

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GSBCA 15997-COM GRANTED; GSBCA 16057-COM GRANTED IN PART:
June 22, 2004

GSBCA 15997-COM, 16057-COM

DIVECON SERVICES, LP,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Mitchell S. Griffin of Cox, Wootton, Griffin, Hansen & Poulos, LLP, San Francisco, CA, counsel for Appellant.

Terry Hart Lee, Contract Law Division, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **PARKER**.

DANIELS, Board Judge.

In consolidated appeals, Divecon Services, LP (Divecon) challenges decisions of a contracting officer of the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) which terminated a contract for default and denied termination for convenience costs. We hold that NOAA did not have good grounds and solid evidence for terminating the contract for default. We therefore grant the appeal as to the termination (GSBCA 15997-COM) and convert the termination to one for the convenience of the Government. We conclude that Divecon is entitled to some, but not all, of the claimed termination for convenience costs. We therefore grant in part the appeal as to those costs (GSBCA 16057-COM).

Findings of Fact

1. On July 15, 2002, NOAA awarded to Divecon a contract for the charter of a remotely operated vehicle (ROV), support vessel, and captain and crew for an eight-day cruise in the Olympic Coast National Marine Sanctuary, Washington. Through the use of the

ROV, the agency expected to monitor the recovery of the ocean floor from whatever damage had been done by the laying of fiber optic cables. Exhibit 11¹ at SF1449, 26-27. The cables had been laid in 1999 and 2000, and the work performed on this cruise was to be the third annual portion of a ten-year program of monitoring the recovery of the bottom habitat and the organisms that live there. Transcript at 146-47, 161; see also Exhibit 24 at 4-5.

2. An ROV is a device which operates in contact with or near the ocean floor. Tethered to a vessel with a cable, it transmits electronically to personnel on the vessel information about its location and conditions there, as well as images taken by cameras attached to the vehicle. An ROV also collects organisms and sediment cores for analysis by personnel. Exhibits 3 at § 2.1, 11 at 28-29.

3. Because the ROV would have to operate under ocean waters and over potentially rugged substrate, Exhibit 11 at 28, NOAA was concerned about the durability of the vehicle to be provided by its contractor. This concern was expressed in three ways. First, in the request for proposals, the agency asked offerors to "explain how many hours can be actual dive (underwater) time assuming workable weather conditions before scheduled down time is needed." Exhibit 2 at 6. Divecon responded that it "require[d] two (2) hours out of every twelve (12) hours to perform maintenance on the ROV system and its subassemblies." Exhibit 3 at § 2.3.3. This response, because it was a part of Divecon's proposal, was incorporated by reference into the contract. Exhibit 11 at 1.

4. Second, the agency placed in the contract the following provision, entitled "Mechanical Breakdown":

The contractor is responsible for maintaining all contractor provided equipment & vessels in a safe operating condition during the contract performance. If a mechanical breakdown occurs of the vessel or ROV . . . that is >12 hrs, the vessel & ROV . . . shall be considered to be off charter for the purposes of billing. The contractor shall make every reasonable effort to solve any problem causing the vessel and/or ROV . . . and/or equipment to be out of service, & bring it back into service as quickly as possible to continue contract performance.

Exhibit 11 at 30-31.

5. Third, the agency also placed in the contract a clause entitled "Inspection/Acceptance," which stated in part: "The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price." Exhibit 11 at 2.

6. Divecon's proposal, which became part of the contract, stated that "[t]he operational weather limits of the proposed ROV and vessel combination is approximately Sea

¹All exhibits are contained in the appeal file for these cases. Numbered exhibits were submitted by the Department of Commerce; lettered exhibits were submitted by Divecon.

State 3." Exhibits 3 at § 2.3.3, 11 at 1. In discussions prior to award of the contract, NOAA asked Divecon to explain this statement more fully. Divecon responded:

A sea state of three (3) is approximately winds up to 15 knots, wave heights of four (4) feet and a wave period of four (4) seconds. . . . We use sea states to describe our operating limits because it isn't possible to provide an absolute limit of wind speed, wave height and period, because they are interrelated. We can and have launched and recovered the ROV in sea states greater th[a]n three (3) by positioning the support vessel in a favorable position for recovery. The absolute determining factor is the safety of the ROV and crew. The ROV supervisor on board the vessel will make all determinations as to whether or not it is safe to launch or recover the ROV.

Exhibit 7 at 1. This response, as part of the proposal, was incorporated by reference into the contract. Exhibit 11 at 1.

7. The parties agree that the contract does not explicitly address, and the parties never discussed prior to award, how costs would be allocated if, on any cruise day or days, the weather was so bad that the ROV could not operate. Transcript at 54-55, 122, 232. The contract mentions weather impacts only in its Excusable Delays clause, which provides:

The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

Exhibit 11 at 3 (emphasis added).

8. The Government was permitted to terminate the contract either for cause or for "its sole convenience." As to the first of these possibilities, the contract stated:

The Government may terminate this contract, or any part hereof [sic], for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Exhibit 11 at 5.

9. With regard to termination for the Government's convenience, the contract provided:

In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. . . . The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

Exhibit 11 at 4-5.

10. The contract contained a very brief Changes clause, which provided in its entirety as follows: "Changes in the terms and conditions of this contract may be made only by written agreement of the parties." Exhibit 11 at 2.

11. The contract award amount was \$312,352 – \$121,365 for mobilization and demobilization, \$189,987 for an eight-day base survey period, and \$1,000 for additional sampling capabilities. Exhibit 11 at SF1449, 1. By incorporating by reference Divecon's proposal, the contract also provided that if the survey were to continue beyond the eighth day, NOAA would pay the contractor \$22,960 for each additional day. Exhibits 3 at § 3.1, 11 at 1.

