



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON
December 16, 2020**

GRANTED: December 7, 2020

CBCA 5692

EAGLE PEAK ROCK & PAVING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Bennett J. Lee, and Stephen L. Pessagno of Varela, Lee, Metz & Guarino, LLP, San Francisco, CA; and David B. Wonderlick of Varela, Lee, Metz & Guarino, LLP, Tysons Corner, VA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA; and Milton Hsieh, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Sterling, VA, counsel for Respondent.

Before Board Judges **KULLBERG**, **SULLIVAN**, and **RUSSELL**.

RUSSELL, Board Judge.

This appeal arises from a contract entered into between Eagle Peak Rock & Paving, Inc. (Eagle Peak) and the Department of Transportation's Federal Highway Administration

(FHWA) for construction work in Yellowstone National Park. Eagle Peak asserts that FHWA improperly terminated its contract for default, and requests that the termination be converted to one for convenience. The Board conducted a hearing on the appeal, during which the parties presented fact and expert witness testimony, followed by the filing of post-hearing briefs.¹ For the reasons provided below, we grant the appeal.

Findings of Fact

I. The Eagle Peak Contract

A. Statement of Work

On May 2, 2016, FHWA awarded Eagle Peak a “firm-fixed price with economic price adjustment” task order (the contract) under a multiple award task order contract for construction work to make improvements along approximately 4.7 miles of Grand Loop Road in Yellowstone National Park, Wyoming, as well as nearby parking areas, trails, and overlooks (the Project). The Project consisted of four primary project sites: (1) Grand Loop Road (also known as the Mainline), (2) Inspiration Point, (3) Brink of the Upper Falls, and (4) Uncle Tom’s Point. The Inspiration Point, Brink of the Upper Falls, and Uncle Tom’s Point sites are commonly referred to as the Canyon Rim sites, as each abuts the Yellowstone River and the Grand Canyon of Yellowstone.

The Project was scheduled for three construction seasons, with an overall Project completion date of October 5, 2018. The contract included winter shutdown periods. Specifically, no work was permitted during winter periods from November 11, 2016, to April 16, 2017, and from November 15, 2017, to April 15, 2018. The estimated original value for the task order was \$28,049,200.62.

The solicitation also required Eagle Peak to submit bids for certain options, namely Option W, which included work to reconstruct the entry drive and parking lot at the Brink of the Upper Falls site, and Options X, Y, and Z, which included work at the Uncle Tom’s Point site. The options were exercised by FHWA via unilateral modification on July 14, 2016. The option work totaled \$6,536,810.50, increasing the estimated contract value to \$34,586,011.12.

¹ This appeal was consolidated with CBCA 5955, an appeal in which Eagle Peak challenges FHWA’s withholding of retainage under 48 CFR 52.232-5(e) (2017). A decision in CBCA 5955 will be issued separately.

In order of precedence, the contract was to be governed by (a) the Federal Acquisition Regulation (FAR) (48 CFR ch. 1 (2017)); (b) the Transportation Acquisition Regulations; (c) the Multiple Award Indefinite Delivery Indefinite Quantity Contract under which the task order contract at issue in this appeal was awarded; (d) FHWA Special Contract Requirements (SCRs); (e) the Project plans; and (f) standard specifications. As for the latter, the contract incorporated FHWA's Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-14 (Standard Specifications or FP-14), along with certain SCRs which modified the Standard Specifications.

Pertinent here, SCR § 155.03 required Eagle Peak to submit an initial construction schedule within twenty days of receiving the notice to proceed under the contract. The schedule was required to show completion of work within the contract time (i.e., by October 5, 2018). SCR § 155.03 additionally provided that, once accepted by the contracting officer, the initial construction schedule would serve as the baseline for construction schedule updates. Under SCR § 155.05, Eagle Peak was to submit updated construction schedules. Pursuant to SCR § 155.06, a construction schedule was defined as “a Critical Path Method (CPM) schedule and a written narrative.”

B. Federal Acquisition Regulation (FAR)

In addition to the statement of work in the solicitation, the contract incorporated FAR 52.249-10, Default (Fixed Price Construction) (Apr 1984), which states in pertinent part:

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

The contract also incorporated FAR 52.236-15, Schedules for Construction Contracts (Apr 1984), part of which states:

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a

progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. . . .

