 11).

In a letter dated 30 September 1998, COR Burkhart advised FFR that the Pre-Construction Conference was scheduled for 6 October 1998 and reminded FFR it should be prepared to submit the items required in the asbestos abatement section of the specifications (R4, 52152, tab 12). At the Pre-Construction Conference, FFR did not submit the items required under the asbestos abatement specification section. The Corps, however, gave notice to proceed (NTP) with contract work, establishing 3 July 1999 as the contract's completion date. During the conference, the COR reminded FFR: it was obligated to mobilize within 15 calendar days of the NTP; its CQC and AP plans must be approved before commencement of work at the site; and the latter plan must be in accord with EM 385-1-1. (R4, 52152, tabs 15, 15a, 28; tr. at 1/141-45)

In a letter issued the same date as the conference, the Corps asked FFR to submit a proposal no later than 13 October 1998 for the performance of extra work, *i.e.*, move the mailroom of building 8246 to building 8261 because the base's Department of Public Works could not do so within a reasonable period of time. The additional work consisted of preparing the basement of building 8261 to receive the existing mailboxes, and then moving and reinstalling the existing mailboxes over a weekend. (R4, 52152, tab 14; tr. 1/151-53)

Two days after the pre-construction conference, on 8 October 1998, COR Burkhart sent FFR a letter stating: certificates of training for each asbestos supervisor and worker were to be submitted for review and approval no later than 15 calendar days after contract award; the "certificates are late" since FFR's contract was awarded on 9 September 1998; section 2A.3.2 required FFR to submit several items at the Pre-Construction Conference; FFR failed to submit the items; and it will not be allowed to mobilize without submission and government acceptance of all required submittals (R4, 52152, tab16; tr. 1/159). Six days later, on 14 October 1998, COR Burkhart sent FFR another letter stating:

I am concerned with the progress of this contract at this early date. I have not received any of the submittals required by the contract prior to mobilization. I have not received any proposals for the asbestos and mailroom changes, nor have you contacted me to inspect the location of the new mailroom. We scheduled the CQC System coordination

meeting for tomorrow with your assurance that the CQC System Plan would be submitted by October 13, 1998. I cannot hold a coordination meeting without having first reviewed your plan. . . . The CQC coordination meeting will be scheduled after I receive the CQC System Plan.

I again must state that you will not mobilize without all submittals as required by the contract. Your present performance is unacceptable. If it continues this way, we may be forced to take appropriate action.

(R4, 52152, tab 17; tr. 2/5)

By letter dated 16 October 1998, COR Burkhart advised FFR that its AP plan, which was received on 15 October 1998, had been reviewed and found “unacceptable.” She explained that it did not conform to the requirements of EM 385-1-1, as required by the Special Technical Requirements and FAR 52.236-13, and must be written for the specific project to be performed. She asked FFR to revise and resubmit the plan “as soon as possible” since it “will not be allowed to mobilize until this plan is approved.” (R4, 52152, tabs 19, 20; tr. 1/183-84)

In another letter dated 16 October 1998, COR Burkhart further advised FFR that its CQC plan, which was received on 15 October 1998, had been reviewed and found to be “unacceptable.” She explained that it did not conform to SR 9, and asked FFR to revise and resubmit the plan “as soon as possible” because it “will not be allowed to mobilize until this plan is approved.” (R4, 52152, tabs 21, 22; tr. 2/6-8)

In a third letter dated 16 October 1998, COR Burkhart advised FFR its asbestos plan received 15 October 1998 had been reviewed and also found “unacceptable.” She explained that the plan did not address the requirements of specification section 2A.3.2.1 and was not in English. She again asked FFR to revise and resubmit the plan “as soon as possible” because it “will not be allowed to begin . . . until this plan is approved.” (R4, 52152, tabs 23, 24; tr. 1/160-64)

During the weekly meeting held 20 October 1998, COR Burkhart authorized FFR to deliver “containers” to the job site, which would be used as FFR’s job site trailer or office. She also told FFR that she would review its draft plans prior to their submission for approval to assist FFR in obtaining approved plans and referred FFR to the specific sections of its contract setting forth requirements for the plans not approved. (R4, 52152, tab 25; tr. 1/162-64, 2/9-12, 2/175).

Three days later, on 23 October 1998, FFR submitted a proposal for performing the mailroom work. It advised the Corps, however, that it would not submit the proposal requested for additional asbestos abatement work until completion of a survey of such work and proposed an independent company be engaged to perform that survey. The Corps did not believe a survey was necessary because the barracks FFR was to renovate was similar to other barracks recently renovated by the Corps where asbestos abatement work was performed. (R4, 52152, tab 26; tr. 1/146-48, 151-53)

During the weekly meeting on 27 October 1998, FFR submitted revised AP and CQC plans, and an asbestos plan which indicated that Firm SK would be FFR's asbestos subcontractor. COR Burkhart advised FFR that an asbestos survey was not necessary prior to submission of the proposal requested to perform additional work, FFR should prepare a proposal to perform that work, and it should assume the additional flooring layer was contaminated, but the original hardwood floor was not. She further advised FFR that: it had delivered and installed fencing without authorization; the only work authorized without an approved AP plan was delivery of FFR's containers/trailers; FFR's workers installing the fencing were not wearing hardhats or safety shoes; such behavior was "unacceptable"; and her office had stopped installation work for the fencing. COR Burkhart reminded FFR that it should contact her office if it was not able to provide information by the date requested. (R4, 52152, tab 27; tr. 1/148-49, 153, 188-89, 2/175)

By letter dated 29 October 1998, COR Burkhart informed FFR its second, revised CQC plan had been reviewed and found "unacceptable" because the plan did not conform to SR 9. She set forth nine problems with FFR's plan, explained that merely stating in the plan "something will be done 'as . . . required by the contract'" was not acceptable, and again advised that the CQC plan "must be written specifically for this project and incorporate its specific requirements." (R4, 52152, tabs 30, 31; tr. 2/13-14)

In another letter of the same date, COR Burkhart informed FFR that its second, revised AP plan had been reviewed and found "unacceptable" because the plan did not conform to EM 385-1-1, Appendix A of the *US Army Corps of Engineers Safety and Health Requirements Manual*. COR Burkhart set forth in detail nine specific problems with FFR's plan, explained that one section of the plan was simply "Section 2B 'Safety and Health Program'" of "EM 385-1-1 copied verbatim," advised FFR it should address specifically those issues and bring a draft revised plan to the next meeting; and reiterated FFR will not be allowed to mobilize without approval of the plan. (R4, tabs 32, 33; tr. 1/189-95)

In a third letter of the same date, COR Burkhart informed FFR that its asbestos demolition plan did not fulfill the requirements of specification sections 2A.3.2.1.1 through 2A.3.2.1.8. She noted that certificates of training are required for each asbestos worker and supervisor; the certificates should have been submitted at the

Pre-Construction Conference; only two such certificates had been received to date; two persons was “an unacceptable and unrealistic crew size”; the remaining certificates must be submitted to her; and FFR will not be allowed to begin asbestos work without those submittals. (R4, 52152, tabs 34, 35; tr. 1/161-65)

While COR Burkhart’s statements — that an asbestos survey was not necessary prior to submission of a proposal to perform additional asbestos work and FFR should simply make specified assumptions in preparing a proposal — were memorialized in the minutes of the 27 October weekly meeting furnished FFR for approval and signature, FFR requested by letter after the meeting that COR Burkhart provide it with a written response to its letter proposing performance of a survey prior to its proposal submission (R4, 52152, tabs 27, 29). COR Burkhart accordingly informed FFR in a fourth letter dated 29 October 1998 that “no asbestos survey is required,” described in detail the asbestos conditions found by the Corps, and stated that she was awaiting submission of FFR’s proposal (R4, 52152, tab 36; tr. 1/148-49).

The next day, on 30 October 1998, FFR submitted a proposal to perform the extra asbestos work. Attached to the proposal were the results of an asbestos survey which had been performed by a FFR subcontractor two days before FFR suggested to the Corps that a survey was necessary, *i.e.*, on 21 October 1998, without the knowledge or authorization of the Corps. (R4, 52152, tab 37; tr. 1/149, 2/175)

By letter dated 2 November 1998, FFR informed the Corps it had “refused” to “provide money for a proper examination” of the asbestos and therefore “cannot receive an efficient asbestos removal plan” and “cannot expect complete documentation from [FFR]” because “proper details from [the Corps] are insufficient” (R4, 52152, tab 38). During the weekly meeting held one day later, on 3 November 1998, FFR did not submit any revised plans to COR Burkhart for review, but did discuss the requirements for both the CQC and AP plans with her (R4, 52152, tab 39).

