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HOUSE OFFICE BUILDING COMMISSION

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| Appeal of - - |) | |
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| Montage Inc., |) | |
| |) | |
| Under Contract No. A0C05C0052 |) | |
| |) | |

CAB No. 2006-2 (HOBC)

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| Appearance for the Appellant: | Herman M. Braude, Esq. Michael A. Lewis, Esq. Michelle R. Daley, Esq. Braude & Margulies, P.C. |
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| Appearance for the Respondent: | James. R. Watson, Esq. WallacePledger, PLLC Lee Carson, Esq. Assistant General Counsel, Architect of the Capitol |
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DECISION

Montage Inc. (Appellant) appeals three final contracting officer decisions issued by the Architect of the Capital (Respondent) on December 15, 2005 concerning its contract No. AOC05C0052 for the installation of an emergency generator in the Longworth House Office Building, Washington, D.C. One contracting officer's final decision terminated Appellant's contract for default for failure to make progress under and repudiation of the contract (Count I). Rule 4 (R4), Tab 112, at 001095-97. A second contracting officer's final decision denied Appellant's request for reformation or rescission of the contract based upon an alleged mistake in its proposed price (Count II). R4, Tab 110, at 001087-89. The third contracting officer's final decision consolidated and denied Appellant's three requests for costs and additional time based on Respondent's alleged unreasonable delay of the project for failing to approve a staging plan submitted by Appellant under the contract and Respondent's directive that all construction and staging activities under the contract be confined to an area designated as the Limits of Disturbance (LOD) (Count III). R4, Tab 111, at 001091-93. The three appeals have been docketed and consolidated into this decision.

On January 16, 2006, Appellant filed notices of appeal of all three contracting officer final decisions. This Board was created on May 15, 2006 by the House Office Building Commission (HOBC), the head of the agency with regard to this contract. Jurisdiction

over these appeals is authorized pursuant to the Disputes clause in the contract and the appointment of the Board by the House Office Building Commission.¹

A complaint and several amended complaints were filed by Appellant and answers were filed by Respondent. After completion of discovery by the parties, Respondent filed motions for summary judgment and Appellant filed a cross-motion for summary judgment with regard to all three appeals. We denied the parties' respective motions regarding Counts I and III because we found that material facts were in dispute and further evidence was necessary to decide those appeals. As to Count II regarding the alleged mistake in bid, we granted, for the reasons stated below, Respondent's motion for summary judgment and denied Appellant's cross-motion for summary judgment. The Board conducted a 4-day hearing during which the Board took testimony with regard to issues relating to the propriety of the termination for default. In reaching its decision, the Board has considered the evidence admitted into the record through the Rule 4 file and during the hearing, the hearing testimony, and the various party pleadings.

We deny the appeals.

BACKGROUND

Solicitation and Contract

On February 15, 2005, Respondent issued request for proposals (RFP) No. 050018, with a due date for receipt of proposals of March 16, 2005. R4, Tab 7, at 00027. Per Amendment No. 1 dated February 15, 2005, the date and time for receipt of offers was rescheduled to March 23, 2005. R4, Tab 12, at 00055.

The RFP indicated that the award of a fixed-price contract was contemplated, and that Respondent would "evaluate offers in response to this solicitation without discussions and will award a contract to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government considering only price and price-related factors specified elsewhere in the solicitation." R4, Tab 3, RFP, at 00013-14. No evaluation factors other than price were specified in the RFP. The solicitation also indicated that a site visit would be conducted on March 3, 2005. *Id.*, at 00008. A representative of the Appellant attended the site visit. R4, Tab 5, at 00019; Hearing Transcript (Tr.) 3/6 at 273.

¹ These appeals are not subject to the Contracts Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601 *et seq.* (2006). According to the terms of the Disputes clause included in this contract, the decision here is final and conclusive on questions of fact arising under the contract unless fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. R4, Tab 26, at 00131. Subsequent to the filing of these appeals, a permanent Government Accountability Office Contract Appeals Board was established, pursuant to section 1501 of title I of division H of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161 (December 26, 2007), to consider appeals from decisions of contracting officers with respect to any contract entered into by a legislative branch agency filed on or after October 1, 2007 in accordance with the CDA (with certain exceptions).

The contract awarded under the solicitation was “for the installation of an Emergency Generator, Emergency Power Distribution System and Stone Moat Wall at the Longworth House Office Building.” Besides the installation of the emergency generator, associated accessories, and new electrical, mechanical, plumbing, communications, and fire protection systems, the contract also involved expansion of the existing space, dismantling of an existing stone moat wall and reconstructing it in a new foundation, reinstalling a sidewalk, and various demolition and repair work. R4, Tab 2, at 00003. Most of the work was to be performed outside the building. Tr. 3/5 at 504-05. The Longworth House Office Building and the contract work area were on the west side of that section of New Jersey Avenue that runs north-south between Independence Avenue and C Street, South East, Washington, D.C. Tr. 3/4 at 244-45. The street is approximately 50 feet wide from curb to curb on this block. Tr. 3/5 at 290; 3/7 at 206.

The contract was awarded on May 12, 2005 to Appellant, which had submitted the low-priced proposal. The contract award amount was \$3,584,087. R4, Tab 20, at 00087; Tab 30, at 000686. The contract award was for contract line item number (CLIN) 001 of the RFP, which represented the basic contract work. Tab 30, at 000686. The award also indicated that Respondent, during contract performance, could exercise contract options CLINs 002 through 007, for which prices were obtained from the offerors during the competition. *Id.* at 00686-87. On August 19, 2005, Respondent exercised Option 0004 (new granite curbs instead of existing granite curbs) for \$64,009.20, Option 0005 (new limestone pavers instead of existing limestone pavers) for \$48,600, and Option 0006 (new concrete pavers instead of existing concrete pavers) for \$25,200. R4, Tab 59, at 000826-27. The exercise of these options increased the total contract amount to \$3,721,896.20. *Id.* at 000827.

The original contract completion date was May 12, 2006. R4, Tab 26, Contract, Article 1, Commencement, Prosecution and Completion of Work (establishing completion date as “within 365 days of contact award”), at 00161. On September 7, 2005, the parties modified the contract completion date to June 12, 2006 to accommodate certain scheduling issues and concerns that Appellant’s subcontractors had not been timely approved for entry to government areas. R4, Tab 69, at 000854-55; Tab 71, at 000860.

Included in the contract was the Default (Fixed-Price) Construction clause (FAR § 52.249-10), which states in pertinent part:

(a) If the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or separable part of the work) that has been delayed.

* * * * *

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

R4, Tab 26, at 00159. Also included in the contract was a Disputes Clause (AOC 52.233-1) (Nov. 2003), which stated in pertinent part:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. . . . Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

R4, Tab 26, at 00131. The contract also included a Changes Clause (FAR § 52.243-4 (Aug. 1987)) and a Changes-Supplement (AOC 52.243-1 (Apr. 2004), which set forth the procedures for pursuing claims for changes to the contract. R4, Tab 26, at 00134-37.

The contract required the submission of a staging plan that was required to indicate:

[s]pecific locations of the superintendent's trailer, storage and loading of materials, traffic direction and control concept and signage, security perimeter for staging area, locations of informational construction signage, locations of temporary toilets and other temporary construction, emergency facilities and resources and any other construction facilities required.

R4, Tab 26, Contract, General Requirements, § 1.6.C.4.d, at 00186-87. The contract did not provide a drawing or description of where the designated staging area was to be located. Tr. 3/7 at 391-92. Instead, section 1.6.C.4.d required Respondent to "designate staging area(s) to be used by contractor," after award of the contract. R4, Tab 26, Contract, General Requirements, § 1.6.C.4.d, at 00186-87. Moreover, note 2 on Drawing G002 of the contract advised that "[c]onstruction staging area will be designated by the government: Do not block traffic. Provide temporary fence and gate protection." Rule 4 Supplement (R4B), Tab 83, at 2699.

In addition, the contract provided that a contracting officer's technical representative (COTR) would be appointed with certain delegated duties, but the COTR would not be "delegated authority to order any change in the contractor's performance which would affect cost, the completion date for intermediate phases or milestones, or overall completion date." R4, Tab 26, at 00164. The COTR was appointed by the contracting officer on May 12, 2005. Under his appointment letter, various duties were assigned the COTR, which included, but were not limited to: (11) the authority to "[r]eview and approve or disapprove deliverables/submittals under the contract" and (18) the authority to [p]rovide written interpretations of technical requirements of Government drawings, designs, and specifications to the contractor." R4, Tab 31, at 000693-94. The COTR was not authorized to make changes to the contract. Id. at 000695.

The contract provided:

where action and return on submittals is required or requested, the Architect will review each submittal and mark with appropriate "Action."

* * * * *

3. If changes to the drawing are required, but are of such a nature that fabrication or construction cannot proceed . . . [the] reproducible drawing will be returned to the

Contractor, bearing the stamp of the Architect stating – ‘Revise and Resubmit.’ In such a case, the Contractor shall resubmit the drawings, properly corrected.

R4, Tab 26, Contract, General Requirements, § 1.6.D.4, at 00187. The contract also provided:

Changes to the Contract will not be made by notations on Submittals. In the event submittals returned by the Architect with notations, which in the opinion of the contractor, constitute additional work for which he is entitled to an adjustment in the contract sum or the contract time, the Contractor shall comply with the procedure set forth in Article, “Changes,” of the GENERAL CONDITIONS.

R4, Tab 26, Contract, General Requirements, § 1.6.A.2, at 00183.

On June 8, 2005, after performance and payment bonds and evidence of insurance had been submitted by Appellant, Respondent issued a notice to proceed under the contract to Appellant. R4, Tab 33, at 000703.

Kick Off Meeting and Designation of Staging Area

On June 16, 2005, at the project’s kick off meeting attended by various representatives of Respondent and Appellant, Respondent, through the COTR, designated the staging area “[t]o be located in area of disturbance as shown on Drawing C104.” R4, Tab 39, at 000724. The COTR also stated, during the meeting, that the construction must be done within the “limits of disturbance.”² Tr. 3/7 at 65, 375. The LOD line was depicted on Drawing C104, entitled “Sediment and Erosion Control Plan.” The LOD is a boundary line circling the job site as represented on the drawing by tulips or flowers; the line is on the east side and outside of the Longworth House Office Building and extends beyond the curb into the west side of New Jersey Avenue. See R4, Tab 29, at 000684; Tr. 3/4 at 241. It was only shortly before the kick off meeting when Respondent determined, after consulting with the Superintendent of the House Office Buildings, where the designated staging area was to be located. Tr. 3/7 at 375. The record also evidences that the government stated at the kick off meeting that it “agreed to entertain specific written requests for additional staging area in an adjacent area to the north of the limits of disturbance.” R4, Tab 111, at 001092 (statement in final contracting officer’s decision on requests for equitable adjustment not disputed by Appellant); Tr. 3/7 at 72.

Summary of Staging Area Dispute

From the date of Respondent’s designation of the staging area, the record reflects continuing discussions between the parties regarding the limits on staging and construction that were established by Respondent. Appellant maintained, among other things, that the construction work and staging area could not be confined to the designated LOD. Appellant’s primary focus in these discussions involved the limitation on the allowable construction/staging area in New Jersey Avenue, arguing that this was an improper restriction on construction and staging, and that the construction work could not be done within this restriction. Appellant asserted that the limit on

² The “area of disturbance” was the area bounded by the “limits of disturbance” line as designated on Drawing C104. See Tr. 3/4 at 163-64; 3/7 at 263-64.

construction/staging should be bounded by the construction fence 30 feet from the west sidewalk of New Jersey Avenue, which would allow for two-way traffic and no parking, but which was beyond the LOD as designated on Drawing C104. In contrast, the LOD limit on staging and construction required by Respondent was approximately 14 feet from the west curb of New Jersey Avenue and would allow for parking on the east side of New Jersey Avenue as well as for two-way traffic. See R4, Tab 29, at 000684; R4B, Tab 26, at 0681-82; Tr. 3/5 at 306, 525-31; 3/6 at 43; 3/7 at 154, 241-42, 376, 385, 392, 395, 449. The reason for Respondent's limitation on the staging and construction areas in New Jersey Avenue was the insistence of the Superintendent of the House Office Buildings that "the client" wanted "two-way traffic and parking [to] be maintained as much as possible."³ Tr. 3/7 at 69, 376, 395. This dispute continued until the contract was terminated for default, during which time no mobilization occurred and no actual construction work was done. Tr. 3/6 at 47; 3/7 at 71.

Beginning of Staging Area Dispute

In a letter dated June 29, 2005, Appellant claimed that Respondent had not yet designated a staging area.⁴ R4, Tab 40, at 000727. With this letter, Appellant submitted a safety plan, which was a required submittal under the contract.⁵ See R4, Tab 26, Contract, General Requirements, § 1.6.C.4.f, at 000187. With the safety plan, Appellant submitted a "Demolition Plan," which the contractor in its submission specifically acknowledged was not provided for under the contract. The demolition plan described the contractor's planned activities for the first part of the contract. In the demolition plan, it was mentioned that Appellant would require "a minimum of 30 feet from the existing street curb [on New Jersey Avenue] for access to perform this work." R4, Tab 40C, at 000750-53.

On July 11, 2005, the safety plan was reviewed by Respondent's Safety and Occupational Health Branch's representative, who found "no gross omissions from the plan" and that the "plan appears to address the requirements listed" in the contract. R4, Tab 43, at 000766.⁶ However, Respondent did not review or approve the demolition plan as it was not considered part of the safety plan. Tr. 3/7 at 159.

³ The Superintendent of the House Office Buildings controlled the space that could be used for staging and construction in the vicinity of the House Office Buildings. Tr. 3/7 at 73.

⁴ In response to this claim, Respondent documented in internal emails that it had previously advised Appellant of the staging area at the June 16, 2005 kick off meeting as being within the LOD. R4, Tab 41, at 000760; Tab 46, at 000776.

⁵ A safety plan was required to meet "[Occupation Safety and Health (OSHA)] and AOC safety Guidelines for work in hazardous environments (Areas where high voltage and large moving equipment are found). Plan shall define number of individuals on the job site(s), their training, typical safety equipment to be used, and procedures for addressing typical hazardous conditions." R4, Tab 26, Contract, General Requirements, § 1.6.C.4.f, at 000187.

⁶ Contrary to Appellant's arguments, Respondent did not specifically approve Appellant's safety plan in the safety officer's safety plan review document.

On July 20, 2005, Respondent's Director of the Procurement Division, a contracting officer, signed a letter sent to Appellant, which primarily responded to Appellant's position concerning the timing of submittals to be provided under the contract and an earlier cure notice that this contracting officer had sent Appellant on this subject.⁷ In this letter, Appellant was also specifically advised that, contrary to statements in Appellant's June 29, 2005 letter, Respondent had provided Appellant with the location of the staging area at the kick off meeting. The letter requested that Appellant attend a meeting with Respondent to discuss these matters. R4, Tab 50, at 000787-88.

On July 25, 2005, Appellant's project manager responded to Respondent's July 20, 2005 letter. Among other things, he stated that the staging area designated at the kick off meeting was "unworkable" and "unsafe," and that he had pointed this out at the kick off meeting, but Respondent took no corrective action. Appellant stated that the demolition plan included in the safety plan showed the need for a staging area with a 30-foot minimum from the curb of New Jersey Avenue. R4B, Tab 26, at 0681-82.

On July 27, 2005, a meeting was held between Appellant's and Respondent's representatives, where, among other things, Appellant was advised:

From the June 16, 2005 Kick Off meeting, Montage was directed to locate their staging area in area of disturbance as shown [Drawing] C104. In the event Montage cannot place staging in area of disturbance as shown on plans they will provide a detailed written explanation and marked up drawings for AOC review.

R4, Tab 51, at 000794.