II. Contract Performance – Eagle Peak’s Schedule Submissions

A. The October 3, 2016, Cure Notice and Response

Between August 1 and August 30, 2016, Eagle Peak submitted three baseline schedules which FHWA rejected. On October 3, 2016, FHWA’s contracting officer issued a cure letter to Eagle Peak reflecting her concern that Eagle Peak had not submitted an approved schedule. In the letter, the contracting officer stated:

I have reviewed the project records related to the performance to date, specifically in relation to the schedule for the work. I am very concerned that Eagle Peak is over four months past the notice to proceed date and it has yet to submit a schedule for the project that is in compliance with the contract requirements.

I have great concern that Eagle Peak is not prosecuting the work with sufficient diligence to ensure completion [within] the time specified in the contract. I believe Eagle Peak’s failure to submit a schedule is directly affecting its progress of work on the contract.

You are hereby notified that the Government considers your lack of submission of a schedule, which is in compliance with the contract requirements, a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default under the terms of and conditions of FAR Clause 52.249-10 Default (Fixed-Price Construction) (April 1984) of this contract. . . .

Within ten days after receipt, Eagle Peak must provide a schedule in conformance with FAR Clause 52.236-15 Schedules for Construction Contracts and [SCR] Section 155 of the contract.

On October 13, 2016, Eagle Peak submitted another version of its baseline schedule to FHWA. By letter dated November 4, 2016, the contracting officer rejected the schedule, and included an analysis of the agency’s concerns with the schedule. FHWA explained that its analysis “highlight[ed] only the [FHWA’s] significant issues with the submitted schedule”

and that, in general, the schedule (1) was missing items of work, (2) included flawed durations and production rates, and (3) had logic flaws.

However, during the hearing in the appeal, Jason R. Nolting, Eagle Peak's expert, presented testimony that the schedule submission met contract requirements and should have been accepted or accepted with notes. He added that, although there were errors in the schedule submissions, those errors were not material.

In his review of the schedule, Mr. Nolting specifically noted that Eagle Peak's schedule contained 671 activities, 1108 logic ties, and four constraints, for a total of 1783 schedule entries. Mr. Nolting explained that "mathematically the FHWA documented exception rate in its November 4, 2016 letter was 2.97%," or stated another way, the schedule was more than 97% acceptable based on the issues documented by FHWA in its analysis of Eagle Peak's schedule submitted on October 13, 2016. Mr. Nolting also noted that the contract "does not require the contractor to match durations with quantities and production rates" and opined that the "schedule logic omissions were minor in comparison to the overall schedule and more importantly the alleged missing logic would have in no way influenced the Project critical path or completion dates." As for the missing items of work, Mr. Nolting opined that three of the twenty-three items identified as missing were related to non-construction submittals for hauling, accident prevention, and water quality monitoring. He added that, "[w]hile these items may have been required under the Contract," he did not believe that the items "represent[ed] work likely to have any impact on the overall Project critical path or contract fixed completion date." As for the remaining twenty construction items, he found the value of these alleged missing items to be approximately \$591,272 of a contract of \$34,586,011. Importantly, according to Mr. Nolting, Eagle Peak's schedule demonstrated that the company had an appreciation for the scope of the Project, the various elements within the contract, and the Project calendar.

B. The November 23, 2016 Schedule Submission

By letter dated November 23, 2016, Eagle Peak, through a new project manager, submitted another baseline schedule. Eagle Peak expressed a willingness to work with FHWA if the agency found that corrections to the schedule were needed. Eagle Peak also noted that it believed there was sufficient time to accommodate any changes to the schedule as the Project was in the first winter shutdown. In the letter, Eagle Peak additionally stated:

Starting next year, we will be mobilizing additional crew members to work on our project. We have completed a project in California that will make available additional employees to work on this project. We also will gain additional personnel from our Utah project that is nearing completion.

Our plan is to run two crews on the Grand Loop of the project, one day shift and one night shift. Each of the crews will have a Superintendent to oversee operations and monitor production. We will utilize the night shift and employ a road closure at night to install culverts, installing culverts at night with the road closure will allow the crews uninterrupted work conditions.