The following day, on 4 November 1998, FFR submitted to the Corps a document entitled “Work Plan,” which identified Firm SK as its asbestos abatement contractor and was the “English translation” of FFR’s earlier submittal in German with four additional pages attached. The extra four pages identified the “user” as “Ledward Barracks” in Schweinfurt, Germany, rather than Smith Barracks in Baumholder, Germany, stated the number of workers would be “four”, and indicated that “white zone,” rather than “black zone,” asbestos work was going to be performed. The translation listed a total amount of floor tiles of 3,000 square meters, but no other reference to the work to be performed. (R4, 52152, tab 40; tr. 1/176-79, 2/100, 4/10)

At the weekly meeting on 10 November 1998, FFR did not submit an AP plan, asbestos submittal, additional asbestos certificates for its workers, or a four-month

submittal schedule. While it did submit a CQC plan, several of the items set forth in the plan were in “German.” The COR advised FFR that those items needed to be translated and the plan would be reviewed once an English translation was received. To assist FFR, COR Burkhart gave it an outline of the requirements listed in contract section 2A for the asbestos submittal. She reiterated that the submittal must be approved before FFR begins asbestos demolition. COR Burkhart completed negotiations with FFR for the asbestos and mailroom change orders during the meeting. Because the Corps desired to have mailroom change order work performed in about two weeks, *i.e.*, during Thanksgiving weekend, and FFR agreed to perform the work at that time, COR Burkhart asked FFR to submit an “activity hazard analysis” for the mailroom work. If such an analysis was submitted and approved, she could allow FFR to perform this limited work without it having an approved AP plan for the “entire” project. (R4, 52152, tab 41; tr. 1/153-56, 166-68, 170-71, 198-200, 2/14-15)

On 11 November 1998, FFR submitted to the Corps the mailroom “activity hazard analysis” it developed with COR Burkhart (R4, 52152, tab 48 at 12; tr. 1/156, 170, 196-97, 2/171-72). The next day, by letter dated 12 November 1998, COR Burkhart sent FFR a contract modification, No. P00001, memorializing the parties’ negotiation of mailroom and asbestos change order work. The modification described the scope of asbestos work to be performed as “[r]emove all asbestos material in all rooms of the building,” and thus included 35 square meters of removal in the basement added during negotiation. While FFR had not asked for any additional time to perform, the modification added 20 days to the contract performance period making the contract’s completion date 23 July 1999, and increased the contract’s price by DM 55,000 for additional asbestos work (which included payment to FFR for the asbestos survey performed) and by DM 26,000 for move of the mailroom. COR Burkhart asked FFR to execute this modification and return it to her no later than 19 November 1998. (R4, 52152, tab 42; tr. 1/156-58, 2/102-04)

In a second letter dated 12 November 1998, COR Burkhart requested that Mr. Noll attend the weekly meeting on 24 November 1998. She explained:

Your firm’s progress regarding mobilization is not acceptable and is placing the project in jeopardy. We will discuss this issue and the steps you are taking to fix this problem.

The [NTP] was issued on October 6, 1998. Completion of an acceptable [CQC] plan was required within five days of the NTP. An acceptable [AP] Plan is required to be complete prior to mobilization. Your firm’s multiple submissions of these plans have been unacceptable, despite the fact that I have discussed the requirements of both plans many times

with Dr. Gerr. The requirements of the plans are clearly outlined in the EM 385-1-1 ([AP] Plan) and the Special Attachment of the Technical Requirements ([CQC] Plan), yet with each submission, it is clear that the plan author has read neither of these documents. Your contract requires you to mobilize within 15 days of the NTP. You are currently not in compliance with the terms of the contract.

(R4, 52152, tab 43; tr. 2/20-21)

The following week, work began on the mailroom. FFR demolished the existing stud wall and reset the concrete stairs. (R4, 52152, tab 44; tr. 1/168-69) At the weekly meeting of 17 November 1998, FFR again did not submit an AP plan, asbestos submittal, or four-month schedule of submittals. It also did not return to COR Burkhart an executed contract modification and “had no information” about the modification. COR Burkhart advised FFR at the meeting its CQC plan had been reviewed and found unacceptable. She presented FFR with a two-page list of plan deficiencies and directed that the plan be resubmitted. FFR asked permission to perform work on the mailroom on Thursday, November 26, Thanksgiving Day, and its request was approved. (R4, 52152, tab 44; tr. 1/167, 197-99, 2/17-18)

The next week, work continued on the mailroom move. FFR performed painting and electrical work, and was on schedule to move the mailroom Saturday, 28 November 1998. (R4, 52152, tab 45; tr. 1/70, 2/22) While Mr. Noll had been requested to attend the weekly meeting of 24 November 1998, he did not do so. During this meeting, Rudolf Gerr, who possessed a doctorate in philosophy and was a freelance consultant retained by FFR as onsite project manager, advised that FFR would submit an AP plan and resubmit its CQC plan later that week. He did not provide the COR with FFR’s required asbestos submittal and could not state when this would be accomplished. He also was unable to provide any information about the status of the modification sent FFR for execution or the date mobilization might occur. COR Burkhart told Dr. Gerr that, unless communication between him and FFR’s chief project manager (Mr. Noll) improved within one week, Mr. Noll would be required to attend every weekly meeting. (R4, 52152, tab 45; tr. 1/167, 170-72, 2/21, 4/5, 8, 18, 40, 44, 67, 210)

By letter dated 25 November 1998, COR Burkhart notified Mr. Noll his attendance was required at a meeting on 27 November to discuss the status of the project (R4, 52152, tab 46; tr. 1/172, 2/22). Mr. Noll attended the special meeting on 27 November, during which the COR reminded him of the need for an asbestos submittal, showed him various construction deficiencies in the mailroom work performed, and requested that he attend the weekly meeting on 1 December 1998. (R4, 52152, tabs 47, 51; tr. 1/172-75)

On 30 November 1998, FFR provided the Corps a “revised” version of its prior asbestos submittal in which it had “crossed out” the identification of Ledward Barracks as the site of the work and “Firm SK” as the abatement contractor, and identified itself as the asbestos abatement contractor. The “revised” plan continued to indicate that the asbestos work was “white zone” even though FFR’s survey indicated all of the asbestos work was “black zone.” While FFR also submitted medical certificates for some FFR personnel, it did not submit training certificates for any individuals except for Mr. Noll, who was not among those who had submitted medical certificates. (R4, 52152, tabs 40, 49; tr. 1/175-79)

FFR completed its work on the mailroom move by 1 December 1998, except for some repair work. At the weekly meeting on 1 December, Mr. Noll was not present. Dr. Gerr advised COR Burkhart at the meeting that: FFR planned to begin asbestos work the following week; Mr. Noll would provide her the remainder of the asbestos information required later that day; the asbestos work would be completed prior to Christmas; bracing of the building walls would begin after Christmas; the wall bracing design had not been completed as of that date; and a four-month submittal schedule would be provided later that day. Dr. Gerr had no information regarding the modification sent to FFR. COR Burkhart advised Dr. Gerr that concern was being expressed regarding lack of progress on the contract work, Mr. Uzun was not acceptable as CQC System Manager based upon his performance with respect to the mailroom work, Mr. Noll could act as CQC manager for the asbestos portion of the work, and FFR could nominate a new manager after the first of the year. (R4, 52152, tab 51)

When Mr. Noll arrived at the site 90 minutes to two hours late, after the weekly meeting occurred, COR Burkhart directed him to attend all weekly meetings because Dr. Gerr blamed missing information on Mr. Noll. Mr. Noll stated Dr. Gerr was being taken off the project as soon as all plans were complete and a new project manager would be in place the following week. He then gave COR Burkhart the executed modification she had requested be returned no later than 19 November 1998. COR Burkhart advised Mr. Noll that the overall quality of the mailroom work was considered poor, and FFR had failed to submit satisfactory plans and timely mobilize. She informed Mr. Noll that: she may pursue an unsatisfactory interim rating for the company and, if a final unsatisfactory rating is issued, FFR will be barred from contracts with the United States government; FFR had “30 days to improve” its performance, which included completing and obtaining approval for all required plans; and FFR’s performance would be reviewed again on 1 January 1999. (R4, 52152, tab 52; tr. 2/23-29)

The next day, 2 December 1998, FFR sent COR Burkhart a letter asserting that the “processing” and “handling” of its contract was “absolutely unsatisfactory.” FFR stated that: it does not believe “such an important building is intended to be completed as fast

as possible”; issuance of the contract’s notice to proceed should not have occurred since the mailroom had to be moved and extra asbestos work performed; asbestos work could not commence until FFR received a contract modification executed by the CO; COR Burkhart was trying to prove “wrong behavior” by FFR with her “complaints” about its submittals; there is apparently “an instruction to put as many obstacles in [FFR’s] way as possible . . . to create the basis for contract termination”; FFR “will probably entrust the company HS-Helmut Schmidt with the asbestos” work; “required” documentation for that company already is available to the COR because the company previously has performed asbestos work on Corps contracts; FFR has “enormous doubts that the work performance [it] provides will be paid in the appropriate amount according to the provided plans”; and, if that is the case, it “cannot assume any liability.” (R4, 52152, tab 54; tr. 1/179, 2/30-33)