On August 15, 2005, Appellant submitted its staging plan to Respondent. R4, Tab 58, at 000823-24. Appellant's staging plan depicted the areas where Appellant intended to place its security fence, office trailer, sanitary facilities, dumpsters, truck loading and unloading areas within the secure area, and other activities. The staging plan showed Appellant's security fence as being placed in New Jersey Avenue approximately 30 feet from the west curb, which was outside of the LOD as indicated on Drawing C104 and thus inconsistent with Respondent's June 16, 2005 direction. R4, Tab 58, at 000824; Tr. 3/7 at 63-65.

On August 25, 2005, a monthly project meeting was held, and the agenda prepared for that meeting by Appellant's representative showed the items to be addressed included:

Fine Tune Mobilization Date: It is Scheduled for Monday August 29, 2005. The Latest Date To Mobilize Shall Be Tuesday September 6, 2005.

Staging Plan: Finalize/Agree on Montage's Submitted Plan Enabling Montage Order Staging Equip. for One of the Above-Mentioned Dates.

* * * * *

⁷ The cure notice regarding submittals is discussed below in considering Appellant's arguments that the termination for default resulted from a lack of cooperation and bad faith on the part of Respondent.

Critical Submittals: As of today Staging Plan [is a] Critical Submittal[.]

R4, Tab 61, at 000831; Tr. 3/7 at 116. The COTR testified, without rebuttal, that Respondent had not directed the mobilization date contained in the agenda. Tr. 3/7 at 117.

The meeting minutes for the August 25, 2005 meeting, which were prepared by Appellant's representative, identified the "areas of discussion" as follows:

- Gov't expressed its unwillingness to approve the submitted staging plan stating that the number of Government[-]used pa[r]king spots is not negotiable.
- [Appellant's project manager] responded that a wider or narrower staging area would not change the number of the parking spots that are used by Gov't therefore the approval of a wider staging area shall not be consid[e]red as a factor as far as the number of parking spots is concerned. This is because one side of the street will be under demolition/construction in any scenario therefore cannot be used for parking.
- Gov't mentioned that the staging area to be within the LOD limits as per contract drawings enabling the Gov't to keep 2 way traffic.
- [Appellant's project manager] repeated the same Montage[] position which has been consist[e]nt since beginning of this project stating that the placement of staging area within the limits of the LOD has never been a contractual agreement. [Appellant's project manager] repeated that considering the dimen[s]ional requirements of the equipment it would not be possible to perform such activities as sheeting/shoring, 24' deep excavation and structural concrete demolition of this magnitude and yet keep all the concurrent equipment[] and their maneuvering dimensions within the limits of LOD.
- Montage informed the Gov't, that the 4 months new concrete activities which follow after completion of excavation/demolition, will have heavy/large equipment.
- Gov't asked Montage, "What is the amount of staging space that can be proposed maintaining the 2-way traffic on New Jersey Ave. and the parking slots?" [Appellant's representative] stated that as we know the street has barricade[s] on both ends and there is no public traffic on that street and having one-way traffic would not be a big sacrifici[c]e for the Gov't parking spot users which are the only users of the street. The minimum safe and functional staging width would be 35 feet from the curb as already submitted. This was a lengthy conversation between Montage and Gov't and it ended where the Gov't will get a response to Montage by the end of the day on the approval or disapproval of the proposed staging area.

R4, Tab 62, at 000834-35.

On August 26, 2005, the day after the meeting, Respondent's COTR returned the Staging Plan Submittal to Appellant with the following notation:

The submitted staging plan shows staging/construction outside of the limits of disturbance as show[n] on [Drawing] C104. All construction and staging shall be

performed inside the construction work zone as defined by the limits of disturbance as shown on [Drawing] C104. The client has offered additional staging space at adjacent walks and mote (sic) [moat] area and will be more than glad to walk the site with you to show you this additional space. Please revise and resubmit this submission.

R4, Tab 63, at 000837.

On August 31, 2005, Appellant's project manager responded to Respondent's COTR by requesting reconsideration of the previously submitted staging plan. The reconsideration request stated that

[a]s we have discussed at our last Progress Meeting, Montage requires the entire area designate[d] in its Staging Plan for construction activities in order to maintain a safe and workable environment for the construction activities contemplated under the Contract [, given that] [t]he AOC's proposal would have the construction perimeter only five feet from the area of excavation [, which] would be in violation of basic safety protocol and obviously unacceptable under OSHA regulations.

R4, Tab 64, at 000839-40. Appellant repeated the previously stated reasons why it believed that it required the construction/staging area to extend further into New Jersey Avenue as indicated on its staging plan, and asserted that Respondent "must either sacrifice the additional parking spots or maintain only one-way traffic during construction." (Emphasis supplied.) In conclusion, Appellant's project manager stated, "I respectfully request your reconsideration of the Staging Plan as previously submitted. I am requesting this on an expedited basis in light of the pending need to mobilize on the Project." Id.

On September 1, 2005, there was a progress meeting, during which Appellant indicated that mobilization could not commence until the submitted staging plan was approved. R4, Tab 65, Progress Meeting Agenda (Sept. 1, 2005), at 000846 (prepared by Appellant's project manager, see Tr. 3/7 at 134).

In a September 12, 2005 letter, the COTR responded to Appellant's request for reconsideration of its Staging Plan and advised Appellant that:

After careful review of your request, the Government[']s position remains the same. Please revise and resubmit a staging plan that shows all construction activities and staging to be performed inside the work zone as defined by the limits of disturbance as shown on Drawing C104. . . . As I have brought to your attention previously, the client has offered additional staging space at adjacent walks and mote (sic) [moat] area and I will be more than glad to walk the site with you to show you this additional space. Please revise and resubmit your staging plan submission as I requested on August 26, 2005.

R4, Tab 72, at 000863.

The COTR credibly testified, without rebuttal, that, in addition to his written offers to Appellant to walk the site to identify additional staging area, the COTR verbally made the

same offer to Appellant's project manager on several other occasions, but Appellant's project manager always declined. Tr. 3/7 at 80-82; 370; see Tr. 3/6 at 408.

On September 15, 2005, another monthly project meeting was held. According to the COTR, the meeting minutes prepared by Appellant's representative contained numerous inaccuracies.⁸ The COTR prepared a near contemporaneous memorandum of what was actually said at the meeting that he provided to Appellant on October 4, 2005, and provided testimony at the hearing authenticating and elaborating on this memorandum; we accept COTR's testimony and memorandum in the absence of countervailing evidence.⁹ R4, Tab 74, at 000883-84; Tab 75, at 000886-89; Tr. 3/7 at 286-93. For example, while Appellant's meeting notes indicate that the COTR required a staging plan within the LOD, the COTR denied making this statement, and stated that he actually said, "the Government has offered additional staging outside of the LOD as reflected in Dwg. - C104 at the mote (sic) [moat] and walks and will be more than glad to walk the site with [Appellant's representative] and show him this additional space that can be used for staging." R4, Tab 74, at 000883; Tab 75, at 000886. Appellant's minutes also stated:

Montage states reducing the size of the equipment will take longer time, at least 5-6 months longer. A Bobcat in place of an excavator Cat 320 B. It was mentioned that reducing the size of the equipment together with Phasing and Re-shifting may help us get to what Gov. is asking however it would take at least 6 more months time and more than ½ million dollar additional cost.

R4, Tab 75, at 000883-84.¹⁰ Finally, the COTR testified that he advised Appellant's project manager at this meeting, "if you don't feel that I'm giving you the response that you're looking for, you're more than welcome to go to the contracting officer and request a determination." Tr. 3/7 at 289-90.

On September 20, 2005, the COTR sent an email to Appellant's project manager stating:

⁸ The contract required Appellant to prepare meeting minutes for progress meetings and provide them to attendees. R4, Tab 26, at 000183.

⁹ We found the COTR's un rebutted testimony on this and other matters to be credible. In the absence of any rebuttal testimony or evidence from Appellant, we give considerable weight to the COTR's account of the facts surrounding the performance of this contract. In this regard, Appellant's project manager was its primary representative at the kick off and all other meetings with Respondent under the contract and did not testify at the hearing. Tr. 3/7 at 81. Appellant's president, who did testify, attended none of these meetings with Respondent. Tr. 3/5 at 561, 567. Appellant's expert, who also testified, only attended some meetings towards the end of the project as an observer. Tr. 3/7 at 319. The COTR and the COTR's supervisor also credibly testified, without rebuttal, that Appellant's project manager was "very confrontational" and "combative" at these meetings, which were generally not productive. Tr. 3/7 at 309, 402, 499.

¹⁰ The respective versions of the meeting also reflect a disputed discussion about the possibility of phasing or sequencing the construction work. While Appellant's meeting notes indicate that Respondent suggested phasing the work, the COTR testified that he was referring to sequencing the work, not phasing the work. R4, Tab 74, at 000883; Tab 75, at 000886; Tr. 3/7 at 286-87.

In your letter requesting reconsideration of the AOC's position regarding staging dated August 31, 2005 you state that "The AOC's proposal would have the construction perimeter only five feet from the area of excavation. This would be in violation of basic safety protocol and obviously unacceptable under OSHA regulations." Please quote me the chapter and verse of the regulations your (sic) are citing as found in the current OSHA CFR. I requested this information at the last two progress meetings and have yet to see this information.

Should you have any questions, please contact me.

Respondent Hearing exh. 16.

The impasse continued when Appellant's project manager replied to the COTR's email with a September 21, 2005 letter, stating:

Montage's Staging Plan specifically contemplates a distance of 30 feet from the sidewalk once the deep excavation work commences. Of course as we have discussed earlier, that minimum perimeter is necessary not only because of good safety practice but also due to the physical footprint of the construction equipment required to perform that excavation/backfill work during the remainder of the Project.

This letter also referenced and provided selected excerpts from OSHA 1926.625 (Subpart P, Appendix F) and the U.S. Army Corps of Engineers "Safety and Health Requirements Manual in support of Appellant's position that excavating within the LOD designated by Respondent would be unsafe."¹¹ R4, Tab 76, at 000891-910.

On September 21 and 22, 2005, Respondent's safety officer prepared reports (one summary and one with detailed analysis) for the COTR regarding Appellant's allegations regarding OSHA standards on excavation. The safety officer reported that she found no regulation that sets limits regarding distance from excavation that would be applicable here. One of the reports provided analysis why the safety officer determined that Appellant had misinterpreted and misapplied the OSHA standards that it had cited in support of this issue. In this regard, the safety officer reported that Appellant's arguments were predicated on sloping the trenches, yet the contract provided for other options, such as shoring and sheeting and using a trench box. Respondent Hearing exhs. 22 and 23; R4B, Tab 83, Contract Drawing C501, at 2704; Tr. 3/7 at 139-47.¹²

On September 28, 2005, Appellant submitted to Respondent a traffic control plan that had been prepared by Appellant's representative and approved by the District of Columbia on September 21, 2005; this plan was consistent with the staging plan submitted to Respondent by Appellant on August 15, 2005. Appellant Hearing exh. 75; R4, Tab 86B, at 000952-53; Tr. 3/5 at 566-67. On October 7, 2005, the COTR rejected this

¹¹ This was the first time the specific references to the OSHA and Corps of Engineers Manual were provided to Respondent by Appellant. Tr. 3/7 at 94.

¹² As further detailed below, there is no credible evidence in the record showing that the safety officer's conclusions were in error.

plan because it violated the LOD staging restriction. Appellant Hearing exh. 76; Tr. 3/7 at 304, 328-29.

A site investigation report dated October 6, 2005 was prepared by an architect employed by URS, the designer of this project. This report was requested by and provided to Respondent. Respondent Hearing exh. 24; Tr. 3/7 at 102, 198-99. This report concluded that the project design was OSHA compliant and that the construction activities were achievable within the LOD, and provided a detailed explanation for the architect's conclusions. Respondent Hearing exh. 24 at 3. Earlier, on September 28, 2005 (prior to the issuance of the cure notice), URS representatives met with the COTR and "rewalk[ed] the site, measuring and confirming clearances for the placement of equipment," and found that the LOD limitation established by Respondent should be maintained. Respondent Hearing exh. 19; Tr. 3/7 at 99, 102-03, 105-06.

Respondent Cure Notice and Appellant Response

On October 3, 2005, the Contracting Officer sent a "cure notice" to Appellant stating:

You are notified that the Government considers your failure to submit an acceptable Staging Plan in accordance with Division 01000, General Requirements, Article 1.6.C.4.d, as a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days of this notice, the Government may terminate for default under the terms and conditions . . . of this contract.

R4, Tab 80, at 000926. This letter provided Appellant with the opportunity to present, in writing, any facts bearing on this issue by October 13, 2005. Id.

Meanwhile, there were a variety of meetings between Appellant's project manager and the COTR during September and October of 2005. The COTR testified that at these meetings Appellant kept "on saying basically that they're not going to submit staging plan to us unless we give them the space that they want" and [i]t's come to a logger head where Montage doesn't want to do anything. So you know in good faith we hold meetings so we can have discussions and so forth, but the discussions aren't very productive at all." Tr. 3/7 at 309; see Tr. 3/7 at 472-73. On October 12 and 13, 2005, Appellant again advised Respondent that it would not perform any construction work until the staging plan that it had submitted was approved. Respondent Hearing exhs. 33 and 36; Tr. 3/7 at 472-73.

On October 13, 2005, Appellant provided Respondent with a response to the cure notice. Appellant's letter stated that its staging plan conformed to the specifications, its District of Columbia-approved traffic control plan, its approved safety plan, the United States Corps of Engineers "Safety and Health Requirements Manual," and OSHA regulations. Appellant further stated that Respondent "was attempting to impose restrictions concerning the Plan design beyond the Contract terms." Appellant claimed in this letter that it first raised this issue at the kick off meeting, and that it had attempted, without success, to resolve this matter with Respondent during the contract. Appellant detailed the various reasons that Appellant believed that its staging plan reflected all of the area necessary to safely perform the construction work, and claimed that Respondent's refusal to fairly consider its requests was motivated by its "refusal to inconvenience

Members of Congress or their staff” by denying them parking places without regard to the contract requirements. R4, Tab 86, at 000942-47. The Appellant’s response to the cure notice did not transmit a revised staging plan.

Respondent Show Cause Notice and Appellant Response

On October 27, 2005, Respondent issued Appellant a “show cause” letter advising Appellant that its “October 13, 2005 response does not cure the conditions of the requirements of this contract in accordance with Sub Paragraph 1.6.C.4.d Staging Plan . . . as described to you in the Government’s letter of October 3, 2005. Therefore, the Government is considering terminating the contract in accordance with the clause 52.249-10, Default (Fixed Price Construction).” The show cause notice also stated that Appellant’s District of Columbia-approved traffic control plan “does not supersede the Limits of Disturbance requirement of this contract” and that the Corps of Engineers manual “is not applicable to this project because the project does not involve Department of Defense or any of its components.” The show cause letter also stated:

[AOC] has verified through an independent analysis that the construction staging area in the construction documents is adequate to perform the work required in the contract and is in compliance with applicable OSHA requirements and regulations.

Your reliance on the approval of your safety plan submission (which contained an unsolicited demolition section) to support your entitlement to an expanded staging area is misplaced. The safety plan submittal is not effective as a change to the construction documents.

Finally, this letter stated, “you are given the opportunity to show cause why the contract should not be terminated for default,” and stated a deadline of November 7, 2005 for Appellant’s response to the show cause letter. R4, Tab 94, at 001028-29.

Meanwhile, Appellant had submitted various requests for equitable adjustment to Respondent. On September 13, 2005, Appellant advised Respondent that it had discovered a mistake in its proposed price and submitted a request for an equitable adjustment of \$487,800 to compensate for the error. R4, Tab 73, at 000866. Appellant also made various requests for equitable adjustment for time extensions and additional costs based on Respondent’s failure to approve its staging plan as it was submitted. Specifically, on October 27, 2005, Appellant requested a 56-day time extension and \$53,579 in costs for Respondent’s failure to approve Appellant’s staging plan. R4, Tab 95, at 001033-36. On November 6, Appellant revised its request for equitable adjustment for a 71-day time extension and \$76,211 in costs for Respondent’s continuing failure to approve its staging plan, and requested a final contracting officer’s decision on this request. R4, Tab 97, at 001040-42. On November 6, Appellant also requested an equitable adjustment of a 156-day extension and \$458,597 based on Respondent’s directive to confine all construction and staging activities within the LOD, and requested a final contracting officer’s decision on this request. In this last request, Appellant stated, “we are proceeding on the assumption that the AOC wants Montage to confine its activities to within the LOD while allowing Montage to locate its trailer and additional staging space outside the LOD.” R4, Tab 98, at 001050.

There was another meeting, approximately 2 hours in length, between the parties on November 2, 2005 that was attended by the contracting officer, where the dispute was discussed in detail. Tr. 3/7 at 349-50, 521-23; Respondent Hearing exh. 48, November 2, 2005 Meeting Attendees (see Tr. 3/7 at 343 (correcting date on contemporaneous document)).

On November 7, 2005, Appellant responded to the contracting officer's "show cause" letter. Appellant contended that under the contract the LOD was not stated to be the limit on construction activities, but is only the sediment control line within the area of construction. Appellant reiterated its earlier position that "Montage included its demolition plan to report to the AOC the minimum staging space necessary for the construction activities contemplated under the Contract," and that "Montage continues to maintain that the Staging Plan it has submitted is wholly consistent with the terms of the Contract." Appellant went on to state that "AOC is intentionally misinterpreting the Contract terms for reasons not related to the Project . . . and in bad faith," and was imposing a "unilateral change to the contract." Appellant's letter acknowledged that Respondent stated that it had conducted an independent analysis of the staging restrictions that concluded that the LOD was "adequate to perform the work," but complained that Respondent had not provided this report to Appellant "out of a concern that it later could be accused of dictating means and methods," even though Respondent "is apparently basing its decision to direct the method of Montage's excavation work, in significant part, upon the very consultant's report it declines to reveal." Appellant also indicated that, "[w]ithout waiving its claims against the AOC, and expressly reserving its right to seek compensation for these unilateral changes by the AOC and the resulting damage to Montage, Montage is nonetheless ready, willing and able to proceed with its performance under the Contract" and "will submit a revised staging plan that will show all construction activities confined to the LOD, excepting the trailer and additional staging space, as you have required." R4, Tab 100, at 001062-66.

Appellant's response to the show cause letter also made a number of requests for information and imposed a number of conditions to be satisfied by Respondent before Appellant would provide the required revised staging plan. First, Appellant asked Respondent to "explain in writing how [the AOC] *want[ed] Montage to perform the work that is located outside the LOD, including the demolition, carpentry, asbestos abatement and sediment control work required under the Contract, while confining its construction activities to within the LOD* [, given that] [i]t is physically impossible for the contractor to perform that portion of the Contract work while confining its activities to the LOD." Second, Appellant requested:

On a related point, although the AOC maintains that Montage is not entitled to any space outside of the LOD, the AOC has also told Montage that it may use areas outside of the LOD to site its trailer and to store its materials for the Project [referring to an AOC letter to Montage dated September 12, 2005]. This is, of course, baldly inconsistent with the AOC's contention that the Contract confines all construction activities to the LOD. Under such circumstances, Montage is requesting express written direction from the AOC where Montage may locate these items and identification of the limits of the maximum area available for its staging area. Montage desperately requires this clarification and information so that it can submit a Staging Plan consistent with the AOC's instructions.

Third, Appellant requested Respondent to agree that Appellant would be allowed “regular and constant access to New Jersey Avenue” and “will not be denied its right to restrict access to New Jersey Avenue as reasonably needed for the project.” Finally, Appellant stated that it intended to seek reimbursement for the costs and expenses arising from the Respondent’s improper interpretation of the Contract and denial of appropriate access to the site, which it previously estimated at \$500,000, and that it would “require” a time extension once Respondent approved Appellant’s revised staging plan. Id.

On November 28, 2005, Appellant sent another letter to Respondent reiterating its requests that Respondent provide written responses stating how it wanted Appellant to perform the work that is outside the LOD, a description of the specific locations outside the LOD where Appellant can site its trailer and store its materials, the limits of the maximum area available for its staging area, and the assurances that it requested with regard to the “regular and constant” use of New Jersey Avenue “for the continued progress of the Project.” The letter goes on to reiterate that “Montage needs this clarification and information so that it can re-submit a Staging Plan consistent with the AOC’s instructions.” R4, Tab 106, at 001080-81.

Meanwhile, various other meetings between the parties were held. Respondent’s notes on a meeting on December 8, 2005 indicate that Appellant took the position that there would be no mobilization until it received a response to its November 28, 2005 letter. R4, Tab 109, at 001085.

Respondent did not respond in writing to Appellant’s November 7, 2005 or November 28, 2005 letters. Tr. 3/5 at 540, 3/7 at 380-83. Appellant did not submit a revised staging plan or mobilize or commence construction. Tr. 3/7 at 71, 310; Appellant’s Proposed Findings of Fact and Conclusions of Law at 34-35.

Termination for Default and Other Contracting Officer Final Decisions

On December 15, 2005, Respondent terminated Appellant’s contract for default because Appellant had failed to provide, as required, a satisfactory staging plan in accordance with the contract, which was determined to be a “condition that endangers performance and/or a repudiation of the contract,” and because Appellant “failed to show cause why the contract should not be terminated for default.” R4, Tab 112, at 001095. The termination letter recounted Respondent’s disapproval of Appellant’s August 15, 2005 staging plan on August 26, 2005, and its denial of Appellant’s reconsideration on August 31, 2005, which offered Appellant additional staging space outside the LOD at the adjacent walks and moat area. The letter then stated that Appellant had “failed and/or refused to provide a revised staging plan” and that “[t]his failure and/or refusal to provide such a staging plan is a condition endangering performance of the contract, if not a repudiation of the contract itself.” The termination letter also stated that Appellant’s response to the show cause notice “neglected to show the Government how your firm planned to correct the deficiency in accordance with the requirements of this contract and why [the Government] should not terminate you.” In this regard, this letter observed that Appellant had not provided the staging plan requested, but “requested that the Government counsel you on how to perform the work.” The termination letter concluded, “[t]herefore [Appellant] ha[s] failed to provide a plan of action to correct the

deficiency noted, and to show cause why [Appellant] should not be terminated for default.”¹³ R4, Tab 112, at 001095-96.

On December 15, 2005, the contracting officer also issued a final decision denying Appellant’s request for equitable adjustment claiming a 156-day extension of the contract and \$458,597 in costs. Appellant’s request was based on Respondent’s directive to confine all construction and staging activities within the LOD and Respondent’s delay in approving Appellant’s staging plan. This decision stated that Respondent’s letters requiring that Appellant’s staging plan be revised and resubmitted and denying Appellant’s requests for reconsideration were not a “directive or a change” under the contract. In this regard, this decision found that, contrary to Appellant’s contention, its staging plan was unacceptable and needed to be revised and resubmitted because the staging area was not within the LOD, as required by Respondent’s direction given in accordance with section 1.2.B.3 of the General Requirements of the contract, Note 2 on Drawing G002, and the LOD line designated on Drawing C104. The decision also stated that Appellant failed to revise and submit an acceptable staging plan, despite repeated requests by Respondent, including a cure notice and show cause notice. R4, Tab 111, at 001091-93.¹⁴

On April 21, 2006, a contract was awarded to The Whiting-Turner Contracting Company, which submitted the second lowest-priced proposal under the RFP, to complete Appellant’s defaulted contract to install the emergency generator in the Longworth House Office Building.¹⁵ Tr. 3/4 at 138; R4, Tab 25, at 00108.

Count I—TERMINATION FOR DEFAULT

Legal Framework for Termination for Default

The government bears the burden of proof as to “the correctness of its actions in terminating a contractor for default.” Lisbon Contractors, Inc., v. United States, 828 F.2d 759, 763-64 (Fed. Cir. 1987). However, a “contracting officer has broad discretion to determine whether to terminate a contract for default” and this decision will be overturned only if it is “arbitrary, capricious, or constitutes an abuse of discretion.” Consol. Indus., Inc. v. United States, 195 F.3d 1341, 1343-44 (Fed. Cir. 1999).

Here, one of the two stated reasons that the contracting officer terminated Appellant’s contract for default was that its failure to provide a staging plan constituted a repudiation of the contract.¹⁶ R4, Tab 112, at 001095. Anticipatory repudiation is one of

¹³ The issue of possible excess procurement costs as a result of the termination for default has not been presented to this Board because there has been no appeal of a final contracting officer’s decision on this issue.

¹⁴ The third contracting officer’s decision issued on December 15, 2005, pertaining to Appellant’s claimed mistake in proposed price, is discussed below.

¹⁵ The Whiting-Turner contract was not offered into evidence by either party.

¹⁶ The termination for default letter also stated that Appellant’s failure to provide a staging plan was determined to be a condition that endangers performance under the contract. R4, Tab 112, at 001095. We do not decide whether Respondent properly terminated the contract for default for this reason because we find, for the reasons

the reasons that an agency can terminate a contract for default. United States v. Dekonty Corp., 922 F.2d 826, 828 (Fed. Cir. 1991). At common law, anticipatory repudiation of a contract requires an unambiguous and unequivocal statement that the obligor would not or could not perform the contract. Id.; Danzig v. AEC Corp., 224 F.3d 1333, 1337-38 (Fed. Cir. 2000).

However, courts and boards have recognized several other grounds that would justify a finding of anticipatory repudiation that provides sufficient legal reason for terminating a contract for default. Specifically, boards and courts have recognized that the contractor's failure to proceed with performance under the contract pending resolution of a dispute under the contract can justify a termination for default. Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1276 (Fed. Cir. 1999); Stoeckert v. United States, 391 F.2d 639, 646 (Ct. Cl. 1968). Such a failure to proceed has been equated and treated as anticipatory repudiation of the contract. Twigg Corp., NASA BCA No. 62-0192, 93-1 BCA ¶ 25,318 at 126,157 (1992); Brenner Metal Products Corp., ASBCA No. 25294, 82-1 BCA ¶ 15462 (1981); John Cibinic, Jr. & Ralph C. Nash, Administration of Government Contracts, (4th ed. 2006), at 920. This rule has been applied because of the various clauses in government contracts, such as the Disputes and Changes clauses here, which specifically require the contractor to proceed diligently with performance of the contract in accordance with clear directions from the contracting officer while the dispute is resolved. The rule has been explained by the Armed Services Board of Contract Appeals as follows:

After the contracting officer has given an interpretation of the contract requirements, the contractor must perform as directed and may not stop work. If the contractor believes the interpretation erroneous, the determination may be appealed through the claims procedure. . . . The contractor may disagree with the Government's representative as to how the work is to be completed, but nevertheless is under a duty to proceed diligently with performance.

Essex Electro Engrs., Inc., ASBCA No. 49915, 02-1 BCA ¶ 31,714 at 156,695 (2001). A contracting officer's decision is not necessary for this "duty" to proceed to attach to the contractor; the duty to proceed with performance also embraces the period when the dispute is in the "embryonic stage" before the contracting officer's formal decision. Stoeckert, *supra*, 391 F.2d at 645-46; Dimarco Corp., VABCA No. 1953, 1984 VABCA LEXIS 81 (1984); John Cibinic, Jr. & Ralph C. Nash, Administration of Government Contracts, (4th ed. 2006), at 921. This rule is applicable even where the board finds that the contracting officer's contract interpretation to be erroneous and the contracting officer's insistence on this interpretation would entitle the contractor to an equitable

stated below, that Respondent had a reasonable basis to find that Appellant's actions constituted anticipatory repudiation of the contract that justified the termination for default. Where a termination for default is justified because of a contractor's failure to proceed as directed or anticipatory anticipation, the fact that the contracting officer based the default decision on some other ground is unobjectionable as long as the alternate ground existed at the time of termination. Sterling Printing, Inc., GPO BCA No. 20-89, 1994 GPOBCA LEXIS 38 at *53 n.50 (1994); James B. Beard, D.O., ASBCA Nos. 42677, 42678, 93-3 BCA ¶ 25,976 at 129,171 (1993); see Joseph Morton Co., Inc. v. United States, 757 F.2d 1273, 1277 (Fed. Cir. 1985).

adjustment. RFI Shield-Rooms, ASBCA Nos. 19005, et al., 77-1 BCA ¶ 12,236 at 58,940 (1976).

In addition, the United States Court of Appeals for the Federal Circuit has found that where the government justifiably issues a cure notice as a precursor to a possible termination of the contract for default, it may terminate the contract for default if the contractor fails to provide adequate assurances of timely completion in response to the cure notice. Danzig, supra, 224 F.3d at 1338. Such a failure by a contractor was said to be a branch of the law of anticipatory repudiation. Id. at 1337; see Discount Co., Inc. v. United States, 554 F.2d 435, 438-39 (Ct. Cl. 1977). In Danzig, the court also stated:

At common law, anticipatory repudiation of a contract required an unambiguous and unequivocal statement that the obligor would not or could not perform the contract. [citations omitted]. As the Restatement of Contracts has recognized, however, modern decisions do not limit anticipatory repudiation to cases of express and unequivocal repudiation of a contract. Instead, anticipatory repudiation includes cases in which reasonable grounds support the obligee's belief the obligor will breach the contract. In that setting the obligee "may demand adequate assurance of due performance" and if the obligor does not give such assurances, the obligee may treat the failure to do so as a repudiation of the contract." Restatement (Second) of Contracts § 251 (1981). . . . The law of government contracts has adopted that doctrine, expressing it as a requirement that the contractor give reasonable assurance of performance in response to a validly issued cure notice. [citations omitted] That rule, as the Restatement explains, rests "on the principle that the parties to a contract look to actual performance 'and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain'"

Danzig, supra, 224 F.3d at 1337-1338; see Composite Laminates, Inc. v. United States, 27 Fed. Cl. 310, 323 (1992) quoting Tubular Aircraft Prods., Inc. v. United States, 213 Ct. Cl. 749 (1977) (opinion of trial judge) ("parties are entitled to ask for reassurances when persons with whom they have contracted have by word and deed created uncertainty about their ability or intent to perform, and they are entitled to treat the failure to provide such assurances as a repudiation of the contract").

Generally, if the government meets its burden of proving that a termination for default was justified, the burden shifts to the contractor to show that the non-performance was excused. Keeter Trading Co., Inc. v. United States, 79 Fed. Cl. 243, 253 (2007) ("If the government succeeds in proving default, the plaintiff then must demonstrate that the default was excusable under the terms of the contract"); Lassiter v. United States, 60 Fed. Cl. 265, 268 (2004); El Greco Painting Co., ENG BCA No. 5693, 92-1 BCA ¶ 24,522 at 122,379 (1992). A plaintiff can show the default was excusable "by showing that improper government actions were the primary or controlling cause of the default," such as a material breach by the government or that the contracting officer's exercise of discretion in terminating the contract for default was unreasonable or arbitrary or capricious. Keeter Trading Co. Inc., supra, 79 Fed. Cl. at 253; Dae Shin Enters., Inc., d/b/a Dayron, ASBCA No. 50533, 03-1 BCA ¶ 32,096 at 158,646 (2003).

For the reasons detailed below, we find that the contracting officer's decision to terminate Appellant's contract for default was proper because the record shows that

there was an anticipatory repudiation of the contract by Appellant and Appellant has not shown that its non-performance was excused.

Designation of Staging Area

As indicated above, the contract expressly provided that Respondent would designate the staging area after award and the contract did not provide any specific limitations on Respondent's actions in this regard. We find that this designation was expressly made by the COTR at the kick off meeting on June 16, 2005, where Appellant was advised by Respondent's COTR that it must restrict all of the staging activities to within the LOD. R4, Tab 39, at 000724; Tr. 3/7 at 65, 375. We also find that when Respondent informed Appellant that it must confine its staging to the LOD, Respondent's obligation to designate a staging area was satisfied under the contract. Thus, we find that Appellant was on notice, as of June 16, 2005, that it was required to submit a staging plan consistent with the staging area designated by Respondent. R4, Tab 26, Contract, General Requirements, § 1.6.C.4.d, at 000186-87.

While Appellant asserts that Respondent's restrictions on construction and staging in New Jersey Avenue were improper because they were only to allow for more parking for members of Congress and their staff, the contract expressly reserved to the government (not the contractor) the right to designate the staging area after award. Respondent could reasonably consider the needs of its client in deciding the amount of staging that could be provided and there was no requirement, contractual or otherwise, that Respondent had to provide whatever staging Appellant demanded. See Hitt Contracting, Inc., GAO CAB No. 2006-1 (HOBC), 2007 GAOCAB LEXIS 4 (2006) (AOC could designate off-site vehicle security inspection at a location to be designated after award by the United States Capitol Police).

Appellant also contends that the LOD line on Drawing C104 was only for "sediment and erosion control only," and was not intended to be a restriction on actual construction and staging. Appellant's Proposed Findings of Fact and Conclusions of Law at 13; Appellant Hearing exh. 139A at 3. Appellant also notes that the LOD line was not a diagrammatical representation and the lines were not dimensioned, such that the actual limit would depend on the actual construction methodology employed under the contract. Appellant's Proposed Findings of Fact and Conclusions of Law at 12-13, 32; Appellant Hearing exh. 139A at 3. Thus, Appellant asserts that Respondent's designation of the staging area was unclear. Appellant's Proposed Findings of Fact and Conclusions of Law at 32. Appellant also asserts that it is inconsistent with construction practice to locate staging areas within the LOD. Id.

Respondent representatives testified that the LOD line in New Jersey Avenue, as designated on Drawing C104, can be and was determined from the drawings as 14 feet from the curb into New Jersey Avenue. Tr. 3/7 at 242-43. Appellant's expert testified that this was "represented as being a definitive location" on Drawing C104. Tr. 3/5 at 411. Moreover, as indicated above, the record shows that Respondent made Appellant specifically aware, as early as the June 19, 2005 kick off meeting, of the intended location of the LOD limitation on staging and construction, that is, approximately 14 feet from the west curb in New Jersey Avenue. Tr. 3/7 at 376, 385; R4B, Tab 26, Appellant's Letter to Respondent (July 25, 2005), at 0681-82 (Appellant statement that it complained to Respondent about its staging area designation at the kick off meeting). Thus, the record

evidences that there was no confusion on Appellant's part as to the location of the LOD limitation on staging and construction in New Jersey Avenue imposed by Respondent, which could and was definitively located, only disagreement.¹⁷ Therefore, Appellant's arguments here regarding the potential lack of clarity of the non-diagrammatical LOD line on the sediment and control drawing are essentially irrelevant.¹⁸

Failure to Submit Acceptable Staging Plan

Appellant did not submit its staging plan until August 15, 2005.¹⁹ The staging plan was reviewed by the COTR and returned to Appellant on August 26, 2005 with a note that Appellant needed to "revise and resubmit" the staging plan because it showed the staging area outside the LOD. R4, Tab 63, at 000837. We find that the staging plan submitted by Appellant was not consistent with Respondent's instructions regarding the location of the staging area because it showed the staging area to be outside the LOD line in New Jersey Avenue, as represented on Drawing C104. R4, Tab 29, at 000724; Tab 58, at 000824; Tr. 3/4 at 241; 3/7 at 63-65.

The parties agree, and we find, that under Appellant's construction plan, the staging plan is on the critical path, and must be submitted and approved before mobilization and construction can commence. R4, Tab 54, at 000803; Tr. 3/5 at 546; Appellant's Proposed Findings of Fact and Conclusions of Law at 34-35; Respondent's Reply Brief at 6. Because Appellant never revised and resubmitted the staging plan consistent with Respondent's directions, no mobilization or construction work was done. Tr. 3/5 at 546.

Appellant argues that the rejection of the staging plan was improper because Respondent had earlier approved its safety plan, which included a demolition plan that showed that, consistent with the staging plan that Appellant later submitted, Appellant planned on staging into New Jersey Avenue further from the west side curb than the limitation directed by Respondent. However, the safety plan was only reviewed by Respondent to see if it met safety standards, and the demolition plan was not reviewed and approved by Respondent because it was reasonably not considered to be part of safety plan. R4, Tab 43, at 000766; Tr. 3/7 at 158-59. In any case, any approval of the safety plan could not be reasonably interpreted as acquiescence to Appellant's proposed demolition plan

¹⁷ Any possible remaining confusion in this matter could also have been resolved by simply sending a request for information to Respondent during the 2-month period from when the staging area was identified by Respondent on June 16, 2005 and when Appellant submitted its noncompliant staging plan on August 15, 2005. No requests for information were submitted by Appellant on this subject. Tr. 3/7 at 384.

¹⁸ To the extent that Appellant's arguments here concern the solicitation's failure to give reasonable notice of the LOD limitation on staging and construction to the offerors, this issue relates to whether Appellant may have been entitled to an equitable adjustment, if Respondent's staging area designation under the contract constituted a constructive change. We discuss this issue below.

¹⁹ The critical path method schedule prepared by Appellant and dated July 18, 2005 indicated that the staging area was designated by Respondent on June 16 and the staging plan was to be submitted on July 19, 2005; the staging plan was submitted a month later. Respondent Hearing exh. 90; Tr. 3/7 at 123-25.

(which itself recognized that it was not a submittal called for under the contract), or for staging and construction in New Jersey Avenue that was inconsistent with Respondent's designation of the staging area. R4, Tab 39, at 000724; Tab 40C, at 000750; Tr. 3/7 at 65, 375. Indeed, the contemporaneous record does not evidence that Appellant believed that Respondent had acquiesced to Appellant's plan. In this regard, Appellant, in its July 25, 2005 letter, which was submitted prior to its noncompliant staging plan, advised Respondent that the submission of a demolition plan was to show Respondent where staging on New Jersey Avenue should be instead of where the COTR had designated the staging area. R4B, Tab 26, at 0681-82.

Appellant also alleged that Respondent had no authority to overrule the District of Columbia government's approval of Montage's Traffic Control Plan, which adopted Appellant's proposed staging plan in New Jersey Avenue. R4, Tab 86, at 00943. Contrary to Appellant's arguments, Federal law gives Respondent and the Capitol Police Board primary control over New Jersey Avenue at the Longworth House Office Building. 2 U.S.C. § 1969 (2006); 40 U.S.C. § 5102 (2006); Map Showing Properties Under Jurisdiction of the Architect of the Capitol (Apr. 7, 2005). In any case, the application to the District of Columbia was prepared by Appellant's representative (without review or approval by Respondent) and was clearly in violation of Respondent's designation of the staging area in New Jersey Avenue. There is no suggestion that the District of Columbia would not also have approved a traffic plan consistent with Respondent's directives.

Appellant's Failure to Provide Adequate Assurances of Performance

We also find that the Respondent provided Appellant with repeated opportunities to provide adequate assurances of contract performance in its cure notice of October 3, 2005, signed by the contracting officer, R4, Tab 80, at 000926, and again in its show cause letter of October 27, 2005, also signed by the contracting officer. R4, Tab 94, at 001027-31. The contracting officer only terminated Appellant's contract for default on December 15, 2005, when it failed to receive the required revised staging plan or the requested adequate assurances. R4, Tab 112, at 001095-97.

We find that the cure notice clearly stated the agency's concern--Appellant's failure to provide what Respondent considered to be an acceptable staging plan--which the agency found was endangering contract performance. The cure notice clearly provided Appellant with the opportunity to present any facts bearing on this issue and advised Appellant of the possible consequences if adequate assurances were not provided--a termination for default. R4, Tab 80, at 000926.

In its October 13, 2005 response to the cure notice, Appellant offered no plan for how it was going to provide a revised staging plan or ensure contract completion by the date specified in the contract. Instead, as indicated above, it made numerous arguments as to why it believed that Respondent's designation of the staging area was unreasonable and was beyond the contract terms. R4, Tab 86, at 000942-47.

Consequently, on October 27, 2005, the contracting officer issued Appellant a "show cause" letter advising that Appellant's "October 13, 2005 response does not cure the condition of the requirements of this contract in accordance with Sub Paragraph 1.6.C.4.d Staging Plan . . . as described to you in the Government's letter of October 3, 2005. Therefore, the Government is considering terminating the contract in accordance

with the clause 52.249-10, Default (Fixed Price Construction).” As indicated above, this letter addressed the concerns raised by Appellant about limiting the space for the staging area, including “[AOC] has verified through an independent analysis that the construction staging area in the construction documents is adequate to perform the work required in the contract and is in compliance with applicable OSHA requirements and regulations.” This letter also stated, “you are given the opportunity to show cause why the contract should not be terminated for default,” and that the contractor’s response must be submitted by November 7. R4, Tab 94, at 001028-29.

Appellant did not respond to the show cause letter by providing the required revised staging plan or unconditionally promising to perform the contract work in accordance with Respondent’s instructions. Instead, while Appellant’s November 7, 2005 letter responding to the show cause letter stated that it “remains committed to meeting its contractual obligations”; that it “remains ready, willing and able to proceed”; and that it “looks forward to working with your project management team as work proceeds,” the letter also asserted that the staging plan that it had previously submitted was compliant with the contract, and that Respondent’s contrary position was not supported by the contract terms, and was “absurd,” “patently ridiculous,” and in “bad faith, for reasons that are political and internal to the AOC.” R4, Tab 100, at 001062-66. Most importantly, however, the letter expressly conditioned Appellant’s providing the required staging plan and continuing with the project on Respondent’s making various assurances and providing certain information to Appellant in four separate areas (discussed below). *Id.* In this regard, Appellant made it clear that it could or would not submit a revised staging plan, or begin mobilization and commence construction until Respondent provided the requested assurances and information. R4, Tab 106, Appellant’s Letter to Respondent (Nov. 28, 2005), at 001080 (Appellant statement that it needed responses to requests for information for the “continued progress of the Project”); Tab 109, AOC Notes on December 8, 2005 Progress Meeting, (Dec. 8, 2005), at 001085 (“No mobilization until response to letter dated Nov. 28, 2005”).

Respondent never provided the information and assurances requested by Appellant because Respondent regarded them as imposing conditions on performing the contract work. Tr. 3/5 at 540; 3/7 at 380-83. Appellant never submitted a revised staging plan, and had not mobilized or commenced construction when the contract was terminated for default on December 15, 2005. Tr. 3/7/08 at 71, 310; Appellant’s Proposed Findings of Fact and Conclusions of Law at 34-35.

Appellant Conditioned Performance on Receipt of Information and Assurances

As indicated above, in its response to the show cause letter, Appellant requested information and assurances from Respondent in four areas as a precondition for submitting a revised staging plan. Appellant argues that the termination for default was not proper because the agency breached the contract by failing to provide the information requested by Appellant that would allow it to proceed with contract performance. Appellant’s Proposed Findings of Fact and Conclusions of Law at 47-48.

Where the government fails to respond to reasonable requests for necessary information to perform the contract, this will excuse a contractor’s failure to proceed under the contract as a basis for a termination for default. Bison Trucking & Equip. Co., ASBCA No. 53390, 01-2 BCA ¶ 31,654 at 156,385 (2001); SAE/Americon-Mid Atl., Inc., GSBCA

Nos. 12294 et al., 98-2 BCA ¶ 30,084 at 148,912 (1998). Under such circumstances, the government is said to have breached its duty to cooperate and cannot rely upon the contractor's failure to proceed to justify terminating the contract for default. Mega Constr. Co., Inc. v. United States, 29 Fed. Cl. 396, 420 (1993); PBI Elec. Corp. v. United States, 17 Cl. Ct. 128, 135 (1989); James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645, at 99,456 (1987). However, not all instances where the agency fails to respond or provide requested information constitute a material breach that precludes a termination for default, even if providing the information would have made the contractor's tasks easier, but was not essential to complete the project. Mega Constr. Co., Inc., supra, 29 Fed. Cl. at 420; PBI Elec. Corp., supra, 17 Cl. Ct. at 135; Big Red Enters., GPO BCA 07-93, 1996 GPOBCA LEXIS 26 at *56, *62 (1996). The gravamen of the [forum's] inquiry in cases involving a breach of the duty of cooperation is the reasonableness of the Government's actions considering all the circumstances. PBI Elec. Corp., supra, 17 Cl. Ct. at 135.

The first of the four areas where Appellant requested information and assurances as a prerequisite for submitting a staging plan, which Appellant included in its response to the show cause letter, stated, "it is vital that the AOC explain in writing how [AOC] want[ed] Montage to perform the work that is located outside the LOD, including the demolition, carpentry, asbestos abatement and sediment control work required under the Contract, while confining its construction activities to within the LOD [, given that] [i]t is physically impossible for the contractor to perform that portion of the Contract work while confining its activities to the LOD." R4, Tab 100, at 001064-65. This request was essentially repeated in Appellant's November 28, 2005 letter to Respondent. R4, Tab 106, at 001080-81.

It appears that Appellant's request is referring to the specific contract work that necessarily must be done outside the LOD, specifically the work to be done inside the building, such as carpentry and asbestos abatement. Such a request can reasonably be regarded as disingenuous at best, because any reasonable reading of the contract provides the obvious answer that contract work specifically identified as outside the LOD, such as that to be performed inside the Longworth House Office Building, must be done there, regardless of the LOD limitation on staging and construction imposed by the Respondent. See Tr. 3/7 at 336-37; Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953, 958 (Fed. Cir. 1993) ("A contract should be interpreted in such a way that all parts make sense").

Appellant may also have been more broadly demanding that the government describe "how" all contract work can be performed within the LOD. See R4, Tab 112, Respondent's Notice of Termination for Default to Appellant (Dec. 15, 2005), at 001095 (Appellant's response to the show cause letter "challenged the 'assertions' of the Government's Show Cause letter, and requested the government counsel [Appellant] on how to perform the work"). However, the government is not required to describe "how" a contractor will perform all of the contract work, where the contractor is supposed to use its own means and methods to accomplish the contract work within the limitations imposed by the contract or the government. See Logicon, Inc., ASBCA Nos. 37130, 37827, 95-2 BCA ¶ 27,921 at 139,397 (1995); SEB Engineering, Inc., ASBCA No. 39728, 94-2 BCA ¶ 26,810 at 133,352 (1994).

We find that Respondent's failure to respond to a request like this can hardly be regarded as a failure on the part of Respondent to cooperate, given that the duty to cooperate is not the duty to do whatever a contractor demands. *See Tri Indus., Inc.*, ASBCA Nos. 47880 *et al.*, 99-2 BCA ¶ 30,529 at 150,765 (1999).

The second area for which Appellant, in its response to the show cause notice, requested information from Respondent as a prerequisite to submitting a revised staging plan was "express written direction from the AOC where Montage may locate" "its trailer and . . . store its materials for the Project," and "the limits of the maximum area available for its staging area." Appellant stated that "Montage desperately requires this clarification and information so that it can submit a Staging Plan consistent with the AOC's instructions." Here, Appellant referenced the written directions of Respondent to confine staging and construction to the LOD and the offers from Respondent to provide additional staging area, and contends that these statements were "baldly inconsistent," and stated that "under such circumstances" Appellant required the requested "express written direction" from Respondent regarding available staging areas. R4, Tab 100, at 001065. This request was reiterated in Appellant's November 28 letter. Appellant stated in this letter that this information was necessary before Appellant could proceed with further contract performance. R4, Tab 106, at 001080-81.

As detailed above, as early as the kick off meeting, Respondent advised Appellant that it could have additional staging area beyond that designated at the kick off meeting. R4, Tab 111, at 001092; Tr. 3/7 at 72. In addition, it is not disputed that Respondent subsequently repeatedly advised Appellant, both in writing and orally, that additional staging area beyond the LOD was available in the adjacent walks and moat areas. The record also shows that as a prerequisite to identifying and obtaining additional staging space, Appellant's project manager was requested to walk the site with the COTR and a representative of the Superintendent of the House Office Building. However, as detailed above, Appellant's project manager always declined Respondent's invitations.²⁰ R4, Tab 63, at 000837; Tab 72, at 000863; Tr. 3/7 at 80-82; 370, 399, 403. The COTR never specifically disclosed to Appellant, in writing or otherwise, the maximum staging area that could be made available to Appellant because Respondent wanted to negotiate the exact amount of additional staging area that Respondent would grant based on Appellant's actual needs. Tr. 3/7 at 379-81.

Appellant complains that since Respondent knew the maximum additional staging area that it could make available to Appellant, Respondent's failure to identify this area in

²⁰ One apparent reason why Appellant's project manager may have been unwilling to review the additional available staging area was that this would not be a "solution." That is, Appellant wanted more space in New Jersey Avenue for its construction and staging area than Respondent was willing to offer and Appellant's "problem" was not addressed by providing other staging area space. Respondent Hearing exh. 33, Email from Appellant's Project Manager to COTR (Oct. 12, 2005) (regarding Respondent's offer of more staging area space, Appellant's project manager stated, "that would not be a solution because the main problem is excavating equipment size and their maneuvering dimensional requirements along the edge of deep excavation on the side of the road"); Tr. 3/7 at 295-96, 403.

response to Appellant's November 7, 2005 request constituted a failure to cooperate by Respondent that precluded the termination of the contract for default. We disagree.

As indicated, Appellant took no steps to learn of the additional staging areas repeatedly offered by Respondent.²¹ Instead, for many months, it simply adhered to its position that the amount of staging and construction was insufficient with regard to New Jersey Avenue, and that Respondent's directive was unreasonable. In contrast to its prior lack of interest and/or cooperation on this matter, it was only when Appellant received the show cause notice that it demanded that Respondent identify the precise location of the additional staging area available. We find that it was incumbent upon Appellant to go, observe, and evaluate these additional staging areas in order to effectively explain to Respondent whether or not such additional areas were in fact sufficient. In this regard, both the government and the contractor have a duty to cooperate under a contract, and a contractor can violate this duty with a lack of diligence in obtaining information necessary for the performance of the contract, even in a situation where the government does not give it guidance on the issue that was holding up performance. John S. Vayanos Contracting Co., Inc., PSBCA No. 2317, 89-1 BCA ¶ 21,494 at 108,294 (1988) (contractor's lack of diligence in obtaining information caused the problem that led to the default, even though the government did not provide requested information); Florida Sys. Corp., ASBCA Nos. 12443, 12822, 69-2 BCA ¶ 8,028 at 37,303 (1969) (contractor requested no information despite the contracting officer's express willingness to clarify disputed items). Thus, the record demonstrates Respondent's willingness and attempts to identify and provide additional staging area to Appellant, albeit not in the manner that Appellant wanted, and Appellant's lack of cooperation or interest in this matter until a show cause letter was issued.

Considering all of the circumstances here, such as Appellant's knowledge of the general location of the additional staging area, its consistent failure to cooperate in identifying the available staging area, its belated interest and request for this information, and the imposition of other conditions on performing the work, we do not find Respondent's failure here to respond to Appellant's request to identify the maximum additional available staging area to constitute a material breach for a failure to cooperate that would preclude the termination for default.

The third area for which Appellant requested information, in its response to the show letter, as a precondition to submitting a revised staging plan stated:

[T]he AOC has told us that it recognizes that Montage will require regular and constant delivery of materials and removal of construction debris from the site during the course of daily progress on the Project. In this regard, the AOC has told us that Montage will use flagmen to block the street and control traffic during these deliveries and other regular interruptions of the flow of traffic and use of adjacent parking spots along the street. However, given the AOC's unfortunate conduct in this matter, Montage is requesting written confirmation that it will be permitted to regularly restrict access to New Jersey Avenue immediately adjacent

²¹ The record indicates that the additional staging area that would have been made available to Appellant was utilized by Whiting-Turner to complete the project. Tr. 3/4 at 165-66; 3/7 at 186.

to the site for these activities. Montage would also appreciate the AOC's acknowledgment that regular and constant access to the street will not be denied Montage, nor will it be denied its right to restrict access to New Jersey Avenue as reasonably needed for the Project.

R4, Tab 100, at 001065. The request was repeated in Appellant's November 28, 2005 letter. R4, Tab 106, at 001081. We find that a reasonable reading of this request is that Respondent must agree to allow Appellant "regular and constant" access to New Jersey Avenue, and to permit Appellant to "regularly restrict access to New Jersey Avenue immediately adjacent to the site," before it would submit a staging plan in accordance with Respondent's directions.

As indicated above, Respondent is in control of New Jersey Avenue next to the Longworth Building. The contract indicated with regard to "traffic control" that the contractor has to:

Submit a site plan and details for review and approval by the Architect to diagrammatically indicate proposed measures for safely and efficiently controlling and re-routing traffic as necessary to enable construction work, deliveries, paving, testing operations and other activities. Indicate schedules of activities occurring hourly before, during and after the normal workday. At all times provide minimal disruption to the day-to-day activities occurring on the site and at adjacent locations.

R4, Tab 26, Contract, General Requirements, § 1.6.C.4.e, at 00187. The contractor was further required to:

Plan vehicular access methods, locations and timing of deliveries in a manner to minimize interference with street and pedestrian traffic and to conform to District of Columbia regulations. Do not block or obstruct public streets, driveways and walkways adjacent to the site at any time during performance of the work without proper authorization. Do not permit trucks of any kind to use existing sidewalks without prior authorization of the Architect.

Id. at § 1.7.G.1, at 00194. With regard to site clearing, the contract provided, "Do not close or obstruct streets, walks or other adjacent occupied or used facilities without permission from [Respondent] and authorities having jurisdiction." R4, Tab 26, Contract, Site Clearing, § 1.3.A.1, at 00220. Finally, the contract provided that "[a]ny work requiring obstruction of public road ways or building access" should "not be performed during standard occupied hours of operation." R4, Tab 26, General Requirements, § 1.2.B.2.d.2.d, at 00172; see Tr. 3/5 at 452 (testimony of Appellant's expert).

There is no suggestion in the record that Respondent would not comply with the contract in allowing Appellant to use New Jersey Avenue. The COTR credibly testified that Appellant was never "denied permission to load or unload on New Jersey [Avenue]," that Respondent recognized that there would be deliveries that would have to be done from out in the street and that it was planned that such deliveries be done in off hours when possible, that flagmen should be used by the contractor when trucks were on New Jersey Avenue, that the contract allowed for blocking and obstructing the street if there was "proper authorization," and that it was contemplated that there would be "temporary interruptions" to the traffic and parking in New Jersey Avenue. Tr. 3/7 at 406, 429-30,

464-65, 467. Since Appellant chose not to continue performance of the contract, it cannot credibly assert that Respondent would not have allowed reasonable access to New Jersey Avenue during the contract.²²

Given the contract terms that contemplate that Respondent, not the contractor, had control over traffic in New Jersey Avenue, including authorizing instances where the street may need to be obstructed to accomplish the contract work, Respondent was not obligated to allow the Appellant the unconditional “regular and constant” access to New Jersey Avenue that it demanded. Nor was Respondent required to respond to this unreasonable request, particularly given Appellant’s imposition of other conditions on providing a revised staging plan to which the agency was not required to acquiesce.

Appellant argues that Respondent granted the replacement contractor, Whiting-Turner, the “regular and constant access” to New Jersey Avenue that was denied Appellant. In support of this contention, Appellant references various photographs taken by automatic cameras located on New Jersey Avenue taken during Whiting-Turner’s performance of the replacement contract, which show the road being obstructed by vehicles at various times. Appellant Hearing exhs. 124 and 124A; Tr. 3/4 at 136. We find these photographs to be of little probative value.²³ For example, there is no evidence that Respondent did not provide prior authorization for some of the instances where the street was blocked, as provided for under the contract. E.g., Tr. 3/4 at 204, 3/5 at 448-49. Moreover, it appears that many of these photographs were of deliveries on weekends or outside regular hours, when street blockages were preferred to be scheduled under the contract. E.g., Tr. 3/4 at 187, 3/5 at 399, 450. In addition, the COTR testified that some of the instances of obstruction were not authorized and that he would have taken action under the contract if he had seen these conditions. E.g., Tr. 3/4 at 175-76, 187-88, 212. Based on our review of the record, contrary to Appellant’s arguments, we find no probative evidence that Whiting-Turner had “regular and constant access” to New Jersey Avenue, and further find that, even if the photographs were probative evidence of such access, Respondent was not required to agree to give Appellant unfettered “regular and constant access” to New Jersey Avenue as a condition to Appellant agreeing to provide the required revised staging plan.

The fourth area in which Appellant requested information or assurances mentioned in Appellant’s response to the show cause letter was that it will “require a time extension to perform the work once the AOC approves Montage’s revised staging plan” and that

²² Appellant also argues that it needed the assurances that it would be given “regular and constant” access to New Jersey Avenue, in view of the LOD limitation imposed by Respondent on construction, because the deliveries of construction materials are construction work that would fall under Respondent’s limitation and because the contract provisions otherwise contemplated that New Jersey Avenue would be used for deliveries. Appellant’s Post-Hearing Reply Memorandum at 10-14. However, there is no evidence that Respondent ever took the position that New Jersey Avenue could not be used for deliveries or that Appellant asked any question concerning the effect of the LOD limitation had on construction deliveries until it demanded “regular and constant” access in its response to the show cause letter.

²³ Only limited and selected information pertaining to the Whiting-Turner contract is included in the record.

Respondent has yet to provide Appellant “with any instruction to proceed with the work and Montage is concerned with that ambiguous circumstance[.]” R4, Tab 100, at 001065.

We first note that contrary to Appellant’s assertion, Respondent had unambiguously advised Appellant to proceed with the work by revising and resubmitting an acceptable staging plan in accordance with Respondent’s designation of the staging area (with offered additional staging area), and subsequently provided Appellant with a cure notice and a show cause notice indicating to Appellant that its contract could be terminated for default if it did not provide a revised staging plan in accordance with the Respondent’s instructions.

In addition, the statement that Appellant would “require” a time extension under the contract once a revised staging plan was approved appears to be the imposition of another condition on providing a revised staging plan, particularly given that it was included with the other preconditions on contract performance. As indicated above, a contractor’s failure to proceed as directed pending resolution of a dispute with the Government has been equated with anticipatory breach of the contract by repudiation, giving the government the right to terminate the contract for default. Twig Corp., supra, at 126,157.

Appellant asserts that it needed the information and assurances that it requested in its response to the show cause letter because of Respondent’s previous actions of bad faith and lack of cooperation during the contract. As discussed below, Appellant has not met its burden of showing that Respondent’s actions were in bad faith. In addition, before it issued the show cause notice and terminated the contract for default, the record shows that Respondent investigated the various claims made by Appellant regarding the constructability of the project and the asserted violations of OSHA regulations in performing the construction within the confines of the LOD restrictions. Based on these investigations, Respondent concluded that the contract could be constructed within the LOD, and that the OSHA regulations would not be violated. See Respondent Hearing exhs. 19, 22, 23, and 24. While Appellant asserts that these investigations and analyses were flawed, there is no suggestion in the record that they were done in bad faith.²⁴

²⁴ The Site Investigation Report prepared by the architect employed by URS was not one of the pieces of information specifically requested by Appellant in its response to Respondent’s show cause letter as a precondition to providing a revised staging plan, although Appellant did complain that it had not been provided. Respondent’s exh. 24; R4, Tab 100, at 001063. While we believe that Respondent should have provided this report to Appellant (with whatever caveats it felt were necessary to ensure that Appellant would not regard it as dictating means and methods of construction), Appellant has asserted in its post-hearing briefs that this report was flawed in many respects and could not serve as a reasonable basis for determining the constructability of the project within the designated LOD limits. Appellant’s Proposed Findings of Fact and Conclusions of Law at 16-18. Appellant does not otherwise suggest that this report would have been helpful in allowing it submit a staging plan in accordance with the Respondent’s directions. Thus, the fact that the report was not provided to Appellant provides no basis for finding that the termination for default was improper.

In sum, we find the agency's failure to respond to Appellant's November 7, 2005 and November 28, 2005 letters, which imposed multiple conditions on providing the required staging plan, to which Respondent was not required to acquiesce, did not constitute a material breach of the contract because of a lack of cooperation by Respondent, and did not negate the propriety of the termination for default.

Failure to Provide Adequate Assurances

We find that Appellant's responses to the cure notice and show cause notice did not provide adequate assurances that Appellant would perform the contract, notwithstanding its repeated statements that it was "ready, willing, and able" to complete the work. Neither response included the required revised staging plan in accordance with Respondent's directions. Instead, the responses repeated Appellant's complaints about the propriety of the Respondent's designation of the staging area and, in Appellant's response to the show cause notice, Appellant made it clear that it would not revise and re-submit a staging plan and proceed to mobilizing and actual construction until Respondent provided certain information and assurances, which we found Respondent was not obligated to provide. R4, Tab 106, at 001080-81; Tab 109, at 001085. While failing to provide these requested adequate assurances, Appellant also failed to submit the required staging plan and consequently failed to mobilize or begin construction up to when the contract was terminated for default on December 15, 2005, even though the contract award was on May 12, 2005, with a notice to proceed issued on June 8, 2005. R4, Tab 112 at 001095; Tr. 3/7 at 70-73, 519-20. Based on Appellant's failure to respond to the cure notice and show cause notice with adequate assurances of contract performance, coupled with Appellant's failure to perform any construction work for the first 6 months of a 12-month contract, Respondent could reasonably determine that Appellant's conduct constituted an anticipatory repudiation of the contract, and that it was justified in terminating the contract for default. Danzig, supra, 224 F.3d at 1337-38.

Failure to Perform Pending Resolution of a Dispute

As discussed below, Appellant's failure to perform the contract pending resolution of its dispute with the agency regarding the designated staging area also constituted an anticipatory repudiation of the contract.

Although the COTR, consistent with his authority, designated the location of the staging area at the kick off meeting on June 16, 2005, Appellant never submitted a staging plan consistent with that technical direction. On June 29, 2005, Appellant first professed that the COTR had not designated a staging area, but after a contracting officer advised Appellant on July 20, 2005 that the staging area had been designated at the kick off meeting, Appellant claimed, on July 25, 2005, that it had disputed the reasonableness of the designation of the staging area at the kick off meeting. R4, Tab 40, at 000727; Tab 50, at 000787-78; R4B, Tab 26, at 0681-82. By then, Appellant had been made fully aware of the reasons for Respondent's insistence on the LOD restriction for the staging area, that is, that New Jersey Avenue needed two lanes and an area for parking, which could not be met with Appellant's staging plan that would only allow for two lanes of traffic or one lane of traffic and a parking area. Appellant did not assert that the COTR did not have the authority to make the designation of the staging area (although it claimed that the designation was inconsistent with the contract). Indeed, a contracting officer expressly

confirmed this designation, when questions about whether a designation had been made were raised by Appellant. R4, Tab 50, at 000787-78. The Appellant also did not request a contracting officer's determination in this matter. Instead, Appellant simply ignored the COTR's designation of the location of the staging area and submitted a noncompliant staging plan on August 15, 2005--a month after the date its project schedule indicated it would provide the plan.

On August 26, 2005, the COTR, acting within the scope of his delegated duties, required Appellant to revise and resubmit the staging plan to comply with the designation of the staging area. R4, Tab 31, at 000693-94; Tab 63, at 000837. Appellant did not revise and resubmit the staging plan, but continued arguing that it needed the staging area in New Jersey Avenue that it designated in order to perform the contract, even after the COTR responded that Appellant was to "revise and resubmit a staging plan that shows all construction activities and staging to be performed inside the work zone as defined by the limits of disturbance as shown on Drawing C104."²⁵ R4, Tab 72, at 000863. Under the contract, where submittals are returned to the contractor with notations that the contractor considers to be additional work for which it believes it is entitled to an equitable adjustment, the contractor is required to submit the claim to the contracting officer under the Changes clause of the contract. R4, Tab 26, Contract, General Requirements, § 1.6.A.2., at 00183. However, Appellant did not revise and resubmit as required; nor did it submit a change claim or request a contracting officer's determination in this matter, but continued arguing about the propriety of the designation of the staging area.

Only when the contracting officer issued Appellant a cure notice on October 3, 2005 for failing to submit an acceptable staging plan, R4, Tab 80, at 000926, does the record show that Appellant formally advised the contracting officer on October 13, 2005 that it believed that Respondent's directions regarding the staging plan were not consistent with the contract. R4, Tab 86, at 000942-47. In addition, on October 27, 2005, the same day the contracting officer issued the show cause notice, Appellant submitted a request for equitable adjustment based on Respondent's delay in approving the staging plan that Appellant had submitted. However, this claim was predicated on not complying with Respondent's designation of the staging area, but on its insistence that Respondent acted unreasonably in not approving its staging plan as submitted. R4, Tab 95, at 001033-36. Only on November 6, the day before it responded to the show cause letter did Appellant submit a request for equitable adjustment predicated on complying with Respondent's designation of the staging area. R4, Tab 98, at 001050. Even though Respondent's cure

²⁵ Appellant asserts that under the contract the COTR was required to make corrections to the submitted staging plan, instead of returning it for revision and resubmission. Appellant's Proposed Findings of Fact and Conclusions of Law at 6-7. However, the provision relied upon Appellant is only applicable where changes "are of such minor nature that . . . construction can proceed in accordance with the correction noted." R4, Tab 26, Contract, General Requirements, § 1.6.D.2, at 00187. Instead, section 1.6.D.3 of the contract's general requirements is applicable here because the changes were of such nature that "construction cannot proceed." *Id.*, § 1.6.D.3, at 00187. Where this section is applicable, the COTR is supposed to advise the contractor to "revise and resubmit" the submittal, and places the responsibility on the contractor to correct or change the submittal. *Id.*

notice and show cause notice continued to insist that Appellant submit the required staging plan consistent with Respondent's directions, Appellant did not do so, but imposed conditions—that Respondent was not obligated to accept—before Appellant would submit a revised staging plan.

We find in these circumstances that Appellant's failure to proceed by submitting a staging plan in accordance with Respondent's directions, or to mobilize or commence construction, but to instead continue to dispute the propriety of Respondent's order, also constituted an anticipatory repudiation of the contract by the Appellant. Twigg Corp., supra. In this regard, as noted above, after the contracting officer has given an interpretation of the contract requirements, the contractor must perform as directed and may not stop work while it appeals the matter through the contract claims procedure, even where the contractor correctly believes that the directions constitute a constructive change to the contract, or incorrectly believes that the work is impossible, or commercially impracticable, constitutes a cardinal change, or otherwise constitutes a material breach of the contract by the government. See Dae Shin Enters., Inc., supra, at 158,647, 158,649; Essex Electro Engrs., Inc., supra; Protech Atlanta, ASBCA No. 52217, 01-2 BCA ¶ 31,434 at 155,231 (2001).

Contracting Officer's Failure to Testify

In its post-hearing brief, Appellant argues that because the contracting officer did not testify at the hearing, Respondent did not carry its burden of proof that the contracting officer's termination of Appellant's contract for default was reasonable or proper. However, there is no requirement for the contracting officer to testify in support of his or her determination to terminate a contract for default where the contracting officer's final decisions, other evidence included in the record, and other hearing testimony, establishes the reasonableness and propriety of the termination for default.²⁶ Kadri Int'l Co. dba ValueCAD, AGBCA No. 2000-170-1, 04-2 BCA ¶ 32,646, at 161,543, 161,552 n.8 (2004) (contracting officer's hearing testimony is not necessary to find termination for default proper); Del E. Webb Corp., ASBCA No. 22386, 79-2 BCA ¶ 14,140 at 69,597 (1979) (contracting officer's decision is part of the record and speaks for itself; no adverse inference will be drawn regarding contracting officer's failure to testify where this matter was brought up during the hearing and the Appellant did not request the contracting officer as a witness).²⁷

²⁶ The contracting officer was not on Respondent's or Appellant's witness list for the hearing, and Appellant made no comment before or during the hearing regarding the necessity for the contracting officer's testimony, but only raised this issue in its post-hearing briefs.

²⁷ The decision relied upon by Appellant in asserting that the contracting officer's failure to testify means that the termination for default cannot be sustained, Bell BCI Co. v. United States, 81 Fed. Cl. at 617, 639 (2008), related to an accord and satisfaction defense to a contractor claim and the contracting officer's failure to testify was but one reason why the court failed to uphold this defense. (We note that Court of Federal Claims' decision finding no accord and satisfaction was reversed by the Court of Appeals for the Federal Circuit, Bell BCI Co. v. United States, 570 F.3d 1337, 1341-42 (Fed. Cir. 2009)).

Anticipatory Repudiation of Contract

Based on the foregoing, we find the record demonstrates that Appellant was in anticipatory repudiation of the contract, such that Respondent could terminate the contract for default. In this regard, not only did Appellant fail to give Respondent adequate assurances of due performance in response to Respondent's cure notice and show cause notice, but it failed to proceed with the contract work while pursuing its dispute with Respondent over its directives regarding the staging plan. Moreover, even though 6 months of the 12-month contract had passed when the contract was terminated for default, Appellant had neither mobilized nor began any construction. Given that the record shows that Appellant was in anticipatory repudiation of the contract, we find that Respondent has met its burden as to "the correctness of its actions in terminating a contractor for default." Danzig, supra, 224 F.3d at 1337-1338; Takota Corp. v. United States, 90 Fed. Cl. 11, 17-21 (2009) (failure to submit required submittals despite being directed to do so was a breach of the contract that justified terminating the contract for default); C.H. Hyperbarics, Inc., ASBCA Nos. 49375 et al., 04-1 BCA ¶ 32,568 at 161,140-41 (2004) (anticipatory repudiation justifying termination for default found where contractor failed to respond adequately to agency's reasonable requests for assurances of timely performance, failed to proceed with performance, and conditioned performance on contracting officer negotiating request for equitable adjustment or modifying contract); Renaissance Investments, Inc., ENG BCA No. 5704, 98-1 BCA ¶ 29,712 at 147,325 (1998) (termination for default was justified where the contractor failed to proceed under contract because of an ongoing dispute with government, even where the contractor was "right."); Accu-Met Products, Inc., ASBCA No. 19704, 75-1 BCA ¶ 11,123 at 52,923 (1975) (termination for default was justified where the contractor stopped work rather than proceeding in accordance with government's instructions that constituted a constructive change, for which the contractor would have been made whole if it had proceeded with performance).

Impossibility and Commercial Impracticability

Appellant argues that the termination for default was improper because the staging area and construction limitation imposed by Respondent made the work impossible or commercially impracticable to perform.

Where the performance of the contract as directed by the government is impossible or commercially impracticable, the contractor will be excused from performance under the contract and a termination for default based on this failure to perform will not be upheld. See Blount Bros. Corp. v. United States, 872 F.2d 1003, 1007 (Fed. Cir. 1989); Soletanche Rodio Nicholson (JV), ENG BCA Nos. 5796, 5891, 94-1 BCA ¶ 26,472 at 131,779 (1994). The doctrine of impossibility does not require a showing of actual or literal impossibility of performance but only a showing of commercial impracticability. Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1294 (Fed. Cir. 2002). However, the Court of Appeals for the Federal Circuit has observed:

The commercial impracticability standard can be easily abused; thus, this court has not applied it with frequency or enthusiasm. It is not invoked merely because costs have become more expensive than originally contemplated.

Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 409 (Ct. Cl. 1978); see Short Bros., PLC v. United States, 65 Fed. Cl. 695, 784 (2005). The legal standards regarding impossibility and commercial impracticability have been summarized by the General Services Board of Contract Appeals as follows:

Appellant has the burden of establishing commercial impracticability. [Citations omitted.] The law excuses performance where the attendant costs of performance bespeak commercial senselessness. [Citations omitted.] Commercial impracticability does not mean impracticality. [Citations omitted.] Mere increased expense is not proof of commercial impracticability; there must be a showing that the work was beyond the contemplation of the parties when they entered into the bargain. [Citations omitted.] The appellant must also show that its difficulties were not due to its own subjective fault. [Citations omitted.]

Technical Sys. Assocs., Inc. v. Department of Commerce, GSBCA No. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684 at 151,562 (2000).

Installation of Waterline

At the hearing, Appellant's claims of impossibility and commercial impracticability focused on the installation of a new 8-inch waterline. The removal of the existing waterline and the installation of the new waterline were among the first tasks that were to be performed under the contract, before the rest of the work associated with excavating and installing the new generator could be performed. Tr. 3/5 at 261. The location of the new 8-inch waterline was to be determined based on the location of the existing 8-inch waterline, which ran north-south on the west side of New Jersey Avenue. Tr. 3/5 at 257-58, 267-68; R4, Tab 29, Contract Drawing C104, at 000684; R4B, Tab 83, Contract Drawing C501, at 2704. There was a designation of the existing waterline on the contract drawings that indicated that the line was located under the sidewalk on the west side of, but not in, New Jersey Avenue, but its exact location was not known and it was the contractor's responsibility to determine its exact location. Tr. 3/5 at 257, 264, 275; R4, Tab 29, Contract Drawing C104, at 000684; R4B, Tab 83, Contract Drawing C101, at 2700. According to Appellant, the actual location of the existing waterline turned out to be approximately 8 feet west of the curb line of New Jersey Avenue (and thus not in the street). Tr. 3/5 at 282. According to the contract drawings, the new waterline was to be installed as running at a right angle from the existing waterline for 18 feet then turning at a right angle northerly up New Jersey Avenue. In that north-south segment, the line would join the new valve box as well as "T's" to connect the line to the utility lines running east-west across New Jersey Avenue. The line would then turn back at another right angle 263.5 feet up New Jersey Avenue to the location of the existing line. Tr. 3/5 at 262-68; R4B, Tab 83, Contract Drawing C101, at 2700; Drawing C501, at 2704. According to Appellant's expert, given the actual location of existing waterline, this would mean that the new waterline would be installed 10 feet into New Jersey Avenue. Tr. 3/5 at 283.

The contract authorized Appellant to use either sheeting and shoring or a sloped excavation method to install the new 8-inch waterline. In this regard, Note 1 of Drawing C501 provided that, "Pipe laying condition Type 2A (Trench Installation) shall be used for all water main construction unless otherwise specified." Note 2 of Drawing C501 stated, "Trenches may be excavated wider than the trench width (Ws [sheeted

excavation] or Wu [unsheeted excavation]) above 1 – 0 from top of pipe at contractor's option and at no additional cost to the Government." R4B, Tab 83, Contract Drawing C501, at 2704; Tr. 3/5 at 272-73. Appellant's expert testified, without rebuttal, that to a contractor experienced in excavations of this type, these statements indicate that the contractor may use either sloped excavation or trench protection when performing the utility work, but the government will not pay additional compensation if the contractor chose a more expensive method of excavation.²⁸ Tr. 3/5 at 271-73.

As indicated above, Appellant's expert testified that the LOD line on Drawing C104 was for "sediment and erosion control only," and had no fixed location, that is, it was not a diagrammatical representation and the lines were not dimensioned. Appellant Hearing exh. 139A at 3; Tr. 3/5 at 276-77. Here, Appellant's expert testified that the LOD in New Jersey Avenue was supposed to be based on the actual location of the existing waterline and the amount of disturbance measured from that location considering the "trench excavation means and methods selected by the contractor" in installing the new waterline. Appellant Hearing exh. 139A at 3; Tr. 3/5 at 275. According to the expert, the actual LOD would vary depending on which option permitted by the contract for the installation of the new 8-inch waterline was selected by the contractor, either sheeting and shoring or sloping back the excavation areas. Tr. 3/5 at 274. Appellant's expert calculated the location of the LOD, based on the actual location of the existing 8-inch waterline, and using Appellant's chosen means and methods of sloping the excavation to install the new 8-inch waterline, to be 25 feet into (or midway) on New Jersey Avenue. Tr. 3/5 at 289-91; Appellant Hearing exh. 122. This is outside the staging and construction limitation designated by Respondent of 14 feet into New Jersey Avenue.

We find that Respondent's designation of the staging area limited the means and methods that Appellant could employ in performing the contract, so as to exclude the slope excavation method of installing the 8-inch waterline. Because Respondent's directive as to the location of the staging area, although authorized by the contract, effectively took away an option for excavation that the contract authorized, we believe that it constituted a constructive change to the contract for which Appellant may have been entitled to additional compensation and a time extension. International Data Products Corp. v. United States, 492 F.3d 1317, 1325 (Fed. Cir. 2007); W.M. Schlosser Co., Inc., ASBCA No. 44778, 96-2 BCA ¶ 28,297 (1996). However, as discussed above, a contracting officer's directive that turns out to constitute a constructive change to the contract does not entitle the contractor to stop work under the contract unless Appellant meets its burden of showing that the government breached the contract in a material manner, for example, by directing work that was impossible or commercially impracticable or that constitutes a cardinal change.²⁹ Dae Shin Enters., Inc., *supra*, at 158,647, 158,649; Essex Electro Eng'rs., Inc., *supra*, at 156,695. Appellant has not met this burden.

²⁸ Appellant's expert was accepted by the Board as an expert in excavation and construction practices in the Washington, D.C. area and in construction management. Tr. 3/4 at 227.

²⁹ Appellant could have re-submitted the staging plan as required and proceeded with the work while submitting a request for equitable adjustment for the increased costs of using different equipment and for any additional time resulting from the change in its

This is so because Appellant's claim of impossibility here is predicated on its demand for more staging area in New Jersey Avenue, so that it could utilize the equipment it planned using its chosen means and methods of a sloped excavation for installing the waterline. R4, Tab 64, at 000839-40. In this regard, Appellant's expert testified that different equipment than that planned to be used by Appellant in installing the waterline using the sloped excavation method could be utilized to install the new waterline, although this would be less efficient. Tr. 3/5 at 467-69. Appellant's expert also testified that installing the 8-inch waterline using sheeting and shoring and a trench box in excavating the trench was impractical, but not impossible to accomplish, although the contract expressly provided that the contractor may use its own means and methods to install the waterline and Respondent's designation of the staging area did not allow Appellant to utilize its chosen means and methods of a sloped excavation. Tr. 3/5 at 437-39, 441-42; 3/6 at 109-10.

Moreover, during a September 15, 2005 meeting Appellant stated that, if the staging and construction area limitation directed by Respondent were accepted, "reducing the size of the equipment will take longer time, at least 5-6 months longer." R4, Tab 74, at 00884. We regard this as an acknowledgement by Appellant that contract performance adhering to Respondent's designation of the staging and construction area was not impossible, although performance would be more costly and time consuming. Appellant's submission of a request for equitable adjustment on November 6, 2005 to perform this work within the staging area designated by Respondent and the additional staging area offered by Respondent is also evidence that Appellant did not then believe the work was impossible to perform. R4, Tab 98, at 001050.

Thus, we find that Appellant has not met its burden of showing that the preclusion of Appellant's chosen means and methods of installing the waterline rendered performance of the contract impossible.

Appellant also argues that it could not perform the waterline installation work within the LOD limits required by Respondent because this would not comply with applicable OSHA requirements and was thus impossible. The Geotech Report incorporated as an attachment to the contract stated that the contract:

require[s] considerable excavation between the existing building and New Jersey Avenue. All excavations should be performed in accordance with local, State, and Federal requirements. In absence of any local or State requirements, the OSHA standards should be followed. . . . As an alternative to sloping, sheeting and shoring may be used for temporary excavation support.

R4, Tab 26, at 00618. Appellant alleges that it would be a violation of OSHA requirements to have a construction perimeter 5 feet from the area of excavation. Appellant cites to 29 C.F.R. § 1926.652, app. F (2004), as authority for its position. However, here too Appellant's arguments are predicated on using a sloping method of excavation, whereas the applicable OSHA regulation allows for excavation to be sloped, shored, or shielded. Appellant still has pointed to no OSHA regulation that requires the 5-foot perimeter

construction methods. Appellant lost this opportunity when it did not submit a revised staging plan.

where the sloping method of excavation is not used.³⁰ Because, as stated above, Appellant's expert testified that the 8-inch waterline could be installed with sheeting and shoring excavation, Tr. 3/5 at 437-42, Appellant's arguments of impossibility based on asserted OSHA violations do not meet its burden.³¹ Appellant's burden is also not met by its expert's general testimony that there would be greater safety concerns in performing the work within Respondent's designated staging and construction area. Tr. 3/5 at 361-63.

Appellant argues that Whiting-Turner's performance as the replacement contractor demonstrates that the performance under Appellant's contract was impossible with regard to the installation of the 8-inch waterline. The record does not confirm this allegation. As indicated above, there is limited and selected information in the record concerning Whiting-Turner's contract performance. However, the record does show that the same staging area limitation, which required the perimeter fence to be installed 14 feet from the curb in New Jersey Avenue that was imposed on Appellant, was also applicable to Whiting-Turner's contract. Tr. 3/4 at 119, 122; 3/6 at 135; 3/7 at 383, 466-67; Appellant Hearing exh. 111, Agreement Regarding Limits of Disturbance between Respondent and Whiting-Turner (Apr. 24, 2006);³² Appellant Hearing exh. 116A, Whiting-Turner Staging Plan. A subcontractor representative called as a witness by Appellant testified that Whiting Turner advised its subcontractors, during the course of performance of the replacement contract, that the LOD "at that fence [in New Jersey Avenue] was sacred [and] that all construction activities had to be contained within that fence." Tr. 3/6 at 135.

Appellant claims that under Whiting-Turner's contract the location of the new 8-inch waterline was moved 3 feet closer to the existing waterline and thus closer to the west curb of New Jersey Avenue "in order to accommodate [Respondent's] LOD restriction," and that it was this change and unsafe construction practices that enabled Whiting-Turner to install the waterline. Appellant's Proposed Findings of Fact and Conclusions of Law at 24. Appellant claims that this demonstrates the impossibility of installing the new 8-inch waterline under Appellant's contract. However, the record shows that this change in location of the new waterline was actually the result of a change mandated by the District of Columbia Water and Sewer Authority (WASA). Tr. 3/4 at 123-25, 143; 3/5 at 421-22, 3/6 at 143-44. There is no suggestion that this same change mandated by WASA would not have been made under Appellant's contract if it had chosen to continue contract performance. See Tr. 3/4 at 143. Thus, while it is possible that this change made it easier to confine the construction work on New Jersey Avenue to the LOD, this

³⁰ Respondent found no applicable OSHA regulation when it investigated Appellant's assertions of OSHA violations if it complied with Respondent's directions regarding the staging and construction area. Respondent Hearing exhs. 22, 23 and 24; Tr. 3/7 at 139-47.

³¹ Appellant's reliance on U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 385-1-1 at 25.B.01.b, as set forth in its letter dated September 21, 2005, is also misplaced as Appellant's contract does not require the use of this Corps of Engineers standard. R4, Tab 76, at 000891, 000909-10.

³² The Agreement Regarding Limits of Disturbance between Respondent and Whiting-Turner expressly provides that Respondent's designation of the staging area did not impact Whiting-Turner's price. Appellant Hearing exh. 111.

change does not show that it was impossible for Appellant to perform the work within the designated limitation.

Appellant also contends that Whiting-Turner's installation of the new valve box on the new 8-inch waterline in New Jersey Avenue demonstrates that this work was impossible to perform within the LOD designated by Respondent as the limit of staging and construction. In support of this contention, Appellant references the testimony of a representative of a subcontractor for Whiting-Turner and Appellant's expert, who testified that it was "very difficult" to install the valve box within the designated LOD. These witnesses testified that this was so because the new waterline trench was close to the construction perimeter fence, such that the trench could not be sloped and the installation required mining under the fence under New Jersey Avenue; in addition, the subcontractor representative testified that the installation of the valve box was done in an unsafe manner. Tr. 3/5 at 277-78, 291-93, 441-42; Tr. 3/6 at 148-55, 165, 175. We find that the testimony regarding this one aspect of the contract does not meet Appellant's burden to show that the contract work was impossible; rather, it only shows the work, which Whiting-Turner actually accomplished, was difficult because of the confined area involved.³³

In sum, we find that Appellant has not met its burden of supporting its claim in defense of the termination for default that it was impossible for the contractor to comply with Respondent's designation of the staging and construction area, particularly considering Respondent's offer to provide additional staging area.³⁴

As indicated above, in order to prevail on its claims of commercial impracticability, Appellant is required to show that the incurrence of the increased costs of installing the 8-inch waterline under these circumstances was commercially "senseless." See Technical Sys. Assocs., Inc. v. Department of Commerce, *supra*, at 151,562.

³³ Appellant also asserts that the photographs discussed above showing vehicles in the street that were taken during the performance of the Whiting-Turner contract also demonstrate that contract performance was impossible because the vehicles in New Jersey Avenue indicate that construction was being performed outside the perimeter fence that marked the limit on staging and construction directed by Respondent. Tr. 3/6 at 51-52; Appellant Hearing exhs. 124 and 124A. However, as discussed above, the contract contemplated that vehicles could block the street with proper authorization, particularly in off hours, and there is no suggestion in the record that had Appellant elected to proceed with performance that it would not have been given the same kind of access to New Jersey Avenue that was granted Whiting-Turner. R4, Tab 26, Contract, General Requirements, §§ 1.2.B.2.d.2.d at 000172, 1.6.C.4 at 000186, 1.7.G.1, at 000194. Based on our review and for the reasons discussed above, we find that these photographs and Appellant's interpretation of them do not meet Appellant's burden to show impossibility.

³⁴ As indicated above, prior to issuing the show cause letter, Respondent required a review of Appellant's various claims of impossibility by URS's architect, who concluded that the contract was constructible within the limits of staging and construction on New Jersey Avenue using the shoring and sheeting method of excavation. Respondent Hearing exh. 24. There is no suggestion that this review was done in bad faith.

Appellant's request for equitable adjustment to perform the work in accordance with Respondent's direction was for a 156-day extension and \$458,597 based on Respondent's directive to confine all construction and staging activities within the LOD.³⁵ R4, Tab 98, at 001050. The original contract amount for the project was \$3,584,087.00. R4, Tab 20, at 00087. Thus, the request for equitable adjustment submitted by Appellant constituted less than 13 percent of the contract value. Under the circumstances, even assuming Appellant's claim would be allowable in the amount claimed, we do not believe that performance of the contract has been shown by Appellant to be commercially senseless. Compare Ocean Salvage, Inc. ENG BCA, 3485, 76-1 BCA ¶ 11,905 at 57,094-95 (1976) (practical impossibility occurred when an 800 ton crane costing more than double the contract price was required to remove a sunken barge that the parties had assumed could be removed by only a 50-ton crane) with Raytheon Co., ASBCA 50166, 01-1 BCA ¶ 31,245 at 154,204 (2001), aff'd, Raytheon Co. v. White, 305 F.3d 1354, 1368 (Fed. Cir. 2002) (a 57-percent increase in price does not by itself support a commercial impracticability claim).

Cardinal Change

Appellant argues that the designation of the LOD as the outer limits of the staging and construction areas was a cardinal change to the contract, which excused Appellant from further performance. A cardinal change is an out of scope change to a contract.

A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach."

Keeton Trading Co., Inc., supra, 79 Fed Cl. at 260, quoting from Allied Materials & Equip. Co. v. United States, 569 F.2d 562, 563-64 (Ct. Cl. 1978). When the government makes a cardinal change to a contract, the contractor is excused from performance of the contract, including its obligations under the Changes and Disputes clauses. Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1276 (Fed. Cir. 1999). Whether a change is cardinal is largely a question of fact requiring an analysis of the totality of the circumstances. Becho, Inc v. United States, 47 Fed. Cl. 595, 601 (2000). The contractor must prove facts with specificity that support its allegations that a cardinal change occurred. PCL Constr. Servs., Inc. v. United States, 47 Fed. Cl. 745, 804 (2000).

We find that Appellant has not shown that Respondent's direction was a cardinal change to the contract. As discussed above, the contract expressly contemplates that the

³⁵ The Appellant has not provided any credible evidence that validates the time charged or claim amount included in its request for equitable adjustment. See The Clark Constr. Group, Inc., GAO CAB No. 2003-1 (JCL), 05-1 BCA ¶ 32,843 at 162,565, 162,694 (2004). While Appellant's expert testified "generically" that the cost and time impact would be significant for the change claimed in this request for equitable adjustment, Tr. 3/6 at 91-92, the expert admitted that he had not reviewed the claim or performed an independent analysis that considered Appellant's proposed price and work breakdown structure or its claims regarding contract delay. Tr. 3/6 at 22-24.

staging area would be designated after contract award and that the designation here would have constituted a constructive change to the contract because it did not allow Appellant to utilize the sloping excavation option that was permitted under the contract. While this designation may have made the contract more costly to perform, it did not prevent Appellant from completing the contract. In this regard, as noted above, Appellant's request for equitable adjustment based on Appellant's LOD limitations on staging and construction represented less than a 13-percent increase in the contract value. In sum, this limitation on the excavation method that the contractor could use was not so drastic a change as to constitute a cardinal change to the contract. See International Data Products Corp. v. United States, *supra*, 492 F.3d at 1325.

Alleged Bad Faith

Appellant also alleges that Respondent had improper motives and acted in bad faith in terminating the contract for default. Appellant argues that the termination was the result of Respondent's desire to remove Appellant (a small business) from the contract in order to make award to Whiting-Turner (a large business), who submitted the second low-priced offer in response to the solicitation.

The United States Court of Appeals for the Federal Circuit had found that where there is a finding that the government's reason for terminating a contract for default was solely to rid itself of a contractor, the termination for default was arbitrary and capricious, even if the contractor was in default of the contract. Darwin Constr. Co., Inc. v. United States, 811 F.2d 593, 598 (Fed. Cir. 1987). The burden for showing that agency's actions were arbitrary and capricious or based on improper motives is on the defaulted contractor. Id.; Mega Constr. Co., Inc., *supra*, 29 Fed. Cl. 421; AIW-Alton, Inc., ASBCA No. 45032, 96-1 BCA ¶ 28232 at 140,979 (1996). In this regard, there is a presumption that government officials act in good faith and contractors must present clear and convincing evidence of government bad faith in order to prevail. AM-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002).

The first instance where evidence of bad motives is alleged concerns Respondent's reluctance to make award to Appellant, even though it had submitted the low-priced proposal. Appellant's Proposed Findings of Fact and Conclusions of Law at 18. Appellant points to an April 18, 2005 email from the contract specialist, who reviewed Appellant's proposal in which she stated, "I have tried everything possible to keep from awarding this project to [Appellant], however there is nothing legal we can do, but make the award." Appellant Hearing exh. 19. While Appellant suggests that this shows that the contract specialist was pressured to reject Appellant's proposal, there is no evidence in the record supporting this speculation. Instead, the record shows that the contract specialist had genuine concerns with Appellant's proposal, such as white-outs on the price schedule, a lack of legibility of some portions of the price schedule, Appellant's failure to execute or provide a corporate seal for its bid bond, a mistake in the CLIN 7 price, a math error in the price schedule, and some statements from references on past performance questionnaires indicating "unsatisfactory" or bad performance by Appellant. Tr. 3/6 at 284, 292-96, 305-06, 332-33; Respondent Hearing exh. 108, at 00060; Respondent Hearing exh. 132. However, the contract specialist provided Appellant with the opportunity to address these matters and Respondent ultimately made award to Appellant. Tr. 3/6 at 307; Respondent Hearing exh. 113; R4, Tab 19, at 00083; Tab 20, at 00085. The contract specialist credibly explained that the comments in the April 18, 2005

email reflected that, because of the foregoing concerns, she “was not getting a warm and fuzzy feeling about this company” and did not feel “good” about the award to Appellant. Tr. 3/6 at 315, 332-33. Thus, we find that the expressed reluctance on the part of Respondent’s representative regarding the award to Appellant was reasonably based, and does not show bad motives or bad faith on the part of Respondent.

Another prong of Appellant’s assertions that Respondent had improper motives and acted in bad faith involved the dispute early in the contract involving the timing of required submittals under the contract. The contract provided for the submittal of the shop drawing submittal schedule, schedule of values and safety plan within 30 days of contract award. R4, Tab 26, Contract, Supplementary Conditions, § 2(b), Submittals, at 000161. As noted above, award of the contract was on May 12, 2005 and the notice to proceed under the contract was issued on June 8, 2005. R4, Tab 20, at 000087; Tab 33, at 000703. On June 14, 2005, the COTR advised Appellant that these submittals were required to be submitted by June 13, 2005 and asked Appellant when they would be provided. Respondent Hearing exh. 61. By June 15, 2005, Appellant advised Respondent that it believed the notice to proceed date was the key date for measuring the timing of required submittals and the submittals were therefore not late. Respondent Hearing exh. 63.

On June 20, 2005, Respondent sent a cure notice to Appellant because it had not provided the required submittals within 30 days of contract award. Respondent Hearing exh. 66. After some further communications, the submittals in question were provided, R4, Tab 40, at 000726-28, and no further action by Respondent was taken regarding this matter.

Appellant argues that the cure notice, sent only weeks after the notice to proceed was issued, reflected Respondent’s desire to terminate Appellant’s contract to make award to the second low offeror. However, we find the record here actually reflects a good faith dispute between the parties, with Respondent relying upon the clear language of the contract that these submittals be made within 30 days of award,³⁶ see R4, Tab 26 at 000161, and Appellant relying upon the restriction on its work imposed by the contract until a notice to proceed was issued. See R4, Tab 26, at 00140.

Appellant also references certain emails concurrent with this dispute regarding the timing of submittals that it asserts show a predisposition to terminate Appellant’s contract for default. For example, an email on June 23, 2005 from Respondent’s director of project management to the COTR, with regard to the dispute over the timing of submittals, stated:

I thought that based on our conversation last week, that Procurement was on board with playing hardball with [Appellant] based on the specific contract language pertaining to the submittals that are still overdue. I was glad to hear this, but I believe I cautioned that Procurement may not play as “hard of ball” as we might like

³⁶ As a general rule, the government is entitled to insist on strict compliance with unambiguous contract specifications. Cascade Pac. Int’l v. United States, 773 F.2d 287, 291 (Fed. Cir. 1985).

them to in possibly getting to the second low bidder. . . . we were proceeding towards (stopping short of saying we were) a default of [Appellant].

Respondent Hearing exh. 96. The Director of Project Management also stated, in an email to the COTR on July 1, 2005 on this same subject, that the contracting officer:

is still leaning towards a T4D but feels we are not there yet. I asked about timing (she is aware that we are under the gun here) and she cautioned that we are at least a couple of months out (best case) from being able to award a contract to the 2nd low. This does not include time if [Appellant] were to protest the T4D in wrapping up legal issues.

I know that when we talked on this a couple of weeks ago, you were optimistic that there would be quick resolution on this matter. . . . it does not appear that this will be the case, especially with [Appellant] apparently not being eager to let go.

R4, Tab 41, at 000760.

These emails evidence that at least some Respondent representatives were concerned with Appellant's performance under the contract and wanted strict compliance of the contract terms with regard to submittals, and tend to show that Respondent recognized that it could not terminate Appellant's contract for default for insubstantial reasons. See Tr. 3/7 at 541. In this regard, Appellant's contract was not terminated for default for its general failure to timely submit submittals, but the termination was based on the more significant failure to submit a revised staging plan in accordance with Respondent's directions, which was necessary to mobilize and commence construction. In fact, the termination for default occurred more than 5 months after these emails were sent. We find that these emails do not meet Appellant's burden of showing that the ultimate termination of the contract for default was motivated by improper motives or was in bad faith.³⁷ See Mega Constr. Co., Inc., supra, 29 Fed. Cl. at 421

Another prong of Appellant's bad faith argument is its allegation that Respondent repeatedly refused to cooperate with Appellant in developing a workable staging plan

³⁷ Appellant also cites to the testimony of the Respondent's Director of Project Management that the point of getting the first cure notice out was to put Respondent in the position of proceeding to award to the second low offeror, Whiting-Turner, and that he maintained this belief to the end of the contract. Tr. 3/7 at 544-45. This witness also testified "[t]ime was ticking and there was very little progress" by Appellant under the contract for a "high visibility, high complexity project," and his review of contract performance "led me to believe that [Appellant] had no intention of performing the work." Tr. 3/7 at 486-89, 519-20, 545. We do not believe the testimony of the director, who was not the contracting officer for this contract, satisfies Appellant's burden of showing improper motivation or bad faith on the part of Respondent that would render the termination for default arbitrary and capricious. Instead, we think the testimony reflects the director's reasonably based frustration with Appellant's contract progress and performance, and his anticipation that Appellant may not perform the contract. This was a contingency that could reasonably be discussed and planned for by Respondent on this "high visibility, high complexity project."

that addressed Appellant's safety and practical concerns, and failed to show Appellant the additional staging area so that Appellant could revise and resubmit its staging plan. These allegations are discussed in detail above and were found to be not supported by the record. Each of Appellant's concerns was investigated in good faith and Respondent repeatedly offered to provide additional staging area if Appellant's project manager would walk the site, an offer that Appellant always declined. Moreover, the crux of the dispute here was that Appellant's desire for more room for construction activities in New Jersey Avenue than would be allowed by the LOD limitation on staging and construction imposed by Respondent. However, for the reasons stated above, the agency was not required to provide this space,³⁸ and there is no showing in the record that the agency's actions here were made in bad faith or were simply motivated by a desire to terminate Appellant's contract in order to make award to Whiting-Turner.

In sum, Respondent has met its burden of showing that Appellant was in anticipatory repudiation of the contract that justified terminating the contract for default and Appellant has not met its burden of showing that the non-performance was excused. Therefore, we find the termination for default was proper and deny Appellant's appeal of Count I.

Count III, Delay:

Appellant claims \$76,211.00 and a time extension of 71 days based on Respondent's alleged unreasonable delay of the project for failing to approve a staging plan submitted by Appellant under the contract. However, as discussed above, Respondent had a reasonable basis for not approving Appellant's staging plan. Thus, this claim is denied. Appellant's request for an equitable adjustment of \$458,597 and a 156-day extension, based on Respondent's directive to confine all construction and staging activities within the LOD, is also denied because Appellant did not perform any part of this work prior to its termination for default. Thus, we deny Appellant's appeal of Count III.

Count II, Mistake in Proposal

Appellant asserted that it made a mistake in its proposed CLIN 0001 price based on a mistake in a subcontractor's quote and that it is entitled to recover \$487,800 because it would be "unconscionable to hold [Appellant] to the price as awarded." R4, Tab 73, at 000866. Prior to the hearing, Respondent submitted a request for summary judgment to deny Respondent's mistake claim and Appellant filed a counter-motion for summary judgment asserting that its mistake claim should be allowed. We granted Respondent's motion for summary judgment and denied Appellant's mistake claim for the reasons stated herein.³⁹

³⁸ The record shows that after Appellant demanded the additional staging and construction area in New Jersey Avenue, the COTR asked the Superintendent of the House Office Buildings whether it could provide the space requested by Appellant and received a negative response. Respondent's Hearing exh. 97 at 002; Tr. 3/5 at 526.

³⁹ The Board has not previously issued a written decision on the motions for summary judgment.

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Any inferences must be drawn in favor of the party opposing summary judgment. Hughes Aircraft Co., ASBCA No. 30144, 90-2 BCA ¶ 22,847 at 114,759 (1990). In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. General Dynamics Corp., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 at 109,931-32 (1989). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 626-27 (Fed. Cir. 1984).

CLIN 0001 represented the basic contract work. The CLIN 0001 prices submitted by the offerors in response to the RFP were:

| | |
|-----------------|-------------|
| <u>CLIN 001</u> | |
| Montage: | \$3,584,087 |
| Whiting Turner: | \$3,786,500 |
| Company A: | \$4,060,000 |
| Company B: | \$4,412,000 |
| Company C: | \$4,522,000 |
| Company D: | \$5,099,099 |

R4, Tab 25, at 00109. The government estimate for CLIN 0001 was \$4,740,337. Id. at 00107.

As detailed above, the contract specialist found numerous discrepancies in Appellant's original hand-written price schedule, including white-outs and illegibility. After these matters were corrected, the contract specialist reviewed the CLIN prices and determined that there was an apparent mistake in the CLIN 0007 price because it appeared that Appellant's proposed price for this CLIN was not on a per foot basis as required. R4, Tab 19, at 000083. CLIN 0007 was one of the options for which prices were solicited by the RFP. This CLIN requested unit price per cubic foot for removing and disposing of possible former tower crane concrete foundation during excavation. R4, Tab 13, Appellant's Original Price Schedule, at 00062. Appellant's original proposal reflected a CLIN 0007 price of \$6,409. Id. On April 5, 2005, the contract specialist advised Appellant of the apparent mistake in the CLIN 007 price and that there was a mathematical error in the combined CLIN prices in Appellant's price schedule; the contract specialist requested that Appellant clarify its prices. R4, Tab 17, at 000076. On April 8, 2005, Appellant submitted a typed clarified offer with prices listed for CLIN 001 of \$3,584,087 and of \$35.80 for CLIN 007. R4, Tab 18, at 00078-81. On May 6, 2005, Respondent issued Amendment 3 to the offerors to clarify CLINs 005, 006 and 007, and to obtain revised prices based on these clarifications. R4, Tab at 000094. Appellant's prices did not change. R4, Tab 23, at 00096-99. There is no evidence that the contract specialist specifically requested Appellant to verify whether its CLIN 001 price was correct. Award to Appellant of CLIN 0001 was made on May 12, 2005. R4, Tab 20, at 000087.

Four months later, on September 13, 2005, Appellant first advised Respondent of its assertion that it had made a mistake in its proposed CLIN 0001 price and requested an equitable adjustment to the contract in the amount of \$487,800. According to Appellant, the mistake occurred because one of its clerks failed to fully capture an intended subcontractor price in developing its bid. The subcontractor's price should have been \$542,000. Instead, Appellant misplaced a comma and used a price of \$54,200 in calculating Appellant's total bid price. Appellant stated that it was entitled to the equitable adjustment because it would be "unconscionable to hold [Appellant] to the price as awarded." R4, Tab 73, at 000865-66. Respondent issued a final decision denying that request on December 15, 2005. R4, Tab 110, at 001087-89.

In its complaint, Appellant argued

Because Montage's bid was \$1.2 million lower than the government's estimate, the AOC had reason to believe that the bid mistakenly omitted items that should have been included in the price. The AOC also had a duty to inquire of Montage to review its base contract (CLIN 001) bid and to verify that it was accurate. The AOC did not ask Montage to verify its base contract bid, but only to verify a trivial unit price for removing a piece of concrete crane base that had been used on a previous contract (CLIN 007).

Montage made a clerical error in preparing its bid by dropping a "0" from the estimate received from its stone subcontractor. As a result, Montage's bid was mistakenly low by \$487,800.

Montage is entitled either to correct its clerical error to include the correct stone estimate of \$542,000 in lieu of \$54,200, or to rescind the contract and obtain restitution.

Second Revised Complaint at 18-19.

As an initial matter, we note that Appellant first advised Respondent of this mistake on September 13, 2005. In support of its motion for summary judgment, Respondent advised, and provided evidence that showed, that Appellant had become aware of this mistake in June 2005, and thus subcontracted with another stone subcontractor for the performance of this contract (perhaps prior to the issuance of the notice to proceed under the contract), but Appellant did not assert its mistake claim to Respondent at that time. Respondent's Motion for Summary Judgment (Jan. 7, 2008) at 14; attach, Deposition of Appellant's Project Manager (Oct. 26, 2007), at 248-51, 253-54; R4B, Tab 1, Replacement Stone Subcontractor's Proposal (June 8, 2005), at 0001-03; Tab 2, Replacement Stone Subcontract Agreement (June 9, 2005), at 0004-09. Appellant provided no rebuttal or response to this evidence, and thus the record showed, for purposes of granting Respondent's motion for summary judgment, that Appellant was aware of its claimed unilateral mistake in June 2005.

When a contractor waits an unreasonable amount of time to notify the government of a claimed mistake, the delay has been found by various Boards of Contract Appeals to be a breach of the implied obligation of good faith and fair dealing owed the government that could preclude recovery of the claimed mistake claim. *E.g.*, Turner-MAK (JV), ASBCA No. 37711, 96-1 BCA ¶ 28,208 at 140,795 (1996); J.C. Mfg., Inc., ASBCA No. 34399,

87-3 BCA ¶ 20137 at 101,935 (1987). Thus, the record shows that Appellant's mistake claim, which, if corrected, would have caused Appellant's low-priced proposal to be no longer low, was evidently known to Appellant close to the beginning of this contract. However, the claim was only submitted to Respondent 4 months after award at the time when the agency made it clear that Appellant's staging plan, which violated Respondent's directions on the subject, would not be accepted. Under the circumstances, we believe that Appellant may have breached its obligation of good faith and fair dealing in failing to promptly advance the mistake claim, particularly where, as here, the government had no reasonable basis for believing that Appellant's proposal contained such a mistake.

In any case, however, Appellant has not shown that its mistake claim should be allowed. In McClure Elec. Constructors, Inc. v. Dalton, 132 F.3d 709 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit set forth the elements of proof necessary to establish a unilateral mistake in the context of a government contract:

The contractor must show by clear and convincing evidence that:

1. a mistake in fact occurred prior to contract award;
2. the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error;
3. prior to the award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification;
4. the Government did not request bid verification or its request for bid verification was inadequate; and
5. proof of the intended bid is established.

Id. at 711.

There is clear and convincing evidence in the record that Appellant's mistake was pre-award and clerical in nature as well as the amount of Appellant's intended bid on CLIN 0001. This evidence includes price quotes to Appellant from the stone subcontractor dated March 22, 2005 and May 10, 2005 reflecting that the subcontractor left a zero off its quoted price, so that the quote read "\$542,00" rather than "\$542,000," and Appellant's bid calculation sheet, where its total CLIN 0001 price was calculated, reflected the stone subcontractor quote as "\$54,200." R4, Tab 73, at 000877; Tab 110, at 001088.

However, drawing all inferences in Appellant's favor, the evidence did not demonstrate that Respondent had actual or constructive knowledge of the mistake in Appellant's CLIN 0001 price. We first note that the record demonstrates that Respondent examined Appellant's proposal for possible mistakes and where it had reason to believe that there were mistakes, it clarified the matters with Appellant prior to award. There was no actual notice by Respondent of a mistake in CLIN 0001 because, unlike the mistake in CLIN 007, the mistake in Appellant's stone subcontractor's price was not apparent from the face of Appellant's bid, but could only be discerned from the Appellant's bid calculation sheet.

Appellant contends that Respondent should have known of the mistake in CLIN 0001. The general test of whether the agency should have known of the mistake, so as to

require it to verify the offered price, is whether a reasonable person, knowing all the facts and circumstances, would have suspected a mistake. Chernick v. United States, 372 F.2d 492, 496 (Ct. Cl. 1967). Here, the fact that Appellant's CLIN 0001 price of \$3,584,087 was 24.4 percent lower than the government estimate of \$4,740,337 provided no basis to find constructive knowledge of the mistake, given that the CLIN 0001 prices from five of the six offerors—all of whom were experienced construction contractors—were lower than the government estimate. See Hankins Constr. Co., 838 F.2d 1194, 1196 (Fed. Cir. 1988) (disparity between low bid and government estimate did not put agency on notice of possible mistake, where low bid was clustered with many of the other bids); Sanders-Midwest, Inc., 15 Cl. Ct. 345, 351-52 (1988) (fact that bid was \$2 million less than government estimate did not put agency on notice of possible mistake where seven bids were within \$500,000 of low bid); Lord & Sons Constr. Inc., ASBCA No. 47050, 97-2 BCA ¶ 29,264 at 145,595-98 (1997) (24-percent disparity between low bid and government estimate did not put agency on notice of probable mistake, where 10 of the 11 other bids were below government estimate). The record here shows a fairly close distribution of proposed prices below the government estimate, with Appellant's CLIN 0001 price being only 5.3 percent less than the second low offered price and 11.7 percent less than the third low offered price. This is plainly insufficient to impute notice of a possible mistake in Appellant's bid to Respondent, so as to have obligated Respondent to seek verification of Appellant's CLIN 0001 price.⁴⁰

Because Appellant has failed to establish any genuine issue of material fact that Respondent had constructive knowledge of the unilateral mistake in Appellant's CLIN 0001 price, we denied Appellant's mistake claims and found that Respondent was entitled to summary judgment on Count II of Appellant's appeal.⁴¹

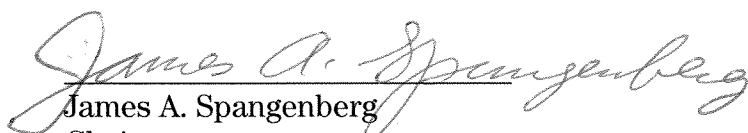
⁴⁰ While the contract specialist did not specifically ask Appellant to verify the CLIN 001 prices, she did ask Appellant to verify the total price for the combined CLINs. A thorough review by Appellant of the total amounts for the combination CLINs could and probably should have included a review of CLIN 001 price, which would have alerted Appellant to its mistake.

⁴¹ To the extent that Appellant argued that Respondent was also required to verify Appellant's price because of what Appellant characterizes as the unusual restrictions imposed by Respondent on construction and staging in order to ensure there was a meeting of the minds, the contract contemplated that the staging area would be designated after award, R4, Tab 26, Contract, General Requirements, § 1.6.C.4.d, at 00186-87; R4B, Tab 83, Drawing G002, note 2, at 2699, the record does not evidence that Respondent was aware of what staging area would be provided until after award, Tr. 3/7 at 375, and, for the reasons detailed above, Respondent's staging designation was not the cardinal change to the contract that Appellant has claimed. Thus, Appellant has failed to establish that Respondent had any duty to discuss this matter with Appellant as part of the price verification process.

Consequently, these appeals are denied.



Kenneth E. Patton
Presiding Member
Contract Appeals Board of
The House Office Building Commission



James A. Spangenberg
Chairman
Contract Appeals Board of
The House Office Building Commission



Shirley A. Jones
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The House Office Building Commission

Dated: June 21, 2010