12. The contract originally stated that the eight-day survey period would occur between August 12 and September 20, 2002, with specific dates to be set at the time of contract award. Exhibit 11 at 1, 27. Those dates were established as August 29 to September 7. Transcript at 305-06. The parties later agreed, however, and amended the contract to provide, that the cruise would take place from September 12 to 20. Exhibit 12 at 2; Transcript at 55.

13. Before the cruise began, the ROV was tested in the water, both at Divecon's headquarters in California and in Seattle, and no problems were found. Transcript at 385-88. Nevertheless, serious difficulties arose from the start of the survey. According to the marine biologist who was the senior NOAA scientist on the cruise (and the contracting officer's technical representative), Divecon's equipment worked less than five percent of the time. *Id.* at 194. The contractor did not provide sufficient power to run all the required equipment, the ROV was damaged both on launch and recovery, lasers were positioned improperly so that accurate measurements could not be taken, light sources were inadequate, the images from the cameras were unclear, the beacon which should have allowed tracking of the ROV's location failed, and the vessel sometimes pulled the ROV off the area being studied. Transcript at 167-81; Exhibit I at 1-2. Finally, on September 15, Divecon achieved the first dive of consequence, through which NOAA obtained some usable data. Transcript at 174, 179; Exhibit I at 3. But on September 16, a thruster on the ROV failed, robbing Divecon of any ability to steer the vehicle. Transcript at 181; Exhibit I at 3. Divecon's

cruise superintendent generally corroborated this recitation of events. Transcript at 389, 408. The NOAA scientist testified that compared to other surveys in which she had participated, the equipment failures on this one were "horrendous. I've never experienced this type of equipment failure." Id. at 194.

14. On September 16, Divecon's vice-president decided that the vessel would have to return to port because problems with the ROV were so severe that repairs could not be made at sea. Transcript at 283, 288, 328, 390. At this time, some individuals with each party seem to have believed that the other party had terminated the contract. Id. at 186, 200, 327-29, 330, 341-42; Exhibit L at 25. We find, however, that no termination took place at the time. NOAA's contracting officer testified that he was not even considering termination on September 16; the agency's contract administrator understood that Divecon was not terminating the contract; and Divecon's president and vice-president both said that their firm did not tell NOAA on that date that it was terminating or abandoning the contract. Transcript at 33-34, 57-58, 233-34, 327.

15. In the wee hours of the morning of September 17, the NOAA scientists disembarked at Port Angeles, a town on the Olympic Peninsula. The vessel then continued on to Seattle, eight hours away, where necessary repairs to the ROV could most easily be made. Divecon preferred to do the work in Seattle because the vessel had berthing rights there and replacement parts could readily be flown to that location. Transcript at 282-83, 289; Exhibit E at 9 (unnumbered). Work on the ROV began immediately. Transcript at 331-32, 394; Exhibit E at 9 (unnumbered). It continued non-stop throughout the remainder of September 17 and all of the next two days. Transcript at 240, 283-84, 395-96; Exhibit E at 9-11 (unnumbered). Divecon's vice-president testified that his firm incurred costs for the repairs "[b]ecause we were in discussions with NOAA and we felt that we were going to be going back to work." Transcript at 368. The agency's contracting officer and contract administrator testified that they understood that throughout the repair period, Divecon and its subcontractors were doing everything they possibly could, without any delay, to fix the equipment. Id. at 74-76, 124-25.

16. Early on the afternoon of September 17, the NOAA contracting officer, contract administrator, and senior survey scientists spoke with Divecon's president and vice-president by phone. The contracting officer told Divecon that if it demobilized upon reaching Seattle, it would be considered to have abandoned the project. Divecon's president made clear that his firm was not abandoning the project, but rather, working to make the ROV operable. The NOAA personnel did not dissuade Divecon from making the repairs. Nor did they suggest additional or revised contract terms at this time. Transcript at 37, 63, 235-36. The contracting officer testified specifically that he understood the vessel was in Seattle and equipment was being evaluated and repaired. Id. at 103; see also id. at 201 (senior scientist's testimony that she understood Divecon was working on equipment in preparation for completion of contract work).

17. On the afternoon of the following day, September 18, Divecon's vice-president wrote by electronic mail to the contracting officer:

Divecon is presently endeavoring to identify and rectify the ROV problems in preparation to continue with the project. . . . If everything continues at the present rate we hope to be ready to depart from Seattle at 00:01 hours Friday [September 20]. This would put the vessel in Port Angeles to pick up the NOAA personnel at (approx.) 06:00 to 08:00 Friday.

In an effort to have complete understanding of a continuing operation between Divecon and NOAA, we need your comments and discussion regarding the following: . . .

3.) How will it be handled if sea or weather conditions prevent operations upon arrival at site??

Exhibit L at 12-13, 17-18, 20. NOAA was aware at this point that Divecon had been working on the ROV since the previous day and would continue to do so, and the agency did not respond by directing Divecon to cease its efforts. Transcript at 64, 332.

18. Early on the morning of September 19, Divecon's president and vice-president spoke with NOAA's contracting officer. The Divecon officials reported that work on the ROV was progressing well. The contracting officer said that he was discussing with the survey scientists scheduling for a resumption of the cruise. Transcript at 260-61; Exhibit 16 at 4.

19. Later that morning, the contracting officer and contract administrator spoke with the survey's senior scientist about conditions under which the cruise might be continued. Transcript at 190-91. With specific regard to the two questions raised in Divecon's message of the previous day, the scientist then wrote to the contracting officials by electronic mail:

We will not pay for sea or weather conditions preventing us from diving on a site necessary to complete the base part of the project. . . . Because we had calm, launchable weather the entire time we were at sea² and also during the original window of 29 August through 7 September, but we were not able to collect data pertaining to our main purpose, we are not willing to accept costs incurred for weather days.

Exhibit L at 11, 16.

20. There followed two electronic mail messages from the NOAA contract administrator to Divecon's vice-president, describing the agency's conditions for resuming the cruise. After a brief message at 2 p.m. on the 19th, Exhibit L at 4-5, 8, the contract administrator sent this more detailed communication a few minutes before 4:

²The senior scientist and Divecon's cruise superintendent both testified that weather conditions were good and the seas were calm during the cruise. Transcript at 189, 403.

The Government considers the malfunction of the ROV and Divecon's inability to correct it unacceptable and will consider termination of the contract . . . pursuant to the Termination for Cause clause of the contract document . . . unless Divecon is willing to agree to the following conditions.

Assuming you have corrected all mechanical problems with the ROV, the Government is willing to reinstate research efforts and pay you the balance of what may be due under the terms of the contract if the following minimum amounts of data are obtained within an 8 day survey period after remobilization. [Operations described.] . . .

NOAA also has the following staffing requir[e]ments:

NOAA's complete scientific party will not be available to board the ship in Port Angeles until 3PM on Friday [September 20]. . . .

In addition, because of the dates, the composition of our scientific party is changing necessitating crew transfers during the cruise. . . . [W]e will require the [vessel] to transfer the staff using its skiff or for Divecon to make alternative arrangements for boat transfer out of Neah Bay [– a town west of Port Angeles and also on the Olympic Peninsula – on September 24]. . . .

The following is the Government response to your questions sent by email yesterday

3.) How will it be handled if sea or weather conditions prevent operations upon arrival at site??

The Government is not willing to pay for survey days where weather conditions prevent operations.

Id. at 3-4. This message represented the contracting officer's position – the official position of the Government – as of the time it was sent. Transcript at 67, 129. It was also the first mention to Divecon of conditions the agency wished to impose in exchange for continued work on the contract. Id. at 66-67, 239, 333-34.³ The contracting officer testified, and the

³According to NOAA's senior scientist on the cruise, she and a colleague handwrote certain conditions for resuming the survey (including the extent of work to be performed and the insistence that the contractor absorb the cost of all days on which bad weather precluded survey work) while the vessel was returning to port on September 16. She testified that she gave this note to a Divecon employee, who gave it to Divecon's cruise superintendent. Transcript at 187-88. There is no corroborating evidence for the scientist's assertion that she proposed such a condition to Divecon on the 16th, however. The NOAA contract administrator's notes state that on the 17th, she discussed with Divecon's president and vice-president such a condition for resuming contract work. Exhibit K at 3-4. The contract (continued...)

written record confirms, that at this time, NOAA had not established new dates for continued contract performance. Id. at 106.

21. Divecon's president testified that he was taken aback by the agency's response to the question about allocation of costs on days when bad weather prevents operations, and he tried to contact the contracting officer to discuss the response as soon as he saw it. The contracting officer was gone for the day, however, and no further communications occurred on the 19th. Transcript at 239.

22. While the parties' officials slept, Divecon and subcontractor personnel were continuing to attempt to make the ROV operable again. At 1 a.m. on September 20, they discovered a problem with the multiplexer, a device which permits communication between the ROV and the vessel. They fixed the problem, and at this time, repairs were essentially complete. In light of the history of equipment failures on the cruise, Divecon's superintendent decided to take the unusual step of testing the ROV in deep water. This test revealed one minor problem, which was fixed quickly. By 6 a.m., the ROV was fully operational. The superintendent took the vessel back to port to pick up some spare parts, and then, from an abundance of caution, out for a second, highly unusual deep water test. The test showed no problems at all, and by 2:30 p.m., Divecon was ready to resume the cruise. Transcript at 396-401; Exhibit E at 12 (unnumbered).

23. Well before 2:30 p.m., however, other events critical to this story had occurred. At 8 a.m., NOAA's contracting officer, contract administrator, and survey senior scientist spoke by telephone with Divecon's president and vice-president. The principal subject of discussion was the conditions under which contract performance would continue. The parties agreed on all conditions other than the allocation of costs incurred on bad weather days.⁴ Although the senior scientist said that she was not willing to have NOAA absorb these costs, the contracting officer felt that agreement could ultimately be reached. Transcript at 43, 106-07, 193, 213, 240-41. The NOAA personnel asked about the status of the ROV, and Divecon confirmed that testing was under way and that the contractor was on track to pick up the NOAA scientists later that day in Port Angeles. No one suggested

(...continued)

administrator testified on cross-examination, however, that she probably did not communicate this condition to Divecon on the 17th. Transcript at 69. She expressly testified that her electronic mail messages on the afternoon of the 19th constituted the first mention of such a condition to Divecon. Id. at 67-68. Further, it would have made no sense for Divecon to have asked on the 18th, "How will it be handled if sea or weather conditions prevent operations upon arrival at site??" Exhibit L at 13-17, if NOAA had already answered the question. We find that no discussion of conditions for resuming the cruise occurred prior to the afternoon of September 19.

⁴The only written recitation of the agreed-upon terms is contained in Divecon's letter to the contracting officer dated September 27, 2002: "We . . . agreed to 7.5 days of vessel time which included 6 hours of NOAA crew transit to support NOAA crew changes. We agreed that if the voyage extended past the 7.5 days the Contract would be charged in accordance with the Contract terms on a daily rate." Exhibit 16 at 5; Transcript at 198-99, 338, 360.

that the equipment might not be ready at that time. Id. at 106, 261-62, 291. Firm dates for continued performance were still not established. Id. at 107. No mention was made of terminating the contract. Id. at 43.

24. At 10 a.m. on September 20, another telephonic conference took place. This one involved everyone who had participated in the 8 a.m. conference except for NOAA's survey senior scientist. Again, agreement was reached on all issues other than the one involving bad weather. In particular, Divecon agreed to provide seven and one-half days of additional research time and to transfer scientists at Neah Bay at its expense. The agency's contracting officer and contract administrator decided to talk with the scientist one more time, regarding payment for bad weather days, before finalizing the agreement. Transcript at 72-73, 107-08, 212-13, 242; Exhibit K at 6-7. At the end of this conversation, Divecon's president testified, "I thought we had a deal, and I think [the contracting officer] thought we had a deal as well." Transcript at 241-42. Divecon's vice-president said, "I thought it was pretty much a slam dunk and they just needed to pacify [the scientist] and, you know, let's get on with it." Id. at 361.⁵

25. At 11 a.m., the contracting officer and contract specialist spoke again with the survey senior scientist. During this conversation, all participants assumed that Divecon's equipment would be repaired and available to proceed to Port Angeles for resumption of the cruise. Transcript at 127. Even if the equipment were ready, however, the contract administrator's notes reflect, the scientist "would not agree to paying for weather days and decided she would rather lose the data than go back out and finish the survey under those conditions." Exhibit K at 7.

26. The contracting personnel then called Divecon's officials once more. A little after 11, the contracting officer orally terminated the contract and told Divecon that he would issue a show cause notice that afternoon. Transcript at 70-73, 296, 412; Exhibits 16 at 6, K at 7. Divecon's president testified that during this conversation, the NOAA representatives never asked whether the ROV was ready to operate and never said that they were terminating the contract because the ROV was not ready. Instead, he said, the question of when the vessel would be able to pick up the scientists was discussed. Because this question would have been moot without an operable ROV, he felt that all participants in the conversation understood that the ROV was indeed operable. Transcript at 245-46, 303; see also id. at 337 (Divecon vice-president's similar recollection). The NOAA contract administrator's testimony appears to confirm these statements: her notes do not contain any information from that conversation about the state of the repairs to the ROV, and she

⁵The contracting officer testified that he might have told Divecon, during this conference, that a show cause notice would be forthcoming because the equipment had not yet been repaired. Transcript at 109. Divecon's president testified, however, that the NOAA contracting personnel did not inquire as to whether the ROV was ready to operate at that instant. "[W]e wouldn't have fought this battle if the ROV wasn't ready to go." Transcript at 245. In view of the emphasis on reaching an agreement which would permit continued performance of the contract, we find the latter testimony a more likely portrait of what actually transpired.

testified that if that subject had been discussed, she would have recorded mention of it. Id. at 81.

27. At about 1 or 2 p.m. on September 20, the contract administrator sent to Divecon, by facsimile transmission, the contracting officer's show cause notice. Transcript at 46, 296. The notice stated:

Since you have failed to perform the subject contract as described in the terms and conditions of the contract, the Government is considering terminating the contract under the provisions for default.

Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to [me] within 10 days after receipt of this notice.

Exhibit 13 at 1. The contracting officer testified that the last quoted sentence gave Divecon a chance to present evidence as to why the termination should be for the convenience of the Government, rather than for default. Transcript at 413.

28. Divecon responded to the show cause notice at about 4 p.m. by sending to the contracting officer a letter which stated:

We are writing to make clear and confirm the following:

1. All Divecon personnel and subcontractors are, at this moment, on the vessel and Divecon is ready to proceed to Port Angeles to complete the contract. The ROV has completed multiple test dives and is fully operational;
2. Divecon is ready, willing, and able to complete the contract as written, or alternatively, in accordance with the modifications you and [the contract administrator] agreed upon with us during our telephone conversation at approximately 10 a.m. this morning;
3. Divecon will remain at our current sea trial location, prepared to proceed to Port Angeles, until 1700 hours today, September 20, 2003;
4. ***Absent notification from you prior to 1700 hours today September 20, 2002***, to proceed to Port Angeles, we will begin at 1700 hours to transit back to Seattle and commence demobilization.^[6] Upon doing so,

⁶Divecon's president testified that he put a time limit on NOAA's response because his firm had been incurring costs to repair the ROV and maintain its non-ROV subcontractors (such as the vessel owner) on stand-by status on a twenty-four-hour basis, and the significant
(continued...)

we will have no choice but to consider the contract to have been "Terminated for the Government's convenience."

We reiterate that Divecon is in all respects ready willing and able to complete the contract. There is no cause for a termination of the contract and any termination by the Government under the circumstances will be "for the Government's convenience." We look forward to your immediate confirmation that Divecon should proceed to Port Angeles to complete the contract.

Exhibit 14; Transcript at 47, 337-38.

29. Upon receipt of this letter, NOAA's contract administrator called the contracting officer, who had gone home earlier in the day. Transcript at 47, 413. The contracting officer decided not to respond that afternoon. Id. at 414.

30. On the following morning, Saturday, September 21, the contracting officer and contract administrator wrote to Divecon, over the contracting officer's signature:

[T]he assumption cited in your September 20 letter that the circumstances of the termination support cancellation for Convenience is incorrect, and premature. The contract was terminated because of the failure of your equipment to adequately perform the survey, and the Government's concern that you would not be able to correct that performance based on current sea state conditions in the survey area. The final decision as to whether the termination should be converted from a "Default" to a "Convenience" situation will be made after review of the facts, as presented by both DIVECON and the Olympic Coast Sanctuary's representatives.

Exhibit 15.

31. Divecon responded on September 27 with a lengthy recitation of its view of the history of this misadventure. Exhibit 16. The contractor pressed its points that on September 20, after "proceed[ing] with due diligence and in reliance upon its reasonable understanding of NOAA's directives . . . to complete the Contracted work," it "was ready, willing and able to complete . . . the Contract." Id. at 1. Divecon consequently maintained that "the reasonable and equitable conclusion is that NOAA's decision to terminate the Contract was for the convenience of the Government." Id. Divecon said that in following NOAA's directives, it "necessarily mobilized and demobilized for the contracted work, performed a portion of the work and incurred other costs in connection with the partial performance of the Contract." Id. The contractor asked to be paid \$239,022.91 and provided a detailed breakdown of costs sought. Id.; Exhibit 17.

(...continued)

financial impact to Divecon "could not just continue on and on and on and on." Transcript at 248.

32. The contracting officer reviewed Divecon's September 27 letter, considered each of the arguments made in it, and "concluded that the situation did not merit conversion of the termination to a convenience termination." Transcript at 415. Consequently, on October 11, 2002, he issued a decision that the contract "is partially terminated for default due to the inability on Divecon's part to make progress so as to endanger performance of the contract in accordance with its terms and conditions." Exhibit 18 at 1. The contracting officer asserted that "as a result of significant equipment problems, Divecon effectively abandoned performance under the contract on September 16 when Divecon's [cruise superintendent] apparently ordered the vessel to return to Port Angeles to demobilize and then continue on to Seattle to effect the needed repairs to the ROV." *Id.* The contracting officer noted that "we attempted to reach agreement as to the conditions under which the contract could continue before our official Notice of Termination on September 20," but asserted that agreement proved impossible because "Divecon refused to guarantee performance of the equipment under sea states existing at that time." *Id.* He also asserted that "as late as that morning, Divecon had still not advised that the mechanical problems had been corrected to their satisfaction, even though Divecon had continually represented that the ROV was under repair and being tested." *Id.* The contracting officer agreed to pay Divecon \$84,431.38 – \$60,683 for half of the costs of mobilization and demobilization and \$23,748.38 for one charter day. *Id.* at 1-2. He testified that he paid for one day of work because he felt, based on the survey senior scientist's advice, that the Government had received "value for their mobilization at the start of the contract" and "one day's worth of value" from the cruise. Transcript at 118, 416.

33. In testifying as to his reasons for terminating the contract, the contracting officer reiterated grounds noted in his show cause notice of September 20, letter of September 21, and decision of October 11. For example, he said, "the basis on which the . . . contract was going to be terminated [was] the failure of Divecon's equipment to adequately perform the survey"; "[t]hey were in default of the contract because of the failure of the equipment to perform properly"; and "I told them it was terminated because the equipment wasn't ready to go [on September 20]." Transcript at 112-13, 128, 415; see also *id.* at 412. The contracting officer also testified, however, that he was disappointed and surprised that he had terminated the contract. The surprise was that the parties could not reach agreement on the allocation of costs on days on which bad weather prevented survey activities. *Id.* at 129, 418-19.

34. Other statements by two agency witnesses regarding the cost impact of bad weather are worth mentioning, as well. First, NOAA's senior survey scientist says that she believed on September 20th – the day on which the contracting officer orally terminated the contract – that a reasonable compromise on the issue would have been splitting the costs between the parties. Transcript at 206, 212. Indeed, she believed that she had suggested to the agency's contracting officer and contract administrator that NOAA propose such a compromise, and she thought (but was not sure) that they had made such a proposal to the contractor. *Id.* at 157, 206, 210; Exhibit J at 7-8. Upon being confronted with the written record, however, she could not confirm that such an offer was ever discussed or made to Divecon. Transcript at 207-09; Exhibits K at 6-7, L at 4, 16. The Board finds that even if NOAA ever contemplated making such an offer – and there is no evidence that it did – no compromise on allocation of costs of bad weather days was ever proposed by the agency to

Divecon. See Transcript at 243-44 (testimony of Divecon's president that "there was no talk of compromise. There was no offer of split rate for weather delays. It was never mentioned.")

35. The contracting officer also made notable statements regarding the cost impact of bad weather. He testified that when a NOAA contract contemplates that a contractor might be in a stand-by status due to bad weather, the contract usually establishes a rate at which the contractor will be paid for that time. Further, when a NOAA contract is silent as to the financial impact of bad weather, the agency typically negotiates a rate at which the contractor will be paid for stand-by time. Transcript at 122-23. With regard to this particular contract, he said that if Divecon had agreed to absorb the cost of bad weather days, resumed the cruise, and encountered several days on which weather precluded survey operations, he "would have negotiated some consideration." Id. at 130. He stated that during the negotiations on September 20, however, he never said this to Divecon. Id.

36. Divecon's president also testified as to the cost impact of bad weather. His understanding was that because the contract did not contain any "weather risk allowance," "[a]s long as we were up and running, we were on hire, or on charter as the contract says, regardless of weather." Transcript at 276. Therefore, if weather precluded survey activities, the contract's excusable delay clause would have come into effect, and NOAA would have paid Divecon the contractually-prescribed daily rate for days beyond the eight-day base period of the cruise. Id. at 277. With this understanding, Divecon had not included a "weather risk allowance" in its proposal. Id. at 312. Divecon's president felt that accession to NOAA's demand that the contract be amended to require Divecon to absorb all bad weather costs would have been grossly unfair, for stand-by costs for bad weather would have been similar to those Divecon incurred while the ROV was being repaired, and "we could not absorb those costs not knowing how long the weather was going to go bad in order to get the seven and a half days of data that they needed." Id. at 311. Effectively confirming this concern about uncertain and potentially large costs, NOAA's senior survey scientist testified that "typically . . . in Washington [State] the weather deteriorates towards the latter part of September, and then you get into winter conditions where you often have higher sea states." Id. at 191.

37. On November 12, 2002, Divecon submitted to the contracting officer a certified claim for termination for convenience costs in the amount of \$154,592.54. NOAA's contracting officer received the claim on November 14. Exhibit 20. The claim includes five line items: "mobilization/demobilization balance owed" (\$60,683); "sampling equipment" (\$1,000); "costs incurred during repair effort expecting to continue operations" (\$69,434.69); "additional costs incurred during repair effort expecting to continue operations" (\$3,525.90); and "allowable profit for the terminated portion of the work" (\$19,948.95). Id. at A-1. Divecon's president explained the derivation of each of these line items. The balance owed for mobilization and demobilization was the contract amount for those activities, less the contracting officer's allowance of one-half of that amount in the termination for default decision. The sampling equipment was purchased by Divecon expressly for contract performance, and the amount was provided for in the contract but never paid. The costs incurred during the repair effort were actually-incurred costs – for both Divecon personnel and subcontractor personnel and equipment – plus markups for

overhead (only for Divecon personnel costs) and general and administrative costs. The other additional costs were for miscellaneous local purchases and shipping, plus a markup for general and administrative costs. The profit was at the same rate at which the job was bid – twelve percent of costs involved in setting the contractually-specified daily rate for the seven days of the cruise which were planned, but never occurred. Transcript at 249-52, 263-64, 304, 313; see also Exhibit 20 at Exhibit A. NOAA has not challenged any of these costs.

38. In making its claim, Divecon asserted:

Had the Government unequivocally instructed Divecon to terminate work when the ROV problems became apparent, Divecon would have done so and a significant amount of the costs that make up this claim would never have been incurred. Instead, the Government partially terminated the contract on the basis of default after having encouraged Divecon to incur the costs of staying on station and continuing to prepare to complete the contract. Divecon therefore submits this claim for its actual costs incurred and associated overhead, less those amounts that the Government has agreed to pay.

Exhibit 20 at 2. Divecon's president explained that if the contract had been terminated on September 16 – when the contractor was forced to head back to port because the ROV could not be made operable at sea – Divecon could have simply trucked the ROV to its headquarters in California and repaired it there, as personnel had spare time in which to perform the repairs. The contractor would not have had to incur the costs it did incur for around-the-clock repair efforts and stand-by of the vessel and subcontractor personnel. Transcript at 253, 304.

39. The contracting officer denied the termination for convenience cost claim on December 17, 2002. He wrote:

[B]ecause all of the facts and circumstances show that Divecon abandoned performance, the partial termination for default was proper; and there is no basis on which to convert the termination for default to a termination for convenience and pay Divecon the costs of performance, when in fact Divecon failed to perform the contract within the requisite period of time.

Exhibit 22.

Discussion

GSBCA 15997-COM – Termination for Default

The issue in GSBCA 15997-COM is whether NOAA's partial termination for default of Divecon's contract was permissible. "[A] default-termination is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." J. D. Hedin Construction Co. v. United States, 408 F.2d 424, 431 (Ct. Cl. 1969) (citation omitted). The Government bears the burden of proving by a preponderance of the evidence the propriety

of the termination. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 763-65 (Fed. Cir. 1987). "[A] termination for default will be set aside if it is arbitrary or capricious, or constitutes an abuse of the contracting officer's discretion." McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1326 (Fed. Cir. 1999) (citing Darwin Construction Co. v. United States, 811 F.2d 593, 598 (Fed. Cir. 1987)). See also American Sheet Metal Corp. v. General Services Administration, GSBCA 14066, et al., 99-1 BCA ¶ 30,329, at 149,992; Sierra Tahoe Mfg., Inc. v. General Services Administration, GSBCA 12679, 94-2 BCA ¶ 26,771, at 133,157.

A contract clause permitted NOAA to terminate the contract, "or any part hereof[sic], for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance." Finding 8. NOAA has given many reasons for its action, both in its contracting officer's letters and decision and in its brief in this appeal. We have distilled these justifications into four reasons and will discuss each of them. Whether a reason was cited by the contracting officer or even known to him at the time of termination is immaterial. If a valid basis for termination for default existed at that time, we will uphold the decision. Empire Energy Management Systems, Inc. v. Roche, 362 F.3d 1343, 1357 (Fed. Cir. 2004); Kelso v. Kirk Brothers Mechanical Contractors, Inc., 16 F.3d 1173, 1175 (Fed. Cir. 1994); Joseph Morton Co. v. United States, 757 F.2d 1273, 1277 (Fed. Cir. 1985); Pots Unlimited, Ltd. v. United States, 600 F.2d 790, 793 (Ct. Cl. 1979); ESC Polytech Consultants, Inc. v. General Services Administration, GSBCA 12509, 95-2 BCA ¶ 27,629, at 137,754.

The principal reason given by NOAA for the termination was "the inability on Divecon's part to make progress so as to endanger performance of the contract in accordance with its terms and conditions." Finding 32 (contracting officer's decision of October 11). For this contention to succeed, the Government must convince us that the contracting officer had a "reasonable belief . . . that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance." McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016 (Fed. Cir. 2003) (quoting Lisbon Contractors, 828 F.2d at 765); see also Hannon Electric Co. v. United States, 31 Fed. Cl. 135, 143 (1994); American Sheet Metal Corp., 99-1 BCA at 149,992-93. The Board "should focus on the events, actions, and communications leading to the default decision in ascertaining whether the contracting officer had [such] a reasonable belief." McDonnell Douglas, 323 F.3d at 1017.

The time remaining for contract performance was originally until September 20, 2002. The events, actions, and communications leading to the default decision demonstrate, however, that NOAA effectively waived that contract completion date and never established a new completion date.

The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued

performance by him under the contract, with the Government's knowledge and implied or express consent.

Empire Energy, 362 F.3d at 1354 (quoting DeVito v. United States, 413 F.2d 1147, 1153-54 (Ct. Cl. 1969)). It was clear to all by September 16 – when only one day's worth of data had been collected, the ROV needed major repairs, and only four days remained before the end of the prescribed contract period – that the contractually-required eight-day cruise could not be successfully completed by September 20. Yet rather than terminate the contract because of the contractor's failure to provide the necessary equipment and services, NOAA personnel encouraged Divecon to continue contract performance (under the Mechanical Breakdown clause) by going to the considerable expense of repairing the ROV while the vessel and various personnel were standing by. Throughout the days of September 17, 18, and 19, and part of September 20, NOAA personnel knew that Divecon was working hard, around the clock, to fix the vehicle. The agency's contracting officer never dissuaded the contractor from continuing these efforts, choosing instead to attempt to negotiate terms under which the cruise would continue – obviously, beyond the original completion date of September 20. Such action constitutes a waiver of that date. Automated Services, Inc., GSBCA EEOC-2, et al., 81-2 BCA ¶ 15,303, at 75,756-57; Applied Cos., ASBCA 43210, 94-2 BCA ¶ 26,837, at 133,487; S.T. Research Corp., ASBCA 39600, 92-2 BCA ¶ 24,838, at 123,927; cf. Technical Systems Associates, Inc. v. Department of Commerce, GSBCA 13277-COM, et al., 00-1 BCA ¶ 30,684, at 151,563 (1999) (Government waived right to terminate for default when, despite knowing of valid ground for termination – a false certification by the contractor – it let the contractor spend time, effort, and money in attempting to perform). Without a new reasonable and specific completion date, the Government could not rationally terminate for default for failure to make progress, since there was no objective against which the contractor's progress could be judged. DeVito, 413 F.2d at 1154; American Sheet Metal Corp., 99-1 BCA at 149,995; Alton Iron Works, Inc., GSBCA 2596, 69-2 BCA ¶ 7841; Electronics of Austin, ASBCA 24912, 86-3 BCA ¶ 19,307, at 97,631.

A second reason given by NOAA as justification for terminating the contract is that Divecon's equipment failed to perform the survey adequately and that as late as the morning of September 20, "Divecon had still not advised that the mechanical problems had been corrected to their satisfaction, even though Divecon had continually represented that the ROV was under repair and being tested." Findings 28 (contracting officer's letter of September 21), 32 (contracting officer's decision of October 11). Thus, according to the agency, Divecon "acknowledge[d] that it could not continue performance as originally agreed." Respondent's Post-Hearing Brief at 14.

That the equipment – and the ROV in particular – malfunctioned for most of the first four days of the cruise is uncontested. After Divecon took the vessel into port in order to repair the ROV, however, it assured NOAA on September 18 that it expected to be ready to resume cruise operations within two days. From that date until the contract was terminated, the parties negotiated terms under which the cruise would continue, all the while assuming that Divecon's estimate was accurate. The assumption proved correct, for as early as the morning of September 20, the ROV was fixed and Divecon was prepared to resume operations. The only reason that the contractor did not make an affirmative statement that the mechanical problems had been resolved was that the agency representatives, believing that resolution had occurred, never asked for such a statement. Divecon never said on

September 20 that it could not continue performance. To the contrary, it specifically pledged that it was "ready, willing, and able to complete the contract as written" or in accordance with agreed-upon modifications.

As to problems with the equipment, the agency cites Western Machinery Co., AGBCA 83-266-1, 87-3 BCA ¶ 20,085, at 101,680, for the proposition that where extensive repairs are necessary to produce a fully operational product and such repairs cannot be made during the performance period, termination for default is warranted. Respondent's Post-Hearing Brief at 16. There is a significant difference between Western Machinery and the instant case, however, and it relates to the difficulty on which founded the alleged justification of failure to make progress. In Western Machinery, the contracting officer reasonably determined that the equipment in question had major defects which could not be repaired within the period allowed by the contract, and he terminated the contract for default immediately upon making that determination. Here, however, the contracting officer allowed – indeed, encouraged – the contractor to repair its equipment within an open-ended period of time, and refrained from terminating the contract until the equipment had been repaired. By that time, termination for default was not permissible.

A curious reason given for terminating the contract for default is that Divecon could not guarantee the performance of its equipment under sea states existing on September 20, or in sea states rougher than sea state 3. Findings 28 (contracting officer's letter of September 21), 32 (contracting officer's decision of October 11); Respondent's Post-Hearing Brief at 14, 21. The record contains no evidence as to sea states existing on September 20. The contract required Divecon to perform only in sea states of 3 or less (although the contractor promised to perform in rougher sea states whenever possible). Any guarantee that the equipment would perform in sea states greater than 3 would have necessitated an amendment to the contract. Such an amendment was never even broached, much less agreed to, so it is particularly odd for NOAA to contend that Divecon's failure to make such a guarantee justified termination for default.

NOAA's last identifiable basis for the termination was that Divecon "abandoned performance," Finding 39 (contracting officer's decision of December 17), or "effectively abandoned performance . . . on September 16 when Divecon's [cruise superintendent] apparently ordered the vessel to return to Port Angeles to demobilize and then continue on to Seattle to effect the needed repairs to the ROV," Finding 32 (contracting officer's decision of October 11); see also Respondent's Post-Hearing Brief at 14 ("Divecon's abandonment of performance as a result of significant equipment problems").

We find no evidence that Divecon abandoned performance on September 16 or at any other time. On September 16, the contractor headed its vessel toward port for the purpose of making repairs to the ROV so that the cruise could continue. On September 20, the contractor proclaimed itself "ready, willing, and able to complete the contract." What Divecon did not agree to do was to assume all costs which might be incurred if bad weather prevented survey operations. The contract did not explicitly address allocation of costs in the event of bad weather, so a change would have been necessary to provide for such allocation. In its post-hearing brief, Divecon says that it "can find no case or reported administrative hearing in which a contractor has been found to be in default on a government contract on the basis that it would not accept a contract modification – in this case, a contract

modification that would place the contractor at significant financial risk." Appellant's Post-Hearing Brief at 11-12. Evidently NOAA could find no such case, either, for it did not file a reply brief in which it might have contested Divecon's assertion. We agree with Divecon that permitting the Government to terminate a contract on this ground would generally be "a license for abuse of contractors." See Appellant's Reply Brief at 6. It would be especially improper in this case, for the contract's brief Changes clause permitted "[c]hanges in the terms and conditions of this contract . . . only by written agreement of the parties," and no such agreement was ever reached as to allocation of bad weather costs.⁷

We can appreciate that NOAA wanted additional consideration in exchange for allowing Divecon to perform the contract later than the parties had planned. Why the agency insisted on imposing on Divecon the particular costs of standing by in the event of bad weather, however, is unclear. The contracting officer testified that the agency usually negotiates a rate at which a contractor will be paid for stand-by time in the event of bad weather, and that even if Divecon had accepted the risk of assuming these costs, he would have paid some of them anyway. The agency's survey senior scientist mistakenly thought that NOAA had proposed splitting the costs and that a division would have been reasonable. Perhaps the scientist insisted that Divecon accept the costs because NOAA did not "have anymore [sic] money" to pay claims under the contract. She had asked the agency's contracting officials, "Where would money come from . . . ?" This is surely not a permissible reason for terminating a contract for default. In any event, we agree with Divecon that the contractor's refusal to change the contract to its potential significant financial detriment was the real cause for termination, and it was not a valid justification.

In sum, we conclude that NOAA did not have good grounds or solid evidence justifying the partial termination for default of the contract. To the contrary, the termination was an abuse of the contracting officer's discretion. We therefore grant GSBCA 15997-COM, and under the terms of the contract's Termination for Cause clause, we convert this improper termination for default to a termination for the convenience of the Government.

GSBCA 16057-COM – Termination for Convenience Costs

The issue in GSBCA 16057-COM is whether Divecon's claimed termination for convenience costs should be awarded to the contractor.

[T]he overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to make the contractor whole for the costs

⁷Even the testimony of NOAA personnel supports a conclusion that the agency's insistence in imposing on Divecon all the costs of standing by in the event of bad weather was unreasonable. The contracting officer testified that the agency usually negotiates a rate at which a contractor will be paid for stand-by time in the event of bad weather. The contracting officer additionally testified that even if Divecon had accepted the risk of assuming these costs, he would have paid some of them anyway. The agency's survey senior scientist mistakenly thought that NOAA had proposed splitting the costs and testified that in her opinion, a division would have been reasonable.

incurred in connection with the terminated work. Settlement agreements are intended to compensate the contractor fairly, which "is a matter of judgment and cannot be measured exactly." 48 C.F.R. § 49.201(a) (2002).

Nicon, Inc. v. United States, 331 F.3d 878, 885 (Fed. Cir. 2003). "[T]he Government's decision to terminate a contract for convenience essentially acts to convert a fixed-price contract into a cost reimbursement contract, subject to the properly adjusted contract price as a ceiling." Airo Services, Inc. v. General Services Administration, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071 (quoting Richerson Construction, Inc. v. General Services Administration, GSBCA 11161, et al., 93-1 BCA ¶ 25,239, at 125,704 (1992)).

Under the contract in question, if the contract was terminated for convenience, the contractor was to be paid "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination." With one minor exception, NOAA has already paid the "percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination." We will address the minor exception and then proceed to our primary task of determining the extent of "reasonable charges [which] have resulted from the termination."

NOAA has said not a word about the termination costs claimed by Divecon, so it is tempting simply to award all of them. We do make two deductions, however, in accordance with well-established law.

As to the exception to the agency's payment of the percentage of the contract price reflecting the percentage of work performed prior to the notice of termination: One of the line items in the contract was \$1,000 for additional sampling capabilities. Divecon purchased the necessary equipment specifically for this job, but has never been paid the line item amount. We award the \$1,000 claimed.

As to the two deductions: First, although the Federal Acquisition Regulation provides generally for "a reasonable allowance for profit" on "the work done and the preparations made for the terminated portions of the contract," 48 CFR 49.201(a) (2001), the regulation also states that profit shall not be allowed "if it appears that the contractor would have incurred a loss had the entire contract been completed," id. 49.203(a). Foremost Mechanical Systems, Inc. v. General Services Administration, GSBCA 13250-C(12335), et al., 98-1 BCA ¶ 29,652, at 146,918. Divecon clearly would have incurred a loss if this entire contract had been completed. The contractor priced this job at a profit of twelve percent. Thus, its anticipated profit on the contract price of \$312,352 was \$33,466. The additional costs claimed during the effort to repair the ROV – \$72,960.59 – were considerably greater than this anticipated profit. And of course if the cruise had continued, to complete contract work, Divecon would have incurred costs for at least three and one-half cruise days more than planned (the four already consumed, plus seven and one-half more, instead of the eight expected), without deriving any profit from the extra work. Consequently, we must disallow any profit claimed on termination costs.

Of the line items in Divecon's termination for convenience claim, two – "costs incurred during repair effort expecting to continue operations" (\$69,434.69) and "additional costs incurred during repair effort expecting to continue operations" (\$3,525.90) – do not include profit. NOAA has given us no cause for questioning the reasonableness of these costs, and we award them in their entirety. The line item for the balance owed for mobilization and demobilization (\$60,683), on the other hand, is the contract rate for this work. The contract rate includes a profit of twelve percent, which is \$6,501.75 on a price of \$60,683. We disallow the profit, awarding only the costs associated with this item – \$54,181.25.

The second deduction is as to the final line item in the termination claim – what Divecon terms allowable profit for the terminated portion of the work (\$19,948.95). Both the applicable regulation and the case law are definitive in stating that anticipated but unearned profits on work not performed are not allowable under a convenience termination. 48 CFR 49.202(a); Dairy Sales Corp. v. United States, 593 F.2d 1002, 1004-05 (Ct. Cl. 1979); Nolan Brothers, Inc. v. United States, 405 F.2d 1250, 1253-54 (Ct. Cl. 1969); Chemray Coatings Corp. v. General Services Administration, GSBCA 10700, 93-3 BCA ¶ 26,194, at 130,407; Centennial Leasing v. General Services Administration, GSBCA 11284 (Nov. 20, 1992), aff'd, 17 F.3d 1443 (Fed. Cir. 1994) (table). We therefore disallow this line item.

Of the \$154,592.54 claimed in termination for convenience costs, we award \$128,141.84.

Decision

GSBCA 15997-COM is **GRANTED**. NOAA's partial termination for default of Divecon's contract is converted to a termination for the convenience of the Government.

GSBCA 16057-COM is **GRANTED IN PART**. We award to Divecon in termination for convenience costs \$128,141.84. Interest is due on this amount from November 14, 2002, until the date of payment, at the rates established by the Secretary of the Treasury. 41 U.S.C. § 611 (2000).

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ROBERT W. PARKER
Board Judge