By letter dated 3 December 1998, COR Burkhart advised FFR that the asbestos plan received 30 November had been reviewed and found “**UNACCEPTABLE**”. She explained that: the plan identifies only FFR personnel, but a letter dated 2 December says HS-Schmidt will probably be entrusted with the asbestos work; it thus “is unclear which firm will be doing the asbestos abatement work for the project”; no training certificates have been submitted for anyone other than Mr. Noll contrary to specification § 2A.3.1.2; there is no documented evidence the company doing the work has successfully completed five similar asbestos abatement projects as required by specification § 2A.3.2.1.1; there are no certificates of compliance from manufacturers of vacuum cleaners, ventilation equipment and other equipment required for retention of airborne asbestos fibers which show the equipment conforms to the requirements of ZH 1/134 and 1/487 as required by specification § 2A.3.2.1.2; there are no manufacturer and model numbers for any approved respiratory protection as required by specification § 2A.3.2.1.3; the blank “Job Safety” form submitted does not address whether the workers are briefed on decontamination procedures, respirator use or proper fitting of face pieces as required by specification § 2A.3.2.1.4; there is no medical information for Mr. Noll or HS-Schmidt employees if that firm is performing the abatement work as required by specification § 2A.3.2.1.6; the plan does not address the method of removing the asbestos sheet gasket material or the multiple layers of asbestos-contaminated material; and the plan does not appear specific to the project as required by both specification § 2A and EM 385-1-1. (R4, 52152, tab 56; tr. 1/179-80; *see* R4, 52152, tab 49; tr. 3/6-8)

In another letter dated 3 December 1998, COR Burkhart advised FFR that the AP plan received 30 November had also been reviewed and found acceptable “**EXCEPT AS NOTED**,” the 16 items noted “require resubmission,” and if the items are not resubmitted by 11 December 1998 the plan will be reclassified as “**DISAPPROVED**.” Among the 16 items noted by the COR were that: the signature sheet did not contain a signature by Mr. Noll and another individual; FFR needs to designate a person to immediately notify the COR and emergency personnel in case of an accident and furnish that individual’s

name; use of scaffolding and work platforms must be addressed in the safety plan, and the type of heating and fire protection requirements for the heaters also must be addressed. (R4, 52152, tab 55; *see* R4, 52152, tab 49)

The COR informed FFR by letter dated 7 December 1998 that she had scheduled a CQC coordination meeting for 9 a.m. on 15 December, which was “mandatory” prior to acceptance of the CQC plan. She stated that Mr. Noll, as well as FFR’s superintendent and candidates for CQC manager, should attend and, if the time she had chosen was not convenient, FFR should contact her. (R4, 52152, tab 58; tr. 2/39-41; *see* R4, 52152, tab 5 at 10-11)

Mr. Noll failed to attend the 9 a.m. weekly meeting held 8 December 1998. No FFR representative appeared at this meeting. The COR received by telecopier at 9:29 a.m. that day a note indicating Mr. Noll was ill. (R4, 52152, tabs 59, 60; tr. 2/39-42)

By letter dated 9 December 1998, the COR informed FFR that: she had reviewed its 2 December 1998 letter; she was processing an interim unsatisfactory rating; she was considering recommending its contract be terminated for default for “failure to comply with contract requirements” and “diligently pursue the work”; contrary to its contention, the mailroom and additional asbestos “changes” did not affect the AP and CQC plans; FFR delayed returning an executed contract modification; and she has “no knowledge of any instruction to place obstacles in [its] path in an attempt to terminate [its] contract.” She stated that she simply “want[s] the [renovation] project completed according to [FFR’s] contract requirements and provisions.” (R4, 52152, tab 57; tr. 2/33-34, 37-38)

The construction schedule submitted by FFR showed a construction period of 41 weeks or 287 days, starting in October 1998. The schedule indicated that mobilization would occur immediately upon issuance of the NTP and that the first phase of the work (asbestos abatement) would commence the last week of November and continue through the last week of the year. (R4, 52152, tab 53; tr. 2/29-31, 48)

On 15 December 1998, Mr. Noll did not attend the scheduled CQC meeting. Only Dr. Gerr attended the meeting on behalf of FFR. Dr. Gerr said Mr. Noll was sick. (R4, 52152, tabs 61, 62) COR Burkhardt therefore rescheduled the meeting for 23 December 1998 by letter dated 16 December 1998. She reiterated in her letter that Mr. Noll, as well as his superintendent and all FFR candidates for CQC Manager, were to attend this meeting and FFR should contact her immediately to reschedule if the required persons are unable to attend. COR Burkhardt once again explained that this meeting is “mandatory” prior to Corps acceptance of the CQC plan. (R4, 52152, tab 62; tr. 2/42-45)

On 18 December 1998, FFR proposed the 23 December meeting be rescheduled for the second calendar week in January 1999 because CQC mechanical and electrical

candidates would be on vacation beginning 21 December 1998 (R4, 52152, tabs 53, 63; tr. 2/47). At approximately the same time, the Corps received additional documentation identifying Firm Helmut Schmitt as FFR's asbestos abatement contractor, four training certificates, and significant backup information required for the asbestos plan, but no asbestos "work plan" (R4, 52152, tab 64; tr. 1/181-83).

By letter dated 23 December 1998, CO Hill notified FFR that its failure to submit an acceptable CQC plan, implement the approved AP plan, submit an acceptable asbestos plan conforming to the specifications, complete the project work pursuant to the schedule it submitted, and ensure an officer of the company attended all meetings as directed "is endangering performance of the contract." She stated that, "unless this condition is cured by January 4, 1999, [she] may terminate [FFR's contract] for default." (R4, 52152, tab 65; tr. 2/49)

In a letter dated 29 December 1998, COR Burkhardt informed FFR that the most recent asbestos submission had been reviewed and found unacceptable. She stated: there "is a great deal of information missing"; the only training certificates included are for supervisors; no medical certificates are provided for the supervisors; no quality control official is identified; there is no schedule with milestones, locations specified for waste storage and decontamination units, or statement of methods used to protect workers and passers-by; and there is no description of the different work methods for the project's varying layers of flooring. COR Burkhardt noted the "bulk" of the plan "relies on a specification written for another asbestos abatement project which is different from the project here." COR Burkhardt advised FFR its plan resubmission "is due in this office not later than January 4, 1999." (R4, 52152, tab 66; tr. 1/182-83)

On 29 December 1998, CO Hill received from FFR by telecopier a document which was in German requesting a time extension to 15 January to respond to her 23 December 1998 cure notice based on the fact that Mr. Noll was away from his office. CO Hill notified FFR by letter dated 4 January 1999 that she was granting it an extension of time until "COB 14 January 1999." She stated that, "unless all conditions, as outlined in the Cure Notice, are cured by that date, the Government will terminate for default." (R4, 52152, tabs 67, 68; tr. 2/49, 3/43, 45-46)

In a letter dated 5 January 1999, COR Burkhardt notified FFR that, as a result of its "poor performance to date," the Corps intended to issue an "interim unsatisfactory rating for this project." COR Burkhardt set forth 10 reasons for this rating relating to untimely performance, ineffective management, and unacceptable quality control. (R4, tab 69; tr. 2/49-50, 52-54)

On 14 January 1999, FFR sent CO Hill a letter "responding" to her Cure Notice. The letter stated that: it was prepared to attend the CQC meeting necessary for approval

of its CQC plan at 9 a.m. on 19, 20, 21, or 22 January 1999; the COR cannot “dictate to [it] that the meeting is to be held on 23 December 1998”, the start of the holiday season; its AP plan had been “approved”; adequacy of its asbestos plan “must be measured against the required content of the plan as called for in the specifications;” its 10-page asbestos plan clearly meets those requirements; the COR “raise[s] ungrounded, bordering on the frivolous, objections to [its] Plan”; it is not required to supply training certificates for workers performing asbestos work; it will however supply such certificates once it is given permission to proceed with the asbestos work; the project specifications do not require it to supply medical certificates for its supervisors, only for “each worker”; the COR’s objection that no CQC official is mentioned in FFR’s asbestos plan constitutes “nitpicking” because Mr. Noll is stated to be that official in FFR’s CQC plan; the contract does not require it to describe methods used to protect workers and passerbys, specify locations for decontamination units and waste storage areas, or a schedule of asbestos work until immediately before it commences work and it will do so at that time; the contract does not require it to have an approved asbestos plan before beginning asbestos work; by her actions with respect to its plans, the “COR has issued a constructive stop work order” and not allowed FFR “to start the work” as it is “contractually entitled to do;” Mr. Noll’s presence at all weekly meetings “does not appear necessary” and he will only “be present at any meeting of significance;” FFR “has made good faith efforts to meet the extraordinary administrative demands placed on [it] by the COR;” “objections being raised [by the CO and COR] . . . do not justify a default termination, or indeed a cure notice;” FFR is “ready to proceed;” and it “look[s] forward to . . . withdrawal of the cure notice.” (R4, 52152, tab 70; tr. 2/52-59)

By letter to the CO dated 19 January 1999, FFR addressed its “proposed interim rating.” It asserted its “proposed rating is not fair,” “there is nothing wrong with [its] performance,” and “[w]hat is wrong is the way [it] ha[s] been treated on this and the other contract.” (R4, 52152, tab 71; 2/54-58)

CO Hill determined that FFR was not actively solving its performance problems but making excuses regarding its failure to perform. She concluded that FFR could not reasonably complete the contract work by the contract completion date since almost four months of the nine-month original performance period had passed with virtually no work accomplished. CO Hill, therefore, terminated FFR’s contract for default on 28 January 1999 (R4, 52152, tab 2; tr. 1/205-06, 3/47-51, 136-37)

III. Reprocurement

On 9 February 1999, CO Hill sent a request for proposals to four Multiple Award Task Order Contract (MATOC) contractors for western Germany seeking competitive best value proposals to perform the renovation project work. The reprocurement proposal request included technical and price evaluation factors in order for the Corps to

choose “best value,” as occurred in FFR’s original procurement, and required contractors submit two different proposed completion schedules and price proposals — one for 270 days (the duration of FFR’s original contract) and another for completion of the work by 3 July 1999 (FFR’s original completion date). The proposal request converted the bid schedule from one for a “lump sum” to a “unit price” bidding schedule, which generally “offers a lower risk” to contractors and therefore often obtains a lower price for the work to be performed. (R4, 54809, tab 18 at 1, 3-4; tr. 3/51-54, 57-58, 64-65, 141-50, 178-79)

In part 2B (“Demolition Work – Architectural”) of the reprocurement contract, CO Hill added two sections to those that appeared in the original contract — §§ 2B.4.81 and 2B.4.82. The former added demolition of a concrete floor slab with ceramic tile to the work to be performed under the original contract. The latter stated that all masonry or concrete window sills were to be removed. FFR’s original contract required it to provide “all labor and material for the installation of cast stone window sills for new windows.” Thus, while § 2B.4.81 was a “new” section, it did not set forth additional work not found in the original contract, but simply accounted for an item of work already required to be performed due to the nature of the unit-priced bidding schedule used in the reprocurement contract. (R4, 54809, tabs 8 at 2B-11, 23 at 2B-12, 26d at 7; tr. 3/158-60)

The Corps had awarded the four MATOC contracts, Nos. DACA90-98-D-0040, DACA90-98-D-0041, DACA90-98-D-0042, and DACA90-98-D-0043, during fiscal year 1998 pursuant to a “best value selection” and those contractors thereafter competed for specific construction and renovation projects which were awarded by the issuance of a task order under the contractor’s MATOC contract. Two of the four MATOC contractors (Nöelke and SKE) were also bidders on the original FFR contract. (R4, 54809, tabs 17, 20, 22; tr. 3/51-54, 58, 106-08, 111-12, 141, 144, 146-50)

On 3 March 1999, CO Hill amended her reprocurement proposal request. She deleted the expedited schedule for completion by 3 July 1999 because her technical advisors did not believe it possible to complete performance within that period (thereby requiring contractors submit only a proposal for a performance period of 270 calendar days), deleted and replaced specification § 2A (Asbestos Abatement), revised in part specification §§ 26 and 29, and extended the submission date for proposals until 11 March 1999. (R4, 54809, tabs 18, 18a; tr. 3/151)

Both the original FFR contract and request for proposals contained two clauses to “Construct interior concrete foundations” — specification §§ 26.4.33 and 26.4.34. In revising § 26 of her proposal request, CO Hill eliminated the second of the two clauses (§ 26.4.34), and subsequent Specification sections were moved forward and renumbered, *i.e.*, §§ 26.4.35 and 26.4.36 became §§ 26.4.34 and 26.4.35. CO Hill additionally deleted § 26.4.37 appearing in the original contract and her initial request for proposals which

required a cast-in-place concrete ramp slab. (R4, 54809, tabs 8 at 26-27, 18a at 10, 23 at 26-27; tr. 3/93, 95-96, 156)

CO Hill amended her reprourement proposal request a second time by letter of 11 March 1999. She advised that the task order would be awarded based on lowest price only, again deleted and replaced specification § 2A in its entirety, deleted a requirement for schedule submittals, and extended the due date for proposals to 15 March 1999. The new version of specification § 2A.4.3 provided:

- Removal of vinyl asbestos floor tile on wood subfloor:
The existing flooring in the living rooms of the first and second floors and the attic consists of the following cross section from top to bottom:
- a. vinyl tile with adhesive
 - b. particle board (approx. 2.5 cm thick)
 - c. bituminous paper
 - d. up to 3 cm Moabit
 - e. vinyl tile with adhesive (second layer)
 - f. particle board
 - g. wood floor

The total thickness of the flooring is less than 7 cm. The entire area shall be treated as a black zone. The contractor shall remove all asbestos-contaminated material.

The new version of specification § 2A.4.7 provided:

Remove up to 2 layers of asbestos tile glued to the concrete floor. All layers of flooring shall be treated as asbestos containing material. Included is the removal of all glues and adhesives used to secure the asbestos containing material to the building structure. The Contractor shall assume all vinyl floor tile in the basement is asbestos-contaminated. The contractor shall remove all asbestos-contaminated material.

(R4, 54809, tab 18b at 18, 26-27)

CO Hill received proposals to perform the work from three of the four MATOC contractors. Noëlke GmbH submitted the lowest price proposal in the amount of DM 4,180,093.64. This amount was less than the amount of its price proposal to perform the original FFR contract (DM 4,481,255) and the Corps' estimate for the performance of

the reprourement work (DM 4,483,493). (R4, 54809, tabs 17, 19, 20, tr. 3/58, 146-47, 150)

On 29 March 1999, after obtaining approval from the Contract Review Board, CO Hill awarded the reprourement work to Nöelke as Task Order 0001 under its MATOC contract, No. DACA90-98-D-0042 (R4, 54809, tabs 21, 22; tr. 3/101, 141-42). The requirements for submittals under the task order were the same as in FFR's contract. Due to urgency of completion of the work, however, the liquidated damages daily rate was DM 614, rather than DM 340, the rate set forth in FFR's contract (R4, 54809, tab 18 at 1; R4, 52152, tab 3 at 93; *see* R4, 54809, tab 22; tr. 2/220-28, 3/153-54). While § 2B.4.79 of FFR's contract required it to dismount and move mailboxes, Nöelke's task order/contract did not require performance of that work when issued. This contract work, however, was added via a modification for which Nöelke was paid DM 1,589.07. (R4, 54809, tabs 2 at append., 8 at 2B-11, 23 at 2B-11; tr. 2/131, 156, 167, 170, 194-97, 3/160) Nöelke's specification § 19.4.1 was identical to § 19.4.1 of FFR's contract and the estimated quantity for both was four square meters. Nöelke, therefore, did not receive any different treatment with respect to § 19.4.1. (R4, 54809, tabs 8 at 19-2, 23 at 19-2, 26a at 14, 26d) The Corps, however, did pay DM 3,864 to Nöelke for work pursuant to § 2B.4.81 (concrete floor and ceramic tile added demolition), which was not a part of FFR's original contract (R4, 54809, tab 26d at 7).

While the Corps paid Nöelke DM 317.40 for work under § 11.4.9 (Construct Cleanouts on Subdrain Line), § 11.4.9 of Nöelke's contract is the same as § 11.4.9 of FFR's contract. A line item for that section was added to the bidding schedule simply to individually account for that item. The line item, therefore, is not one for work additional to that specified in FFR's original contract. (R4, 54809, tabs 2 at append., 8 at 11-3, 23 at 11-3, 26a, 26b at § 11, 26d at § 11)

The Corps paid Nöelke DM 349.60 for work pursuant to its specification § 23.4.29 (guardrail installation), which was identical to § 23.4.29 of FFR's original contract. The line item for the section was added to the reprourement bid schedule only to individually account for that item. Accordingly, this line item also is not one for work additional to that specified in FFR's contract. (R4, 54809, tabs 2 at append., 8 at 23-7, 23 at 23-7, 26a, 26b at 16, 26d at § 23)

Estimated quantities for the original FFR contract show "300 square meters" of anticipated work for both specification § 2A.4.3 and § 2A.4.7. Estimated quantities for the same two sections in Nöelke's reprourement contract were both "650 square meters." FFR's contract, however, was modified prior to default termination to specify that it was to "clear building of all asbestos material" in exchange for additional compensation of DM 55,000. (R4, 54809, tabs 10g, 26a at 2, 26d at § 2B) The square meters of the change order work are not reflected in the estimated quantities for FFR's

contract. The Corps paid Nöelke DM 16,055 for § 2A.4.3 work and DM 67,730 for § 2A.4.7 work under the reprourement contract or a total of DM 83,785, which does not appear to be significantly greater than the sum of DM 55,000 plus the cost of asbestos work included in FFR's lump sum bid the Corps would have paid FFR had its contract not been terminated for default. (R4, 54809, tabs 8 at 2A-6 and 2A-7, 18b, 26a at § 2A, 26d at § 2A; R4, 52152, tab 42; tr. 3/83-85, 156).

Estimated quantities for the original FFR contract show a quantity of 6 cubic meters of reinforced concrete for specification § 26.4.34 and a quantity of 6 cubic meters of reinforced concrete for § 26.4.37 (*i.e.*, the ramp) with identical unit prices for both of DM 950. Estimated quantities for the reprourement show a quantity of 9 cubic meters for § 26.4.34 and a zero quantity for § 26.4.37 (the deleted ramp) or a total quantity of 9, rather than 12, cubic meters for the two sections. Thus, there was a net "decrease" in the scope of reinforced concrete work between the original and reprourement work. (R4, 54809, tabs 18a at 14, 26b at 19, 26c at 19; tr. 3/89-90, 157-58)

Nöelke's MATOC contract (under which the reprourement task order was issued) provided at § 00010, ¶ 2.1 that:

The maximum overall cumulative value of all work awarded under all contracts resulting f[ro]m the solicitation will be \$12 million for the base period, \$9.5 million for option period one, \$8.5 million for option period two or \$30 million over the life of the contracts. Task Order minimum and maximum limits are \$50,000 and \$2 million, respectively. . . .

(R4, 54809, tab 22 at 1) It also provided at § 00700 that:

(a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than \$50,000, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) Maximum order. The Contractor is not obligated to honor - -

- (1) Any order for a single item in excess of \$2,000,000;
- (2) Any order for a combination of items in excess of \$2,000,000; or
- (3) A series of orders from the same ordering office within Three (3) days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

(c) If this is a requirements contract . . . , the Government is not required to order a part of any one requirement from the

Contractor if that requirement exceeds the maximum order limitations in paragraph b above.

(d) Notwithstanding paragraphs (b) and (c) above, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within Three (3) days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

(R4, 54809, tab 22 at 00700-19 and 00700-20)

IV. Claims and Appeals

During both February and March 1999, CO Hill made demands for payment under the terms of FFR's BLG. Volksbank Wetzlar-Weilburg eG (Volksbank) initially resisted making payment through litigation in the German courts, but eventually tendered DM 374,767.80 in full payment of its rights and obligations under the letter of guaranty (R4, 54809, tabs 2 at 6, 13).

On 16 April 1999, FFR filed a notice of appeal of the default termination with this Board (R4, 52152, tab 1). Approximately five months later, by letter dated 21 September 1999, FFR advised that it "filed a bankruptcy proceeding in German court" and, "at this juncture," neither the company nor its counsel had "authority to pursue . . . the appeal," ASBCA No. 52152. FFR requested that the Board place the appeal in "suspense status pending the outcome of the bankruptcy proceeding."

On 6 October 1999, a German bankruptcy judge formally opened insolvency proceedings for FFR "due to inability to pay and over indebtedness." He appointed Andreas Netzer as "insolvency administrator," assigned FFR's present and future assets to Mr. Netzer, and forbid FFR from availing itself of those assets for the duration of the insolvency proceedings. (R4, 52152, tab 76; *see* R4, 52152, tab 75 at 3)

By order dated 3 February 2000, the Board dismissed FFR's default termination appeal without prejudice pursuant to Rule 30 because it was unable to proceed with the appeal for an "inordinate length of time" due to factors not within its control. The Board's order stated that, "unless either party . . . acts to reinstate the appeal within 3 years from the date of th[e] Order the dismissal shall be deemed with prejudice."

Almost three years later, on 31 January 2003, the Board received from Mr. Noll a letter stating that “Appellant herewith requests and moves that . . . appeal [No. 52152] be reinstated.” Pursuant to that letter, this Board reinstated the default termination appeal under its original number.

On 30 September 2003, Mr. and Mrs. Noll and Mr. Netzer executed an agreement which recognized that “receivables concerning” FFR’s contract with the United States were “questionable and controvertible,” assigned “all compensation/recourse receivables” resulting from FFR’s United States “contractual relationship” to the Nolls, authorized the Nolls “to claim compensation/recourse receivables on their own behalf . . . for [their] own account . . . at their own expense,” assigned “20%” of monies collected by the Nolls from the United States (after court and attorney fees) to Mr. Netzer, and surrendered the value of the Nolls’ two life insurance policies to Mr. Netzer. By letter dated 7 October 2003 addressed simply to “Sir/Madam,” Mr. Netzer “confirm[ed]” that Mr. Noll “was already in 2002 authorized” by him “to submit and prosecute lawsuits and claims of . . . [FFR] against the US Army and Government.” (Ex. A-1, A-2)

In a claim dated 21 October 2003 certified by Mr. Noll, FFR sought €191,565 plus applicable interest for the value of the bank guaranty obtained by the Corps to cover excess reprocurement costs because the Corps “did not use the most efficient method of reprocurement to obtain a reasonable price in order to mitigate the amount of the reprocurement costs.” FFR asserted with respect to the reprocurement that the Corps did not solicit a “sufficient number of potential contractors . . . to assure [receipt of] competitive prices” and thus “no excess reprocurement costs are due” the Corps. (R4, 54563, tab 3)

In a final decision dated 23 January 2004 denying FFR’s claim, CO Hill stated that: the Corps had incurred reprocurement costs of at least DM 4,180,093.64; the Corps thus had excess reprocurement costs of at least DM 432,415.64; the Corps had competed the reprocurement contract to minimize FFR’s excess cost liability; that liability was not fully compensated by FFR’s BLG; and therefore no amount of the guaranty was due back to FFR or Volksbank (R4, 54563, tab 2). During April 2004, FFR appealed the CO’s final decision denying its claim for return of the guaranty to this Board, which docketed FFR’s appeal as ASBCA No. 54563. Because the CO did not issue a “separate” final decision assessing excess reprocurement costs but denied FFR’s claim for return of the guaranty value due to assessment of those costs in FFR’s claim denial decision, in its answer to the complaint in ASBCA No. 54563, the Corps asserted a counterclaim in the amount of DM 432,415.64 for such costs. The Board later issued an order assigning a separate appeal number, ASBCA No. 54808, to this “government claim” (or counterclaim), *i.e.*, assessment against FFR of excess reprocurement costs.

In April 2004, the Corps also moved to dismiss the default termination appeal, ASBCA No. 52152, for lack of jurisdiction because the three years for reinstatement of that appeal had passed without a reinstatement request by “a proper party.” According to the Corps, the appeal had not been reinstated by FFR but by “Mr. Noll,” who possessed an “invalid” assignment of the contract and lacked privity of contract with the United States.

On 14 May 2004, Mr. Netzer submitted a certified claim to the Corps seeking €191,565, plus applicable interest, for “the contractor (in bankruptcy)” because the Army breached its duty to mitigate by: increasing quantities in the reprourement for line items 2A.4.3, 2.A.4.7, and 26.4.34; adding to the reprourement contract line items 2.B.4.81, 2.B.4.82, 11.4.9 and 23.4.29; issuing a task order exceeding \$2 million under a MATOC contract to accomplish the reprourement; and failing to issue the reprourement contract to the next best bidder under the initial solicitation. According to this claim, the Corps was not entitled to excess reprourement costs because it had violated its duty to mitigate. (R4, 54809, tab 4)

In a final decision dated 26 July 2004, CO William Mills denied the 14 May claim and assessed liquidated damages against FFR in the amount of DM 109,292 for 178 days from 23 July 1999 (adjusted completion date of defaulted contract) to 17 January 2000 (completion date of Nöelke’s reprourement task order, absent issuance of any change orders), *i.e.*, a daily rate of DM 614 multiplied by 178 (R4, 54809, tab 2; tr. 3/62-63). On 3 August 2004, the Board denied the Corps’ motion to dismiss the default termination appeal, ASBCA No. 52152, for lack of jurisdiction. The Board stated “[w]e consider Mr. Noll and Mr. Netzer to be authorized representatives of FFR in bankruptcy, the sole appellant in this appeal,” and “fail to see any undue burden on the government in dealing with multiple claims (but not multiple claimants) under the contract.” *FFR-Bauelemente + Bausanierung GmbH by Admin’r in Bankr.*, ASBCA No. 52152, 04-2 BCA ¶ 32,707 at 161,815.

In October of 2004, FFR appealed the CO’s July final decision denying the claim submitted by Mr. Netzer for the value of the guaranty and assessing liquidated damages against FFR to this Board, which initially docketed the matter simply as ASBCA No. 54809. The Board issued a later order to clarify the scope of the claims before it, which stated it would treat ASBCA No. 54809 as the claim for the value of the guaranty and assign a new, separate appeal number, ASBCA No. 55017, to the government’s claim, *i.e.*, CO’s assessment of liquidated damages set forth in the same July final decision.

In December of 2004, the Corps requested consolidation of FFR's appeals and the Board subsequently granted that request. During November 2005, the Board conducted a five-day hearing in these appeals. COR Burkhart testified at the hearing that: she had no reason to believe FFR was going to be able to complete the contract timely; FFR "burned up" two of nine months for contract completion without performing any work originally specified; FFR had not mobilized as required by contract; FFR had not submitted and obtained Corps approval of plans as required; FFR's own schedule showed the asbestos abatement work was to be completed by Christmas but the work had not been begun by that date; she was COR for two other barracks renovations; such contracts had very tight completion schedules because project work commenced when soldiers using the barracks were deployed elsewhere and needed to be complete by the soldiers' scheduled return to base; a contractor needed all of the time allotted by contract to complete the renovation of the barracks; barracks' renovations were deemed to be "high visibility" projects with Army Europe headquarters due to continuing base deployments; other sites available to house returning soldiers were far worse than the barracks now being renovated; FFR and Mr. Noll were aware of these facts but appeared "almost ambivalent" about barracks contract work; it was in her and base's interests to have contract completed by FFR under existing schedule; if FFR's plans came anywhere close to satisfying the contract she would have approved plans; she tried to explain the contract requirements to FFR and help it with submittals because FFR did not appear to be "reading spec"; she offered to review FFR's draft plans prior to submission and wanted to make it easy for FFR; she allowed FFR to do a hazard analysis for only the mailroom so it could begin that work even though it did not have approved plans for the entire contract; FFR, however, had problems properly performing mailroom work, which was a very small part of job; with respect to asbestos work, FFR "seemed just to be throwing paper at her," giving her a job safety plan used on another contract for a different type of asbestos abatement; she felt "she had done all she could to get FFR going with no response"; FFR did not appear to be taking steps to begin work, much less complete it; and, given all the problems she experienced with FFR, she did not see how it could complete the contract within the time remaining. (Tr. 1/151, 159, 160, 164-70, 173, 175, 176-79, 205-06, 2/10, 11-13, 15-16, 21, 22, 25, 29-30, 33-38, 58, 177, 199)

CO Hill testified at the hearing that: the barracks renovation was a high priority project and FFR was informed of this fact; FFR did not promptly pick up the notice of contract award or furnish the required bank letter of guaranty; she thus was concerned from outset that FFR was not proceeding with contract; the COR kept her informed of problems with FFR; the Department of Public Works at the base, the Corps' "customer," requested a meeting with her because progress was not being made upon the renovation, troops were coming back to the base, and the renovated barracks was needed to house them; it was unusual for her to have to meet with a client regarding lack of progress on contract work; she discussed the issues with the resident office at base and met with the client; FFR appeared to be engaged in continuous delays; and the only solution appeared

to be to terminate FFR's contract for "default" and to re-procure the renovation work (tr. 3/37, 39, 40, 41, 48-51, 64, 124-25, 129, 137). CO Hill also testified at the hearing that: she, the project manager, and project engineer agreed 270 days was necessary for a contractor to perform the renovation; the ultimate contract re-procuring the work thus had a 270 day performance period the same as FFR's initial contract; she thought renovation work would be completed faster if performed as a task order under one of the existing MATOC contracts; she therefore had work "broken down" into units to receive "bids" to perform work under a MATOC task order, which are "competed" like other contracts; two of four existing MATOC contractors had bid upon the original FFR contract five months earlier; the only differences between the task order and original FFR contract were those noted in her final decision; and the MATOC task order price for performing the re-procurement work was less than the price offered on FFR's contract by the next lowest bidder (tr. 3/60-61, 101, 143-44, 145, 147-50, 151).

The Corps also introduced at the hearing testimony from Matthias Doersam, an expert on German bankruptcy law. Mr. Doersam explained that: a German bankruptcy court appointed Mr. Netzer as Bankruptcy Administrator or trustee for FFR; a Bankruptcy Administrator essentially takes the place of the bankrupt and makes the decisions for the bankrupt estate; it is possible a Bankrupt Administrator might allow someone such as Mr. Noll to pursue legal claims on behalf of the bankrupt estate before transfer of those claims or property to that individual, and it appears that (in exchange for the assignment of Mr. Noll's life insurance policy to the bankrupt estate) the Administrator transferred FFR's claims against the United States to Mr. and Mrs. Noll, who would also have to pay 20% of any monies collected from such claims to the bankrupt estate. Mr. Doersam added he stands by his written opinion on German bankruptcy law stating that: "the ability of the bankrupt to make any disposals [of property] on his estate . . . is transferred" to a trustee or Bankruptcy Administrator upon opening of insolvency proceedings; FFR's bankruptcy estate consisted mainly of three assets (a bank account, claims against the United States, and claims against Volksbank Wetzlar-Weilburg); generally "it is in the discretion of the [Bankruptcy Administrator] to decide how to realize the bankrupt estate"; and the trustee or Administrator is "entitled to make any disposals on the assets/estate he considers to be necessary to fulfill its legal tasks, especially to realize the assets," including assigning "any possible claim of the bankrupt estate to a third party." (Tr. 1/75-79, 81-82, 93, 97-98, 100-03, 106-07, 109-14; R4, 52152, tab 75; ex. A-1)

DECISION

I. "Standing"

A. Proper Party to Maintain Suit

The Corps concedes: Mr. Netzer was appointed “Administrator in Bankruptcy” for FFR on 9 October 1999 and, as a result, “[b]y operation of law,” acquired the rights to claims FFR possessed against the Corps; the Bankruptcy Administrator had the authority under German bankruptcy law “to make disposals of any assets he considers necessary in order to fulfill obligations;” on 30 September 2003, almost four years after appointment as FFR’s Bankruptcy Administrator, Mr. Netzer transferred “under German insolvency law” any contract claims FFR possessed against the United States to Mr. and Mrs. Noll, FFR’s owners; and transfers that are “incident to court-ordered bankruptcy proceedings” are “excepted from provisions of the Anti-Assignment statutes” (31 U.S.C. § 3727, 41 U.S.C. § 15a). The Corps, however, contends the Nolls cannot pursue the appeals before this Board. According to the Corps, “United States’ anti-assignment statutes prohibit” the transfer of the claims to the Nolls, the transfer is thus “annulled” and the “proper party” to pursue claims is FFR’s bankruptcy estate (not the Nolls), and these “appeals should be dismissed with prejudice” due to lack of “proper party” or “standing.” (Govt. br. at 5-6, 32-35)

In sum, the Corps characterizes the Bankruptcy Administrator’s transfer of the claims/property from the bankruptcy estate to the Nolls as a “third-party assignment” and then proceeds to argue in its brief that third-party assignments are prohibited by United States anti-assignment statutes. Such an argument, however, fails to recognize that the transfer of claims/property to FFR’s Bankruptcy Administrator was by operation of law, *i.e.*, the execution of German bankruptcy laws, and that the subsequent transfer of those claims/property to the Nolls by the Bankruptcy Administrator was incident to ongoing bankruptcy proceedings under German bankruptcy law, as the Corps’ own expert upon German bankruptcy law testified at the hearing in these appeals. It is well-established that the passing of claims to assignees in bankruptcy “is not within the evil at which the [anti-assignment] statute aimed.” *E.g., Erwin v. United States*, 97 U.S. 392 (1878); *McKay v. United States*, 27 Ct. Cl. 422 (1892). The transfers of FFR’s claims against the United States here were by operation of law incident to judicially supervised insolvency proceedings and do not violate legislative objectives of the anti-assignment statutes. *See, e.g., id.; Rel-Reeves, Inc. v. United States*, 606 F.2d 949, 957-58 (Ct. Cl. 1979). Accordingly, we hold the transfers come within the “court-sanctioned” exceptions to the anti-assignment statutes.

B. Proper Party To Initiate Suit

Alternatively, the Corps contends that three of the appeals were not “brought” by the “proper party” and thus should be dismissed. The Corps asserts that ASBCA No. 52152 was not reinstated within three years of its February 2000 dismissal pursuant to Rule 30 and is barred as untimely because the appeal was reinstated in January 2003 by Mr. Noll, when the “proper party” to have reinstated the appeal in January 2003 was Mr. Netzer, the Bankruptcy Administrator. The Corps further asserts that the October

2003 claim seeking the value of the bank letter of guaranty obtained by the Corps, which was the basis for the CO final decision issued in ASBCA No. 54563, was submitted by Mr. Noll, but Mr. Netzer was the proper party to submit and pursue claims in October 2003 and that the 14 May 2004 claim which was the basis for the final decision in ASBCA No. 54809 was submitted by Mr. Netzer, but Mr. Noll was the “proper party” to submit and pursue claims in May 2004 due to Mr. Netzer’s 30 September 2003 transfer of contract claims to the Nolls. (Govt. br. at 5-6, 32-34)

The Corps previously moved to dismiss ASBCA No. 52152 on the ground that Mr. Noll had no authority to petition the Board for reinstatement of the appeal. We denied the motion. We held that Mr. Noll’s request to reinstate the appeal was authorized by Mr. Netzer on behalf of FFR in bankruptcy, citing Mr. Netzer’s statement that Mr. Noll “was already in 2002 authorized to submit and prosecute lawsuits and claims of . . . FFR . . . against the U.S. Army and Government.” We explained, “[i]n effect, the government suggests that appointment by a principal, Mr. Netzer, of an agent, Mr. Noll, somehow extinguishes the authority of the principal,” but no authority under German or American law has been cited by the Corps in support of such a proposition. *FFR-Bauelemente+ Bausanierung GmbH by Adm’r in Bankr.*, ASBCA No. 52152, 04-2 BCA ¶ 32,707 at 161,813, 161,815. Our prior holding is the “law of the case” and entitled to finality unless the controlling law has changed, new facts come to light, or the ruling was plainly wrong and adherence to it would be manifestly unjust. *See, e.g., Northern Helex Co. v. United States*, 634 F.2d 557, 561 (Ct. Cl. 1980). The Corps has not shown that any of the preceding has occurred. Accordingly, we must address the merits of ASBCA No. 52152 and do so below.²

While the Corps argues that ASBCA No. 54563 seeking the value of the bank letter of guaranty should be dismissed because its October 2003 claim was submitted by Mr. Noll, rather than Mr. Netzer, the premise underlying the Corps’ assertion is not correct. We expressly rejected above the Corps’ contention that Mr. Netzer’s September 2003 transfer of FFR’s claims to the Nolls was invalid because it violated anti-assignment statutes. We, therefore, cannot dismiss ASBCA No. 54563 for lack of standing, but must address the issues raised in that appeal.

² We note that, even if we found ASBCA No. 52152 should have been reinstated by Mr. Netzer rather than by Mr. Noll, we could address the issues raised in that appeal regarding the correctness of the Corps’ termination of FFR’s contract for default under the *Fulford* doctrine (*Fulford Mfg. Co.*, ASBCA Nos. 2143, *et al.*, 1955 ASBCA LEXIS 970 (ASBCA 20 May 1955)), which allows the propriety of a government default termination to be challenged in a subsequent appeal of an excess procurement cost assessment. *See GSE Dynamics, Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059 (modifying prior dismissal order); *accord Phoenix Petroleum Co.*, ASBCA No. 45414, 02-1 BCA ¶ 31,835 at 157,286.

Moreover, while the Corps also seeks dismissal of ASBCA No. 54809 seeking the value of the bank letter of guaranty and challenging imposition of excess procurement costs because its May 2004 claim was submitted to the CO by Mr. Netzer, rather than Mr. Noll, all of the issues presented by that appeal are presently before the Board in ASBCA Nos. 54563 and 54808, two appeals arising from an earlier claim submitted by Mr. Noll. Accordingly, in this *pro se* appeal, there simply is no need for us to address the legally complicated issue of Mr. Netzer's authority under German bankruptcy law during May 2004. *See, e.g., Elec. Boat Corp.*, ASBCA No. 55574, 2007 ASBCA LEXIS 35 (14 June 2007).

II. Default Termination

A default termination is a drastic sanction, which should be imposed and sustained only on "good grounds and on solid evidence." *E.g., Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). Government contract provisions authorizing termination of a contract for default are a species of "forfeiture" and are to be strictly construed. *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969); *King v. United States*, 37 Ct. Cl. 428, 434 (1902). Forfeitures are not favored, and one who asserts that there has been a forfeiture is held to the letter of its authority. *E.g., King v. United States*, 37 Ct. Cl. at 436; *B.V. Constr., Inc.*, ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,350.

The parties' contract here incorporates by reference a standard default clause for fixed-price construction contracts, which authorizes the CO to terminate a contract for default when the CO is "justifiably insecure about the contract's timely completion" due to "events, actions and communications leading to the default decision." *See McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1017 (Fed. Cir. 2003); *Discount Co. v. United States*, 554 F.2d 435, 441 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 938 (1977). Thus, to default terminate, the clause requires existence of a "reasonable belief on the part of the [CO] that there was no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance." *McDonnell Douglas*, 323 F.3d at 1016, *quoting Lisbon*, 828 F.2d at 765; *Danzig v. AEC Corp.*, 224 F.3d 1333, 1336-37 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001). The CO's assessment regarding the contractor's ability to timely complete, accordingly, need not be found to be "correct." Rather, in order for a default termination to be sustained, the CO need only be found to have been "justifiably insecure about the contract's timely completion." *McDonnell Douglas*, 323 F.3d at 1017; *Discount*, 554 F.2d at 441.

Determination of the propriety of the CO's default termination, however, does not turn on the CO's subjective beliefs, but on an "objective" inquiry. *Lisbon*, 828 F.2d at 766. A decision to default terminate must be based on tangible, direct evidence reflecting

impairment of timely contract completion. *E.g.*, *McDonnell Douglas*, 323 F.3d at 1016. While CO testimony concerning the termination and contemporaneous documentation are relevant to deciding the propriety of the termination, other factors may also be considered, including comparison of the percentage of work completed and amount of time remaining under the contract (*McDonnell Douglas*, 323 F.3d at 1017), existence of problems with subcontractors (*id.*), a contractor's failure to meet progress milestones (*Kennedy v. United States*, 164 Ct. Cl. 507, 512 (1964)), and the performance history (*Decker & Co. v. West*, 76 F.3d 1573, 1581 (Fed. Cir. 1996)). The government bears the burden of proving that the CO's termination of the contract for default was proper. *E.g.*, *Lisbon Contractors, Inc.*, 828 F.2d at 765.

In these appeals, the government has shown that the CO was “justifiably insecure about the contract’s timely completion.” The CO and COR believed, based on experience with other barracks renovations, that nine months was needed for a contractor to perform the barracks renovation work. The CO’s decision to allow nine months for performance of such work under the procurement contract here, instead of a shorter period of time, despite the imminent need for the renovated barracks, shows she and the Corps officials responsible truly believed nine months was necessary to perform the renovation work. After 113 days of the 290 day revised performance period (or almost 40% of the period) expired with little or no work accomplished by FFR (*i.e.*, clearly less than 5% of contract work completed), the CO terminated FFR’s contract for default. While over 40% of the original performance period had passed, FFR had not yet obtained necessary approvals to commence the initial item of renovation work under the contract, the performance of asbestos abatement. The lack of activity by FFR with respect to the contract obviously made the CO insecure about FFR’s timely completion of the barracks renovation work. *See, e.g.*, *McDonnell Douglas*, 323 F.3d at 1017. As found above, FFR appeared to be having difficulty procuring a subcontractor to perform asbestos abatement work, failed to meet numerous contract progress milestones (timely submission of a BLG, mobilization within 15 days of issuance of NTP, and timely submission of its asbestos training certificates and other contract submittals), and did not possess a contract performance history with respect to the barracks renovation that would instill confidence in a CO. These facts constitute further tangible, direct evidence that the CO was “justifiably insecure about the contract’s timely completion.” *See, e.g.*, *McDonnell Douglas*, 323 F.3d at 1017; *Decker & Co.*, 76 F.3d at 1581; *Kennedy v. United States*, 164 Ct. Ct. at 512. Thus, we conclude that the government has met its *prima facie* burden of proving it was justified in terminating FFR’s contract for default.

A defaulted contractor has the “burden of proving that its nonperformance was excusable” under the provisions of the default termination clause, including occurrence of an event that was beyond its control and without its fault or negligence. *E.g.*, *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). FFR has not offered any evidence that its nonperformance was excusable under the provisions of

the default termination clause. Rather, it simply has asserted that the COR made “repeated

. . . false allegations” regarding FFR, the COR’s actions regarding FFR were “arbitrary and in bad faith,” the COR “hated FFR” and “no longer wished to do business with it,” and FFR was “ousted under false pretenses.” (Compl. 52152 ¶ 6; tr. 1/71, 5/10) Unlike private parties, however, the government is presumed to act in good faith and we may abandon that presumption only upon “clear and convincing” evidence of a “specific intent [by government officials] to injure.” *Galen Med. Assocs. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002); *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977); *Gadsen v. United States*, 78 F. Supp. 126, 127 (Ct. Cl. 1948). The record in these appeals does not reflect that the COR and CO were motivated by malice or otherwise possessed any specific intent to injure FFR when they acted to default terminate FFR’s contract. Instead, it shows that the COR and CO made various efforts to assist FFR with the performance of its contract. FFR, therefore, has not demonstrated bad faith action by the Corps or any basis under the default clause that would excuse its nonperformance of the contract.

III. Excess Reprocurement Costs

Paragraph (a) of the default clause in FFR’s contract provides that FFR is liable for increased costs incurred by the Corps in completing the contract work. FAR 52.249-10; *Walsh Constr. Co.*, ASBCA No. 52952, 02-2 BCA ¶ 32,024 at 158,283. To recover excess reprocurement costs, however, the Corps must show: (a) the work it procured is the same as or similar to that which was to be performed under the contract terminated; (b) it has incurred costs in excess of those under the original contract for performance of the work; and (c) it acted reasonably when reprocuring the work to minimize excess costs resulting from the default. *Cascade Pac. Int’l v. United States*, 773 F.2d 287, 293 (Fed. Cir. 1985); *Astro-Space Labs., Inc. v. United States*, 470 F.2d 1003, 1018 (Ct. Cl. 1972).

A. Similar Work

To satisfy the requirement of similarity, the Corps need not prove that reprocured work is identical to that set forth in the contract terminated. Rather, it must demonstrate it has not made “material changes” in the reprocurement work specifications resulting in “substantial alterations” to the work. *United States v. Axman*, 234 U.S. 36 (1914); *Cal. Bridge & Constr. Co. v. United States*, 50 Ct. Cl. 40, 64-65 (1915), *aff’d*, 245 U.S. 337 (1917); *see AGH Indus., Inc.*, ASBCA Nos. 27960, 31150, 89-2 BCA ¶ 21,637 at 108,863. If work procured is comparable to that set forth in the terminated contract, the Corps may adjust its cost of that work to account for differences from work to be procured under the defaulted contract. However, if work procured is not sufficiently comparable, the Corps loses its right to recover excess costs under the default clause.

Cosmos Eng'rs, Inc., ASBCA No. 24270, 88-2 BCA ¶ 20,795 at 105,055; *Romeo P. Yusi & Co.*, ASBCA No. 19810, 76-1 BCA ¶ 11,835 at 56,596.

In reprocurring the renovation work, the Corps utilized the specifications for FFR's contract. As found above, minor changes were made in the specifications to accommodate the unit-priced bidding schedule of MATOC contracts, add concrete floor slab demolition work and asbestos abatement work set forth in the modification to FFR's contract, and delete construction of interior concrete foundations. The Corps does not seek its increased costs attributable to the changes. None of the changes made by the CO go to the "heart" of the procurement – the renovation work procured is comparable to that which was to be performed under FFR's contract. *See H.N. Bailey & Assocs. v. United States*, 449 F.2d 376, 386 (Ct. Cl. 1971); *Solar Labs, Inc.*, ASBCA No. 19957, 76-2 BCA ¶ 12,115 at 58,195 (revisions neither increased costs nor created substantial changes in functional purpose or physical characteristics of work).

While the CO reprocured the renovation work by obtaining bids on a "task order" under already existing MATOC contracts, a change in procurement technique is not, by itself, sufficient reason to find dissimilarity in the reprocurement. In reprocurring, a CO has broad discretion and the choice of procurement methods falls within that discretion. *Astro-Space Labs.*, 470 F.2d at 1017; *Orlotronics Corp.*, ASBCA No. 23287, 79-2 BCA ¶ 13,912 at 68,296. Due to the imminent need for completion of the renovation work, *i.e.*, soldiers returning from Bosnia requiring base housing, and the requirement the Corps mitigate FFR's damages, it was reasonable for the Corps' CO to utilize existing MATOC contracts — the contracting vehicle deemed most expedient for having work performed. *E.g.*, *Rayco, Inc.*, ENG BCA No. 4792, 88-2 BCA ¶ 20,671 at 104,477-78 (fragmentation of contract into 13 purchase orders and two solicitations reasonable under circumstances), *aff'd*, 758 F.2d 668 (Fed. Cir. 1998). Moreover, while the CO also modified the daily rate for liquidated damages (increasing that rate due to the more urgent need for completion arising from FFR's default), the difference in terms (daily rates) does not appear to have increased the cost of performing the reprocurement contract. As found above, Nöelke GmbH, the lowest bidding MATOC contractor to whom the Corps awarded the reprocurement work, submitted a lower bid for performance of the reprocurement contract than it did for performance of FFR's original contract. *See Skiatron Elecs. & Television Corp.*, ASBCA No. 9564, 65-2 BCA ¶ 5098 at 24,016 (insertion of liquidated damages clause in reprocurement contract did not make contract dissimilar where price not increased). Accordingly, we conclude that the Corps has met its burden of proving similarity.

B. Excess Costs Incurred

As found above, the Corps awarded the reprocurement contract in the amount of DM 4,180,093.64. FFR's contract obligated the Corps to pay it DM 3,747,678 plus

DM 55,000 under the asbestos modification or a total of DM 3,802,678. The difference in the two contract obligations is DM 377,415.64. While the Corps suggests the proper excess cost assessment (after adjustments) is DM 376,899.85, it is clear that the Corps incurred excess costs in obtaining performance of the barracks renovation work. Accordingly, we conclude the Corps has met its burden of proving incurrence of excess costs.

C. Acted Reasonably

To satisfy the third requirement of having acted reasonably to minimize excess costs resulting from the default, the Corps must show that it acted within a reasonable time of the default, utilized the most efficient method of reprourement, obtained a reasonable price, and mitigated its losses. *Cascade Pac. Int'l*, 773 F.2d at 294; *Astro-Space Labs.*, 470 F.2d at 1018.

The CO here issued requests for proposals for the reprourement work 12 days after the notice of default termination and awarded a task order for performance of the reprourement work under a MATOC contract 60 days after the termination of FFR's contract for default. The Corps, therefore, acted within a reasonable time of the default in reprocurring.

The CO believed solicitation of proposals to perform reprourement work from already existing MATOC contractors was the most efficient means to obtain performance of the reprourement work. While appellant asserts the CO should have contacted the other bidders on the original solicitation to see if they would "revive" their earlier offers (compl. 54563 ¶¶ 22-24), the government is not obligated after a default termination to solicit every known source of supply or to contact all bidders in the original procurement. The "test for determining the adequacy of a reprourement is . . . one of reasonableness, and the principal criterion is that a sufficient number of potential contractors are solicited to assure competitive prices and thereby mitigate the excess cost liability of the defaulted contractor." *E.g., Premiere Bldg. Servs., Inc.*, ASBCA No. 51804, 01-2 BCA ¶ 31,626 at 156,244; *Advance Bldg. Maint. Co.*, ASBCA Nos. 27183, 28219, 85-2 BCA ¶ 18,076 at 90,750. As found above, the CO solicited proposals to perform the reprourement work from four existing MATOC contractors, two of whom had bid on the original solicitation and, according to the CO, the task order price for performing the reprourement work was less than the price offered on FFR's contract by the next lowest bidder. Accordingly, we conclude that there was adequate competition and that the Corps used the most efficient means available to reprocur the renovation work. *See Ross & McDonald Contracting, GmbH*, ASBCA No. 38154, 94-1 BCA ¶ 26,316 at 130,895-96 (reprocurement method reasonable given urgent need for work); *Ronald L. Collier*, ASBCA No. 26972, 89-1 BCA ¶ 21,328 at 107,557-58 (same).

Appellant asserts the Corps “did not reprocure . . . at as reasonable a price as practicable” and “exercise reasonable diligence to obtain the lowest price available” (compl. 54563 ¶ 21). The price proposed for performance of the reprocurement work, however, was less than the price offered on FFR’s contract by the next lowest bidder and less than the price offered on FFR’s original contract by the MATOC contractor awarded the reprocurement work. We therefore conclude the Corps obtained a reasonable price for performance of the reprocurement work.

Finally, based upon the record before us, we conclude the Corps also acted to mitigate its losses. Appellant has offered no evidence to the contrary. While appellant asserts that the task order awarded under the MATOC contract exceeded the maximum allowed to be ordered under that contract (compl. 54563 ¶ 27), the contract expressly allows a MATOC contractor to accept and perform such an order, and we fail to see how the CO’s issuance of a task order exceeding a maximum limit which can be (and was) waived by the MATOC contractor who received the order harmed appellant or could be viewed as a “failure” to mitigate the Corps’ losses. *See, e.g., Barrett Ref. Corp.*, ASBCA Nos. 36590, 37093, 91-1 BCA ¶ 23,566 at 118,145 (the duty owed defaulted contractor is one of reasonableness and prudence under circumstances), *aff’d*, 937 F.2d 623 (Fed. Cir. 1991) (Table). In sum, the Corps has demonstrated that its CO acted reasonably in effecting the reprocurement.

The Corps has made the showing necessary for it to recover excess reprocurement costs. *See, e.g., Cascade Pac. Int’l v. United States*, 773 F.2d at 293. Accordingly, we hold that the Corps is entitled to recover excess reprocurement costs from appellant.

IV. Bank Guaranty Letter

In two claims submitted to the CO, one dated October 2003 (ASBCA No. 54563) and one dated May 2004 (ASBCA No. 54809), appellant seeks monies obtained by the Corps under the bank letter of guaranty. According to appellant, the Corps is not entitled to monies under the guaranty as reimbursement for excess reprocurement costs incurred because the Corps failed to mitigate such costs. We concluded above that the Corps acted properly to mitigate its incurrence of excess procurement costs. The Corps therefore is not barred from obtaining monies under the bank letter of guaranty based upon a failure to mitigate damages, but entitled to recovery of excess reprocurement costs incurred.

V. Liquidated Damages

In a final decision dated 26 July 2004, a CO assessed liquidated damages against FFR in the amount of DM 109,292 at a daily rate of DM 614 for 178 days, *i.e.*, from 23 July 1999 (the adjusted completion date of defaulted contract) to 17 January 2000

(completion date of Nöelke's reprourement task order, absent the issuance of any change orders). Appellant does not dispute the number of days of liquidated damages assessed. Rather, it simply contends the Corps is not entitled to liquidated damages because the Corps improperly terminated FFR's contract for default (Compl. 54809 ¶ 11). We expressly held above that the Corps was justified in terminating FFR's contract for default. The Corps therefore is not barred from recovering liquidated damages based on its termination of the contract. We note, however, that the Corps may not assess liquidated damages at a daily rate in excess of that in FFR's contract (DM 340.00).

CONCLUSION

ASBCA No. 52152 (default termination) is denied. We remand ASBCA Nos. 54563 (bank guaranty), 54808 (excess reprourement costs), 54809 (bank guaranty), and 55017 (liquidated damages) to the parties for an attempted amicable resolution of quantum in the appeals. If the parties are unable to amicably resolve the appeals, either party may request reinstatement and further proceedings will be conducted on quantum.

Dated: 6 July 2007

TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52152, 54563, 54808, 54809, and 55017, Appeals of FFR-Bauelemente + Bausanierung GmbH, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals