UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 6, 2023

CBCA 5964

HUGHES GROUP LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Robert A. Klimek, Jr. of Klimek & Casale, P.C., Upper Marlboro, MD; and Edward G. Bentley, Washington, DC, counsel for Appellant.

Harold W. Askins, III, Office of General Counsel, Department of Veterans Affairs, Charleston, SC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **SULLIVAN**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Hughes Group LLC (Hughes or contractor) appealed the decision of the Department of Veterans Affairs (VA or agency) to terminate Hughes' janitorial services contract for cause based on Hughes' failure to cure persistent performance deficiencies. Instead of terminating Hughes' contract in the weeks following the cure notice, the agency breached the contract by failing to pay Hughes for months, while Hughes continued to perform. Ten days after paying Hughes' overdue invoices in full, the agency sought to terminate Hughes' contract based on deficient work. The notice, styled as a termination for cause, directed Hughes to continue performing until the contract nearly expired. Because we find that the agency's actions waived the right to terminate without first issuing a new cure notice, rendered the purported termination for cause ineffective, and were arbitrary and capricious,

we grant the appeal and convert the termination to one for the convenience of the Government.

Findings of Fact

Solicitation and Award

In 2015, the VA solicited offers from service-disabled, veteran-owned small businesses to furnish "all labor in order to provide total housekeeping cleaning services" at multiple medical facilities in San Antonio, Texas. This was a performance-based contract that required scheduled and "as needed" cleaning in these facilities in order to "maintain a satisfactory facility condition and present a clean, neat, and professional appearance." The contract required services at nine facilities, which together comprised the VA South Texas Healthcare System.

The statement of work (SOW) spanned twenty-three pages and contained detailed requirements for various items, such as the minimum hours of coverage for contractor shifts, staff qualifications, cleaning requirements, training, building security, quality control, safety, government-furnished equipment, supplies, a cleaning schedule, and deliverables. Section 12 of the contract, titled "Quality Control Monitoring," required the contracting officer's representative (COR) to perform regular inspections of the contractor's performance to ensure compliance with the SOW. The COR was also required to produce weekly and monthly reports to document the results of those inspections. The contract provided for a one percent decrease in monthly billing by facility when the VA received five or more complaints about Hughes' performance during the weekly reporting period. The contract also contained Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions – Commercial Items (Dec 2014), which included provisions for terminating the contract for convenience and for cause.

Before submitting offers, interested firms, including appellant, participated in a partial site visit that was limited in scope. Potential offerors then submitted questions about the total number of patient rooms, the tenant population, the number of restroom fixtures (or total square footage of the restrooms), the areas requiring aseptic cleaning, and the level of staffing under the current contract. The VA did not provide definitive answers to these questions but explained that the patient and tenant numbers were increasing to meet the needs of veterans and that, as a performance-based contract, the agency did not dictate staffing. The agency directed interested firms to refer to their notes from the site visit in preparing their offers. In response to a question about the requirements listed in a cleaning schedule attached to the contract, the VA replied that "the work schedule in attachment 2 should be used as a guide, as these are recommendations."

The solicitation informed potential offerors that proposals would be considered "only from firms who are, in the judgment of the contracting officer, well established in the janitorial business, are financially responsible, and able to show evidence of resources, experience, and qualifications necessary to render service under the contract."[1] The VA awarded the contract to Hughes in November 2015. The period of performance consisted of one base year and two option years. The base year began on December 1, 2015, and concluded on November 30, 2016.

Contract Performance

Significant challenges were evident during the first quarter of the base year. The VA remarked that Hughes was simply not providing the level of service required by the contract. Hughes, on the other hand, perceived a gap between its interpretation of the contract's requirements and the agency's expectations of Hughes in light of those same requirements. For example, two sources of frequent complaints were the canteen and an area of the hospital that was under renovation. Hughes' contract included requirements for cleaning the canteen area. However, the food service contractor for the canteen was not disposing of its own food trash, which created pest and rodent issues. The VA had a memorandum of understanding (MOU) with the food service contractor which clarified the roles and responsibilities of each entity, but it was not provided to Hughes until after award. Hughes, the VA, and the food service contractor updated the MOU to clarify the division of responsibilities among the entities. While this effort largely resolved the problems caused by the lingering food waste, Hughes expected a modification to the contract, which did not occur. As for the area of the hospital under renovation, Hughes was required to perform specific tasks in areas adjacent to the construction site, such as mopping the hallway floor. Hughes explained that soon after it mopped the floor, the construction workers would produce more debris and make the floor dirty again. Hughes maintained that it was not responsible for cleaning up after the construction contractor.