Day shift will be directed to the remainder of the work, clearing and grubbing, excavations, grading, road construction, etc.

For the Canyon work, we will also utilize two crews, both crews will work during daylight hours. Having two crews will facilitate a high production rate.

All the additional personnel are qualified and experienced workers. We anticipate completing a majority of the project next year with the final year for paving, completing masonry work, completing the canyon projects and cleanup work.

We have contracted a highly qualified Mason. We are subcontracting the masonry work to his company and he will complete the masonry work on schedule. We have submitted his qualifications and since he is so highly skilled, we foresee no obstacle pertaining to his acceptance.

We have our capable Timber crew accepted and ready to work.

.....

[Eagle Peak would prefer to] complete all required paper work through this winter shut down so that we may be set to go right into the working phase of the project at the beginning of next season. We are well aware of the contract, its time requirements, design and specifications and believe there will be no delay in starting back next season. We have established our vendors and suppliers to provide the hardware required for the project. We believe we are quite capable to complete this project on time and within specification.

The FHWA never responded to Eagle Peak regarding the company's schedule submission of November 23, 2016. Instead, the contracting officer requested that the project engineer create "schedule rebuilds" for the purpose of determining whether the remaining work on the Yellowstone Project could be completed in the remaining two construction seasons. The project engineer predicted completion of work past the date set out in the contract. However, the rebuilds also reflected the possible need for contract modifications.

C. The January 23, 2017, Schedule Submission

On January 12, 2017, the contracting officer notified Eagle Peak's surety that a termination for default was imminent although she continued to communicate with Eagle Peak regarding the company's efforts to submit a schedule that was satisfactory to FHWA. On January 23, 2017, Eagle Peak submitted another baseline schedule. In its letter accompanying the schedule, Eagle Peak noted that FHWA never responded to the company's schedule submitted on November 23, 2016, adding that the schedule addressed all concerns raised by FHWA in the agency's letter dated November 4, 2016.

Eagle Peak also asserted that the "FHWA's demands regarding the schedule had exceeded – and in some cases, expressly contradicted – the requirements of the Contract." Eagle Peak referenced SCR § 155.06, which only requires that the schedule show the original and remaining durations for construction activities; break construction activities into subtasks such that no activity duration exceeds twenty working days; and break longer activities into two or more activities distinguished by location or some other description. Eagle Peak explained that its submitted schedules complied with these requirements, but that FHWA was imposing an additional demand that the durations of all of these activities correspond precisely with the estimated production levels for the activities provided in the schedule narrative.

Eagle Peak also identified what it considered extensive errors and omissions in FHWA's contract documents possibly impacting the contract completion date, and took issue with FHWA's concerns about how logic ties were presented in the schedule. Eagle Peak noted that SCR § 155.06 only required that Eagle Peak "[s]how the sequence and interdependence of [project] activities" and that FHWA admitted that Eagle Peak had done so. The company added that FHWA went on to cite minor logic errors as grounds for asserting that the schedule did not comply with the contract, and that the company had endeavored to correct the identified items. Eagle Peak argued that FHWA's "demand for flawless logic ties" went beyond what would be expected in the industry and that minor errors are inevitable, but in no way would hinder Eagle Peak's prosecution of the work.

In its January 23, 2017, letter, Eagle Peak also stated that it had the resources to complete the project in accordance with the contract terms, stating that, for the 2017 season, the company had passed on bidding on additional work, even projects in close proximity to its base in California, in anticipation of bringing all personnel and equipment to the Yellowstone project. The company added that any projection of the completion date without accounting for the additional resources was inherently flawed, and with these resources, the company could readily accommodate the work remaining within the allotted period of the contract.

On January 24, 2017, the contracting officer responded to Eagle Peak's January 23, 2017, letter in an email stating:

During our conversation on January 17, 2017 I indicated that I was concerned that Eagle Peak was not going to complete the contract within the fixed completion date. Eagle Peak insisted it could complete the contract within the fixed completion date and asked for an opportunity to submit another schedule that showed this. I was hesitant to accept yet another schedule as Eagle Peak had not been able to submit an acceptable schedule for the duration of the first season including in response to the cure notice. However, I stated that I would accept a schedule that would show me how Eagle Peak would complete the project. I specifically asked that if completion by the fixed completion date was not realistic to provide me with a realistic schedule.

What I got was a baseline schedule that had errors – that did not give me any indication of how Eagle Peak intended to complete the project. When I asked again last night, I was clear that I need to know how you intend to complete the work in the two remaining seasons.

If you want me to consider Eagle Peak's plans to complete this project, then I need an updated schedule. At this point the government is not going to review your baseline schedule and approve it. It is simply too late for that. Eagle Peak needs to submit a schedule that shows me how you will complete this project – taking into consideration what you completed to date and what work is remaining.

D. Eagle Peak's "Recovery" Schedule Submission

On or around January 25, 2017, Eagle Peak submitted a "recovery schedule" attempting to respond to the contracting officer's concerns expressed in her email of January 24, 2017. In the letter accompanying the schedule, Eagle Peak disputed FHWA's contention that the baseline schedules that had previously been submitted did not comply with the contract, asserting that, at the very least, the errors had been corrected in the revised schedule submitted on November 23, 2016. Eagle Peak reiterated that although FHWA had asserted that the November 23, 2016, schedule continued to have significant flaws, the company had not received any formal notification to this effect. The company also reiterated its concerns about plan errors and omissions in FHWA contract documents stating that, although the company had not conducted a formal CPM analysis of the delays to the critical path caused by these issues, it was providing a "rough-order-of-magnitude estimate" of at least seventy days of delay caused by the issues.

The recovery schedule included a narrative report detailing specific project activities, the work to be done, and the estimated number of days to complete each activity. The report included descriptions of the equipment, materials, and labor to be used for each activity. The report also identified specific subcontractors who would perform on the Project, and the subcontractors' availability. The report described proposed site mobilization efforts noting, for example, the type of equipment that would be used to move equipment, where equipment would be stored, and the locations of a concrete plant, office and testing lab (which would be moved during winter shutdowns), trailers (which would also be moved during the winter shutdown), and storage for materials. The recovery schedule also noted that no work would be performed during the winter shutdown periods from November 11, 2016, to April 16, 2017, and from November 15, 2017, to April 15, 2018. The report identified a completion date of October 5, 2018.

Mr. Nolting, Eagle Peak's expert, opined that the recovery schedule did correct forty-seven of the fifty-three items highlighted by FHWA in its November 4, 2016, letter, and stated that the remaining six activities – three related to production rates, two related to missing activities, and one deemed a logic omission – “would have little to no effect on the schedule and . . . did not impact the critical path of the Project or the fixed completion date.” As for FHWA's assertions that certain activities were missing from the schedule, Mr. Nolting estimated their value at \$27,000 out of the \$34,586,011 contract.

III. Termination for Default

A. The Schedules

By letter dated February 1, 2017, the contracting officer terminated Eagle Peak for default pursuant to the Default clause, FAR 52.249-10. The contracting officer took the action “based on Eagle Peak's failure to prosecute the work with the diligence” that would ensure completion of the project within the time specified in the contract. She stated that she had “reviewed Eagle Peak's January 25, 2017 letter identifying delays” and determined that, based on the letter, “there [were no] excusable delays that would extend the fixed completion date of this contract.” She added that she had reviewed Eagle Peak's January 25, 2017, schedule, and that the schedule contained several errors that required correction (i.e., the schedule shows concurrent work on the Brink of the Upper Falls and Uncle Tom's Point sites, and mechanically stabilized earth (MSE) wall facing at the Brink of the Upper Falls MSE wall shown before completion of the MSE wall settlement period). She stated that, after making corrections, the schedule showed Eagle Peak completing the Project sixty-seven days past the fixed completion date.

Notably, although the contracting officer wrote in the letter terminating Eagle Peak's contract for default that she had reviewed Eagle Peak's recovery schedule of January 25, 2017, at the hearing, she stated that she did not recall doing so, relying instead on the project engineer's review of the recovery schedule. At her deposition and at the hearing, she also could not recall whether anyone analyzed Eagle Peak's proposed production rates and resources as presented in the narrative report accompanying the company's recovery schedule before concluding that Eagle Peak could not finish the Project by the contract deadline for completion.

Regarding the value of CPM schedules, Mr. Nolting, Eagle Peak's expert, explained that CPM schedules are "theoretical estimates of how the work [on a project] is going to be performed. . . . [The schedules show an] ability to demonstrate a grasp of what [a] project is and how it will be performed." Mr. Nolting noted that CPM schedules "are almost never the way a project is actually built. They do evolve. They do get more specific and, in [his] experience, more accurate, obviously, as more information is available." Mr. Nolting also testified that "[t]here [are] a lot of variables within the . . . critical path schedules that can be . . . modified or adjusted to potentially drastically change the results" and that his experience is that with the amount of horizon that remained on the Project, a contracting officer had to be "awfully certain . . . that there was no other reasonable . . . way to recover these schedules before making . . . the nuclear decision to terminate for default."

B. Percentage of Work Completed

Also in the letter terminating Eagle Peak for default, the contracting officer calculated that Eagle Peak had completed around 9.2% of the work on the Project (subsequently revised to 10%, post-termination) but that 30.3% of the time available under the contract had been used. In estimating her figure for the percentage of work completed during the first season, the contracting officer excluded any value or credit for Eagle Peak's mobilization efforts on the Project, an effort for which Eagle Peak was paid approximately \$2 million.

However, even Stephen Weathers, P.E., FHWA's expert, opined that Eagle Peak had completed 17.1% of the work under the contract before being terminated. Mr. Nolting, Eagle Peak's expert, opined that Eagle Peak had completed 26.5% of the work on the contract prior to termination. Mr. Nolting also noted what he considered "inherent issues" with the contracting officer's calculation of the work completed. He explained that, when the "front-end significant mobilization costs or earnings" are excluded, what remains is not "high-dollar" work. Such work includes knocking down trees, clearing and grubbing, and taking down the highest elevation of the Grizzly Cut portion of the Project. Mr. Nolting opined that these project items "are difficult, slow-moving activities that are not high-dollar activities." He added that, on large construction projects like the one at issue in this appeal, much of the

contract value is on the “back end” – i.e., “the big materials, the cold recycled asphalt base, the paving.” He identified certain of the canyon work, never represented to start in the first of the three seasons (2016), as valued at \$6.4 or \$6.5 million, or approximately twenty-three percent of the contract value. He explained that simply breaking the project duration into thirds for a three-year project and concluding that Eagle Peak should have completed thirty plus-or-minus percent of work in the first of three seasons of the contract, or otherwise the company was negligent or inefficient, is overly simplistic.

On March 29, 2017, Eagle Peak filed its appeal challenging the termination for default, which was docketed by the Board as CBCA 5692.

Discussion

I. FHWA’s Burden of Proof

A termination for default “is a drastic sanction which should be imposed (or sustained) only for good cause grounds and on solid evidence.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J.D. Hedin Construction Co. v. United States*, 408 F. 2d 424, 431 (Ct. Cl. 1969)); *see also Lionsgate Corp.*, ENGBCA 5809, 92-2 BCA ¶ 24,983 (“Termination for default is judicially viewed as a most drastic remedy, a form of forfeiture, not looked upon favorably, and will be upheld only if clearly warranted and procedurally properly invoked.”). “A termination for default is a government claim, and the Government bears the burden of proof that its action was justified.” *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808 (citing *Lisbon Contractors*, 828 F.2d at 765). However, if the Government does establish “the existence of default, the burden [then] shifts to the contractor to prove that there were excusable delays under the terms of the default provision of the contract that render the termination inappropriate, . . . or that it was making sufficient progress on the contract such that timely contract completion was not endangered.” *I-A Construction & Fire v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913 (internal citation omitted).

Here, the question is whether FHWA satisfied its burden that there was no reasonable likelihood of Eagle Peak’s timely performance by October 5, 2018. We conclude that FHWA has failed to meet this burden.

II. The Termination for Default

A. FHWA’s Failure to Consider Factors Set Forth in FAR 49.402-3(f)

While a termination for default for no reasonable likelihood of timely completion “usually occurs where the contractor has fallen so far behind schedule that timely completion

becomes unlikely,” *Affiliated Western, Inc.*, the Government also must show that it was reasonable for the contracting officer to determine there was “no reasonable likelihood” of timely completion. *I-A Construction & Fire*. In doing so, “[t]he Government is not required to prove that it was impossible for the contractor to complete performance on time,” rather instead, that the Government “could not be assured of timely completion.” *Affiliated Western, Inc.* (citation omitted).

The factors set out in FAR 49.402-3(f) capture the elements an agency must consider when contemplating a termination for default. *Executive Elevator Service, Inc.*, VABCA 2152R, 87-3 BCA ¶ 20,083 (referencing a similar, predecessor provision). Two of the factors set forth in this provision are of particular significance in this case, (f)(4) and (f)(7). They read, respectively, as follows:

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

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

....

(7) Any other pertinent facts and circumstances.

FAR 49.402-3(f)(4), (7).

“Although . . . a [contracting officer’s] failure to consider one or more of the factors [set out in this FAR provision] does not necessarily invalidate a default termination, compliance, or failure to comply, with the regulation[] is relevant to an evaluation of alleged abuse of discretion.” *Marshall Associated Contractors, Inc.*, IBCA 1901, 01-1 BCA ¶ 31,248; *see also Executive Elevator Service, Inc.*, VABCA 2152, 87-2 BCA ¶ 19,849 (“failure of a contracting officer to comply with [48 CFR 49.402-3(f)] is a factor to be considered in determining whether the Contracting Officer abused [her] discretion in taking an action which has the most serious consequences for a contractor, i.e., termination for default.”).

With two full seasons remaining on the contract, the contracting officer here failed to consider “the urgency of the need for the . . . services [described in the contract] and the period of time” that another contractor would have required to complete the remaining work on the contract compared with the date by which Eagle Peak could have completed

performance under the contract. FAR 49.402-3(f)(4); *see also Darwin Construction Co.*, 811 F.2d 593, 599 (Fed. Cir. 1987) (overturning a termination for default, in part, because the agency failed to consider that the terminated contractor could have performed the remaining work on the contract “at least as soon as and probably much sooner than a successor contractor could have performed the unfinished work.”); *Lisbon Contractors, Inc.*, 828 F.2d at 766 (affirming lower court’s overturning of a default termination, based, in part, on the contracting officer’s acknowledgement “that the government did not undertake a study to determine whether [the contractor] could complete the work within the required time, or determine how long it would take a follow-on contractor to do the work” with the Court noting that “[s]uch a comparison is mandated by the relevant procurement regulations.”). “In reviewing the reasonableness of a default termination, the length of time it [would take] a successor contractor to complete the work is pertinent.” *Marshall Associated Contractors, Inc.*; *see Jamco Constructors, Inc.*, VABCA 3271R, 94-2 BCA ¶ 26,792. We find that FHWA’s failure to consider this critical information, particularly with so much time remaining on the contract, a factor weighing against a determination that the agency’s termination was reasonable.

The contracting officer also failed to consider Eagle Peak’s capability to dedicate additional resources to the Project to ensure timely performance. FAR 49.402-3(f)(7); *Marshall Associated Contractors, Inc.* (“The Government owes the contractor no less than an assessment of all the relevant circumstances when it exercises its discretion under the default clause.” (quoting *L&H Construction Co.*, ASBCA 43833, 97-1 BCA ¶ 28,766)). In November 2016 and again in January 2017, Eagle Peak assured the contracting officer that it had the resources to finish the Project by October 5, 2018, the deadline for contract completion. Eagle Peak’s assurances were supported by detailed information on its resources.

The contracting officer did not recall considering Eagle Peak’s detailed narrative prior to issuing her decision to terminate the company’s contract for default. This, notwithstanding, that the contract defines a construction schedule as including both a CPM schedule and a written narrative. Essentially, there is no indication in the record that the contracting officer considered a significant part of the construction schedule.

A contracting officer’s decision to terminate for default is measured objectively, upholding such decisions where the contracting officer “has carefully examined the contractor’s ability to complete the remaining work before the contract completion date.” *1-A Construction & Fire* (quoting *Hannon Electric Co. v. United States*, 31 Fed. Cl. 135, 143 (1994)). A termination decision is measured “in light of the circumstances as they existed at the time the decision was made.” *Affiliated Western, Inc.* (citing *Lisbon Contractors*, 828 F.2d at 765). A careful examination here should have included consideration of both parts

of Eagle Peak's schedule submissions – the CPM schedule and the narrative describing the company's resource capabilities as both are encompassed within the definition of a "construction schedule."

We cannot uphold the decision of FHWA's contracting officer to use the drastic remedy of termination for default when substantial information like resource capability, available to the contracting officer prior to termination, was not given due consideration. Significantly here, Eagle Peak's evidence showing that the company had adequate resources to timely complete the project remained undisputed.

B. FHWA's Inaccurate Assessment of Work Completed by Eagle Peak Prior to Termination

The contracting officer determined that Eagle Peak had only completed nine percent of the work under the contract (revised, post-termination, upward to ten percent) at the time of the termination. However, the contracting officer's exclusion of the company's mobilization efforts from her assessment of work completed in the first season fails to recognize that mobilization to a remote site such as Yellowstone National Park represents a substantial item of work. The exclusion of this item from her calculation misleadingly skewed the work completion number too low. FHWA's own expert assessed that Eagle Peak had completed 17.1% of the work during the first season and Mr. Nolting, Eagle Peak's expert, opined that Eagle Peak had completed 26.5% of the work required under the contract in the first season when weather and design impacts were considered. We are persuaded by Mr. Nolting's testimony and cannot conclude that Eagle Peak's progress during the first season was so deficient as to support a termination for default based on a calculation of work completed during that season.

C. Evidence of Untimely Completion Not Demonstrated

The contracting officer relied heavily on Eagle Peak's CPM schedule submissions – although, as previously mentioned, not the accompanying narrative – in reaching her decision to terminate the company's contract for default, finding that the schedules contained multiple errors. A predecessor Board explained the "underlying intent and value" of the CPM schedule in evaluating contract progress as follows:

[T]he [CPM schedule] is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. . . . The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many

subprojects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the “critical path.” A delay, or acceleration, of work along the critical path will affect the entire project.

SAE/Americon-Mid-Atlantic, Inc., GSBCA 12294, 98-2 BCA ¶ 3008 (quoting *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982)). The CPM schedule has also been described as follows:

A contractor’s initial network analysis is not cast in bronze; it is constantly changing; that is the advantage of the critical path method of scheduling construction. The impact of each change, or delay, on the previously charted sequences must be fitted into the network. The effect may be far-reaching. Activities which were not critical prior to the new event may be rendered critical; and conversely, formerly critical activities may develop float. Whether the change or delay affects the critical path must be determined on the basis of conditions existing immediately prior to its occurrence; not on how it might have changed what someone planned (or should have planned) months or years previously.

Norair Engineering Corp., ENGBCA 3804, 90-1 BCA ¶ 22,327. Following these precedents, the contracting officer’s decision based so substantially upon Eagle Peak’s CPM schedules is not sufficient to support the termination. Consistent with our predecessor Board’s decision in *Norair Engineering Corp.*, Mr. Nolting explained that CPM schedules “evolve,” and get more specific and accurate as information becomes available. However, Mr. Nolting opined that Eagle Peak actually did provide a significant amount of detail in its schedules submitted after receipt of the cure notice, and any errors contained in those schedules were minor. Critically, he added that the schedules demonstrated that the company had an appreciation for the scope of the Project, the various elements within the contract, and the Project calendar.

Further, we find that Eagle Peak’s schedule submissions and the facts of this appeal stand in stark contrast to situations described in cases upon which FHWA relies. In *Discount Co. v. United States*, 554 F.2d 435 (Ct. Cl. 1977), the Court noted that, “weeks after [an] order to resume work had [been] issued and a day after [a] 10-day cure notice had expired . . . [the contractor] had neither begun more-than-piddling construction activities at the [project site], nor assured the Government that it could meet the completion deadline.” *Id.* at 439. The Court added that the record showed that the default termination was not based

on the contractor's failure to comply with the contracting officer's demand to provide a work schedule per se but "rather on the over-all evidence of [the contractor's] failure to prosecute diligently its work under the contract." *Id.* at 441. The Court noted that "[t]he function of the work schedule was to show that the contractor was ready, willing and able to make progress; [the contractor's] failure to furnish such a schedule . . . bolster[ed] the Government's position that it was justifiably insecure about the contract's timely completion." *Id.*

In the Board's decision in *Affiliated Western, Inc.*, we found not only that the appellant-contractor failed to produce the updated and detailed schedules required by contract specifications but that, with only about two months remaining on a one-year contract, the contractor provided no information on how it planned to obtain subcontractor services necessary for completion of certain project phases and failed to demonstrate that it was capable of paying and keeping its subcontractors. And in *I-A Construction & Fire*, the Board found that the contractor had "plainly acknowledged its inability to complete the contract by its deadline" through both its schedules (one described as providing "very little detail" and a second described as providing "slightly more detail") and its extension requests. 15-1 BCA ¶ 35,913. In *Fraya, S.E.*, ASBCA 52222, 02-2 BCA ¶ 31,975, the Armed Services Board of Contract Appeals concluded that the Navy was justified in terminating the contractor for failure to make progress and failure to perform within the time specified in the contract when, at the time of termination, the contractor (1) had not provided contractually-compliant administrative submittals that were approved by the agency, (2) had provided a schedule which omitted a key work requirement, and (3) had completed zero percent of the work on the project within the initial forty percent of the total contract period.

The CPM schedules, including the accompanying narrative describing Eagle Peak's dedicated resources, were evidence that the company was ready, willing, and capable of performing the project work in the two remaining seasons of the contract. "That [a] contractor[] may be in technical default," as Eagle Peak may have been due to the errors in its CPM schedules, "is not determinative to establish the propriety of [a] termination for default." *ABS Baumaschinenvertrieb GmbH*, ASBCA 48207, 00-2 BCA ¶ 31,090. The Government is given discretion to terminate a contract for default, and that discretion must be exercised in a reasonable and fair manner. *Jamco Constructors, Inc.* (quoting *Darwin Construction Co.*, 811 F.2d 593). Notably, "[a] board's review of a termination for default must be based on the totality of the circumstances and 'tangible, direct evidence reflecting the impairment of timely completion.'" *Edge Construction Co. v. United States*, 95 Fed. Cl. 407, 422 (2010) (quoting *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 101 (Fed. Cir. 2003)); see also *Jamco Constructors, Inc.*; *Walsky Construction Co.*, ASBCA 41541, 94-2 BCA ¶ 26,698 ("Even if there is a technical basis for default, this does not require termination; the Government must consider all relevant circumstances in its exercise

of appropriate discretion.”). Unlike the cases cited by FHWA which demonstrated that default was clearly warranted, we cannot find the facts in this appeal reflect “impairment of timely completion” of the Yellowstone project, particularly with two full construction seasons remaining under the contract, justifying the drastic sanction of default termination.

D. Remedy for Improper Termination for Default

The Boards of Contract Appeals have authority to “set aside terminations for default where they find that the contracting officer has not acted ‘fairly and reasonably,’ i.e., where [the contracting officer’s] action was ‘arbitrary and capricious.’” *Executive Elevator Service, Inc.* (citing *Darwin Construction Co.*). Based on the evidence presented, we cannot find that the contracting officer acted “fairly and reasonably” in terminating Eagle Peak for default. We did consider other arguments made by FHWA in support of its default termination and found them without merit particularly in the context of the matters discussed in this decision.

Having found the termination for default improper, we convert it to one for the convenience of the Government. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2345, 14-1 BCA ¶ 35,537. Additionally, because we find that the termination was improper, we need not resolve the issue of whether Eagle Peak is entitled to an extension of the contract deadline due to excusable delay or, alternatively, was making sufficient progress on the contract such that timely contract completion was not endangered. *I-A Construction & Fire*.

Decision

The appeal is **GRANTED**. The termination for default is converted to a termination for convenience under the terms of the contract.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge