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APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ASG SOLUTIONS CORP., DBA AMERICAN SYSTEMS GROUP,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2024-1755

Appeal from the United States Court of Federal Claims in No. 1:23-cv-01029-RAH, Judge Richard A. Hertling.

Decided: December 15, 2025

DAVID DEMIAN, Finch, Thornton & Baird, LLP, San Diego, CA, argued for plaintiff-appellant.

SHERYL L. FLOYD, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before CHEN, BRYSON, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

This case arises from a contract between a private contractor and the United States Department of the Navy ("Navy"). The contractor complains that the Navy improperly terminated the contract for default and raises a number of claims of improper conduct by the Navy that led to that termination.

The contractor sought review of the termination in the Court of Federal Claims ("the Claims Court"), which granted summary judgment for the government in a thorough opinion that addressed each of the claims raised by the contractor. *See ASG Sols. Corp. v. United States*, 170 Fed. Cl. 485 (2024). We agree with the Claims Court's analysis and accordingly affirm.

I

The contract in this case was an Indefinite Delivery Indefinite Quantity task order contract under which the contractor, ASG Solutions Corporation, doing business as American Systems Group ("ASG") agreed to provide engineering and program-management services to support design and construction operations at Naval Air Station Jacksonville. *Id.* at 489; J.A. 2957–3022. The government interpreted the task order as requiring the contractor to assemble a multi-disciplinary team of at least 20 professionals who would provide technical support services on demand relating to design and construction work at the Naval Air Station.

Despite the terms of the agreement, ASG never succeeded in assembling a team of 20 or more professionals who met the qualifications set forth in the contract. For that reason, the Navy terminated the contract for default halfway through the one-year contract period, over ASG's strong objection. J.A. 4556–61.

In its challenge to the termination, ASG raises a number of issues, the principal ones of which are (1) that the Navy misconstrued the contract by interpreting it to require ASG to assemble and maintain a group of at least 20 professionals even at times when the Navy had no tasks for the group to perform; (2) that the contract was invalid because it was an unlawful personal services contract, prohibited by section 37.104 of the Federal Acquisition Regulation ("FAR"); and (3) that the default termination was unjustified and was merely a pretext by which the Navy sought to rid itself of ASG as a contractor.

II

A

The government argues that the plain terms of the contract required ASG to provide the Navy with a team of 20 facilities technical experts to advise and assist on projects at the Naval Air Station as they arose, and that ASG never approached having that number of technical experts available to perform services for the Navy. ASG, on the other hand, argues that the contract did not require it to have a certain number of professionals on staff, but only required it to assemble a qualified team to perform each task after the Navy assigned it a specific project under the contract.

The Claims Court found the government's interpretation of the contract to be more reasonable, as do we. *See ASG*, 170 Fed. Cl. at 498–502. Although the contract gave ASG the right to determine "the precise labor and staffing mix" among professionals selected to provide the contractual services, the contract required ASG to provide at least 20 professionals (or the equivalent) throughout the contract period, not simply to make professionals available when and as needed for the tasks assigned from time to time under the contract. J.A. 2966. Section A.2 of the solicitation states that "[t]he staff of twenty (20) professionals is base/minimum level of service," J.A. 2959; and section H.8 states that "any time there is a vacancy within the Contractor's team (i.e. all twenty (20) positions are not filled), the Government will be entitled to immediate replacement . . . or to a unit price reduction in payment," J.A. 2988.

Other evidence in the case is consistent with the requirement that the contractor have an assembled team of 20 professionals at all times. That evidence included ASG's bid, which referred to "[o]ur proposed 20 FTE All-Senior Team" and outlined the backgrounds of the 20 team members. J.A. 3027; *see also* J.A. 2999 (Attachment 2 to section J of the task order outlining the proposed back grounds of 20 team members). ASG subsequently confirmed that it understood that it would be bound by the representations found in its bid. J.A. 3173–74. In addition, section M of the solicitation provided that for the evaluation of proposals, "[t]he team must be composed of twenty (20) professionals including two supervisors." J.A. 3074.

We agree with the Claims Court's conclusion that the government's interpretation of the contract is clearly more reasonable than ASG's. For that reason, we reject ASG's reliance on the doctrine of *contra proferentem*, which calls for construing ambiguous contract terms against the drafter—here, the government.

B

The Claims Court rejected ASG's argument that the contract was an impermissible personal services contract. *ASG*, 170 Fed. Cl. at 504–05. While the contract required ASG to make a number of professionals available to perform tasks for the Navy, it clearly left the responsibility for hiring and supervising those professionals with ASG.

The FAR provision governing personal services contracts defines nonpersonal services contracts as those in which the personnel rendering the services in question are not subject "to the supervision and control usually prevailing in relationships between the Government and its employees." 48 C.F.R. § 37.101; *see* 48 C.F.R. § 37.104. The contract made clear that the 20 professionals that ASG was committed to making available to do government work would be employees of ASG, not of the government; the contract specifically provided that "[t]he contractor supervises its own team to ensure compliance with this [Performance Work Statement]." J.A. 2968. While the government had the right to review resumes and specify the level of expertise required of those employees, it was not responsible for hiring and firing them or otherwise managing their employment on a day-to-day basis. *See* J.A. 2970 ("Contractor employees performing services under this order will be controlled, directed and supervised at all times by management personnel of the contractor."); *see also* J.A. 2975, 2979–80, 3031–32. The Claims Court was thus clearly correct that the contract was not a personal services contract.

C

ASG argues that it provided the services for which the government contracted because it stood ready to supply professionals to do whatever tasks the Navy asked it to perform, and that the termination for default was therefore unjustified. The Claims Court rejected that argument on the ground that it was inconsistent with the obligations imposed on ASG by the contract. *ASG*, 170 Fed. Cl. at 505– 08. In section F.4 of the contract, ASG agreed that within five days of the contract award it would provide a "[r]esume for each position proposed" to accomplish the tasks falling within the scope of the contract. J.A. 2974–75. ASG failed to deliver those resumes. *See ASG*, 170 Fed. Cl. at 492–93. The contract did not contemplate that ASG would arrange to hire and provide professionals whenever the Navy had a particular task for ASG to perform.

The summary judgment record showed that throughout the contract period, ASG never retained as many as 20 qualified professionals, and for most of that period, it had far fewer.[1] Moreover, on several occasions the Navy notified ASG that it was not complying with its responsibilities under the contract, but ASG never brought itself into compliance with the contract's requirements.[2]

We agree with the Claims Court that the government reasonably concluded that ASG had defaulted on the contract, and that the termination for default was not simply a ruse designed to enable the Navy to escape an improvident contract. Based on that conclusion, the Claims Court properly determined that the government had not breached its covenant of good faith and fair dealing through its actions and communications with ASG. *See ASG*, 170 Fed. Cl. 505, 508.

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[1] The Claims Court held that "ASG materially failed to perform. It did not provide the required services of assembling a fully staffed team . . . . As of March 2023, halfway through the contract period, ASG had retained only four employees who reported to work at NAS Jacksonville." *ASG*, 170 Fed. Cl. at 506.

[2] The Claims Court noted that the Navy sent ASG a "letter of concern" on November 1, 2022; a cure notice on December 5, 2022; and a notice to show cause on January 20, 2023, "based on ASG's failure to comply with its obligations to propose team members meeting the qualifications" required by the contract. *ASG*, 170 Fed. Cl. at 493.

ASG has raised several other subsidiary issues in its brief, which the Claims Court addressed in its comprehensive opinion.[3] None of those issues, however, affect our confidence that the Claims Court's summary judgment order was correct.

AFFIRMED

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[3] ASG contends in passing that the memorandum in which the contracting officer considered seven factors to determine whether to terminate the contract for default (J.A. 4732–44) was inadmissible as hearsay. Appellant's Br. 50–53. The memorandum, however, was not considered for the truth of its contents, but only to show that the contracting officer addressed the factors required by 48 C.F.R. § 49.402-3(f) to be considered before terminating a contract for default. *ASG*, 170 Fed. Cl. at 507–08 & n.8.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 23-1029
Filed: March 29, 2024
FOR PUBLICATION

ASG SOLUTIONS CORPORATION DBA AMERICAN SYSTEMS GROUP,
Plaintiff,

v.

UNITED STATES,
Defendant.

David S. Demian, Finch, Thornton, & Baird LLP, San Diego, CA, for the plaintiff.

Sheryl L. Floyd, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant.

MEMORANDUM OPINION

***HERTLING*, Judge**

The plaintiff, ASG Solutions Corp., dba American Systems Group ("ASG"), was awarded an Indefinite Delivery Indefinite Quantity ("IDIQ") task order by the defendant, acting through the United States

Department of the Navy ("Navy"), to provide engineering and program-management support services to the Naval Facilities Engineering Systems Command Southeast ("NAVFAC SE") to support the operations of the Design and Construction Business Line ("DCBL") at Naval Air Station ("NAS") Jacksonville in Jacksonville, Florida. Ultimately, the Navy terminated ASG's task order for default. ASG filed claims with the contracting officer and, after those claims were largely rejected, filed this action under the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et seq*. The plaintiff alleges that the termination for default was in error and that the Navy breached the contract and the covenant of good faith and fair dealing. The plaintiff has moved for judgment on the pleadings and for summary judgment. The defendant has cross-moved for summary judgment.

The defendant's interpretation of the task order as requiring the contractor to assemble a 20-person, multidisciplinary team of professionals aligns with the plain language of the task order, reads all its provisions in harmony, and makes sense given the task order's purpose. This reading does not render the task order a personal services contract in violation of Federal Acquisition Regulation ("FAR") 37.104 because the task order made clear that, throughout performance, the contractor retained control of its team.

Given that the task order requires a 20-person team, the evidence submitted by the parties demonstrates that the plaintiff failed to perform the contract, and termination for default was justified under FAR 52.249-8 and 49.402-3(f). The plaintiff's motions for judgment on the pleadings and summary judgment are denied, and the defendant's motion for summary judgment is granted.

I. FACTUAL BACKGROUND

ASG is a provider of professional-support services for federal agencies. In 2019, the Navy awarded ASG, along with more than 2,400 other entities, the Seaport Next Generation Multiple Award, IDIQ Contract, No. N0017819D7175 ("Seaport NxG Contract"). (ECF 23 at 3.) Under the Seaport NxG Contract, various Navy commands procure a variety of professionalsupport services, including for technical fields such as architecture and engineering.

A. Solicitation and Task Order

On August 25, 2022, ASG submitted a proposal in response to a solicitation for task order No. N6945022F3005 under the Seaport NxG Contract.[1] (ECF 23 at 15; 23-2 at 67.) Under the task order, the contractor would provide technical-support services at

[1] ASG is a party to two agreements involved in this matter. First, it is a member of the Seaport NxG contract. Second, pursuant to that contract, it was awarded the NAVFAC SE task order at Jacksonville NAS. The parties sometimes refer to this latter contract as the "Jacksonville contract," but this opinion will refer to it as the "task order," or the "Jacksonville task order." The assignments issued to ASG by the Navy pursuant to the Jacksonville task order will be referred to as "sub-task orders" or "assignments" rather than "tasks" or "task orders" to avoid confusion.

NAS Jacksonville for NAVFAC SE's DCBL. The task order was to begin in October 2023. (ECF 23-2 at 70.) The Navy apparently opted to proceed with the solicitation when it found itself unable to fill vacancies in the ranks of its own DCBL workforce.

Sections A through J of the solicitation mirror the content of the task order ultimately awarded to ASG. Section A.2 describes the service requirements under the task order. (ECF 17- 3 at 95.) Offerors were to assemble a "team" to "provide expert advice and assistance services" on various NAVFAC SE-supported projects. (*Id.*) With respect to this team, Section A.2 of the solicitation noted that:

> [a]t the time of initial contract award, the Government anticipates a staff of four (4) Architects, four (4) Mechanical Engineers, four (4) Electrical Engineers, two (2) Civil Engineers, two (2) Structural Engineers, one (1) Fire Protection Engineer, one (1) Cost Engineer, and two (2) Supervisors.

(*Id.*)

Section A.2 identified this "anticipated staff" of 20 professionals as the "base/minimum" level of service required under the task order. (*Id.*)

Section B provided a list of supplies and services to be provided under the task order for which offerors were to provide pricing. (*Id.* at 98.) The first line item is the "base requirement," which is "[t]echnical [s]upport [s]ervices at NAS Jacksonville in accordance with [the performance work statement]." (*Id.*) The "quantity" and "unit" columns provide that the Navy will acquire these services for 12 months. (*Id.*) The second line item required offerors to provide pricing for an additional, "[o]ptional" level of service, through which NAVFAC SE could "award additional architectural and engineering technical expert support services." (*Id.*) This item also stated a quantity and unit of 12 months. (*Id.*)

Section C of the solicitation included the performance work statement ("PWS"). (ECF 17-3 at 103.) The PWS required the awardee to provide, manage, and supervise a team of facilities technical experts to "help[ ] NAVFAC SE achieve its mission and ensure compliance with the Department of Defense (DoD) Unified Facilities Criteria" and other applicable standards related to the "design, construction, sustainment, and demolition" of naval facilities. (*Id.*) The PWS noted that the contractor would "choose[ ] the precise labor and staffing mix to meet the PWS," as long as the team possessed the requisite expert knowledge and experience. (*Id.*) The PWS was silent about the size and composition of the team and failed to reiterate the obligation specified in Section A.2 regarding the "base/minimum" level of service under the task order.

Section F.4 of the solicitation outlined the deliverables due under the task order. (*Id.* at 111-12.) Among the deliverables specified in Section F.4, the awardee would be required, within five days of receiving the task-order award, to provide resumes to the contracting officer for each team member proposed by offerors to perform work under the task order. (*Id.* at 112.) Each resume had to be "in accordance with [the offeror's] proposal and the PWS." (*Id.*)

Section G.5 of the solicitation outlined the task order's quality-assurance plan and detailed NAVFAC SE's review of contractor personnel. (*Id.* at 118.) In relevant part, the quality-assurance plan explained that the contracting officer's representative would review and approve prospective contractor personnel to ensure that they met the required qualifications, including certification and licensure, whenever personnel were added to the task order.[2] (*Id.* at 118.) Section G.6 reiterated this requirement by confirming that the awardee would submit to the Navy the resumes of all proposed employees working on the task order "in accordance with Section F.4." (*Id.*) The awardee would have to demonstrate that its personnel held "certificates, licenses, physical requirements or other expertise required to fulfill the requirements of the [PWS]." (*Id.*) In submitting the resume of each prospective employee, the awardee also had to "certify that . . . the qualified individual[ ] has agreed to accept the position upon acceptance by the [g]overnment." (*Id.*)

Section H.8 of the solicitation provided for deductions to the firm, fixed price the Navy had to pay

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[2] The solicitation was amended twice. The final version of the solicitation included an amendment intended to strengthen the resume requirements. The summary of changes accompanying the final solicitation explained that Section G was amended, in part, to "clarify resume certification." (ECF 17-3 at 95.)

the awardee in the event the awardee did not maintain a team of 20 employees. Specifically, Section H.8 provided that if, "at any time there [was] a vacancy within the [c]ontractor's team (i.e. all twenty (20) positions are not filled)," the contractor had to provide a replacement within five days. (*Id.* at 124.) If the contractor failed to provide a replacement to restore the team to a complement of 20 members within five days, NAVFAC SE would subject the contractor to a "unit price reduction in payment in accordance with FAR 52.246-4 until the qualified technical expert(s) [was] in place."[3] (*Id.*)

Section J of the solicitation included various attachments that offerors had to submit with their proposals. (*Id.* at 128.) Attachment 4 provided a worksheet for offerors to demonstrate the qualifications of the team they would provide under the task order. (*Id.*)

In Section M of the solicitation, NAVFAC SE outlined three factors it would use to evaluate proposals. (*Id.* at 134.) The second factor, Staffing Approach, required offerors to propose a team of 20 professionals to accomplish the work required under the task order. (*Id.* at 136.) The solicitation noted:

The non-price proposal presented by the

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[3] FAR 52.246-4 governs fixed-price service contracts. Section (e) provides that if the services provided do not conform with the contract's requirements, the government may "reduce the contract price to reflect the reduced value of the services to be performed." FAR 52.246- 4(e)(2).

> offeror to whom the award is made will be incorporated into the task order at time of award. Post-award, the offeror will be held to any proposed licenses certifications, qualifications, expertise, etc. of the technical support personnel that exceed the minimum requirements of the solicitation and/or PWS.

(*Id.*)

Section M also specified that each team member "must possess an education level suitable to meet the requirements of the PWS." Section M noted that offerors proposing teams with education, training, or seniority beyond the minimum requirements "may be rated higher." (*Id.*)

During the Navy's development of the solicitation, a NAVFAC SE contracting official had analyzed whether the task order would constitute a personal services contract, because the task order required offerors to propose teams of qualified personnel to assist the Navy in performing its functions. (ECF 23-2 at 76.) FAR 37.104 forbids agencies from awarding personal services contracts unless they are authorized by law to do so. The Navy contracting official determined and certified that the task order would not result in an impermissible personal services contract because the awardee, rather than the Navy, would control and manage its own employees working on the task order. (*Id.*)

To reflect this determination, Section C.8 of the solicitation incorporated a "Non- Personal Service

Statement." In this provision, the Navy certified that all contractor personnel would be "controlled, directed and supervised at all times by management personnel of the contractor. . . . The [g]overnment will control access to the facility and will perform the inspection and acceptance of the completed work." (ECF 17-3 at 107.) Thus, under the task order, the Navy would assign projects to the contractor; the contractor was then responsible for tasking out the assignment to its personnel, who would be supervised exclusively by the contractor in the performance of their tasks.

As part of its proposal, ASG submitted in Attachment 4 of Section J a proposed 20-member team consisting entirely of senior-level, accredited professionals with advanced degrees. Although the list included the specific qualifications of the individuals, it did not include the name of any of the individuals proposed. (*Id.* at 71.) ASG accompanied its proposed team with the proposed cost associated with employing each team member. (ECF 23-2 at 64.) When NAVFAC SE incorporated Attachment 4 into the final contract as the solicitation provided, this list of costs also became ASG's monthly rate: $281,870.00. (ECF 17 at 30; ECF 17-3 at 57.)

On September 15, 2022, the contracting officer contacted ASG about its proposal, requesting that ASG "confirm that [it] underst[ood] the technical experts submitted after award must meet the additional requirements proposed" in ASG's Attachment 4. (ECF 17-3 at 539.) ASG responded simply, "[y]es." (*Id.*)

On September 28, 2022, ASG was awarded the task order, which incorporated the provisions of the solicitation outlined above, except for Section M, which described the awardevaluation criteria. Attachment 4 of Section J of the solicitation was incorporated into the task order as Attachment 2 to Section J.

The task order does not contain an order of precedence clause to resolve disputes in the event of conflicting provisions. The Seaport NxG contract does, however, incorporate by reference FAR 52.215-8, which provides the order of precedence in the Uniform Contract Format. FAR 52.215-8 provides that inconsistencies between provisions shall be resolved by giving precedence to: (a) the schedule; (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications, in that order.

B. ASG's Performance of the Task Order

Problems arose almost immediately. After being awarded the task order, ASG struggled to assemble its team of professionals. On October 3, 2022, the date by which, under Section F.4 of the task order, ASG had to submit resumes for its 20 team members, ASG submitted only two resumes. (ECF 23 at 19.) ASG's owner and president emailed the contracting officer's representative that day noting that "so far I have been able to obtain 2 of the 20 have [sic] signed [letters of intent]." (ECF 17-3 at 392.) After identifying the two individuals, ASG's president continued "I will continue this process till all 20 are filled." (ECF 23 at 393.)

Between October 6, 2022, and November 9, 2022, ASG submitted eight additional resumes. (*Id.* at 19-23.) Of the 10 resumes submitted by November 9, 2022, four were rejected by NAVFAC SE because the professionals lacked required licenses or possessed inadequate experience in comparison to the senior-level team members proposed by ASG on Attachment 2 of the contract. (*Id.*) Six resumes were accepted, but four of these six professionals declined ASG's offer, did not report to work, or quickly resigned. (*Id.*) As of November 9, 2022, ASG only had two professionals available to work under the task order. (*Id.* at 23.)

Email communications between ASG and NAVFAC SE revealed growing disagreement between the parties pertaining to the submitted resumes and the qualifications necessary for ASG's team members. ASG asserted that because the task order was not a personal services contract, it was free to hire personnel that it believed could deliver services consistent with the requirements of the PWS. (ECF 23-2 at 260.) It asserted that NAVFAC SE's failure to issue assignments for ASG contractors to complete under the task order prevented ASG from assembling an appropriate team; ASG could not recruit employees unless it knew what type of work they would need to do. (*Id.* at 477-81.) NAVFAC SE, in turn, explained to ASG that its employees had to meet the experience levels described in Attachment 2 to the task order (Attachment 4 of ASG's proposal) and insisted that it had the right to reject resumes of proposed ASG employees who did not reflect the qualifications for prospective employees initially offered by ASG in its proposal. (*Id.* at 259.)

On November 1, 2022, the contracting officer sent ASG a letter of concern, notifying ASG that it was failing to meet the minimum staffing requirement identified in Section A.2 of the task order by failing to provide a staff of at least 20 professionals. (*Id.* at 458-459.) The letter expressed further concern that ASG was not meeting the requirement of Section F.4 by failing to deliver adequate and timely resumes. (*Id.*)

On November 17, 2022, counsel for ASG responded to the letter of concern. (ECF 23-2 at 460-64.) ASG asserted that it was not required to maintain a staff of 20 professionals under the task order and that, pursuant to Section C, the PWS, ASG retained the authority to choose the precise labor and staffing mix to perform under the task order. (*Id.*)

Between November 18 and November 20, 2022, ASG submitted four additional resumes to NAVFAC SE. (ECF 23 at 24-25.) NAVFAC SE rejected one resume because the proposed employee lacked the credentials described in Attachment 2. (*Id.* at 25.) NAVFAC SE accepted the other three resumes, but ASG successfully retained only one of these professionals. (*Id.* at 24-25.)

On December 5, 2022, NAVFAC SE issued a cure notice to ASG. NAVFAC SE asserted that ASG's inability to meet its obligations under Attachment 2 endangered performance of the task order and could justify termination for default. (ECF 23-2 at 527-28.) Specifically, NAVFAC SE noted that ASG had submitted only nine resumes that met the level of employee qualifications required under Attachment 2.

(*Id.*) NAVFAC SE informed ASG that unless it cured this failure within 10 calendar days, NAVFAC SE could terminate the task order for default under FAR 52.249-8. (*Id.*)

On December 14, 2022, ASG responded to the cure notice and asserted that it was not required to provide 20 professionals to meet its obligations under the task order because Attachment 2 was not a contractual obligation. (*Id.* at 532-34.) ASG further responded that because the Navy had not provided to ASG any then-pending specific assignments to perform under the task order, ASG was not yet obligated to provide a team of professionals. (*Id.* at 531- 32.) ASG reasoned that because it was to choose the precise labor and staffing mix to perform assignments under the task order, it could not put together an appropriate team until NAVFAC SE gave it specific assignments to fulfill. (*Id.* at 530.)

On January 13, 2023, ASG provided an additional resume, which NAVFAC SE accepted. (ECF 23 at 26.) On January 20, 2023, ASG provided two more resumes. (*Id.* at 27-28.) NAVFAC SE accepted one and rejected the other based on lack of experience. Finally, on March 10, 2023, ASG submitted an additional resume, and NAVFAC SE accepted it. (*Id.* at 28.) Of this group of three prospective employees whose resumes NAVFAC SE accepted, ASG retained two professionals. (*Id.*)

On January 20, 2023, NAVFAC SE issued ASG a show cause notice based on ASG's failure to comply with its obligations to propose team members meeting the qualifications of the team members proposed in Attachment 2. (ECF 23-2 at 672.) The notice referenced a meeting held at NAS Jacksonville on January 5, 2023, at which ASG's president allegedly acknowledged that ASG "cannot meet Attachment 4." (*Id.*) This statement, the notice explained, constituted an anticipatory repudiation and abandonment of ASG's contractual obligations. (*Id.*) The notice provided ASG the opportunity to explain why its "failure to perform arose from causes beyond [its] control" and without fault of or negligence by ASG. (*Id.*)

On February 10, 2023, ASG responded to NAVFAC SE's show cause notice. (*Id.* at 674- 86.) ASG continued to assert that it had no obligation to provide 20 professionals under the task order. Rather, ASG insisted that it was only obligated to provide professionals once NAVFAC SE issued specific assignments for work under the task order. (*Id.* at 675.) ASG disputed the notice's characterization of ASG president's statement at the January 5, 2023 meeting as a repudiation or abandonment of the contract. (*Id.* at 676.) Instead, ASG explained that its president had attended the January 5th meeting to ensure that the onboarding of ASG's employees would proceed smoothly. (*Id.* at 680.) Regarding the shortage of resumes it had provided by that date, ASG asserted that post-pandemic labor-market conditions beyond its control prevented it from providing a team of 20 professionals. (*Id.* at 674.) ASG also explained that it was unable to perform because the Navy had not yet paid ASG's monthly invoices, as required by the task order. At that point, ASG had provided services for a few minor assignments under the task order. (*Id.* at 675-76.)

On April 4, 2023, NAVFAC SE issued a final decision terminating the task order for default. (*Id.* at 1600-1605). In its decision, the contracting officer identified that ASG was required as a minimum level of service under the task order to provide the Navy with a team of 20 professionals, and ASG had failed to supply such a team. (*Id.* at 1600.) NAVFAC SE justified its decision to terminate for default on ASG having provided at the halfway point of the task order a team of only five of the 20 required professionals. (*Id.* at 1602.) NAVFAC SE asserted that ASG's position that unforeseen labor-market conditions prevented it from recruiting professionals was unavailing, because ASG either knew or should have known of post-pandemic labor-market conditions prior to submitting its proposal. (*Id.* at 1603.)

C. Payment Invoices and CDA Claims

ASG submitted six monthly invoices to NAVFAC SE during performance of the task order. (ECF 17-3 at 1492-1501.) The invoices were for "Base Requirement for Base Period" services provided between October 2022 and April 2023. (*Id.*) Each invoice was for the full monthly amount stated in the task order, $281,870.00 (aside from the last invoice which did not cover a full, month-long period). (*Id.*) The amounts invoiced were the same as the estimated, monthly cost of employing the 20-person team ASG had provided in Attachment 4 to its proposal, included in the task order as Attachment 2.

ASG submitted three certified claims to the contracting officer seeking payments for the full amounts of its fixed monthly prices, in accordance with its monthly invoices. On January 9, 2023, ASG submitted its first certified claim, seeking the combined amount of its October and November 2022 invoices. (*Id.* at 1509-12.) It submitted a second claim on March 8, 2023, seeking the combined amount of its December 2022, January 2023, and February 2023 invoices. (*Id.* at 1743.) On April 18, 2023, the contracting officer notified ASG that he had not made a final decision on the claim submitted in January 2023 but would do so by June 30, 2023. (*Id.* at 1699.) The contracting officer noted that the task order had been terminated for default on April 4, 2023, and NAVFAC SE's re-procurement with another contractor could result in liability for ASG. (*Id.*) On May 4, 2023, ASG submitted a third claim which sought the combined total of its invoices from March 2023 to April 5, 2023. (*Id.* at 2239-41.)

The contracting officer issued the first decision on any of ASG's claims in a June 28, 2023 decision which addressed the March and May claims. The decision on the March claim explained that ASG had already been paid $156,396.80 for services rendered, and the contracting officer denied the rest of the claim. (*Id.* at 2238.) The decision on the May claim explained that ASG had been paid $77,812.85 for services rendered, and the contracting officer denied the remainder. (*Id.* at 2373.) In both cases, the contracting officer justified the partial payments on Section H.8 of the task order, which provides for a deduction in pay "if there is a vacancy within the [c]ontractor's team." (*Id.* at 2372;

see also 2237.) The contracting officer did not correspond further with ASG about its original January claim until August 18, 2023, when the contracting officer informed ASG that it could expect a final decision by December 15, 2023. (*Id.* at 1700.) This decision arrived on December 1, 2023, when the contracting officer denied the claim in its entirety because ASG had "failed to deliver the 20 [facilities technical experts] required by the task order."[4] (*Id.* at 1741.)

II. PROCEDURAL HISTORY

After NAVFAC SE terminated ASG's contract for default, ASG filed this suit in July 2023. (ECF 1.) The complaint alleges first that NAVFAC SE improperly terminated the task order for default. (ECF 1 at 34.) The termination, the complaint alleges, entitles ASG to damages or, in the alternative, a conversion to a termination for convenience. (*Id.* at 35.) Second, the complaint alleges that NAVFAC SE breached the Jacksonville task order by failing to pay ASG under the firm fixed-price contract. (*Id.*) Third, it alleges that NAVFAC SE breached the implied covenant of good faith and fair dealing by hindering ASG's performance of the task order. (*Id.*) In support of this third claim, the complaint alleges that NAVFAC SE's failure to approve resumes in a timely manner, issue

[4] The decision also addresses a July 18, 2023, claim for "anticipatory lost profits." (ECF 17- 3 at 1709.) No copy of this claim appears among the records submitted by either party. In any event, the contracting officer denied the claim. (*Id.*)

assignments for ASG to perform, inform ASG of upcoming assignments, provide site access to ASG personnel, and require ASG to provide a team of 20 professionals at all times prevented ASG from performing. (*Id.* at 36.)

The plaintiff moved for judgment on the pleadings in November 2023 (ECF 15), and for summary judgment in December 2023 (ECF 17). The defendant responded to the motion for judgment on the pleadings and cross-moved for summary judgment in February 2024. (ECF 23.) Both parties responded to the cross-motions. (ECF 24; ECF 25.) Oral argument was held on March 12, 2024. At the close of oral argument, the parties were encouraged to try to settle the case and were allowed two weeks within which to do so; any settlement discussions that may have taken place apparently failed.

III. JURISDICTION

The Tucker Act, 28 U.S.C. § 1491(a), vests in the Court of Federal Claims jurisdiction over claims for money damages against the United States:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

The Court of Federal Claims has jurisdiction over claims for breach of contract founded upon an express contract with the United States. *Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996). Here, the plaintiff's claim is founded on an express contract with a federal agency.

ASG's claims are founded on the CDA. 41 U.S.C. § 7104(b)(1). The court may hear a claim under the CDA only if that claim has been "submitted to the relevant contracting officer," and the contracting officer has "issued a final decision on that claim." *K-Con Bldg. Systems, Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015). A claim submitted to a contracting officer must provide a "'clear and unequivocal statement that gives the contract officer adequate notice of the basis and amount of the claim.'" *Id.* (quoting *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)).

ASG submitted its claims to the contracting officer in January, March, and May 2023, and the contracting officer has issued final decisions on those claims. The defendant does not dispute that jurisdiction under the CDA over ASG's claims is appropriate.

IV. STANDARDS OF REVIEW

The plaintiff has moved for judgment on the pleadings pursuant to Rule 12(c) of the Rules of the Court of Federal Claims ("RCFC"). To decide a motion for judgment on the pleadings, a court "assumes that all of the nonmovant's allegations are true and indulges all reasonable inferences in favor of the nonmoving party." *Gummer v. United States*, 40 Fed. Cl. 812, 814 (1998). Judgment on the pleadings "is appropriate where there are no material facts in dispute and the party is entitled to judgment as a matter of law." *Forest Laboratories, Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007).

Both parties have also cross-moved for summary judgment. Under RCFC 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are inappropriate at the summary-judgment stage. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An issue is "genuine" only if it "may reasonably be resolved in favor of either party," and a fact is "material" if it "might affect the outcome of the suit under the governing law." *Id.* at 248-50. Contract interpretation involves questions of law and is therefore "generally amenable to summary judgment." *Premier Office Complex of Parma, LLC v. United States*, 916 F.3d 1006, 1011 (Fed. Cir. 2019).

V. DISCUSSION

The parties offer conflicting and inconsistent interpretations of the task order.

The plaintiff argues that the terms of the PWS control; when other provisions of the task order conflict with the PWS, the plaintiff argues the terms of the PWS should prevail. Under the PWS, ASG chooses the labor mix required to meet the assignments given by the Navy. Thus, until the Navy gives ASG an assignment to perform, ASG need not provide any team members because it cannot know what the right mix of professional skills would be to perform an assignment until it receives one. ASG argues that a reading of the task order requiring ASG to provide and maintain a specific number of team members would convert the task order into either a personal services contract, which is prohibited by FAR 37.104, or a time and materials contract, which must comply with FAR 16.601 to be valid. ASG therefore argues that its reading is the only legally permissible one.

The defendant argues the opposite. The Navy asserts that it was indeed procuring a team of 20 professionals, and the various provisions of the task order make that clear. The Navy argues that its reading of the task order is the only one that gives effect to all the task order's terms, including the requirement that the contractor supply a team of 20 professionals or face a reduction in payment if its team endures a vacancy among the 20 positions for more than five days. The defendant argues that because the contractor would maintain total control over its employees by assigning work and supervising team members without interference by the Navy, the contract contains safeguards adequate to avoid a prohibited personal services contract.

ASG also argues that even if the Navy's

interpretation of the contract is correct, the Navy failed to terminate the contract for default in the manner required by FAR 52.249-8 and FAR 49.402-3(f).

A. Contract Interpretation

The central issue of contract interpretation in this case is whether the task order requires the contractor to compose and maintain a team of 20 professionals to assist NAVFAC SE in performing the work of the DCBL and whether these professionals had to meet the qualifications described in Attachment 4 of ASG's proposal, incorporated into the task order as Attachment 2.

Contract interpretation must "begin with the plain language" of the contract. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). In reading that language, a court should "interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee Const. Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citing *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993)). Interpretations should "effectuate [the] spirit and purpose" of the contract. *Hercules*, 292 F.3d at 1381. Although a contract is ambiguous if it is "susceptible to more than one reasonable meaning," *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004), the fact that each party can advance conflicting interpretations of a contract does not on its own render the contract ambiguous. *Metric Constrs., Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 751 (Fed.

Cir. 1999).

This task order is a "standard service contract as defined in FAR Part 37." (ECF 17-3 at 55.) A service contract under the FAR is "a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." FAR 37.101. Examples of service contracts provided in the FAR include "advisory and assistance services." *Id*.

1. The plaintiff's interpretation

The plaintiff argues that the task order's PWS "empowers ASG to determine the make-up of its team" in response to assignments from NAVFAC SE. (ECF 17 at 25.) According to the plaintiff, the task order is a service contract whose "'primary purpose'" is the performance by ASG of identifiable tasks as assigned. (*Id.* at 26 (quoting FAR 37.101).) This interpretation is reinforced, the plaintiff argues, by the provision of the PWS specifying that the contractor "chooses the precise labor mix" necessary to complete the assignment. (ECF 17-3 at 62.) As an example, the plaintiff supposes that NAVFAC SE assigns ASG a project exclusively seeking architectural services. In that case, it reasons, ASG would need to "bring in as many architects as necessary to fulfill the tasks." (ECF 17 at 26.) If the next project assigned by NAVFAC SE requires a team of civil engineers, ASG would then "replace the architects with as many civil engineers as necessary." (*Id.*) This reading, the plaintiff argues, is the only one that enables ASG to complete the full range of assignments contemplated within the PWS as incorporated into Section C. (*Id.* at 27.)

Under the plaintiff's reading, the task order requires the contractor to assemble rapidly a highly qualified team suited to each assignment once NAVFAC SE assigns a specific project. Sections like A.2 specifying the makeup of the team that NAVFAC SE "*anticipate*[*d*]" the awardee would need served to put offerors on notice of the types of professionals the Navy could require them to provide. (*Id.* at 33 (discussing Section A.2, ECF 17-3 at 55).) ASG read this provision as a sensible warning, because under a firm-fixed-price contract, the contractor would need to provide the requested individuals no matter the cost. Given the structure of a firm-fixedprice contract, the plaintiff explains, it makes sense to establish a "base/minimum level of service" for the contractor to expect to have to provide. (ECF 17 at 34.) When the language about a team of 20 professionals appeared as an evaluation criterion in Section M of the solicitation, ASG understood it to require offerors to demonstrate they could provide 20 professionals with a variety of skills; this criterion, ASG argues, did not suggest that providing a team of 20 professionals was an obligation under the task order and a prerequisite to completing any assignments under the task order. (*See id.* at 37.)

ASG argues that a reading of the task order requiring it to hire and maintain a team of 20 facilities technical experts outside of any specific assignments would render the PWS "meaningless, potentially impossible, and illegal." (*Id.*) First, it asserts that the PWS would be meaningless because if the task order only obligates ASG to provide a team of 20 professionals, then "the scope of work so carefully detailed in the PWS is superfluous and absurd." (*Id.*) Second, performing the assignments contemplated by the PWS would be impossible. If ASG is always bound to maintain the slate of professionals proposed in Attachment 2, it "very likely will not be able to perform" assignments requiring, for example, only architects. (*Id.*) Third, requiring ASG to maintain and complete assignments with a team of 20 predetermined professionals would strip ASG of "its right to determine the 'how' of performance." (*Id.* at 28.) As a result, NAVFAC SE would have control over performance of the task order in violation of FAR 37.104(d). (*Id.*)

Under the plaintiff's interpretation, the PWS is central. That section sets forth ASG's "performance obligations under the [task order]." (ECF 24 at 11.) Each section of the task order that references the contractor's performance, the plaintiff notes, points the reader to the PWS. (*Id.*) ASG interprets the deliverables section, F.4, to list "8 types of deliverables of work-product anticipated to be performed based on PWS tasks." (ECF 17 at 28-29.) It argues that the representative team ASG proposed in Attachment 4 of the solicitation, while incorporated into the contract, is not an "irrevocable promise to deliver these personnel in a manner unmoored from the rest of the contract." (ECF 24 at 18.)

2. The defendant's interpretation

In the defendant's interpretation, the task order's central purpose is to provide NAVFAC SE with a team of 20 facilities technical experts to advise on projects at NAS Jacksonville as they arise. Its reading starts from the text of Section A, in which the task order notes that a team of 20 professionals is the "base/minimum level of service." (ECF 23-2 at 3.) This requirement has been clear, the defendant argues, since the solicitation, which noted in its evaluation criteria—Section M—that offerors "shall submit" a team that reflected the requirements specified in Section A.2, *i.e.*, a team of 20 professionals. (*Id.* at 118.)

In addition to these express requirements of the solicitation and task order, the solicitation made clear that the team proposed by each offeror on Attachment 4 of its proposal would be "incorporated into the task order at the time of award." (ECF 23-3 at 118.) ASG confirmed its understanding of this fact when, in reply to the contracting officer's pre-award email, its president acknowledged that ASG was aware that, if awarded the task order, it would be obligated to provide a team whose qualifications matched those it had listed in Attachment 4 of its proposal. (ECF 23-3 at 217.)

Because the purpose of the task order is to provide a team of 20 professionals to advise NAVFAC SE at NAS Jacksonville, the defendant argues that the task order permits NAVFAC SE to review the resumes of prospective team members. (ECF 23 at 47.) The first deliverable due according to the schedule provided in Section F.4 required ASG to submit resumes of the 20 prospective team members within five days of task order award. (*Id.*) The defendant argues that neither this requirement, nor NAVFAC SE's ability to accept the resumes in accordance with Section G.6, violates FAR 37.104's prohibition on personal service contracts. (*Id.* at 49, 14.) During drafting, a contracting officer implemented safeguards to avoid a personal services contract and formally certified this fact before publication of the task order. (*Id.* at 49.) The task order is not a personal services contract, the defendant argues, and NAVFAC SE did not create one by "trying to enforce the contract terms" and reviewing ASG's deliverables. (*Id.*)

3. The defendant's interpretation is the only reasonable one

The fact that the task order is a firm-fixed-price contract is not itself dispositive. A firm-fixed-price contract "is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract." FAR 16.202-1. Such a contract does not, however, necessarily entitle the contractor to the full amount of compensation when it does not perform the contract in full. *See Pacific Coast Community Services v. United States*, 858 Fed. Appx. 346, 349 (Fed. Cir. 2021) ("[A] firm-fixed-price contract requires the contractor to charge the government a fixed price for services but does not provide that the government must pay that price when the contractor does not deliver the services."). Section H.8 provides for a price reduction if the contractor's team membership falls below 20 people. (ECF 17-3 at 84.) Here, the monthly rate NAVFAC SE was to pay ASG was the total cost of employing each of the 20 professionals, $218,870.00. (ECF 17-3 at 89 (showing the monthly cost of each employee); ECF 17 at 30 (stating the monthly cost, which reflects the sum of each employee's monthly rate).) Following the structure of a firm-fixed-price contract, ASG requested this monthly amount in each of its certified claims to the contracting officer. (ECF 17-3 at 1509-12, 1743, 2239-41.)

ASG argues, however, that the provisions of the task order specifying a team of 20 reflect the Navy's best estimate of how many employees, and their respective qualifications, would be required to fulfill the requirements of the task order. ASG relies on the word "anticipates" in Section A. (ECF 23-2 at 3 (emphasis added) ("at the time of initial contract award, the [g]overnment *anticipates*" a staff of 20 experts).) ASG explains that the provisions reflecting a team of 20 were designed to allow offerors, and the eventual awardee, to price their offers appropriately, because under a firm-fixed-price contract, the awardee would bear the financial risk if it ultimately required more resources to fulfill the assignments NAVFAC SE gave it. The parties have provided conflicting readings of the task order, but no party has suggested that provisions of the task order itself are internally inconsistent such that the Seaport NxG contract's order of precedence clause would apply to resolve the conflict. Overall, the defendant's interpretation best harmonizes all the task order's provisions and is most consistent with its purpose. The first section of the task order makes a team of 20 technical experts a requirement from the outset. Section A.2 opens with the proviso, relied on by ASG, that "at the time of initial contract award, the [g]overnment anticipate[d]" that a staff of 20 experts across specified disciplines would be required, and that the team would be "subject to change." (*Id.*) In the next sentence, however, Section A.2 specified that "the staff of twenty (20) professionals is the *base/minimum* level of service." (*Id.* (emphasis added).)

Later sections comport with or do not conflict with Section A's language. Section B supports the defendant's reading. Under Section B, the Navy retained the option to increase the number of employees working for the contractor on the task order. If the contractor retained the full discretion to determine appropriate staffing for any assignment, there would be no need for the Navy to have retained the option of awarding the contractor additional funds to increase the size of the team.

The PWS, Section C, "requires the contractor to provide, manage, and supervise a multidisciplinary team of facilities technical experts." (*Id.* at 10.) The PWS provides that the contractor chooses "the precise labor and staffing mix" to fulfill assignments. (*Id.*) The PWS is silent on the size or composition of the "staffing mix." The PWS is the heart of the task order. A contractor would expect this central part of the contract to specify in detail what tasks will be performed; other provisions often reflect boilerplate language to guide the parties' execution of those tasks. In this case, however, it is the PWS that is almost perfunctory, and the surrounding sections more specific. In this regard, the task order is written inside-out.

Although not expressed as clearly as it should have been, the PWS implicitly requires the contractor to provide *a team* ready to advise on any projects NAVFAC SE assigns to it. As part of its supervisory role over its employees under the task order, ASG had to provide NAVFAC SE with a weekly report setting out, among other items, "active projects for each [facilities technical expert]"; ASG was not required to report each week on the progress of each assigned project. (*Id.* at 12.) This requirement contemplates a standing team ready to take on projects as they are assigned so that the Navy can track the work of the team members, rather than track the staffing of discrete assignments.

In Section F.4, the calendar of deliverables assumes a team of 20 professionals.[5] The calendar

[5] Section F.4 contains the following deliverables:

1. Design Drawings & Specifications. Date of Submission: At project milestones (ex: 35%, 65%, 100%).

2. Requests for Proposals (RFP). Date of Submission: 100% Pre-Final.

3. Design Review Comments. Date of Submission: At project milestones (ex: 35%, 65%, 100%).

4. Quantity Takeoffs for Cost Estimates. Date of Submission: At project milestones (ex: 35%, 65%, 100%).

5. Construction Cost Estimates. Date of Submission: At project milestones (ex: 35%, 65%, 100%).

6. Project Status Report for Assigned Projects. Date of Submission: Weekly.

required that, "[w]ithin five days of award of task order," the awardee was required to submit a "resume for each position proposed in accordance with the [c]ontractor's proposal and the PWS." (*Id.* at 19.) The parties dispute what "task order" means in this context. The plaintiff contends that the term refers to individual project assignments issued under the Jacksonville task order. (ECF 17 at 35.) Only after NAVFAC SE issues an assignment (which the plaintiff refers to as a "task"), would ASG be obligated to submit resumes for that assignment within five days. (*Id.*) The defendant interprets "task order" to refer to the Jacksonville task order. (ECF 23 at 47.) This interpretation requires that the 20 resumes of the members of ASG's prospective team would have been due by October 3, 2022, five days after award of the Jacksonville task order. (*See* ECF 23-2 at 19.)

The defendant's interpretation of the table of deliverables is the better reading of the task order. The term "task order" is singular and does not contemplate multiple submissions. On the other hand, other deliverables listed on the table contemplate multiple submissions, with various due dates "at project milestones" or "weekly." (*Id.*) These plural "project milestones" contrast with the singular reference to

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7. Work Schedule. Date of Submission: Monthly (due by the 5th working day of the month).

8. Resume for each position proposed in accordance with the Contractor's proposal and the PWS. Date of Submission: Within five days of award of task order. (ECF 23-2 at 19.)

"task order," suggesting that deliverables regarding assignments under the Jacksonville task order would occur repeatedly. In this context, the one-time, singular reference to "task order" most logically refers to the Jacksonville task order, and not the recurring assignments within it. If ASG were required to submit resumes at the outset of each assignment under the Jacksonville task order, the deliverable table would use language reflecting those repeated submissions, just like the project milestones and weekly report deliverables. Unless context requires otherwise, a term should be read consistently throughout at least the same provision of a contract. *See Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 990 (Fed. Cir. 2009) (cleaned up) ("A proper interpretation of a contract generally assumes consistent usage of terms throughout the [a]greement.").

Further, a "task order" is defined as "an order for services placed against an established contract or with government sources." FAR 2.101. Interpreting "task order" to mean the Jacksonville task order comports with this definition in the FAR, because the Jacksonville task order was issued pursuant to an established government contract: the Seaport NxG Contract. The Jacksonville task order also expressly identifies itself as a task order in Section A.1. Section A.1 notes that the Jacksonville task order is a "Firm Fixed Price (FFP) task order." (ECF 17-3 at 55.)

The singular word "award" in Section F.4 also suggests the full slate of resumes was due on October 2, 2022, and not five days after NAVFAC SE issues each assignment. Assignments given to ASG under the task order would not be "awarded" to it; once ASG was awarded the Jacksonville task order, there would be no competition for further assignments under that task order. Therefore, it is implausible to interpret the phrase "award of the task order" as referring to the order of each assignment given to ASG by NAVFAC SE under the Jacksonville task order.

Section G of the task order provides further support for the defendant's interpretation that the task order requires a fulltime team of 20 professionals as the baseline of performance under the contract. Section G contains a section titled "Submission and Substitutions of Key Personnel." (ECF 23-2 at 25.) In explaining the resume requirement, Section G.6 notes that "all resumes for proposed individuals will be submitted after award in accordance with Section F.4." (*Id.* 25.) Again, the term "award" in the singular is best read refer to the award of the Jacksonville task order, because assignments given to the contractor under that task order would not be "awarded." In addition, the term appears again in the singular. Under the contract, the Navy expected to make multiple assignments to the contractor; use of the singular "award" is best construed as applying to the one award of the governing Jacksonville task order.

Upon submitting resumes for its 20 team members, the contractor had to certify that the proposed individuals had "agreed to accept the position upon acceptance by the [g]overnment." (*Id.*) This language again suggests that the Navy's goal under the contract was to hire a vetted team of professionals.[6]

Finally, interpreting Section A.2's language according to its ordinary usage gives meaning to Section H.8, which describes what would happen when the contractor's team experiences a labor shortage. Section H.8 provides that "[i]f at any time there is a vacancy within the [c]ontractor's team (i.e. all twenty (20) positions are not filled)," the contractor must fill the vacancy within five days, or the Navy would reduce payments to the contractor otherwise due for that vacant position until another professional joins the team. (*Id.* at 32.) This clause is meaningless if the contract does not require ASG to provide and maintain a team of 20 professionals.

Essentially, the plaintiff treats the PWS as the

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[6] In his first submission of resumes to the Navy, ASG's president seemed to share this interpretation. As noted in Section I.B, above at 5-6, he wrote to the contracting officer's representative on October 3, 2022, that he had "been able to obtain 2 of the 20" and would continue to submit resumes "until all 20 [were] filled." (ECF 23-2 at 223.) This interpretation changed gradually, beginning with an October 6, 2022, email in which ASG's president pushed back against NAVFAC SE's request that future resumes comply with the labor mix ASG had provided in Attachment 2 of the task order. He noted there that it was "up to ASG to [ ] hire who it has reasons to believe in good faith can deliver services per Section C." (*Id.* at 230.) He began to protest the Navy's interpretation of the number of professionals required under the task order in an October 13, 2022, email, writing that ASG has "the prerogative to change the labor mix and quantity as [ASG] deem[s] fit to execute the work." (*Id.* at 269.)

central and governing portion of the contract. Under ASG's reading, the other sections of the task order are important in providing the obligations and limits of the parties' contractual relationship, but only the PWS establishes the contractor's obligations under the task order. A PWS is the "statement of work . . . that describes the required results in clear, specific and objective terms with measurable outcomes." FAR 2.101. As previously noted, it is hard to conceive or explain why the PWS does not include any reference to what the defendant now insists is the contract's central purpose, *i.e.*, to provide the Navy with a team of 20 professionals. Perhaps the Navy thought that by placing the requirement for a team of 20 professionals in Section A.2, it was highlighting the primary purpose of the task order for offerors; if that is what the Navy thought it was doing, its effort was ineffective. Contractors generally look to the PWS to ascertain exactly what goods or services they will be obligated to provide or perform under a contract. The provisions that surround the PWS typically support it by providing boilerplate mechanisms to guide the parties' execution of the contract. Here, however, it is the PWS that describes the advisory work of the contractor's team in broad, generic language, while the surrounding provisions more clearly require a team of 20. A simple reference to the hiring of 20 professionals when the PWS already mentions the contractor's "team" could have avoided this entire dispute, both preserving ASG's standing as a reputable government contractor and the Navy's progress on its essential projects.

A court must read all provisions of a contract together and give effect to each of them. The provisions of the Jacksonville task order are best harmonized if Section A.2 is taken at face value: while the Navy could only anticipate its precise needs, the awardee-supplied team of 20 interdisciplinary professionals was the "base/minimum level of service." Section C describes the assignments the contractor's "interdisciplinary team" will be given to accomplish; Section F requires the contractor to submit resumes of its prospective team members "within five days of award of task order"; Section G describes the required content of the resumes and explains that the prospective employees must agree to work "upon acceptance by the government"; and Section H mandates that the contractor maintain its staff of 20 at all times or face a payment reduction. The plaintiff's interpretation requiring only a to-be-determined team of an unspecified makeup corresponding to specific assignments is inconsistent with the language of Section A.2 and requires strained interpretations of the other provisions of the contract.

The logistical processes involved in performance of the task order also support the defendant's interpretation that a team of 20 professionals was a central requirement of the task order. The contractor's authority to choose a staffing mix in the PWS does not mean that the Navy expected the contractor to overhaul the makeup of its team in response to each individual assignment. Both parties address the onboarding process all the professionals had to undergo before they could report to work. The defendant explained that the security and background screenings for each proposed ASG employee could take up to two months before that employee could access NAS Jacksonville to perform the assignment. (ECF 23 at 13.) Emails submitted by the plaintiff convey ASG's frustration that the onboarding process was moving more slowly than expected. (*See, e.g.,* ECF 17-3 at 361, 374.) The existence of these administrative hurdles further strains ASG's reading of what the task order required. These mandatory processes are also antithetical to the one-year term of the task order. NAVFAC SE would need to have ASG assemble a team as soon as it awarded the task order so that the team could "provide advice and technical assistance" to the Navy's projects at NAS Jacksonville, as the task order required. (ECF 23-2 at 10.) A workflow in which NAVFAC SE assigns a project to ASG, ASG then recruits and hires qualified personnel, the personnel then undergo screening and onboarding for two months, and only then can provide the services needed by the Navy is impracticable. A reading that requires this result, as the plaintiff's does, is therefore implausible and should be avoided. The defendant's reading of the task order is consistent with the plain meaning of the task order language, best harmonizes all provisions of the task order, and is the reasonable interpretation, given the task order's purpose. The plaintiff's interpretation does not produce a reading of the task order that gives meaning to all of its parts to effect the Navy's purpose: to have ASG provide a team of 20 professionals who satisfied the qualifications described in ASG's proposal.

B. Personal Services Contract

Given that the defendant's interpretation of the task order is the only reasonable one, the next step is to analyze whether, under that interpretation, the task order becomes a personal services contract that would violate FAR 37.104 or an improperly executed time and materials contract under FAR 16.601.

The plaintiff's primary argument in advocating for its interpretation of the task order is that under the government's reading the task order is an illegal personal services contract. An interpretation that renders a contract illegal cannot be a reasonable interpretation. *See Bay Co., FL v. United States*, 112 Fed. Cl. 195, 202 (2015); *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 333 (1999) (quoting *Hobbs v. McLean*, 117 U.S. 567, 576 (1886)) ("'where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted'"). Here, the defendant's interpretation of the task order is the reasonable construction, so it must be determined whether that interpretation renders the contract illegal. The "difference between a de facto 'personal services contract' and a nonpersonal services contract often means the difference between an unlawful and a lawful services contract." *Off. of Fed. Contract Compliance Progs. v. Florida Hosp. of Orlando,* 2013 WL 3981196, at *17 (U.S. Dep't of Labor Adm. Rev. Bd. Jul. 22, 2013) (en banc).

FAR 37.104(a) defines a personal services contract as one "characterized by the employer-employee relationship it creates between the [g]overnment and the contractor's personnel." Such a contract is illegal because it "circumvents" laws that govern the procedures for hiring federal employees. *Id.* In assessing a contract, the "key question" is whether the government will "exercise relatively continuous supervision and control over the contractor personnel performing the contract." FAR 37.104(c). The FAR lists six factors that guide an assessment of whether a personal services contract exists:

1. Performance on site.

2. Principal tools and equipment furnished by the Government.

3. Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

5. The need for the type of service provided can reasonably be expected to last beyond 1 year.

6. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees.

FAR 37.104(d).

Of these factors, the last one aligns most closely with the FAR's "key question" underlying whether an employer-employee relationship between a contractor's staff and the government has been created.

Caselaw closely adheres to the FAR's designation of the government's degree of supervision over contractor personnel as the "key question" in determining whether a contract is impermissibly for personal services. As the Federal Circuit has noted, "the principal ground on which a contract will be found to be a personal services contract . . . is the degree of supervision to which the contracting employees were subject under the contract." *Seh Ahn Lee v. United States*, 895 F.3d 1363, 1371 (Fed. Cir. 2018). The fact that some of the factors listed in FAR 37.104(d) are met under a contract does not "'per se render[ ] the contract a personal services contract'"; instead, such factors "are merely 'to be used as indicia of continuous supervision and control of contractor personnel by the government.'" *John Douglas Burke v. Dept. Health & Human Services,* CBCA 7492, 23-1 B.C.A. ¶ 38304 (Mar. 10, 2023) (quoting *W.B. Jolley*, B- 234146, 89-1 CPD ¶ 339 (Comp. Gen. Mar. 31, 1989)).

Before issuing the solicitation, the Navy analyzed whether the task order would constitute an illegal personal services contract. The contracting officer determined that five of the six factors listed in FAR 37.104(d) would be met under the contract. After this finding, the Navy implemented additional safeguards in the task order. It added language to clarify that "the contractor [would] choose[ ] the precise labor and staffing mix" and to require "the contractor to provide, manage, and supervise" the team. (ECF 23-2 at 10.)

With these provisions, even though ASG's employees were working onsite and with government-provided tools, ASG would assign and control the daily activities of its employees performing work under the task order. The lack of Navy control over ASG's employees would prevent the creation of an employer-employee relationship between the government and ASG personnel. (ECF 23 at 49; *see also* ECF 23-2 at 10.)

The fact that several of the factors of FAR 37.104(d) would be met does not necessarily mean that the task order violates the FAR. In *Seh Ahn Lee v. United States*, the Federal Circuit explained that the FAR 37.104(d) factors are "far from definitive." 895 F.3d at 1371. Indeed, meeting several of FAR 37.104(d)'s analysis criteria "does not dictate that an executed contract will be deemed void." *Id.* at 1372. Instead, the controlling question, which assumes greater importance as more of the other factors listed in 37.104(d) are met, is whether the language of the task order or the manner of its administration gives the agency control over the work of the contractor's employees.

The task order specifically left the control of ASG's employees to ASG. The Navy would assign work to ASG. ASG would then select which members of the 20-person team were appropriate to execute the work; ASG would control the daily activities of the team. The Navy was allowed to inspect the completed work to ensure it was satisfactory. Otherwise, from the assignment of the work to its completion and review by the Navy, ASG was in control of its team. Because ASG, not the Navy, assigned work to its employees and managed their daily activities, the Navy's determination that the task order would not create a personal services contract was correct.

Although the task order did not create a personal services contract, the inquiry is not ended. A personal services contract may arise either by the contract's terms or the "manner of its administration during performance." FAR 37.104(c)(1). ASG argues that NAVFAC SE's insistence on reviewing and retaining approval rights over the hiring of ASG's employees created a personal services contract. The defendant's interpretation of Section G.6 as allowing NAVFAC SE to approve resumes would lead, the plaintiff argues, to "an absurd result of NAVFAC SE controlling the labor mix as if this were a personal services contract." (ECF 24 at 15.) By reviewing resumes to ensure they meet the qualifications promised by ASG in Attachment 4 of its proposal (and incorporated into the task order as Attachment 2), the plaintiff argues, NAVFAC SE "stripped [ASG] of its right to determine the 'how' of performance." (*Id.* at 27.) Beyond violating the FAR, the plaintiff contends that the Navy's actions also violated the PWS, which grants the contractor the right to choose the labor mix needed to complete an assignment. (*Id.* at 39-40.) It does not argue why this "labor mix" could not refer to a selection of professionals drawn from the contractor's existing team of 20. Once the Navy approves the contractor's team, the task order gives the contractor freedom to select which individuals to use on any given assignment.

When examining performance, "an order for a specific article or services, with the right to reject the finished product or result, is not the type of supervision or control that converts . . . an independent contractor (such as a contractor employee) into a [g]overnment employee." FAR 37.104(c).

While no federal court has addressed FAR 37.104(d) in a factually similar case, decisions of the Comptroller General have found that agencies may review contractor personnel without creating a personal services contract. *See The Endmark Corp.*, B-278139 (Comp. Gen. Dec. 31, 1997) (quoting FAR 37.104(c)(1)) ("an agency's evaluation of a key employee's performance . . . does not establish or evidence an employer-employee relationship marked by 'relatively continuous supervision and control [of the non-government employee] by a [g]overnment officer or employee,' as required to constitute an improper personal services contract"). Agencies have "discretion to determine [their] needs and the best method to accommodate them," and a party's disagreement with the agency's determination about its needs "does not establish that the agency's judgment is unreasonable." *Matter of: Ronald L. Glass*, B-417855 (Comp. Gen. Nov. 21, 2019).

The plaintiff's argument that NAVFAC SE's administration of the task order created an illegal personal services contract rests on the Navy's insistence on reviewing the resumes and approving the hiring of ASG's prospective employees. The plaintiff neither alleges nor argues that other statements or actions by NAVFAC SE resulted in an employer-employee relationship between ASG's personnel and the Navy. The plaintiff also does not allege that NAVFAC SE attempted to supervise or interfere with ASG's employees' performance of their jobs at all; its argument pertains only to allegations that NAVFAC SE attempted to supervise ASG's recruitment of those employees. Once on site, neither the task order nor NAVFAC SE's actions reflect that the agency had any supervisory involvement with ASG's team members.

The Navy's insistence on reviewing and approving resumes, on its own, is not sufficient to demonstrate that NAVFAC SE administered the task order in a manner that created a personal services contract. The delivery by ASG of resumes matching the qualifications of the contractor's proposal was a specific deliverable under Section F.4 of the task order. The right of NAVFAC SE to review and accept the resumes of proposed ASG team members before the team member could work at NAS Jacksonville is "not the type of supervision or control that converts" a contractor into a government employee. FAR 37.104(c)(1). Once it is established that the task order calls for an interdisciplinary team of 20 professionals, it is within NAVFAC SE's discretion to screen resumes of prospective contractor employees. Agencies have discretion to determine their needs and the best way to meet them. *See Ronald L. Glass*, B-417855. This limited involvement by the Navy of reviewing resumes to ensure they met the qualifications proposed by ASG in its response to the solicitation does not create a personal services contract; rather the submission of the resumes of its prospective employees was a deliverable under the contract. The Navy's review and approval of resumes did not involve any governmental supervision of ASG's employees, and none of these actions interfered with ASG's performance of the task order in violation of the covenant of good faith and fair dealing.

Following the defendant's reasonable interpretation of the task order does not render the task order an illegal personal services contract in violation of FAR 37.104. The plaintiff has not shown that the defendant's interpretation of the task order could render it an improperly executed time and materials contract. The FAR mandates that time and materials contracts be used "only when it is not possible . . . to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence." FAR 16.601(c). In such a case, the contracting officer must prepare and submit for agency approval "a determination and findings that no other contract type is suitable." FAR 16.601(d)(1). The defendant's interpretation of the task order is the most reasonable, and under that reading the task order is a one-year contract which requires the contractor to provide a team of 20 advisory professionals. The duration is established and undisputed by the plaintiff. Moreover, the firmfixed-price structure of the task order means that the costs are established beyond "a reasonable degree of certainty." ASG provided the cost of employing each team member in its proposal, and those rates added together became the contract price. Nothing in the record indicates that these variables were ever in doubt by ASG or NAVFAC SE, and no evidence suggests that NAVFAC SE ever contemplated implementing a time and materials pricing structure.

C. Termination for Default

The defendant correctly interprets the task order to require the contractor to provide a multidisciplinary team of 20 professionals, and such an interpretation does not create a personal services contract in violation of FAR 37.104. Even so, the evidence must also demonstrate that NAVFAC SE correctly effected the termination in accordance with the requirements of FAR 52.249-8 and FAR 49.402-3.

1. FAR 52.249-8

Pursuant to FAR 49.504(a)(1), the provisions of FAR 52.249-8 were included in the contract. Under FAR 52.249-8(a)(1), an agency may terminate a contract for default if the contractor fails to "(i) [d]eliver the supplies or to perform the services within the time specified in th[e] contract or any extension; (ii) [m]ake progress, so as to endanger performance of th[e] contract . . . ; or (iii) [p]erform any of the other provisions of th[e] contract." An agency's right to terminate a contract for default pursuant to subparagraphs (ii) and (iii) requires that it first provide the contractor notice and offer the contractor a 10-day window to cure the failure. FAR 52.249-8(a)(2).

The Federal Circuit provided the standard for evaluating an agency's decision to terminate a contract for default in *Lisbon Contractors, Inc. v. United States.* 828 F.2d 759 (Fed. Cir. 1987). A termination for default "require[s] a reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance." *Id.* at 765 (cleaned up).

The plaintiff argues that "there is no allegation and no evidence of any failure to perform services requested by NAVFAC SE." (ECF 24 at 23.) It explains that ASG performed every task NAVFAC SE assigned it. Despite ASG's successful performance of each assigned task, the Navy insisted that ASG's performance was inadequate because ASG did not hire or provide resumes for the number of facilities technical experts required under the task order. (*Id.*) As a result, the plaintiff argues, NAVFAC SE wrongly claimed that it could not assign ASG all the projects it anticipated accomplishing through the task order. (*Id.*)

The plaintiff's argument turns on its reading, already rejected, of what the task order required. Under the plaintiff's reading of the task order, the Navy assigns projects to ASG, and only then does ASG assemble the appropriate team; because ASG performed each sub-task the Navy assigned, it did not fail to perform any work required by the task order. (*Id.* at 23-24.) The defendant argues that because the point of the task order was to appoint a team of 20 facilities technical experts, the plaintiff's failure to do so clearly justifies a termination for default. (ECF 25 at 23.) The defendant has offered the better reading of the contract. Under this reading, ASG failed to perform.

Given that the defendant's reading of the task order is the better one, the plaintiff's argument (ECF 24 at 25) that it did not fail to perform as required under the task order is rejected. *See* 52.249-8(a)(1)(i). ASG had to submit 20 resumes to the Navy within five days of the award of the task order, which was October 3, 2022. ASG did not do so by that date. Indeed, ASG never did so.

The plaintiff's analyses of the termination according to FAR 52.249-8(a)(1) factors (ii) and (iii) follow the same logic and must be rejected for the same reason: they rest on ASG's flawed reading of the requirements of the task order.

ASG materially failed to perform. It did not provide the required services of assembling a fully staffed team. This failure in turn limited the projects that NAVFAC SE could assign. ASG never made sufficient progress toward assembling the team. As of March 2023, halfway through the contract period, ASG had retained only four employees who reported to work at NAS Jacksonville. (ECF 25-1 at 71-72 (decl. of the contracting officer).) Given ASG's performance halfway through the contract term, it was reasonable for the contracting officer to determine that insufficient time remained both for ASG to assemble the required team and for that team to carry out the tasks NAVFAC SE sought to assign to the team.[7]

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[7] The contracting officer also supported the default termination decision by asserting that ASG had repudiated the task order. According to the defendant, repudiation occurred

While meeting any one factor of FAR 52.249-8(a)(1) can justify termination for default, ASG's performance met all three of them.

ASG also argues that even if its performance provided proper grounds to terminate the task order pursuant to FAR 52.249-8, the termination is nevertheless invalid because ASG did not receive a notice to cure as required by FAR 52.249-8(a)(2). (ECF 24 at 26.) ASG argues that although it received a cure notice letter and a show cause notice on December 5, 2022, and January 20, 2023, respectively, these notices did not provide ASG with the opportunity to cure. It could only cure, the plaintiff reasons, by performing assignments. ASG "repeatedly requested information on projects to perform and was denied that information." (*Id.*) This alleged denial prevented ASG from having a meaningful opportunity to cure. (*Id.*)

The plaintiff's argument, again, relies on its

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during a meeting on January 5, 2023. (ECF 23-2 at 672.) During that meeting ASG's president allegedly stated that ASG "cannot meet Attachment 4" (referring to Attachment 2 of the task order). (*Id.*) NAVFAC SE viewed this statement as anticipatory repudiation. (*Id.*) ASG has repeatedly denied that it repudiated the task order. In an email to a NAVFAC SE representative, ASG's president wrote, "at no time did I repudiate [ ]or state for the record that I 'cannot meet Attachment 4' but did articulate the challenges as I have consistently done." (ECF 23-2 at 1520.) On the evidence provided by the parties, ASG's alleged repudiation of the task order is a factual dispute unfit for resolution on summary judgment. Because the termination for default was appropriate regardless of whether repudiation occurred, the factual dispute over this issue does not preclude summary judgment.

faulty reading of the task order, already rejected. It received and responded to the December 5, 2022 and January 20, 2023 notices. (ECF 23-2 at 532-34, 674-86.) Rather than hire a team of 20 in response to either notice, ASG continued to insist that it was not required to do so. On their face, the notices provided to ASG reflect that the Navy had advised ASG of its failures to perform and gave ASG the opportunity to comply with the terms of the task order. ASG never did. The Navy effected the termination in compliance with FAR 52.249-8.

2. NAVFAC SE's Consideration of the FAR 49.402-3(f) factors

When an agency is contemplating a termination for default, FAR 49.402-3(f) outlines seven factors that the contracting officer "shall consider":

> (1) The terms of the contract and applicable laws and regulations.
>
> (2) The specific failure of the contractor and the excuses for the failure.
>
> (3) The availability of the supplies or services from other sources.
>
> (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

> (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
>
> (6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
>
> (7) Any other pertinent facts and circumstances.

The plaintiff argues that NAVFAC SE failed to satisfy the requirements of FAR 49.402-3(f) when terminating ASG for default. The plaintiff asserts that consideration of the seven factors found in FAR 49.402-3(f) is mandatory, and that the contracting officer failed to consider any of them. (ECF 17 at 47-48; ECF 24 at 30-33.) As a result, the plaintiff contends, the contracting officer failed to exercise his discretion as required to terminate ASG for default, thereby undercutting the validity of the termination. (ECF 24 at 30-31.) The defendant argues that the seven factors identified in FAR 49.402-3(f) are irrelevant because ASG failed to perform under the task order and repudiated. (ECF 23 at 55.)

Although FAR 49.402-3(f) requires contracting officers to consider the seven factors in deciding to terminate a contract for default, the evaluation of these factors is not a prerequisite to a valid termination. *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed.

Cir. 1996). The provision of the FAR setting out these factors does not confer any enforcement rights on a defaulting contractor. *Id.*; *see also Minelli v. United States*, 1995 WL 424858, at *4 (Fed. Cir. July 18, 1995). Accordingly, a contracting officer's failure to consider one or more of the factors does not require that a termination for default be converted into a termination for convenience. *DCX, Inc.*, 79 F.3d at 135.

While the factors outlined in FAR 49.402-3(f) are not mandatory, an agency's compliance or noncompliance with them may aid a court in determining whether a particular termination for default reflects an abuse of the contracting officer's discretion. *See Darwin Constr. Co. v. United States*, 811 F.2d 593, 598-599 (Fed.Cir.1987); *DCX, Inc.*, 79 F.3d at 135; *PCL Const. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 781 (2000) (contracting officer's decision to terminate contract for default was reasonable despite no written analysis of enumerated consideration of FAR 49.402-3(f) factors when the contractor had repudiated the contract); *Alutiiq Mfg. Contractors, LLC v. United States*, 143 Fed. Cl. 689, 698 (2019) (termination for default was improper when contracting officer only considered the first two FAR 49.402-3(f) factors).

The record reflects that the contracting officer considered all seven factors. In a document titled "Request to Terminate for Default," signed by the contracting officer on March 17, 2023, the contracting officer outlined and discussed each factor in detail.[8] (ECF 25-1 at 62-63.) The evidence is sufficient to demonstrate that the contracting officer considered the factors required by the FAR, and the contracting officer's analysis of those factors does not reflect an abuse of discretion. Indeed, given the correct reading of the task order, even without the Navy's analysis of the FAR 49.403-3(f) factors, the termination for default would not be an abuse of the Navy's discretion because ASG failed to perform the contract.

VI. CONCLUSION

The plaintiff is not entitled to judgment on the

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[8] At oral argument, the plaintiff objected to the admission of this document, which was made part of the record only with the defendant's reply brief filed five days before the argument. Because caselaw reflects that the plaintiff does not have an affirmative right to receive an agency's analysis of each factor, the time at which the plaintiff became aware of this document does not affect the validity of the termination analysis. *See DCX, Inc.*, 79 F.3d at 135. The date of the contracting officer's signature on the request, March 17, 2023, reflects that the contracting officer considered the relevant factors before NAVFAC SE made the decision to terminate for default. The document is relied on for that point only, and not for the substance of its analysis. Regardless, a court retains discretion to consider untimely submissions when there is no undue prejudice to the opposing party. *See Aventis Pharma S.A. v. Hospira, Inc.*, 675 F.3d 1324, 1333 (Fed. Cir. 2012) (finding that the district court did not abuse its discretion in allowing a party to make late amendments to its pleadings in part because the non-moving party was not unduly prejudiced by the amendment). Considering the timing and limited use of this document in resolving its claims, ASG has not been unduly prejudiced by its introduction.

pleadings or summary judgment. Although ASG has presented a possible reading of the task order, the defendant's reading is the reasonable one. The defendant's reading of the task order does not convert it into an illegal contract for personal services or an improperly executed time and materials contract. ASG was properly notified of the deficiencies in its performance and received an opportunity to cure. It did not cure, and the contracting officer's decision to terminate the task order for default complied with the FAR and was not an abuse of discretion.

The plaintiff's motions for judgment on the pleadings and summary judgment are denied. The defendant's motion for summary judgment is granted. A separate order will be filed concurrently with this opinion directing the Clerk to enter judgment.

s/ Richard A. Hertling
Richard A. Hertling
Judge

APPENDIX C

ITNOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ASG SOLUTIONS CORP., DBA AMERICAN SYSTEMS GROUP,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2024-1755

Appeal from the United States Court of Federal Claims in No. 1:23-cv-01029-RAH, Judge Richard A. Hertling.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, BRYSON[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK,

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[1] Circuit Judge Bryson participated only in the decision on the petition for panel rehearing.

Circuit Judges.[2]

PER CURIAM.

O R D E R

ASG Solutions Corp filed a combined petition for panel rehearing and rehearing en banc. The petition was first referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

March 3, 2026
Date

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

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[2] Circuit Judge Newman did not participate.

APPENDIX D

[DEPARTMENT OF THE NAVY LETTERHEAD]

4330
Ser CON24/23-046
4 April 2023

TRANSMITTED VIA EMAIL: rito@asgscorp.com
ACKNOWLEDGEMENT OF RECEIPT REQUIRED

Mr. Ritobrata Banerjee
ASG Solutions Corporation American Systems Group
3990 Old Town Ave, STE B107
San Diego, CA 92110-2967

Dear Mr. Banerjee:

SUBJECT: NOTICE OF TERMINATION TO PRIME CONTRACTOR FOR CONTRACT N00178-19-D-7175, TASK ORDER N6945022F3005, TECHNICAL SUPPORT SERVICES FOR THE ENGINEERING AND DESIGN DIVISION FOR THE DESIGN AND CONSTRUCTION BUSINESS LINE

This letter is to notify ASG Solutions Corporation American Systems Group ("ASG") that effective immediately, the subject task order is hereby terminated in its entirety for default of the contractor. As detailed in the Letter of Concern dated November 1, 2022, the Cure Notice dated December 5, 2022 and the Show Cause letter of January 20, 2023, ASG has breached its contractual duty by failing to perform in accordance with the terms and conditions of the contract and has repeatedly reiterated its refusal to comply with the contract or to provide any reasonable assurance to the Navy that the performance will be improved in time to meet mission requirements.

Background

The subject task order was awarded by Naval Facilities Engineering Systems Command (NAVFAC) Southeast to ASG on September 28, 2022, in the total amount of $3,836,152.00 for the one-year base period. The contract called for a self-sufficient and self-supervised multidisciplinary support team consisting of at least twenty (20) professionals to provide professional support services in the form of advisory and assistance services to NAVFAC Southeast's Engineering and Design Division, Design and Construction Business Line (DCBL). In accordance with CLIN 1000, the services were required to be performed on-site at Naval Air Station, Jacksonville, Florida.

Task Order Section A.2 — Service Requirements — specifies: "the staff of twenty (20) professionals is base minimum level of service." In order to enforce this requirement, Section H.8 - Schedule of Deductions - states: "If at any time there is a vacancy within the Contractor's team (i.e., all twenty (20) positions are not filled) the Government will be entitled to immediate replacement (within 5 days of loss of personnel), or to a unit price reduction in payment, in accordance with

FAR 52-246-4 until the qualified technical expert(s) is in place. The daily unit price will [be] determined by the Unit Price per Month proposed in the Optional Levels of Service CLIN, as applicable." Further underscoring the essentiality of this requirement, Section G.6 - Submission and Substitutions of Key Personnel - provides that: "The offeror shall certify that as of the date of submission of the resume, the qualified individual(s) has agreed to accept the position upon acceptance by the Government, pending any unforeseen circumstances."

ASG explicitly acknowledged its understanding of these contractual requirements. On August 24, 2022, ASG submitted its proposal, which contained Attachment 4 — Proposed Labor Mix, listing twenty (20) highly qualified professionals from a variety of technical disciplines. The proposed labor mix included very specific qualifications over and above the minimum requirements set forth in the solicitation, to include Masters Degrees, Professional Licensing, and extensive DoD experience.

The solicitation clearly states: "The non-price proposal presented by the offeror to whom the award is made will be incorporated into the task order at time of award." This was so important that, prior to award of the task order, on September 15, 2022, NAVFAC Southeast issued a clarification notice to confirm ASG's proposal. The clarification notice required ASG to expressly acknowledge that ASG understood that any personnel proposed after award would need to meet the qualifications of the personnel that ASG proposed in its Attachment 4. Specifically, the contracting officer asked: "Please confirm that you understand the technical experts submitted after award must meet the additional requirements proposed that are contained within your non-price proposal, Attachment 4. On the same date, ASG provided written confirmation, acknowledging the requirement, and affirming it with an unequivocal "Yes."

Therefore, due to the highly skilled labor mix proposed and confirmed by ASG, NAVFAC Southeast selected ASG for award as the best value offeror. ASG's Attachment 4 was incorporated in the task order award in Section J as Attachment 2 — Labor Mix.

Contract Schedule

ASG's task order was awarded on 28 September 2022, with a completion date of September 27, 2023. Section F.4 — Deliverables - required the contractor to submit "to the contracting officer" "within five days of award of task order" a "resume for each position proposed in accordance with the Contractor's proposal and the PWS." Approximately halfway through the one-year period of performance, ASG has provided only five (5) of the twenty (20) professionals required by the task order and that were expressly proposed and confirmed by ASG in Attachment 4 of its proposal.

ASG has failed to provide the personnel to perform the technical support services required by the contract, which has had, and continues to have, an adverse impact on NAVFAC Southeast's mission accomplishment. This has been explained to ASG on several occasions, but ASG has failed and/or refused to take sufficient corrective actions.

Contractor Performance Issues

From the beginning of the contract, ASG's performance has never been satisfactory. The task order required the contractor to submit resumes of qualified candidates within five (5) days of contract award to the Contracting Officer for review and approval as stated in Section F.4 — Deliverables of the Task Order.

In the first twelve (12) days of the period of performance, ASG submitted five (5) resumes to the Contracting Officer's Representative (COR), but of those five resumes two failed to meet the requirements, and a third individual has not completed his security forms to date. On October 17, 2022, at the kickoff meeting, ASG began to assert that it would not comply with certain requirements of the task order. According to ASG, due to the performance-based elements within the performance work statement (PWS), ASG could unilaterally decide whether or not to comply with the personnel requirements of the task order and with the personnel qualifications that ASG proposed in its proposal Attachment 4 incorporated into the task order as Attachment 2.

To date, approximately six months into the base period of performance, ASG has provided only five (5) of the twenty (20) professionals that are required by the task order and that were expressly proposed and confirmed by ASG in Attachment 4 of its proposal. Throughout the entire six months, ASG has provided a total of eighteen (18) resumes to the contracting officer. NAVFAC Southeast rejected six (6) of the resumes because they did not meet the proposed qualifications listed in ASG's Attachment 4; and approved twelve (12) candidates, five (5) of which did not accept employment with ASG, the other seven (7) accepted employment with ASG. One of the approved candidates terminated employment with ASG nine (9) days after approval. Another approved candidate has yet to complete the security process. An additional candidate was recently approved in early March 2023. In summary, approximately halfway through the one-year period of performance, ASG has provided only twenty-five percent (25%) of the number of qualified professionals required by the task order and as expressly proposed and confirmed by ASG in Attachment 4 of its proposal. Out of these five (5) professionals, only four (4) have performed professional support services under the task order to date.

ASG insists that it is bound neither by the terms of the task order nor by the terms of its proposal incorporated into the contract. ASG insists that it can unilaterally interpret the task order PWS according to its own unilateral convenience. Moreover, ASG claims entitlement to full compensation under the task order. ASG submits and certifies monthly invoices in the full amount of $281,870.00 each, regardless of the positions filled or services rendered.

On 1 November 2022, NAVFAC Southeast issued a Letter of Concern explaining that ASG was failing to meet the task order requirements. In response to the Letter of Concern, ASG took the position that even though it proposed and confirmed twenty (20) qualified personnel sought by the Government, it is not bound to providing the number, the qualifications, or the on-site services that it proposed.

On December 5, 2022, NAVFAC SE issued a Cure Notice, informing ASG that the Government considered ASG' s repudiation of its proposal, specifically its Attachment 4, a condition that was endangering performance of the task order and that could result in a termination for default. ASG responded to the Cure Notice on December 14, 2022. According to ASG, the labor mix required by the task order and proposed by ASG is irrelevant, and only ASG's self-serving interpretation of select portions of the performance work statement are controlling. ASG has continuously argued that it is not required to provide twenty (20) professionals that meet the qualifications of its proposal. According to ASG, it is allowed to provide whatever staffing it deems appropriate, working from whatever location, and with whatever qualifications, regardless of the terms and conditions of the task order and ASG's proposal.

Additionally, ASG accuses NAVFC Southeast of wanting to enforce a prohibited personal services contract, ignoring the fact that management, supervision, and oversight of personnel remained at all times within the control of ASG (not NAVFAC Southeast). In fact, Section 8 of the task order, entitled

Non-Personal Service Statement, provides: "Contractor employees will perform independent of and without the supervision of any Government official."

On January 5, 2023, at a meeting with NAVFAC SE's Contracting Officer's Representative (COR), ASG stated that it "cannot meet Attachment 4," citing labor market conditions. On one hand, ASG admits that it has defaulted under the contract, blaming labor market conditions. On the other hand, ASG argues that it is not bound by the contract, and that it can unilaterally interpret and administer select portions of the contract to its advantage and profit. NAVFAC Southeast believes that ASG either knew or should have known the state of the labor market prior to making its proposal. NAVFAC Southeast believes that ASG submitted a potentially false or fraudulent proposal that ASG either knew or should have known that it could not achieve. NAVFAC Southeast believes that ASG's invoices requesting full payment for less than full services may constitute a potential false claim against the government.

<u>Termination</u>

On January 20, 2023, NAVFAC Southeast issued a Show Cause Notice, which notified ASG that the Government was considering termination of the contract for default. The Show Cause Notice provided an opportunity for ASG to submit a response detailing any facts bearing on the reason ASG has failed to perform in accordance with the contract with regard to: (1) failure to comply with its proposal, specifically Attachment 4, which expressly proposed a multidisciplinary mix of twenty (20) qualified personnel meeting specific qualifications and credentials; and (2) ASG's anticipatory repudiation of the contract performance by informing the COR that ASG "cannot meet Attachment 4."

On January 22, 2023, ASG requested a time extension to respond, and an opportunity to meet in person with NAVFAC Southeast personnel. On January 31, 2023, NAVFAC Southeast issued an extension notice that also included confirmation of the in-person meeting to be held on February 1, 2023 that had previously been scheduled. On February 1, 2023, NAVFAC Southeast representatives met with ASG representatives. ASG reasserted its position that NAVFAC Southeast should not enforce the terms of the contract that ASG cannot meet. According to ASG, it should be allowed to perform DCBL support tasks with less personnel (four or five) working primarily remotely (online rather than on-site). In sum, ASG essentially requested a total reformation or modification of the task order. NAVFAC Southeast cannot grant ASG's request. For one, allowing ASG to potentially exercise a bait and switch scheme of this magnitude may constitute fraud. Moreover, the mission needs of DCBL for this particular task order called for a multidisciplinary and qualified team of at least twenty (20) professionals providing on-site support to DCBL operations. ASG's failure to provide the required team, hindered DCBL's ability to assign meaningful support tasks under the contract. ASG has asserted that without receiving meaningful tasks it cannot hire a qualified team. However, the task order required providing the qualified team first to be able to receive tasks based on the composition and capabilities of the support staff team. In a meeting on February 1, 2023, the ASG was asked if it would consider a reduction in quantity of required personnel for a reduction in total price. ASG did not propose any sort of reduction in their response dated February 10, 2023 to the Show Cause notice. Rather, ASG has insisted on full pay for its minimal or non-existent performance.

On February 10, 2023, ASG responded to the Show Cause Notice. ASG did not fully address the failures identified in the Show Cause Notice. ASG did not accept any responsibility. ASG did not provide any acceptable recovery plan. Rather, ASG reiterated its stance that: (i) ASG is not required to have a minimum number of 20 professionals; (ii) ASG is entitled to staff the contract with any individuals of ASG's choosing without regard to the qualifications; (iii) the contractual requirement for the professionals to work on-site at Naval Air Station Jacksonville is impossible to meet, and ASG employees should be able to work remotely from anywhere; and (iv) ASG is entitled to full payment under the contract regardless of level of performance.

Decision

After due consideration of all of the information above, I fmd and determine that ASG is in default, without any valid excuse. ASG is hereby notified that the Government, by this written notice, terminates Contract N00178-19-D-7175, Task Order N6945022F3005 including ASG's right to proceed with performance, in its entirety and for default in accordance with FAR 52.249-8 — Default (Fixed-Price Supply & Service) (April 1984). This termination for default shall be effective upon ASG's receipt of this notice. ASG shall cease work under this task order immediately. No further work shall be assigned to ASG. Any current work assigned to ASG shall cease immediately. ASG personnel shall return any Government Furnished Equipment, to include but not limited to, Government Furnished Laptops, Common Access Cards, and any other computer related equipment as scheduled with the Contracting Officers Representative (COR) on-site in building 903 on board Naval Air Station Jacksonville, on 5 April 2023.

The Government reserves its right to re-procure the contract. ASG may be found liable for applicable re-procurement costs under the Termination for Default clause cited above. The Government reserves the rights and remedies provided by law and under the contract.

This notice of termination for default constitutes the Final Decision of the Contracting Officer. ASG has the right to appeal this final decision pursuant to the Disputes Clause, FAR 52.233-1 (May 2014), of the contract. This decision may be appealed to the Armed Services Board of Contract Appeals, which is the authorized representative of the Secretary for hearing and determining contract disputes. If you decide to appeal this decision, written notice thereof must be mailed or otherwise furnished to the Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, VA 22041, within 90 days from the date you receive this decision. A copy shall also be furnished to the Contracting Officer from whose decision the appeal is taken at the following address:

> Naval Facilities Engineering Systems Command Southeast
> Attn: Renee Comfort, Chief of Contracting Office
> Naval Air Station Jacksonville
> P.O. Box 30A BLDG 903 Contracting SL
> Jacksonville, FL 32212-0030

The notice should indicate that an appeal is intended, should reference this decision, identify the contract by number, and state the amount in dispute. The rules of procedures of the Armed Services Board of Contract Appeals are in the Department of Defense Federal Acquisition Regulation Supplement, Appendix A, Part Two. Optional Accelerated Procedures are available in appeals involving $100,000 or less and Small Claims (expedited) procedures are available in appeals involving $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less. In lieu of appealing to the Board of Contract Appeals, you may bring action directly in the Court of Federal Claims* within 12 months of the date you receive this decision (*except as provided in Section 4 of the Contract Disputes Act (Maritime Contracts)).

Sincerely,

COMFORT.RENE
E.M.1082580375

Digitally signed by COMFORT.RENEE.
M.1082580375
Date: 2023.04.04 11:59:05 -04'00'

RENEE M. COMFORT

Chief of Contracting Office
Terminating Contracting Officer

Copy to:

Administrating Contracting Office
Contracting Officers Representative
Planning Design and Construction Division
NAVFAC SE, Office of Small Business
Small Business Association Regional Office

Acknowledgment of Notice

The undersigned acknowledges receipt of a signed copy of this notice on ________, 2023. Two signed copies of this notice are returned.

ASG Solutions Corporation DBA American Systems Group

By ________________________ (Name)

____________________________(Title)

(End of notice)

APPENDIX E

Request to Terminate for Default

From:	Cory Iselin, Supervisory Contract Specialist, NAVFAC Southeast (SE)
To:	Renee Comfort, Chief of Contracts, NAVFAC SE
Via:	Rebecca Jones, FSC Division Director, NAVFAC SE
Subj:	RECOMMENDATION TO TERMINATE FOR DEFAULT CONTRACT NUMBER N69450-19-D-7175 TASK ORDER N6945022F3005 ENTITLED DESIGN AND CONSTRUCTION BUSINESS LINE (DCBL) TECHNICAL SUPPORT SERVICES
Ref:	(a) FAR Part 49 (b) DFAR Part 49 (c) NPGI 49.4
Encl:	(1) N69450-19-D-7175 -N6945022F3005 ASG Systems Corporation DBA American Systems Group (ASG) Proposal (2) Letter of Concern dated 11/1/22 Evidence of Receipt to Letter of Concern dated 11/1/22 ASG Response to Letter of Concern dated 12/14/22 Cure Notice dated 12/5/22

Evidence of Receipt to Cure Notice dated 12/5/22
ASG response to Cure Notice dated 12/14/22
Government response to ASG response dated 12/22/22

Show Cause dated 1/20/23
Evidence of Receipt to Show Cause dated 1/22/23
ASG response to Show Cause dated 2/10/23

(3) Government Estimate (time and money) to complete

1. In accordance with references (a) – (c), it is recommended that the subject contract be terminated for default. Enclosures (l) – (2) provide the supporting background information necessary to assist in making this determination.

2. Background Information:

a. Contract number and title: N69450-19-D-7175-N6945022F3005 Design and Construction Business Line (DCBL) technical support services

b. Date of Award: 9/28/2022

c. Value of contract at time of award: $3,836,152.00 (Funded At Time of Award) & $17,381,838 (Total potential value)

d. Original contract completion date: 9/29/2023

(End of Base Period)

e. Contractor's name and address:
ASG Systems Corporation DBA American Systems Group (ASG)
3990 Old Town Ave, Suite B-107
San Diego, CA, 92110

f. Surety's name and address: NA

g. Modifications: No modifications

h. Amount paid to date: $0

i. Balance of funds remaining: $3,836,152.00

j. Contractor's unpaid earnings for work through date of this document $1,409,350. The contractor may be entitled to approximately $207,615.81 for personnel proposed and approved during the first five months of the task order.

k. Assignee (if applicable): NA

l. Trustee in bankruptcy (if applicable): NA

m. Inventory (List all work in place): NA

n. Percentage of completion (Describe the areas and extent of work performed):

Approximately 8%. Time wise, 42% (5 months divided by 12 months of the base period) has elapsed. Performance wise, 20% (4 qualified professionals out of a minimum of 20 required for a compliant multidisciplinary team) has been provided. Since 20% of 42% is 8.4%, it can be said that completion percentage is 8% at this time.

In terms of assigned projects, NAVFAC SE assigned to ASG the following DCBL professional support projects:

- Whiting Field P286 65% Review – Completed

- Kessler New Cyber Processing Facility 65% Review – Completed

- Kingsville B4766 Replace HVAC Pre-Final Review – Completed

- Indoor SAUSR Range, Charleston Pre-Final Review – In process

- Mayport Triton Maintenance Trainer Final Review – In process

o. List any corrective action required: The contract called for a base minimum of 20 qualified professionals, with resumes to be provided to the Contracting Officer within 5 business days of award. To date the contractor has provided a total of 17 resumes to the contracting officer. NAVFAC SE rejected six (6) resumes because the personnel did not meet the professional qualifications proposed by ASG. NAVFAC SE approved eleven (11) personnel that met the qualifications proposed by ASG. However, ASG has retained only four (4) employees on board. The remaining seven (7) are not on board for the reasons listed below.

1. Approved Architect – Once approved, the candidate did not accept the job from ASG.

2. Approved Electrical Engineer – This candidate was approved on 18 Oct 2022. ASG and the employee have not completed the Security documentation and the candidate has had two Eletronic Questionnaires for Investigations Processing (EQIPs) expire.

3. Approved Civil Engineer – NAVFAC SE approved this candidate on 21 Nov 2022. The candidate resigned on 8 Dec 2022 prior to completing the security review process.

4. Approved Structural Engineer – NAVFAC SE approved this candidate, the candidate did not accept the job from ASG because the candidate's wife did not meet the qualifications for structural engineer and was not approved for the task order.

5. First Approved Supervisor – NAVFAC SE approved the first supervisor on 17 Oct 2022. A few days later, the supervisor notified NAVFAC SE that they (the supervisor) had terminated their employment with ASG effective on 26 Oct 2022. The first supervisor did not finish the security review process.

6. Second Approved Supervisor – NAVFAC SE approved the second proposed supervisor, but this supervisor did not accept the job offer made by ASG.

7. Third Approved Supervisor – NAVFAC SE approved the third proposed supervisor, ASG was unable to hire or employ the individual.

p. List of paid materials and supplies at site: NA

q. List of unpaid materials and supplies at site: NA

r. Pending change orders, percentage of completion of the changed work, status and recommended disposition of pending change orders: NA

s. Whether termination will result in a reduction in employment of 100 of more contractor employees: No

t. Any other applicable data/information:

i. Invoices – Five monthly invoices were submitted in the amount of $281,870.00 each, for a total of $1,409,350.00. The first two invoices have been rejected because the vendor did not have billable employees in place, and did not provide the timesheets required to verify the costs being billed. The three remaining invoices are pending a determination on how they may be partially processed, if at all, without timesheets because the contractor refuses to submit timesheets.

u. Point of contact if additional information is necessary: Cory Iselin, cory.s.iselin.civ@us.navy.mil

1. DISCUSSION

Chronology of events:

a. On 29 July 2022, NAVFAC SE issued Solicitation N6945022R3005. The scope of work consisted of providing a multidisciplinary professional support staff with the minimum personal allocation: four (4) architects, four (4) mechanical engineers, four (4) electrical engineers, two (2) civil engineers, two (2) structural engineers, one (1) fire protection engineer, one (1) cost engineer, and two (2) Supervisors. This could change based upon the successful offeror's proposed technical approach. A staff of twenty (20) professionals was the base/minimum level of service. See additional scope information in Encl. 1 at page 9.

b. On 24 August 2022, ASG submitted a proposal offering an impressive labor mix of 20 highly qualified professionals. Each technical professional was listed as Senior, having a minimm of 12 years to 35+ years of experience, decades of DoD experience, a degree from a specifically named college/university (18 of the 20 listed Masters degrees), and a relevant professional certificate and/or license. On 15 September 2022, NAVFAC SE issued a clarification notice to confirm ASG's offer. The clarification notice required ASG to expressly acknowledge that ASG understood that the personnel proposed after award would need to meet the qualifications of the personnel proposed in Attachment 4 of ASG's proposal. On the same date (15 September 2022), ASG confirmed in the affirmative that ASG would be held to the standards as proposed in ASG's proposal Attachment 4.

c. On 28 September 2022, NAVFAC SE selected ASG for award as the best value offeror due to the highly skilled labor mix of 20 highly qualified professionals proposed and confirmed by ASG in Attachment 4 of its proposal. ASG's Attachment 4 was incorporated in the task order award as Attachment 2. Consequently, NAVFAC SE incorporated ASG's proposed labor mix into the task order award in Section J as Attachment 2 – Labor Mix.

d. On 18 October 2022, ASG began to assert that it could unilaterally decide whether to comply or not with the qualifications proposed in Attachment 4 of its proposal. Additionally, ASG began disputing the task order requirements of providing a staff of twenty (20) professionals as the base/minimum level of service, and to do so by providing resumes of qualified candidates within 5 days of contract award to the Contracting Officer for review and approval by the Government (so the Government could verify that proposed employees met ASG's proposed minimum qualifications).

e. On 1 November 2022, NAVFAC SE issued a Letter of Concern explaining that ASG was failing to meet the task order requirements. ASG did not change its stance. On 5 December 2022, NAVFAC SE issued a Cure Notice, informing ASG that the Government considered ASG's repudiation of its proposal, specifically its proposal Attachment 4 – Labor Mix, which was incorporated into the task order at the time of award, a condition that was endangering performance of the task order and that could result in a termination for default. The task order's period of performance had started on 30 September 22, however, as of the date of Cure Notice, ASG had submitted only 18 resumes, out of which only twelve (12) met the qualifications ASG proposed, and only six (6) accepted employment with ASG, with one (1) terminating their employment nine (9) days after approval, and one (1) additional employee (to the date of this request) has yet to finish the security process. In summary, at approximately halfway through the one-year period of performance, ASG has provided only five (5) (one was just accepted in early March and has yet to finish security process) of the twenty professionals by the contract.

f. On 05 January 2023 Mr. Ritobrata Banerjee (owner of ASG) visited NAVFAC SE for a meeting with Mr. Douglas Szilagyi, Contracting Officer's Representative (COR). During that meeting, Mr. Banerjee stated that he "cannot meet Attachment 4."

g. On 20 January 2023, NAVFAC SE issued a Show Cause Notice asking ASG to Show Cause why the task order should not be terminated for default. The Show Cause Notice informed ASG that it had failed to cure the conditions endangering performance. Specifically, ASG had failed to comply with Attachment 4 of its proposal, which expressly proposed personnel meeting specific qualifications and credentials. On 22 January 2023, Mr. Banerjee requested an in-person meeting to discuss the Show Cause Notice. On 1 Feb 2023, ASG representatives Mr. Banerjee and Mr. Marcy met with NAVFAC SE representatives Ms. Renee Comfort (Chief of Contracts), Mr. Cory Iselin (Contracting Officer), Ms. Rebecca Jones (Public Works Contracts Division Director), Mr. Doug Szilagyi (Contracting Officers Representative), and Mr. John Bazylewicz (Assistant Deputy Director for Small Business). During the meeting the intent and terms of the contract were discussed. Mr. Banerjee continued to assert that his belief was that the Government was wrong and that the Government should allow him to staff the contract with whomever he deemed necessary. He stated that should he be required to respond to the Show Cause Notice that he would propose a 2% reduction in price in order for the ability to provide whomever he deemed qualified for the contract, whether they met the terms of his proposal or not. Mr. Banerjee continued to assert that his proposal was simply just that, a proposal and that he did not need to adhere to or provide what he proposed. The Government continually pointed back to the contract language stating the base/minimum level of service and remind Mr. Banerjee that he responded during clarifications that he was aware that he would be held to his proposal. At the conclusion of the meeting, Ms. Comfort informed Mr. Banerjee that ASG was still required to submit a formal response to the Show Cause Notice.

h. On 10 February 2023, ASG responded to the Show Cause Notice. In Summary, ASG continued to categorically deny the Governments assertions made in the Show Cause and all prior notices. ASG essentially contended that it was not obligated to adhere to the Government's requirements or its proposals, but only to ASG's unilateral interpretation of certain portions of the task order. ASG continued to claim that the Government is operating this contract as a Personal Services contract and that the Government is ignoring contract language and the needs and mission of the Government. ASG stated that "the Government has shown zero regard for 'the impracticability and absurdity of staffing 20 elite professionals to show up in Jacksonville and do nothing.'" ASG closed its response by stating that "the Government has presented ASG with two equally untenable options:

1) "conspire with the Government and its agents to unlawfully treat this contract as a personal services contract and perform the extra-contractual task, which to date is impossible based on market conditions, of delivering 20 professionals of the Government's choosing with no work to be done..." or 2) "Face the full wrath of the

Government's unlimited legal budge in bet the company litigation at the Court of Federal Claims, which all the costs and waste associated with the endeavor." ASG requested that the Government avoid litigation by ceasing "baseless attacks", paying ASG (full price), and consider Alternative Dispute Resolution. The government team discussed and considered the request for ADR as suggested by ASG, and by Mr. John Bazylewicz (NAVFAC Assistant Deputy Director for Small Business), however the team believed that the entirety of this situation does not lend itself to reaching a successful ADR agreement, and as such the Government determined ADR not to be the best path forward.

Past and present performance of the contractor, including deficiencies and difficulties together with a statement of any efforts made to improve performance:

The contractor has refused to perform in accordance with this task order since it start date of 30 September 2022. ASG has not been able to meet its proposal as outlined in Attachment 4 Labor Mix. ASG has been unable to provide twenty (20) professionals as the base/minimum level service requirement. ASG is very combative and argumentative, insisting in its own interpretation of the contract and completely disregarding the fact that it expressly proposed a specific labor mix of 20 qualified professionals to work at NAVFAC SE in Jacksonville, FL. NAVFAC SE requires a multidisciplinary team composed of specific specialties to deliver on-site professional support services for the Design and Construction Business Line. ASG insists that provided that it can perform DCBL work remotely and with personnel of any number and qualification of its choosing, it would meet the performance requirements of the contract. ASG insists on a partial and selective contract interpretation that would render meaningless the requirement to provide a specific labor mix for a multidisciplinary team providing seamless on-site professional support services to DCBL in Jacksonville, Florida. ASG only wants to read the contract sections that support its particular interpretation of the contract, negating other sections of the contract, and negating its proposal. ASG also demands to be paid in full for the contract even if its performance is partial and only meeting specific sections or portions of the task order rather than the task order as a whole. ASG's position is that it should be paid the full amount of $281,870.00 per month regardless of their level of effort. In support of this argument, ASG points to the fact that the CLIN is firm-fixed price. However, the deductions clause of the contract clearly sets forth the mechanism by which the firm-fixed price may be reduced if the contractor fails to keep a minimum staff of 20 professionals. Almost halfway through the performance period, ASG has never achieved this requirement.

ASG has made minimal efforts to correct/improve their performance. They have continued to occasionally submit new resumes; since Show Cause was issued, they have submitted an additional resume, for an individual whom the government approved and whom has yet to finish his security processing. The Government has done it's best to work with ASG in reviewing resumes on time (providing feedback in less than 48 hours in every case since the Kickoff meeting, even though this is not a requirement of the contract). They have provided detailed notes on resumes when individuals have not been approved to help better direct ASG towards acceptable candidates that meet the ASG proposed specifications for their team members.

Present factual position, contentions, representations, or promised performance by the contractor (Review contractor's response to Cure Notice/Show Cause letter and answer each allegation).

ASG response to Letter of Concern: ASG's response contained embellishments and conflations of opposing issues/topics/laws/etc. making the response difficult to understand. Overall, ASG argues that the Government is misinterpreting the task order whereas ASG is allegedly interpreting it correctly. According to ASG, even though it proposed the 20 qualified personnel sought by the Government, it is not bound to provide the proposed team. The Government disagrees. The intent of the task order was clearly to obtain the onsite professional support of a multidisciplinary team composed of at least 20 qualified personnel. It is evident that ASG understood the Government requirement exactly as required in the Solicitation. The evidence is that ASG proposed the 20 qualified personnel required by the Government in the Solicitation. Moreover, ASG confirmed in writing that it could and would provide the required personnel that it proposed. The statement of work is clear that notwithstanding the performance-based nature of the work, the performance is to be rendered on-site by a professional staff of at least 20 professionals physically located at NAVFAC SE in provided administrative office spaces. The task order even specifies that if there is a vacancy in the 20 professionals, ASG would have to replace the vacancy within 5 days of loss of personnel.

ASG asserts that Section A.2 provides no support for the Government's position. The Government disagrees. Section A-2 provides the Services Requirements for the task order, specifying the multidisciplinary team of at least 20 professionals as the base/minimum level of professional support service consistent with FAR 37.101. ASG argued that the Government was trying to change the contract into a cost reimbursable time and materials (T&M) personal services contract. The Government disagrees. Section H.8 clearly advises ASG that vacancies below the minimum of 20 personnel would need to be filled, or that price deductions would be applicable. ASG asserts that Section F.4 provides no support for the Government's position. ASG states that the Government does not have a right to review resumes to ensure potential employees meet the requirement proposed by ASG in its Attachment 4 (labor mix). The Government disagrees. It is implicit in the Government's right and discretion to properly administer the contract to review resumes and approve personnel to be on board a military installation providing professional support services in accordance with FAR Part 37. It is reasonable to review resumes and personnel on board for many reasons, including contract administration, oversight, and avoidance of an improper or fraudulent "bait and switch" against the Government and as a waste of public funding. ASG's response to the Cure Notice set forth a narrative of their efforts to hire individuals to perform the services (albeit not meeting the specifications of their proposal). However, ASG states that it is "impossible." Additionally, ASG's position is that it has performed all work that it has been given, has delivered ahead of schedule, stating, "The Government has not requested any task order that ASG has not performed." Moreover, ASG believes that it deserves a CPARS of Very Good/Exceptional. The Government disagrees. While it is true that ASG has submitted the work assigned, the Government has been unable to assign the complexity of the projects intended for this contract, and only been able to assign small review based projects that require minimal staff due to the lack of a complete team, and scarcity of ASG's approved staffing. NAVFAC has assigned ASG small professional support projects that ASG could handle with the staffing level on hand. As stated previously, the task order was envisioned to have a robust professional support to DCBL by a fully staffed multidisciplinary team of highly qualified professionals. Lacking the full staff has hindered the ability to meet the customers mission as was intended by issuance of this contract.

ASG response to Cure Notice:

As before, ASG's response contained

embellishments and conflations of opposing issues/topics/laws/etc. that made the response difficult to understand and follow. In addition to the same arguments raised before, ASG asserted that it cannot endanger performance of a task order where there is no work to perform. The Government disagrees. ASG pretends to interpret the task order in a self-serving manner where only the requirements that ASG likes or can meet are valid while all other requirements can be ignored, disregarded, and waived at Government's expense.

ASG decided to interpret the task order as only requiring performance regardless of the composition, location, and qualification of the team. According to ASG, provided that it can perform with any personnel it wants and from wherever it wants, it is complying with the contract. In other words, ASG wants to invalidate the contractual requirement for a multidisciplinary team of a minimum composition providing onsite professional support to DCBL at NAVFAC SE in Jacksonville, Florida. That is neither what the Government procured nor what ASG offered. Somehow, however, ASG wants to unilaterally reform and change the contract to its own selfserving interests without consideration and at Government's and taxpayers' expense. The task order sought a multidisciplinary team for onsite professional support. ASG understood the requirement, and expressly proposed to meet it. After contract award, and after displacing competitors with a potentially false proposal, ASG pretends to change the contract to its sole and self-serving advantage. This is borderline fraud and false claim conduct that cannot be reasonably accepted or condoned. The task order calls for the vendor to provide a staff of twenty (20) professionals who would provide professional support on-site at NAVFAC SE. However, since ASG failed to provide the required staff, the task order never took off as planned. Rather the Government received no services for the first three (3) months of the period of performance until ASG provided its first qualified, approved and cleared through security employees on 3 January 2023. At such time, the Government began to assign tasks to ASG. The Government attempted to help prevent no performance by assigning smaller review type work that could be completed by the disciplines of the three (3) approved employees now on board, rather than assigning work that required a fully multi-disciplinary team.

Once again, ASG asserted that its proposed labor mix spreadsheet is not a contract obligation. The Government disagrees. The staff was confirmed before award, and ASG's offer was accepted and incorporated into the task order. ASG made reference to Non-personal Services Contract Provisions.

It is difficult to understand the actual argument being made, but to the extent that it implies that the task order is an impermissible personal services contract, the Government disagrees. The task order requires a multidisciplinary team to provide professional support services on-site under the supervision and management of ASG (not the Government).

ASG asserted that the Government has a duty to exercise discretion in connection with a termination for default. The Government agrees and has given ASG plenty of opportunities to honor its proposal and position its company to perform. However, ASG insists on its legal arguments to negate portions of the task order and accuse the Government of breach.

ASG states that the Cure Notice which may lead to a termination is not justifiable. This is incorrect, ASG has been unresponsive to the Government's requests to provide the services required in the task order. As such, one remedy available to the Government is to issue a Cure Notice to the contractor so it may cure the deficient performance.

ASG asserted that its performance was satisfactory and that it would continue with its action plan based on its own interpretation of the requirements. The Government disagrees. ASG has continually, since the first meeting after award of this task order (Kickoff 17 October 2022), disagreed with the Government on the requirements of the task order and has been combative in asserting that the Government is wrong and does not understand the contract. As such, ASG refused to acknowledge the requirement to provide the twenty (20) professionals for the base period.

ASG response to Show Cause Notice:

As before, ASG's response contained embellishments and conflations of opposing issues/topics/laws/etc. that made the response difficult to understand. ASG's response contained condescending language, and accused the Government of bullying ASG. ASG reiterated that its interpretation of the task order is correct.

ASG stated that, ".... market conditions outside the control of ASG have made it impossible as of the date of this letter for ASG to recruit 20 full time professionals of the Government's choosing to show up in Jacksonville to do nothing, which is apparently what the Government believes ASG is required to do per this contract." ASG implicitly acknowledged that it has tried to recruit the 20 qualified personnel offered, but has failed to do so due to market conditions. The market conditions are complicated, but not drastically different today than five or six months ago when ASG submitted its proposal and confirmed its offer of 20 qualified personnel. Whether ASG was negligent, fraudulent, or both in preparation of its proposal is yet to be discovered. Regardless, it seems that ASG acknowledges the duty to provide 20 qualified professionals to perform the required services on site at Jacksonville, Florida. That is, ASG finally acknowledged that the task order calls for 20 professionals to work at NAVFAC SE (Jacksonville), but ASG cannot satisfy the requirement due to market conditions.

ASG accuses the Government of trying to run this contract as a Personal Services Contract under FAR 37.104. The Government disagrees. As stated above, the professionals would be on-site providing professional support, but would be managed and supervised at all times by ASG (not by the Government). That is precisely why the multidisciplinary team must include qualified supervisors employed by ASG. Requiring ASG to submit potential employee resumes for review (as required by the task order), so the Government can verify they meet ASG's proposed qualifications does not make this a Personal Services contract. That is simply reasonable and proper government contract administration and oversight, it is not management or supervision of employee performance. Finally, requiring ASG to submit timesheets for employees (required per the task order), so the Government can verify ASG is submitting accurate invoices to the Government for payment does not make this a Personal Services contract. This is a reasonable contract administration and oversight process to ensure adequate disposition of Government funds.

ASG argued that if the Government holds ASG to the task order terms, the Government is trying to treat the contract like a Personal Services contract. The Government disagrees. Again, while the Government is providing overall contract administration and oversight, the actual supervision and management of contractor employees would be performed by ASG (not the Government). Holding a contractor to contract terms and conditions does not make a contract a Personal Services contract. At one point in their response, ASG stated that the task order does not require a staff 20 professionals at NAVFAC SE that ASG proposed, but if it did it would be impractical and absurd. ASG stated that 20 professionals at NAVFAC SE would be doing nothing, just sitting there. Also, AGS stated that 20 professionals who meet ASG's proposed qualifications cannot be "manufactured," because "...who will be actually willing to work at NAVFAC SE Facility in this post-pandemic world..." The Government disagrees. This is precisely what AG proposed. The fact that ASG has failed to perform to its proposal does not make the task order requirements unenforceable or reflect negatively on NAVFAC in any way. On the other hand, allowing ASG to negligently or fraudulently run a bait and switch would reflect negatively on NAVFAC SE and the Government.

ASG also argued that Section C, the Performance Work Statement, takes precedence over its proposed labor mix. The Government disagrees. The proposed labor mix incorporated into the task order takes precedence over Section C. FAR 52.215-8 Order of Precedence-Uniform Contract Format clearly states that attachments have precedence over the specifications. ASG goes on to continually state or admit that it cannot meet its proposed labor mix requirements due to market conditions, but at the same time maintains that it does not need to meet its proposed labor mix requirements. Unfortunately, these excuses and contradictory statements do not shield ASG from liability and responsibility to comply with the terms and conditions of the task order. All terms and conditions were part of the Solicitation under which ASG prepared its competitive proposal. ASG had the opportunity to ask any questions pertaining to these terms and conditions during the pre-proposal phase of this procurement. ASG did not submit any questions, Instead, ASG proposed and confirmed what now appears to be a negligent, and potentially false or fraudulent proposal.

a. **Position of the Surety concerning the proposed default action and whether it has expressed an interest in completing the contracting by a contractor of its choosing or by Takeover Agreement:** NA

b. **Additional contract time extensions claimed or likely to be claimed:** NA

c. **Pending claims (date of claim, description, amount (money and time), date of certification, status, recommended disposition):** ASG submitted a claim on 9 January 2023 for two invoices that were rejected because the vendor did not provide timecards of employees so the Government could verify the hours being billed. The vendor was asked to provide time sheets so the Government could verify the invoice amounts, the vendor refused to so, but instead filled a claim:

(1) Invoiced Amount - $281,870.00 - Invoice Number - N6945022F30051022 - Period of Performance – 09/30/2022 – 10/29/2022 - Month of October 2022 – Invoice; and

(2) Invoiced Amount - $281,870.00 - Invoice Number - N6945022F30051122 - Period of Performance – 10/30/2022 – 11/29/2022 - Month of November 2022 – Invoice.

The claim has been sent to the claims department for processing. During the first two months of performance, for which these claims are for, the vendor had very few, if any, employees hired to work on task order N6945022F3005, so most, if not all, of the money being billed is erroneous. It could be considered fraudulent billing to the US Government

d. **Labor violations**: NA

e. **Special military or other urgency concerning the project**: NA

f. **Government estimate (time and money) to complete the work:** NA

g. **Funds available (in addition to funds remaining under the contract) to complete the work**: NA

h. **Project reprocurement date (explain what needs to be done prior to reprocurement and the estimated date for award of the completion contract and for completion of the defaulted work).** Determination as to whether or not to re-procure these services remains to be made, however, Re-procurement of these services is not advised utilizing the FY22 funds on contract. As there is only an additional maximum of 6-months remaining to utilize these funds, there is not a reasonable expectation that DCBL would receive beneficial services in a timely manner prior to the end of the Fiscal Year.

2. FACTORS CONSIDERED IN DETERMINING WHETHER CONTRACT SHOULD BE TERMINATED FOR DEFAULT (reference FAR 49.402-3(f)):

   a. **Terms of contract, applicable laws and regulations:** FAR Clause 52.249-8 Default (Fixed-Price Supply and Service).

   b. **Specific failure of contractor and the excuses for failure**:

      ASG has failed to provide the self-sufficient and self-supervised multidisciplinary professional support team required by the task order. The task order solicitation required a team of at least 20 professionals to provide professional support on site to NAVFAC SE DCBL in Jacksonville, Florida. ASG did not question the solicitation requirements. Instead, offered 20 highly qualified professionals to lure the Government to award the task order to ASG. Immediately after task order award, ASG began to fail on its promise, and began to attack the Government for trying to enforce the bargain of the parties under the terms and conditions of the task order. ASG has failed to provide the required self-sufficient and self-supervised multidisciplinary team for professional support performance on-site at Jacksonville, Florida. Instead of accepting failure and trying to negotiate an equitable price reduction, ASG claims entitlement to full compensation, arguing that it is not require to provide the required and proposed personnel and that the Government wants to convert the contract into a prohibited personal service contract. ASG argues that it is not required to provide 20 professionals to work at NAVFAC SE. ASG argues that it can provide whatever staffing it deems appropriate, from whatever location, and with whatever qualifications regardless of the terms and conditions of the task order and ASG's proposal.

c. **The availability of the supplies or services from other sources:** The services are available from other sources. There was a total of 6 proposals (inclusive of ASG) received in response to the solicitation issued that led to the award of N6945022F3005.

d. **Urgency of the need for the supplies/services and the period of time required to obtain them from other sources, as compared with the time**

delivery could be obtained from the delinquent contractor: To be determined based on the mission needs of DCBL.

e. **The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts:** ASG is one of many staffing companies in the United States, and not essential to the Government acquisition program. The termination for default should not affect ASG's ability to provide staffing under pre-existing contracts, but may affect ASG's ability to obtain similar contracts in the near future. The termination for default may help other agencies avoid similar negligent or fraudulent "bait and switch" schemes under professional support contracts.

f. **The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments:** Unknown

g. Any other pertinent facts and circumstances (i.e. any Government vulnerability, etc. – explain):

The Government has been too lenient with ASG, prolonging a default that was evident within the first five days of the contract into five months of difficult contract administration efforts. It is likely that ASG will appeal the termination for default to convert it into a termination for convenience. ASG will argue that the task order is 100% performance based and that the Government should have allowed to perform with whatever staffing, from whatever location, and with whatever professional qualifications. As with all litigation, there will be hefty expenses and time consuming duties plus risk of an adverse judicial decision.

3. RECOMMENDATIONS:

a. Based on the foregoing, termination for default is in the Government's best interest for the following reasons:

1. The contractor is unwilling and/or unable to provide the self-sufficient and self-supervised multidisciplinary professional support team required in the task order. The requirements were for professional support services provided by a minimum of twenty (20) qualified professionals as clearly understood and expressly proposed by ASG. However, ASG now argues that due to market conditions it cannot fulfill its proposal. Instead of negotiating an equitable reduction of

the contract price for reduced performance, ASG insists that it can reform the contract based on its own self-serving contract interpretation and a myriad of accusations against the Government, demanding full payment regardless of its lack of performance. The Government cannot pay full price for services that have not been performed.

2. To continue this contract would harm and impede the mission of the United States Navy. The contractor has expressly stated that it is impossible for it to obtain the multidisciplinary on-site team (as was proposed) to provide the required professional support to the mission of NAVFAC SE's DCBL. If the Government were to fully assign DCBL professional support projects to ASG in accordance with the contractual level of service of a multi-disciplinary team of at least twenty (20) professional, ASG, having only five (5) qualified professionals on its staff, would certainly fail and negatively impact the mission.

3. The contractor appears to be involved in a classic bait and switch operation with regard to this task order. The vendor proposed highly qualified individuals in order to win the award. Upon winning

the award, the vendor changed its posture arguing that it does not have to comply with portions of the task order or portions of its proposal.

b. Recommended re-procurement method: To be determined upon discussions with DCBL and assessment of command needs for professional support services.

Prepared by:

ISELIN.CORY.
S.1100847996
Digitally signed by ISELIN.CORY.S.11
1100847996
Cory Iselin
CONTRACTING OFFICER/CONTRACT SPECIALIST

3/17/23
DATE

I have reviewed the above for form and legality:

GONZALEZ.JAVI
ER.E.1258530140
Digitally signed by GONZALEZ.JAVIER.E.
1258530140
Date 2023.03.21 09:27:15 -04'00'

3/21/23
DATE

Termination Contracting Officer or Level III

Contracting Officer approval:

/s/
Renee Comfort
Terminating Contracting Officer

4/4/2023
DATE

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS

49.402-3 Procedure for Default
[48 C.F.R. § 49.402-3]

. . .

(d) Subdivisions (a)(1)(ii) and (a)(1)(iii) of the Default clause cover situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the termination is predicated upon this type of failure, the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice may be made a part of the notice described in subparagraph (e)(1) below. Upon expiration of the 10 days (or longer period), the contracting officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured. A format for a cure notice is in 49.607.

(e) **(1)** If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract should not be terminated for default. The notice may further state that failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference. A format for a show cause notice is in 49.607.

(2) When a termination for default appears imminent, the contracting officer shall provide a written notification to the surety. If the contractor is subsequently terminated for default, a copy of the notice of default shall be sent to the surety.

(3) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing checks.

(4) If the contractor is a small business firm, the contracting officer shall immediately provide a copy of any cure notice or show cause notice to the contracting office's small business specialist and the Small Business Administration Area Office nearest the contractor. The contracting officer should, whenever practicable, consult with the small business specialist before proceeding with a default termination (see also 49.402-4).

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

. . .

(j) If the contracting officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Government's interest, the contracting officer may terminate the contract for the convenience of the Government.

52.249-8 Default (Fixed-Price Supply and Service)
[48 C.F.R. § 52.249-8]

As prescribed in 49.504(a)(1), insert the following clause:

Default (Fixed-Price Supply and Service) (Apr 1984)

(a) (1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-

> **(i)** Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> **(ii)** Make progress, so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or
>
> **(iii)** Perform any of the other provisions of this contract (but see paragraph (a)(2) of this clause).

. . .

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

. . .