The VA identified numerous other complaints about Hughes' performance, such as leaving cleaning carts in front of patient access doors, failing to take cleaning supplies out of boxes in supply rooms, failing to wear a uniform, dirty carpets and floors, unemptied trash cans in patient rooms, and a lack of staffing in specific areas. In many instances, Hughes acknowledged the discrepancies and corrected them by retraining specific personnel and terminating others. At other times, Hughes offered explanations. For example, with regard

[1] This was a competitively awarded contract that considered technical approach, past performance, and price in its evaluation of offers. Although the solicitation placed great emphasis on technical approach and past performance, it stated that "technical and past performance, when combined, are *less* important than price." (Emphasis added.)

to the trash cans, Hughes explained that the containers were small and when hospital staff discarded a disposable garment in the trash can, it filled up quickly and personnel were not allowed to compact the trash. As a result, many trash cans had to be emptied more often than the contract required. Also, there were some complaints about trash cans located in areas that were not serviced by Hughes during weekend hours. When presented with complaints about a lack of staffing in a particular area, Hughes responded that cleaning staff were authorized by the contract to move around among the facilities to perform scheduled tasks and to respond to unscheduled cleaning requirements.

Hughes had its own complaints. Vacuum cleaners and waxing machines were identified in the contract as government-furnished equipment, but they were often broken or poorly functioning, and the VA was slow to provide replacements or make the needed repairs. The contract also required the VA to provide hospital-grade disinfectants, cleaning supplies, soap, sanitizer, and paper products. Hughes complained that supplies would often run out and fail to be replenished in a timely manner. On one occasion, when Hughes' CEO visited the facilities to meet with the VA and inspect his company's work, he observed and photographed cleaning staff using trash cans for mop buckets because the VA failed to supply the mop buckets. As to the allegation that a member of Hughes' staff was out of uniform, Hughes stated that the individual was never identified or confirmed to be a Hughes employee.

The record contains numerous communications between Hughes' leadership, the COR, the contracting officer, and members of the Environmental Management Staff (EMS), which was responsible for infectious disease and quality control throughout these facilities. Hughes took direction from multiple individuals on a daily basis to respond to complaints and resolve problems, a fact which undermined the efficient administration of the contract and increased tension between EMS, Hughes, and contracting personnel. Early on in the contract, in an effort to resolve the challenges, Hughes proposed modifying the contract to hire additional staff. The VA rejected Hughes' proposal. The VA reasoned that the cost increase associated with the modification would displace the next higher offeror in the original competition for the contract. Without any change to the contract's terms or the contractor's performance, Hughes' level of service remained the same throughout the base year. Although the contracting officer issued a cure notice to Hughes during the base year, Hughes continued to perform, and the VA exercised the first option year, which began on December 1, 2016.

In late February and early March of 2017, complaints about the level of cleanliness in various facilities increased. At that point, two different contracting officers had been assigned to the contract, both of whom entertained working with Hughes to modify the SOW in an attempt to resolve the challenges. But since neither party seemed willing to absorb the additional costs of hiring more staff, nothing changed. Complaints were routine, the VA did

not take any payment deductions, and Hughes continued to provide sub-standard service. Several months later, a new contracting officer was assigned to the contract. During his first meeting with Hughes, on June 6, 2017, the contracting officer issued Hughes a cure notice. Hughes responded to each item in the cure notice in writing and provided a proposed corrective action plan to address the deficiencies. At the request of the contracting officer, Hughes followed up with a revised corrective action plan on June 30, 2017. Hughes never received a response to either of its proposed corrective action plans.

In the months after the cure notice was issued, conditions remained the same. Hughes continued to perform, the VA continued to issue contract deficiency reports (CDRs), and no deductions were taken under the contract. Then, in August 2017, without any notice or explanation, the VA stopped paying Hughes. Invoices were submitted, but no payments were received. Hughes kept working while making repeated attempts to contact the contracting officer about the lack of payment. For months, the contracting officer did not respond to Hughes' entreaties for payment. Conversations with the COR did not resolve the problem. Her explanations were evasive, and her efforts to address the lack of payment were dilatory, at best. When the deadline for the VA to exercise the option passed in late September, Hughes reached out to the contracting officer's supervisor about the overdue payments and received an immediate response. On October 23, 2017, the VA paid Hughes in full, without any reservations or exceptions to the invoices. The record contains no evidence that the lack of payment was due to deductions taken under the contract.

Termination for Cause and Appeal

Ten days after the VA paid all of Hughes' overdue invoices, the contracting officer terminated Hughes' contract for cause. The termination notice, dated November 3, 2017, informed Hughes that its task order contract was "being terminated effective November 25, 2017," in accordance with the termination clause, FAR 52.212-4(m), which stated, in relevant part: "The Government may terminate this contract, or any part hereof, 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."

According to the letter, the facilities had not been cleaned to the standards outlined in the SOW, and more than twenty CDRs had been issued to Hughes since receiving the cure notice. The contracting officer remarked that Hughes' corrective action plan had not resulted in improved performance and advised that the VA would notify Hughes as soon as reprocurement costs were calculated. The termination letter contained no notice of appeal rights and was not identified as a contracting officer's final decision. Hughes' contract was due to expire on November 30, 2017, just five days after the effective date of termination.

In response to the termination, Hughes submitted an eleven-page letter, dated November 15, 2017, with fifteen attachments. Hughes repeated its previous contentions and complained that it was essentially being set up for failure. Pointing to a provision in the contract that gave Hughes two hours to correct problems, Hughes claimed that it corrected problems but still received CDRs for them. Hughes also pointed out the inconsistencies between the SOW and the directives of EMS personnel and the contracting officer's failure to follow through with promised modifications to the contract. By using MOUs to "clarify" roles and responsibilities rather than modifying the contract, Hughes remonstrated that the VA imposed additional work on Hughes without having to pay for it. "Hughes Group is being judged based on the customer's requirement, not what is written in the SOW." Hughes also raised the issue of nonpayment for six consecutive invoices as further evidence of the VA's attempts to undermine Hughes' performance. Finally, Hughes commented on the timing of the termination, issued just five days before the end of the contract, and five months after the cure notice. While Hughes expressed a desire to remain on the contract and not be terminated, Hughes questioned the motives of the contracting officer and worried about the impact of this situation on any future performance.

On November 29, 2017, one day before the contract expired, the contracting officer issued a second termination notice to Hughes Group, the subject of which was "Amendment to Termination Notice for VA257-16-F-0912 dated September 13, 2017."[2] The amended notice replied to Hughes' response to the termination for cause, explaining that the contract required continuous cleaning but also pointed to "a matrix at pp. 24-26 [of the contract] which tells the contractor how often cleaning must be done." The contracting officer also stated that twenty-seven CDRs had been issued between June 6 and August 1, 2017, and then another eighteen CDRs had been issued between August 1 and September 13, 2017. The contracting officer explained that "due to the end of the fiscal year rush, [many of the CDRs] were not reviewed by contracting or issued to the contractor," and that is why they were not identified in the first termination notice, but Hughes nonetheless received emails about the deficiencies.

Finally, the contracting officer stated that he conducted sequential random inspections of a medical center and an outpatient clinic, both of which Hughes was required to clean. He stated: "The first inspection was done on September 15, 2017, and the second one was done [on] October 18, 2017. [I] made fingerprints in the dust on the 1st inspection that were still there on the second. These two inspections support the VA's decision to terminate the contract for default." Unlike the original termination notice, the amended one contained the appeal rights notice and informed Hughes that it was a contracting officer's final decision.

---

[2] The record contains no termination notice dated September 13, 2017.

Hughes appealed the decision to the Board. Hughes asked the Board to convert the termination for cause to one for the convenience of the Government. Hughes did not request monetary damages in its appeal and made no separate claim for termination costs. A virtual hearing took place during which the Board received testimony about the facts and circumstances surrounding the termination.

Discussion

The Board has jurisdiction to entertain a timely challenge of a termination for default, even absent a certified claim for monetary restitution. *See Malone v. United States*, 849 F.2d 1441, 1444-45 (Fed. Cir. 1988). In such cases, "the only relief available under an appeal of a default termination is the conversion of the default termination to one for the convenience of the Government." *Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,648 (2015). Here, Hughes timely appealed the default termination but submitted no separate monetary claim. Our sole task is to review the propriety of the termination.

"[A] government decision to terminate a contractor for [cause] is the assertion of a government claim against such contractor within the meaning of the [Contract Disputes Act]." *Johnson & Gordon Security, Inc. v. General Services Administration*, 857 F.2d 1435, 1437 (Fed. Cir. 1988). In cases where the Government seeks to terminate a contractor for cause, the Government bears the initial burden of proving, by a preponderance of the evidence, that the termination decision was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Once the Government has satisfied its burden, and default has been established, the burden shifts to the contractor to demonstrate that the causes of the default were excusable under the terms of the contract. *Heroes Hire, LLC v. Department of Veterans Affairs*, CBCA 7195, et al., 22-1 BCA ¶ 38,101, at 185,037 (citing *Emiabata v. United States*, 792 F. App'x 931, 937 (Fed. Cir. 2019)).

"The default clause does not say that the Government 'shall' or 'must' terminate the contract in the event of default, only that the Government 'may' terminate it." *JAMCO Constructors, Inc*., VABCA 3271, 94-1 BCA ¶ 26,405, at 131,361 (quoting *Fairfield Scientific Corp. v. United States*, 611 F.2d 854, 862 (Ct. Cl. 1979)). The Board further observed that "the exercise of discretion . . . presupposes an active and reasoned consideration of available and sometimes contradictory information. Various factors must be evaluated and the totality of circumstances weighed by the Contracting Officer in arriving at a decision which has the most serious consequences for a contractor." *Id.* (citing *Executive Elevator Service*, VABCA 2152, 87-2 BCA ¶ 19,849, at 100,438).

The record before us is replete with such contradictory information. There are numerous CDRs evidencing frequent, noncompliant work by Hughes. The cure notice identified multiple instances of deficient performance between March 21 and May 18, 2017.

Although Hughes responded to the cure notice and specifically addressed each discrepancy in writing, the VA continued to identify and report noncompliant work by Hughes in June, July, and August of 2017. At that point, the VA was likely in a strong position to terminate the contract for cause. "Each individual omission of a service is technically a default, but not necessarily a basis for a default termination . . . . The contract may be terminated for default only when the number of individual defaults have accumulated to the point where it may be said that the contract has not been substantially performed." *Handyman Building Maintenance Co.*, IBCA 1335-3-80, 83-2 BCA ¶ 16,646, at 82,775 (citing *Pride Unlimited, Inc.*, ASBCA 17778, 75-2 BCA ¶ 11,436, at 54,500).

Instead of terminating the contract, however, the VA stopped paying Hughes, though Hughes continued to work. On August 1, 2017, Hughes presented the VA with an invoice for payment of work performed during the second half of July, but the VA did not pay it. This same pattern was repeated every two weeks until October 23, 2017, when the VA paid Hughes in full for all of its overdue invoices. The VA had no legal basis to stop paying Hughes while Hughes continued to work. The contract only permitted a one-percent deduction in billing when five or more complaints were received during the weekly report period. There is no evidence that the VA was exercising its rights under the deductions provision of the contract when it stopped *all* payment. By failing to pay Hughes without excuse, the VA breached the contract. We examine the impact of the VA's material breach, and its remedy of that breach, on the termination decision.[3]

In both its initial and amended termination notices, the VA pointed to numerous CDRs as a basis for terminating Hughes' contract for cause. "Generally, in janitorial and other service-type contracts, the necessary proof [to establish default] may be found in contemporaneous detailed inspection and evaluation reports, which usually are an essential part of the record keeping process of such contracts." *Givens Services*, DOT BCA 2907, 96-2 BCA ¶ 28,271, at 141,168 (citing *Building Maintenance Specialists, Inc.,* DOT CAB 71-35, 72-2 BCA ¶ 9553). Under normal circumstances, such a performance record would likely be a sufficient basis to terminate the contract. *5860 Chicago Ridge, LLC v. General Services Administration*, 104 Fed. Cl. 740, 763 (citing *Cervetto Building Maintenance Co. v. United States*, 2 Cl. Ct. 299 (1983) (upholding termination of a janitorial services contract when performance deficiencies became the rule rather than the exception)). Here, however, the agency's puzzling actions in the months following the cure notice undermined the termination decision. For the reasons that follow, we find that those actions amounted to a

---

[3] "Under general contract principles, a party sued for breach of contract may defend on a theory that its non-performance is excused because the other contracting party committed the first material breach." *Hometown Financial, Inc. v. United States*, 409 F.3d 1360, 1370 (Fed. Cir. 2005).

waiver of the deficiencies complained of, rendering the termination invalid as well as arbitrary and capricious.

Beginning with the issuance of the cure notice on June 6, 2017, and Hughes' timely response to the same, the sequence of events that followed included a cluster of performance deficiencies, a material breach by the agency, and a long overdue payment to Hughes without deductions or reservations. Hughes argues, and we agree, that when the agency paid Hughes in full on October 23, 2017, the agency waived Hughes' performance deficiencies to date, and any subsequent campaign to terminate the contract required the VA to issue a new cure notice, which it did not do.

The waiver doctrine has been described as a hybrid of estoppel and election remedies. When an action or statement by the Government indicates a preference for the contractor's continued performance rather than termination of the contract, the Government's election opens the door to a claim of waiver. The election alone, however, is not enough to establish that the Government has waived any subsequent claim for default against the contractor. Another key element of the waiver doctrine is reliance:

> An election becomes legally operative (as a waiver) if the contractor relies in a significant way on this election. It is this reliance element that makes waiver a form of estoppel. In deciding whether a waiver has occurred, the courts and appeals boards weigh both (a) the statements and acts of the Government indicating election, and (b) the amount of reliance of the contractor, to determine whether the Government should be held to have lost its right to terminate for default.

Ralph C. Nash & John Cibinic, *Waiver of the Right to Terminate for Default: The Impact of No-Waiver Language*, 13 Nash & Cibinic Report ¶ 64 (Dec. 1999).

When the agency paid Hughes without reservation, it made an election for continued performance. Up until the time of payment, Hughes was operating off of its own resources, continuing to perform in reliance upon the agency's promise of payment and a reasonable belief that the contracting officer was allowing the contract to expire. Hughes could have cut its losses, stopped performing, and filed a claim against the agency for breach of contract, but Hughes did none of those things. The agency's election combined with Hughes' reliance satisfy the elements of waiver. As such, a new cure notice was required before the agency could terminate the contract for cause:

> When a "cure" notice is given, the Government must act with reasonable promptness and terminate the contract upon the expiration of the ten-day period set forth in the notice or upon expiration of any period of forbearance.

> If the Government does not act promptly, it has waived its right to terminate based on the original cure notice and must issue another cure notice, giving the contractor ten days to cure the failure specified in that "cure" notice, prior to termination under section (a)(ii) of the "Default" article.

Acudata Systems, Inc., DOT CAB 1198, et al., 84-1 BCA ¶ 17,046, at 84,865 (1983).[4]

The agency argues that a second cure notice was *not* required in this case because the first one remained valid. The agency explained that the five-month time frame between the cure notice and the termination provided Hughes with the opportunity to submit a corrective action plan in response to the cure notice, to further revise that plan after the contracting officer found it to be lacking, and to implement it. While avoiding any discussion of its own breach, the agency contends that five months was a reasonable forbearance period, and no waiver of the termination occurred. Even if this period of time could somehow be construed as a forbearance period during which the agency reserved its right to terminate, we would still find that the agency waived the termination due to the amount of time that passed.

Whether the period between default and the contracting officer's termination notice constituted a "reasonable time" depends "on the circumstances of each case." *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969). Boards of contract appeals have found the following termination periods reasonable in the context of commercial item contracts– a thirty-nine-day delay after response to a show cause notice during which the contractor did not "perfor[m] any substantial work on the contract," *Progressive Tool Corp.*, ASBCA 42809, 94-1 BCA ¶ 26,413, at 131,392-93; a forty-nine-day delay after a failure to deliver 1,040,000 bottles of water with no subsequent preparations for delivery, *American Aquasource, Inc*., ASBCA 56677, 10-2 BCA ¶ 34,557, at 170,417; a seven-day delay after the contractor's failure to deliver on an acquisitions contract, *Terraseis Trading Ltd*., ASBCA 58731, 15-1 BCA ¶ 36,176, at 176,521; and an eighty-four-day delay after failing to correct deficiencies in a janitorial services contract, *SCS Building Maintenance v. General Services Administration*, CBCA 5766, 22-1 BCA ¶ 37,992, at 184,493. When a contractor "continues performance in reliance on the lack of termination and proceeds to incur obligations in [its] efforts to perform," the permissible period is shorter. *Aquasource, Inc*., 10-2 BCA at 170,417.

---

[4] The fact that Hughes' contract contained the commercial items termination for cause clause does not change our position. *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,899 ("Although the commercial items termination provision . . . does not expressly reference the need for the contracting officer to issue a cure notice before terminating a contractor for failure to comply with contract provisions, FAR 12.403 imposes that requirement.").

In this case, 119 days elapsed between the cure notice and the first termination notice. During that time, Hughes continued working, mostly without pay, and the agency did not provide any feedback on Hughes' corrective action plan. Moreover, the agency's characterization of this time period as one of forbearance is disingenuous, since the agency was in breach of contract for the majority of that time. For these reasons, we are not persuaded by the agency's argument that five months was a reasonable period of time. On the contrary, we find that the agency's actions, to include the substantial delay in issuing the termination, resulted in a waiver of the termination. To meet its burden, the agency needed to issue a new cure notice prior to terminating the contract for cause. Since no new cure notice was issued, we find that the agency failed to establish that termination was justified.

Waiver can also be found in the termination notice itself. The notice, dated November 3, 2017, informed Hughes that it was terminated for cause *effective* November 25, 2017. By the plain language of the notice, the contracting officer sought to terminate Hughes' contract while concurrently securing its continued performance. The incompatible commands of the termination notice are self-defeating. "Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate." *DeVito*, 413 F.2d at 1153. Here, the agency's express willingness to allow Hughes to continue to perform, despite Hughes' poor performance history, indicates an election by the agency to waive that same history.

Finally, we recognize that a contracting officer has broad discretion in terminating a contract for cause. *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343-44 (Fed. Cir. 1999). But that discretion is not without limits. Where a contract gives discretion to the Government, "exercise of that discretion must be fair and reasonable, not arbitrary and capricious." *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1090 (Ct. Cl. 1975); s*ee also Quality Environment Systems*, ASBCA 22178, 87-3 BCA ¶ 20,060, at 101,570 (stating that "whether or not to terminate a contract for default is not left by regulations to the contracting officer's unchecked or unlimited discretion"). As we previously noted, the exercise of discretion requires a reasoned consideration of all of the available information. *JAMCO Constructors, Inc*., 94-1 BCA at 131,361. The conduct of a government official will be deemed arbitrary and capricious where no reasonable basis can be found to support the actions of that official. *Quality Environment Systems*, 87-3 BCA at 101,569. Here, there is no evidence that the contracting officer considered the agency's own failures in administering the contract or the utility of imposing such a drastic sanction on the contractor on the eve of the contract's expiration.

This does not mean that Hughes' performance was satisfactory or did not merit adverse action. That is not the case here. During the pendency of this contract, Hughes consistently, on the whole, failed to perform to the standards set by the contract, despite its

substantial experience in this field. It appears from the record that Hughes realized early on that it had likely underbid the contract and then failed to add the needed personnel when it realized the staffing on which it based its bid would not provide adequate performance. That being said, the VA made "price" the most important factor in a procurement that simultaneously sought the small business community's top performers, then failed to hold Hughes' "feet to the fire" in a timely fashion, even after noting multiple and repeated deficiencies and underperformance.

The VA exercised the option year without Hughes significantly improving performance and continued to issue Hughes deficiency reports throughout the contract without taking any deductions. Then, for unexplained reasons, the VA failed to issue the termination for cause until the last possible moments of the contract performance period, while simultaneously directing the contractor to continue performing. At that point, a more reasoned approach to addressing Hughes' poor performance may have been through the contractor performance assessment reporting system. In light of these facts, we find no evidence of a reasoned consideration of the circumstances by the contracting officer at the time of the termination. Indeed, the amended notice, issued just one day prior to the contract's expiration, can only be explained as an arbitrary and capricious act.

For the foregoing reasons, we decline to uphold the agency's termination for cause and convert it to one for the convenience of the Government.

Decision

We **GRANT** the appeal.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge