

DATA INTEGRATORS, INC.,)	
Appellant,)	
)	
v.)	CAB No. 2010-2
)	
U.S. GOVERNMENT PRINTING OFFICE,)	
Respondent.)	

Appearance for the Appellant:

Cynthia Malyszek, Esq.
Malyszek & Malyszek

Appearance for the Respondent:

Julie K. Cannatti, Esq.
Roy Potter, Esq.
U.S. Government Printing Office

Board Members:

Sharon L. Larkin (Presiding)
James A. Spangenberg
Scott H. Riback

DECISION

Data Integrators, Inc. (DI) appeals the final decision of the contracting officer to terminate for default DI's printing contract with the U.S. Government Printing Office (GPO) under Program 96-S, Purchase Order 95795, and deny DI's claim for equitable adjustment. The contract was terminated for default because DI was unable to complete a preproduction test within the allotted time after two attempts. DI asserts that the termination for default was unreasonable, requests that the termination be converted to a termination for convenience, and seeks damages and costs.

This appeal has been fully developed. The parties have engaged in discovery, supplemented the Rule 4 file on multiple occasions, presented evidence at trial, and fully briefed their respective arguments. The Board has carefully considered all of the evidence and argument before it and finds in favor of GPO. For the reasons stated below, the Board upholds the termination for default and denies DI's appeal.

BACKGROUND

The Contract

On June 19, 2009, GPO awarded Program 96-S and Purchase Order No. 95795 to DI in the amount of \$993,054.00. Rule 4 (R4), Tab R5, at 107; Tab R6, at 108.¹ The period of performance was from June 19, 2009, to July 31, 2010, with four 12-month options. R4, Tab R2, at 4; Tab R7, at 109. The contract required DI to produce a variety of mailing packages for the Social Security Administration (SSA). This required DI to, among other things, receive and process wire-transmitted data for five types of notices²; print, sort, fold, and insert notices into envelopes; and prepare the packages for mailing. R4, Tab R2, at 17.

The five types of notices that were the subject of this contract are: DECOR (decentralized correspondence³), eRPA (electronic representative payee accounting system), EAD (earnings after death), YCER (young children's earnings), and BEVE (benefit verification). Id. The information in these notices contained personally identifiable information, such as a person's name, date of birth, social security number, address, and benefit payment data. Id. at 8. As such, the contract included strict security requirements to protect against the mishandling and disclosure of this and other confidential or sensitive information. For example, the contract required DI to maintain an effective security system, id. at 7; provide a secure area for processing and storing data files, with access limited to security-trained personnel involved in the production of notices, id. at 13; properly safeguard personally identifiable information and keep it physically safe from unauthorized access, id. at 8; and submit a security plan for approval by the government, id. at 7. In addition, DI employees working on the contract were required to be prescreened and undergo civil and criminal background checks before having access to sensitive information. Id. at 8, 15.

The contract provided an estimated total workload of approximately 14,707,500 notices per year, with some notices to be issued daily and others to be issued weekly.⁴ Id. at 20. For each notice type, the contract explained what notices were to go into each mailer, identified sizing and folding requirements, and provided estimated fixed or variable page counts. Id. at 18-22. As relevant here, the contract advised that eRPA notices would vary in page count from anywhere between one and ten pages, and that,

¹ References to "R" or "A" preceding the tab numbers in the Rule 4 file signify whether the respondent or appellant submitted the document into the Rule 4 file.

² The SSA provided the wire-transmitted data. The contractor was to use this data to lay out and format the notices, proof the notices, and then populate each notice with individualized content. Trial Transcript (Tr.) at 408-13.

³ DECOR files included DECOR/EE (employee) and DECOR/ER (employer) notices. Tr. at 50.

⁴ For example, eRPA notices were to be issued daily, and DECOR notices were issued weekly. R4, Tab R2, at 20.

for bilingual eRPA notices, the contractor would have to insert both English and Spanish notices into a single envelope. Id. at 18, 22. The contract also advised that, for certain DECOR notices (DECOR/ER), the contractor would have to insert more than one notice into a single envelope. Id. at 18.

The contract included a 100 percent verification requirement, meaning that DI was responsible for ensuring that all notices were printed, inserted, and mailed correctly.⁵ Id. at 11. To accomplish this, DI was required to assign a unique identifying number to each notice to account for and track each individual piece. Id. at 11-12, 30. The contract required DI to ensure that there were no missing or duplicate pieces, and it required DI to validate the page count and sequence in each notice set. Id. at 10-11.

The contract required that DI undergo two tests prior to performing the contract--a wire transmission test (wire test) and a preproduction print/mail/management information run test (preproduction test). Id. at 23, 26. The wire test was to ensure that DI could receive and send data for each of the notice types over a secure T-1 or VPN line.⁶ Id. at 23, 35-36. The preproduction test required DI to print, sort, insert, and prepare for mailing 88,860 test samples of various notice types in a 12-hour period, in accordance with the contract specifications and simulating actual production conditions.⁷ Id. at 23-24, 35. The contract stated that the preproduction test would be conducted using test files furnished by the government at or after the post-award conference, and that the test would be performed after the contractor received the necessary envelopes and data for the test. Id. at 23, 27, 35. Prior to performing the test, DI was to have completed all composition, proofing, notices, and envelopes. Id. at 23-24. DI also was to have provided 100 printed samples of each notice to SSA for approval prior to the test. Id. at 24, 35. The contract stated that DI's failure to perform satisfactorily either the wire test or preproduction test was cause for default.⁸ Id. at 26.

⁵ DI was required to have automated systems to include notice coding and scanning technology capable of uniquely identifying each notice and reconciling discrepancies. R4, Tab R2, at 11.

⁶ DI passed the wire test, so we do not discuss this test further.

⁷ The contract stated that, during actual production, DI would have seven workdays after receipt of the wire transmission to produce and mail DECOR notices, and three workdays after receipt of the wire transmission to produce and mail eRPA notices. The contract further stated that the day of transmission would be counted as a workday if the files were received prior to 7:00 a.m. Monday through Friday. R4, Tab R2, at 36.

⁸ The contract incorporated by reference GPO Contract Terms (GPO Pub. 310.2, effective Dec. 1, 1987, Rev. June 2001). R4, Tab R2, at 5. These terms included a default clause that permitted the government to terminate the contract, in whole or in part, if the contractor failed to: (1) timely perform the services, (2) make progress so as to endanger performance, or (3) perform any other provision of the contract. A cure notice was not required for failure to timely perform services, but it was required for lack of progress or failure to perform other provisions. GPO Contract Terms, Contract Clause ¶ 20(a).

The contract anticipated that the government would provide DI with production and test files as government-furnished property, but that DI would program or reformat those files as necessitated by the DI's method of production. Id. at 17, 23, 26. DI was required to inspect the files immediately after receipt and notify the contracting officer of problems prior to performance of the contract. GPO Contract Terms, Contract Clause ¶ 7. Specifically, DI was required to notify the government of media problems or the need for reprogramming or reformatting. R4, Tab R2, at 26. In the event that problems with the address records in the government-provided files required programming by the contractor and caused delay, the contract permitted DI to charge for programming and production delays. Id. at 27. However, programming necessitated by DI's method of production was DI's responsibility and was not a recoverable cost under the contract. Id. at 24.

Preaward Survey

The contract made reference to a preaward survey. R4, Tab R2, at 9. The purpose of the survey was to allow the government to evaluate DI's personnel, equipment, security, and ability to perform the contract in accordance with the contract requirements. Id. On June 3, 2009, GPO and SSA conducted the preaward survey. R4, Tab R55, at 266. The agencies positively noted DI's promises to install additional printers and inserters to handle the workload,⁹ but they raised concerns regarding: (1) the security status of DI's employees; (2) the lack of security cameras at DI's facility; (3) DI's document shredding procedures; (4) whether DI had a sufficient number of employees to handle a spike in DECOR files; and (5) whether DI had a backup programmer with advance function presentation experience. Id. at 266-68. Despite these concerns, GPO decided to award the contract to DI and further assess DI's ability to process the workload during the 12-hour preproduction test. Id. at 268. Of significance in the preaward survey report, however, is a notation that DI was advised that the government, on occasion, may provide a file that was "exceptionally large or unusually low"; when that occurred, DI was instructed to immediately contact one of two SSA print specialists assigned to the contract. Id. at 267.

First Preproduction Test

As noted above, the contract was awarded on June 19, 2009. A post-award conference was conducted on June 24, 2009. R4, Tab R3, at 103. On July 21, 2009, the government transferred 39 test files to DI.¹⁰ Id. On August 3, 2009, DI confirmed that it had "all the files needed" and the parties agreed to conduct the preproduction test on

⁹ DI's promise to add printers and inserters was reflected in its production plan (which was provided as required by the contract) and in DI's written correspondence to GPO both before and after the preaward survey. R4, Tab A69, at 308, 310; Tab A72, at 331; Tab A73, at 342.

¹⁰ Prior to transmission, SSA advised DI that the DECOR/ER file was "shorter than specified" in the contract for the preproduction test, but that the government would "make adjustments for the timed production test." R4, Tab A77, at 348.

August 13, 2009.¹¹ R4, Tab R57, at 274. Leading up to the test, however, DI had problems with fonts, formatting, and programming of the different notice types; DI had not submitted all required proofs and its slow progress began to concern the government. R4, Tab R3, at 103-04; Tab R58, at 276; Tab R59, at 277-78.

On the afternoon of August 12, 2009, DI informed the government that it was not ready to perform the 12-hour preproduction test and DI requested that the test be rescheduled; however, the government was already en route to DI's facility for the test. R4, Tab R61, at 280. On the morning of August 13, 2009 (the scheduled test day), DI explained that it was still having issues with programming the eRPA files; specifically, DI was having difficulty programming the Spanish characters in the Spanish eRPA notices. Id.; Tab R63, at 299. In addition, DI was still working on processing the replacement DECOR/EE files that it had requested and received the day before. R4, Tab R63, at 298. DI also was still working on setting up internal quality control, programming the inserters, and "fine tuning" the 100 percent accountability reporting requirement. R4, Tab R61, at 280. To accommodate DI, the government agreed to postpone the test one day, until August 14, 2009.¹² Id. at 281.

The preproduction test was conducted on August 14, 2009, and DI encountered several problems. DI was unable to resolve the font issues with the Spanish eRPA notices. R4, Tab R61, at 283; Tab R63, at 301. DI had problems with the glue tab on the envelope sealer. R4, Tab R61, at 284; Tab R63, at 301. DI had not installed an additional printer and inserter as promised, and the installed inserter caused sparks to come out of an electrical outlet. R4, Tab R63, at 302. DI was unable to maintain 100 percent verification with the inserters, and it appeared unfamiliar with its newly installed accountability-reading cameras. Id. at 299, 302; Tab R61, at 284. DI encountered issues with the fold requirements that caused the barcodes to fall outside the window. R4, Tab 61, at 285-86; Tab R63, at 299, 301. Ultimately, DI terminated the test when it became apparent that it would not pass. Tr. at 483. At the conclusion of the test, insertion of the notices into the envelopes was less than 25 percent complete. R4, Tab R63, at 299.

Overall, the government found DI to be unprepared for the test and unsure of the contract requirements. Tr. at 30. The government also observed numerous security problems. For example, DI was using temporary employees who had not undergone background checks. R4, Tab R63, at 302. A DI employee was using a cell phone in a secure area, and a DI programmer also may have been working with government files

¹¹ Despite assuring the government that it had all the files it needed, in the week prior to the test, DI requested additional or corrected files, and the government immediately provided the requested information. R4, Tab R14, at 123; Tab A82, at 361-65. For example, on August 11, 2009, DI informed the government that some the DECOR/EE files were missing barcodes, and SSA retransmitted corrected files on August 12, 2009. R4, Tab A82, at 361-65.

¹² On August 13, 2009, the government also discussed with DI security concerns about unlocked doors and the use of temporary workers without background checks. R4, Tab R61, at 282.

at his home. Id. at 303; Tab R61, at 286-87. The back door of the facility was wide open, as was the door to the insertion room, and the lock for the printer room door was broken. R4, Tab R63, at 303; Tab R61, at 287. The main entry door was unlocked and video cameras provided only limited security coverage. R4, Tab R63, at 303; Tab R61, at 287. Vendors such as a Xerox technician and electrician were allowed access to areas containing personally identifiable information. R4, Tab R63, at 303; Tab R61, at 287.

Cure Notice And Responses

On August 14, 2009 (the day of the preproduction test), GPO issued a cure notice to DI, stating that DI's "failure to perform the preproduction test in a timely manner . . . is endangering your performance of the contract in accordance with its terms." R4, Tab R10, at 117. The government subsequently met with DI and orally conveyed to DI specific concerns about security, equipment, electrical issues, fold requirements, and Spanish eRPA notices. R4, Tab R63, at 307-08. DI was asked to respond to the cure notice by August 17, 2009. R4, Tab R10, at 117.

On August 17, 2009, DI responded to the cure notice, asserting that it was not ready to perform the preproduction test because it was still "going through the proofing stage with the customers' data and forms." R4, Tab R63, at 311. DI stated that, at the time of the test, it was still working on the eRPA Spanish files, as well as the corrected DECOR/EE files provided by the government on August 12, 2009. Id. DI complained that it was not given enough time with the data files before running the test, and that it did not have enough time to test its equipment or plan for the test. Id. at 311-12. DI also claimed that the contract specifications for the fold requirements were "contradicting." Id. at 312.

On August 18, 2009, DI supplemented its response by further explaining why it believed the fold requirements contributed to DI's test failure. R4, Tab A70, at 312-13. DI explained that the fold requirements and the "tap test"¹³ required by the contract caused the addresses and sequence numbers to move outside the window. Id. at 312. DI asserted that the government's failure to allow it to modify the fold requirements put it in a "no-win" situation that prevented it from successfully passing the test. Id.

On August 24, 2009, DI again supplemented its response by addressing the government's specific concerns about security, equipment, electrical issues, and

¹³ Tap test refers to the process of tapping the envelope on multiple sides to settle the inside contents. Tr. at 240. The contract required a 4-tap test (tapping the envelope on all four sides), but past postal service practice was to use a 3-tap test (tapping the envelope's sides and bottom, but not the top). Id.

Spanish eRPA notices.¹⁴ R4, Tab R63, at 307-309. With regard to security, DI promised to complete the background checks for its employees and vendors, and DI stated that it would discontinue the use of temporary workers. Id. at 307. DI also promised to institute a policy prohibiting cell phone use, to fix the broken lock on the printer room door, and to install security cameras. Id. With regard to equipment, DI admitted that it had not installed one printer and inserter, but it denied that this interfered with its test performance. Id. at 307-08. DI acknowledged that it “had spent very little time with” the new camera systems that it had installed on its inserters to perform the verification requirement. Id. at 308. With regard to the Spanish eRPA files, DI stated that it had finished the programming and would send the sample proofs to SSA for approval. Id. With regard to the electrical issue that caused the inserter to spark, DI stated that an electrician had been called to fix the loose connection. Id.

As a result of DI’s complaint about the contractually required 4-tap test, as well as DI’s assertion that the contract specifications for fold requirements were “contradicting,” the government engaged in a series of discussions with DI to resolve these issues. R4, Tabs R17, R19, R22-24. Ultimately, with DI’s input, the parties agreed to a specified fold requirement and envelope size that eliminated any ambiguity in the contract concerning the required fold; the government also agreed to waive the 4-tap test and allow DI to use the more commonly practiced 3-tap test instead. R4, Tab R30, at 171; Tab R31, at 173; Tr. at 44, 239-40, 484-85, 498. The government also recognized that DI may have had insufficient time with the files to prepare for the test, so it decided to give DI another opportunity to successfully complete the test.¹⁵ Tr. at 260. The parties rescheduled a preproduction test for September 18, 2009. R4, Tab R31, at 173.

Second Preproduction Test

In the weeks preceding the second test, DI and the government were in regular communication.¹⁶ Tr. at 247. One week before the test, the contracting officer sent an email to DI, reminding DI to resolve all security concerns prior to the test, asking DI to confirm the fold size it wanted to use at the test, and asking DI whether it had all the files it needed for the test. R4, Tab R30, at 171-72. By return email, DI confirmed the fold size it wanted to use, and DI responded to the government’s inquiry about test files as follows:

¹⁴ DI’s response, dated August 24, 2009, addressed each of the areas documented in the government’s contemporaneous reports of the pre-preproduction test. Compare R4, Tab R63, at 307-09 with R4, Tab R63, at 298-303; Tab R61, at 283-87. In addition to those issues addressed above, DI also reiterated its concerns about the fold requirements. R4, Tab R63, at 308.

¹⁵ The parties also executed a contract modification that provided DI with partial payment for the performance of the first preproduction test, recognizing the parties’ shared responsibility for the test failure. R4, Tab 27, at 161; Tab R40, at 218.

¹⁶ Among other things, DI was still working to resolve problems with the Spanish eRPA fonts and notice proofs. R4, Tab R18, at 134; Tabs R20-21, 26; Tr. at 89.

[Question from GPO:] Do you have all of the approved documents from SSA to conduct the test on Friday? If you do not, please let SSA . . . know by 10 a.m. Monday morning (9/14/09) in order to give SSA sufficient time to get any files you may need by 9/16/09, two days prior to testing.

[Answer from DI:] We have the files

R4, Tab R30, at 171; see also R4, Tab R31, at 173; Tr. 243. Prior to the test, DI did not advise that it anticipated receiving new files for the test, and DI did not alert the government to any issues with the existing files. Tr. at 44, 247, 318, 328, 521-22. Prior to the test, the government did not advise DI that it would provide new files for the second test and, in fact, the government did not provide DI with new files for the second test. Tr. at 44-45, 316. DI was to use the files it had received prior to the first test to perform the second test. Tr. at 316.

The test began at 6:55 a.m. on the morning of September 18, 2009. R4, Tab R66, at 323. An issue immediately arose with the DECOR/ER file counts. Id.; Tab R35, at 189. DI had in its possession 2,095 DECOR/ER files, but it was supposed to produce 15,714 DECOR/ER mailings during the test.¹⁷ R4, Tab R2, at 24; Tab R35, at 189; Tr. at 191-2. DI agreed to duplicate files to produce the specified amount, without objecting or raising any concern that duplication could interfere with the test. R4, Tab R66, at 323; Tr. at 192, 250-51, 293, 517. DI's method of duplicating files, however, created problems. DI duplicated the files without assigning each document a unique identifier (as required by the contract), so the inserters detected the duplicates and kept "error[ing] out," thus causing work stoppages and delays. R4, Tab R38, at 195; Tab R42, at 222; Tr. at 124, 214, 454-56.

DI encountered other problems unrelated to duplication. DI had difficulty inserting multiple DECOR/ER notices into a single envelope. In some instances, the barcode appeared on the back notice and not on the front notice, so the pages appeared out of order.¹⁸ R4, Tab R34, at 186; Tab R41, at 220; Tab R65, at 321; Tab R66, at 323; Tr. at 204, 214. DI's contemporaneous recitation of events indicates that this problem arose because DI did not program its system to presort or barcode multiple letters. R4, Tab R35, at 189.

¹⁷ The test required DI to produce 2,500 eRPA mailings. DI was provided too many eRPA files, and DI eliminated the excess files. However, DI's president testified at trial that this did not delay or negatively impact DI's ability to complete the preproduction test. Tr. at 507-11, 520.

¹⁸ The government also states that DECOR/ER barcodes were not being read because they were shifting outside the envelope window during insertion. Tr. at 320, 325-26. According to the government, this problem was unrelated to duplication and was likely caused by a DI programming error. Tr. at 325-27.

Another issue with the DECOR/ER notices arose when DI's system detected the same address on both the front and back notices, when, in fact, the addresses varied by one alphabetic letter.¹⁹ R4, Tab R35, at 189, Tr. at 466-70. DI contends that this led to "a bit of a wild goose chase" that took 45 minutes to 1 hour to resolve. R4, Tab R35, at 189; Tr. at 488.

DI also had problems with the eRPA notices. DI could not verify the eRPA notices because the sequence numbers kept falling outside the window as the page count increased. R4, Tab R34, at 186; Tab R65, at 321; Tab R66, at 323; Tr. at 585. DI suspected that this problem was caused by the new fold requirements that it agreed to after the first test, since DI never checked to see if the fold requirements would work with the eRPA files.²⁰ Tr. at 498. DI was allowed to change the fold during the test, but this did not resolve the problem. R4, Tab R42, at 221; Tr. at 497, 501. After the test, DI admitted that "eRPA notices are still a work in progress" because there was still an "issue with the address floating out of the window"; DI also admitted that it was the firm's responsibility to fold notices so that required information fit in the window. R4, Tab R35, at 189; Tr. at 501. In addition, the camera on the inserter for the eRPA notices broke, so DI turned it off during the test, thereby abandoning the 100 percent verification requirement.²¹ R4, Tab R66, at 326; Tab R36, at 192; Tr. at 482, 493.

DI had equipment problems as well. DI admitted to having a "late start" with insertion because "multiple vendors and an onsite technician [were] performing preventative maintenance." R4, Tab R35, at 189. DI admitted that other maintenance and setup issues caused "machine downtime." *Id.* One of the printers and one of the inserters were "down for parts," and, as noted above, the eRPA camera was broken. R4, Tab R65, at 321; Tab R66, at 323, 326; Tr. 482, 493, 587. Also, the gluing of the envelopes was not uniform and one sample was not glued at all. R4, Tab R36, at 191.

Finally, DI failed to remedy all of the security issues previously brought to its attention. The distribution door was unlocked, and three DI employees working on the preproduction test had not undergone background checks. R4, Tab R34, at 187; Tab R66, at 327; Tr. at 157-8, 252.

At the conclusion of 12 hours, DI had printed all of the notices, but it had only inserted 77,173 notices of the 88,860 required. R4, Tab R66, at 325. Although DI was given

¹⁹ At trial, DI's president argued that the alphabetical letter issue was the same as the barcode placement issue. Tr. at 585. However, his contemporaneous recitation of the test results demonstrates that these were two separate issues. R4, Tab R35, at 189. Government records and testimony also confirm that a distinct barcode placement issue existed. R4, Tab R34, at 186; Tab R65, at 321; Tab R66, at 26; Tr. at 204-05.

²⁰ As DI's president stated at trial, "we never looked at eRPA, for whatever reason. I don't have an excuse." Tr. at 498.

²¹ DI also turned off the verification cameras to continue with the production of duplicate DECOR/ER files. Tr. at 462-63.

additional time to complete the test, it was unable to do so while meeting the 100 percent verification requirement. Id. at 326.

Termination And Appeal

On October 27, 2009, GPO terminated DI's contract for default, citing DI's "failure to complete the requirements of the timed production test as detailed in the specifications."²² R4, Tab R49, at 248. On November 18, 2009, DI, through its counsel, filed a claim with the contracting officer, appealing the termination for default and requesting an equitable adjustment in the amount of \$472,738.48. R4, Tab R53, at 256-62. The contracting officer denied the claim on December 10, 2009. R4, Tab R54, at 263. On January 22, 2010, DI appealed the final decision of the contracting officer to this Board.

ANALYSIS

DI contends that the termination for default was unreasonable. It asserts that it was unable to perform satisfactorily the preproduction test because the specifications were defective and because the government failed to supply DI with test files in accordance with the contract requirements. Complaint, Counts I-V; DI Post-Trial Brief at 2-3. DI complains that GPO terminated the contract without issuing a cure notice after the second test. DI Post-Trial Brief at 5. DI also challenges other aspects of the contracting officer's decision to terminate the contract. DI Post-Trial Brief at 4, 23, 27.

When a termination for default is appealed, the government has the initial burden of proving that the termination was justified. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 763-64 (Fed. Cir. 1987); Montage, Inc. v. Architect of the Capitol, GAO CAB No. 2006-2, 10-2 BCA ¶ 34,490 at 170,099. If the government demonstrates that the termination was justified, then the burden shifts to the contractor to show that its nonperformance was excusable. Keeter Trading Co., Inc. v. United States, 79 Fed. Cl. 243, 253 (2007); Montage, Inc., supra, at 170,100. For nonperformance to be excusable, it must be beyond the reasonable control of the contractor and without its fault or negligence. GPO Contract Terms, Contract Clause ¶ 20(c); see General Injectables & Vaccines, Inc. v. United States, 519 F.3d 1360, 1363 (Fed. Cir. 2008); Cassidy Printing, Inc. v. U.S. Government Printing Office, GPO CAB No. 10-83, 1984 WL 148106. If the government fails to meet its burden or nonperformance is excusable, the appropriate remedy is to convert the termination for default to a termination for convenience. Cassidy Printing Inc., supra.

For the reasons detailed below, we find that the contracting officer's decision to terminate DI's contract for default was justified, and we further find that DI's nonperformance was not excusable. We uphold the termination for default and deny DI's appeal.

²² GPO has since awarded a replacement contract to NPC, Inc., for an amount higher than DI's contract price. However, GPO has declined to assess excess procurement costs to DI. R4, Tab R50, at 249; Tab R52, at 253.

The Termination For Default Was Justified

The default clause of the contract here provided, in pertinent part, that GPO could terminate the contract, in whole or in part, if DI failed to timely perform the services or make progress so as to endanger performance. GPO Contract Terms, Contract Clause ¶ 20(a)(1). The contract specified that DI's failure to perform the preproduction test satisfactorily could be cause for default. R4, Tab R2, at 26.

The evidence in the record convincingly supports the contracting officer's decision to terminate DI's contract for default because DI failed to perform the preproduction test satisfactorily. DI was provided two opportunities to perform the preproduction test and both times failed to produce the required mailings in the allotted times.

DI's failure to perform the first test satisfactorily was, in large part, DI's fault. As the evidence shows, DI was unprepared. When the test began, DI was still processing files, programming its inserters, and "fine tuning" the 100 percent accountability reporting requirement. DI was still trying to resolve font and character issues with Spanish eRPA files. DI had not installed all of the equipment it had promised in its production plan or in prior communications to the government. DI also had not undertaken adequate security measures--doors were open or unlocked, workers had not been screened, and temporary employees and vendors were allowed access to sensitive information.

In addition, DI was unable to maintain 100 percent verification with the inserters during the test. DI claimed that this was due to defective fold specifications, namely that the fold specifications in the contract were contradictory and thus ambiguous.²³ However, those ambiguities were patent--that is, obvious from the face of the contract--such that DI had a duty to inquire at the earliest opportunity. NVT Techs., Inc. v. United States, 370 F.3d 1153, 1162 (Fed. Cir. 2004). DI has offered no explanation for why it failed to seek resolution of the contradiction prior to contract award or at any time in advance of the test.

In addition, DI complained that it had not received the test files early enough to allow it to prepare adequately for the first test. Although DI had received the data files nearly one month before the test, DI failed to inspect the files immediately or notify the government of problems with the files until the week before the scheduled test.²⁴ Once notified, the government immediately corrected and replaced the problem files. Thus, it was not the government's delay in providing files, but DI's delay in notifying the government of the problems that needed to be corrected, that caused DI not to have all of the data files it needed until the day before the scheduled first test. Consequently, as the test began, DI was still working on processing the late-received files.

²³ The fold requirements were stated to be 8½ inches by 3¾ inches on one page of the contract, and 8½ inches by 4 inches on another page. R4, Tab R2, at 19, 31.

²⁴ As noted above, the contract required DI to inspect immediately the files and notify the government of problems. GPO Contract Terms, Contract Clause ¶ 7; R4, Tab R2, at 26.

The government issued DI a cure notice and allowed DI another opportunity to perform the preproduction test. The government corrected the contract ambiguity by allowing DI to select the fold requirements that it wanted to use during the second test, and the government agreed to waive the 4-tap test requirement that DI had difficulty meeting. The government also gave DI one month to prepare for the second test using the existing files. In the week prior to the second test, the government contacted DI to obtain DI's assurances that it was ready to proceed. DI verified the fold requirements it intended to use, and it confirmed that it had all of the files it needed to perform the test.

Nonetheless, DI was unable to complete its second attempt at the preproduction test in the allotted time. DI continued to have equipment, security, and insertion problems. Printers and inserters were not installed or were "down" for maintenance. Some workers had not undergone background checks. A door was unlocked. DI was unable to insert eRPA files with 100 percent verification because sequence numbers were slipping outside the window. DI was unable to insert properly and verify mailings requiring multiple DECOR notices. DI failed to notify the government in advance of the test that it was missing DECOR/ER files, and, instead, DI agreed to duplicate files on the morning of the test to make up the difference. When duplicating files, DI failed to assign the documents unique identifiers, so inserters kept recognizing duplicates and shutting down. DI began inserting notices into envelopes late, and when it ran into difficulties, it abandoned the 100 percent verification requirement in an effort to complete the test on time. At the conclusion of the timed test, DI had printed all of the notices, but it had only inserted 77,173 of the total 88,860 notices required, and it failed to maintain 100 percent verification.

Based on the evidence, we find that the government has convincingly met its burden of demonstrating that the termination for default was justified. As further discussed below, DI has not shown that its nonperformance was excusable.

DI's Nonperformance Was Not Excusable

DI contends that its failure to complete the preproduction test was excusable for two reasons.²⁵ First, DI argues that the government deviated from the contract by not

²⁵ DI also contends that its nonperformance was excusable because the contracting officer admitted, in an email dated September 24, 2009, that the specifications were defective. DI Post-Trial Brief at 3, 27. The email in question discusses conflicting fold requirements and the tap test requirements in the contract, which DI complained of during performance of the first test. As noted above, the parties resolved this problem prior to the second test; DI was allowed to select the fold requirements it wanted to use, and the government waived the 4-tap test requirement for the benefit of DI. As such, any problems that DI had in performing the second test were not due to the specifications discussed in the contracting officer's email. DI also argues that the specifications were defective because the government did not provide a sufficient quantity of test files. DI Post-Trial Brief at 3, 29-30. This assertion is illogical, since the files are not specifications, but are government-furnished property under the contract. See R4, Tab R2, at 22-23. In any event, our decision above fully addresses the government's failure to provide sufficient files.

providing DI with all of the test files on the morning of the second test. Second, DI contends that the government deviated from the contract by requiring DI to duplicate files to make up the shortage of DECOR/ER files. DI argues that these actions of the government were the “sole cause” of DI’s inability to complete the test on time. DI Post-Trial Brief at 2-3, 15-23.

DI’s assertion that the government was required to provide DI with the test files on the morning of the test is not supported by the contract. In this regard, the contract stated that the preproduction test would be conducted using test files furnished by the government at or after the post-award conference, and that DI would complete its proofing prior to the test. R4, Tab R2, at 23, 27. This suggests that there would be some lag time between the provision of files and the performance of the test for DI to prepare. The contract did not contemplate that DI would be provided files for the preproduction run on the day of the test.

In support of its argument, DI argues that the contract required the test to simulate actual production, and, for actual production, files were to be transmitted on the same day as production. DI Post-Trial Brief at 17; Tr. at 443. Specifically, DI refers to contract language that the “schedule” will begin on the day the files are received if received prior to 7:00 a.m. Eastern Time. R4, Tab R2, at 36; Tr. at 443. DI fails to note the immediately following language that defines the completion schedule for eRPA notices to be three workdays after receipt of the wire transmission, and the completion schedule for DECOR, EAD, and YCER notices to be seven workdays after receipt of the transmission. R4, Tab R2, at 36. Thus, the language DI relies on does not support its argument that the production runs were to be completed on the same day that data was transmitted.

In addition, DI’s assertion that it believed the government would provide new test files on the morning of the second test is not credible or consistent with its conduct during test performance. With regard to the first test, DI complained that it did not have sufficient time with test files to prepare adequately for the test. It is therefore difficult to believe that DI expected to conduct the second test immediately after receiving new files that morning. Furthermore, prior to the second test, DI unambiguously confirmed that it had all of the files it needed to perform the test. This suggests that DI understood that it was going to use the files it already had in its possession for the second test. At no point prior to, during, or after the second test did DI express a belief that it expected to receive new files on the morning of the second test. DI also did not express this position in its certified claim to the contracting officer or in its complaint in this appeal. Indeed, the first time that DI expressed this belief was at trial, which was two years after the contract was terminated.²⁶

²⁶ DI’s president asserted at trial that the confirmation (“[w]e have the files”) pertained only to printer resource files, not test files. Tr. at 572-74; DI Post-Trial Reply Brief at 7. This testimony lacks credibility, especially since DI never expressed this position at any point prior to trial. We find the president’s contemporaneous conduct and responses, discussed above, to be more probative and credible than his trial testimony.

Even if files were not required on the day of the test, DI argues, the government deviated from the contract by not providing DI with the exact file quantities needed for the test. DI Post-Trial Brief at 16; DI Post-Trial Reply Brief at 18. However, the contract did not explicitly state that the government would provide exact file quantities for the preproduction test. It stated only that the contractor was required to perform the test using test files furnished by the government, and it distinguished between test files used for the preproduction test and production files used during actual production. R4, Tab R2, at 23, 27. With regard to production files, the contract required the government to furnish “all” the files, whereas, with respect to test files, the word “all” was omitted. *Id.* at 26. Although another contract provision stated, “NO SHORTAGES WILL BE ALLOWED,” *id.* at 20, DI’s president conceded at trial that this provision referred to DI’s obligation to print and account for all data received as part of the 100 percent verification requirement. Tr. at 414. This provision did not speak to the government’s obligation to provide test files.

Furthermore, we find that DI’s conduct substantially contributed to the problems that arose as a result of the file shortage. Importantly, DI breached its contractual duty to inspect files immediately and notify the contracting officer of discrepancies with the requirements, thereby depriving the government of any meaningful opportunity to address the file shortage prior to performance of the test. *See* GPO Contract Terms, Contract Clause ¶ 7; *see also* R4, Tab R2, at 26 (contractor to advise of media problems or needed reprogramming); Tr. at 328. As the contract states, the “[f]ailure to examine the [files which were provided as government-furnished property] and bring any discrepancies to the attention of the Contracting Officer *will not* relieve the contractor of responsibility to perform.” GPO Contract Terms, Contract Clause ¶ 7 (emphasis in original). Furthermore, DI was reminded, during the preaward survey, that problems with file transmission could occur and that DI was to notify SSA immediately if any of the files appeared “exceptionally large or unusually low.” R4, Tab R55, at 267. DI did not give the required notice. Tr. at 247, 318.

DI asserts that notice to the government was not necessary because the government “was fully aware” of the shortage in the DECOR/ER files.²⁷ DI Post-Trial Reply Brief at 14. While the government may have been aware of the shortage, the evidence does not show that the government understood that the shortage would interfere with DI’s performance of the second test.²⁸ It was prior to the first test that the government informed DI that the DECOR files “will be shorter than specified” and that there would be “adjustments for the timed production test.” R4, Tab A77, at 348. Such adjustments

²⁷ GPO Contract Terms required that DI to give notice of file problems to the contracting officer, not other government personnel. *See* GPO Contract Terms, Contract Clause ¶ 7. However, the contract specifications required that DI give notice to SSA. R4, Tab R2, at 26. The contracting officer also directed (during the preaward survey) that DI give notice to SSA. R4, Tab R55, at 267. We therefore include SSA in our discussion of notice to the government, above.

²⁸ As DI repeatedly points out, the GPO and SSA personnel involved were not programmers; DI asserts that it has more knowledge and experience in this area. DI Post-Trial Brief at 26.

were that the government granted DI an extra day to prepare for the first timed test, and it gave DI a second opportunity to repeat the test after DI complained it did not have sufficient time with the files. The government never led DI to believe that it was going to provide additional files, and DI never indicated that it expected to receive additional files. Tr. at 44-45. DI never objected to the file quantities, never asked for new files, and never informed the government that insufficient file quantities could cause test problems. Tr. at 44, 247, 318, 517, 521-22. To the contrary, DI affirmatively represented to the government that it had all the files it needed for the second test, and, when it realized on the morning of the second test that it was short files, DI agreed to duplicate files without raising any concern whatsoever. R4, Tab R30, at 171; Tr. at 243, 517. Under the circumstances, we cannot conclude that notice was unnecessary.

DI also contends that duplicating files was prohibited by the contract, invalidated the test, and changed the test requirements. DI Post-Trial Brief at 2-3, 15-23. While it is true that the contract prohibited DI from generating duplicates as a general matter, DI readily agreed to duplicate files, without objection, to address a problem primarily created by its failure to inform the government that it needed more files to perform the test.²⁹ This was not a government directed change inasmuch as it was a mutually agreed upon solution to remedy a problem, at the time of the test, that was primarily created by DI.

It was also DI's own unilateral course of action, and not the government's direction, that "invalidated" or "changed" the test. The contract provided a way in which DI could have duplicated files without generating duplicate records, and without altering the test requirements. Specifically, the contract required that DI assign each document a unique identifier so that each piece could be accounted for. R4, Tab R2, at 11-12, 30. DI could have, and indeed should have, assigned each replicated document a unique identifier so that the system would not recognize it as a duplicate.³⁰ Instead, DI failed to assign a unique identifier to each generated document and instead chose to abandon the verification requirement, without notifying the government of its intended course of action. Tr. at 460-61, 512-14, 516-18.

In sum, DI has not proven that its failure to complete the reproduction test satisfactorily within the time allowed was solely, or even substantially, caused by the government. Not only does DI bear significant responsibility for the problems it encountered in

²⁹ As noted above, DI's belief that the government would provide new files on the morning of the test is not credible, supported by the contract, or reflected in the contemporaneous record.

³⁰ GPO's printing services specialist testified that assigning unique identifiers would have taken "no more than two hours." Tr. at 218. DI's president offered a "wild guess[]" that it might have taken "six, seven hours." Tr. at 456. Since DI had the files for more than four weeks prior to the second test, DI had more than enough time to program the files to complete the test without abandoning the verification requirement. In the alternative, DI should have advised the government that additional file quantities were needed to perform the test, to afford the government an opportunity to supply them.

processing duplicates, but it also encountered problems that were unrelated to the duplicate issue and which likely would have caused DI to fail the test in any event.

For example, DI was not able to verify eRPA notices because sequence numbers kept falling outside the window as the page count increased. DI was responsible, under the contract, for ensuring that the eRPA notices were correctly folded, inserted, and verified. Tr. at 501; R4, Tab R2, at 10-11, 17-22. There is no evidence in the record that the government caused, or contributed to, DI's problems with the eRPA files. There also is no evidence in the record that DI was able to solve this problem, or could have solved this problem, within the time allotted for the test. As DI admitted the day after the second test, eRPA notices were "still a work in progress" that would require moving the sequence number, adjusting the fold, and possibly changing the envelope size. R4, Tab R35, at 189.

In another example, DI had difficulty inserting multiple DECOR/ER notices into a single envelope.³¹ DI admitted, after performance of the second test, that this problem arose because DI failed to presort or barcode both letters.³² R4, Tab R35, at 189. Both presorting and inserting letters in the proper sequence were DI's responsibility under the contract. R4, Tab R2, at 17, 23. DI has offered no evidence to suggest that the government caused, or contributed to, DI's problems inserting multiple notices.

In addition, DI experienced multiple problems with its equipment. Printers and inserters were "down" for maintenance, and one of DI's operators broke a verification camera during the test. It was DI's responsibility to provide working equipment, and there is no evidence in the record that the government was at fault for DI's equipment problems. Although DI claims that the equipment issues, alone, would not have caused it to fail the test, they certainly contributed to DI's difficulties and evidence a lack of preparation on DI's part to perform the test.³³

³¹ As noted above, this issue was separate from the issue of two notices being different by one alphabetical letter.

³² In a post-test letter, DI asserted that it was not required to presort multiple notices because it did not presort its sample proofs. R4, Tab R35, at 189. DI is incorrect in this position. The contract clearly and specifically required DI to presort notices. E.g., R4, Tab R2, at 17, 23. DI submitted proofs as loose samples, with sequence being irrelevant, for the purpose of checking for errors with layout, font, and spacing. Tr. at 65; see R4, Tab R2, at 24, 36.

³³ In addition, although security issues did not cause DI to fail the timed preproduction test, DI performed the test without adhering to the security requirements of the contract. Because personally identifiable information was being utilized, the contract imposed clear and unambiguous requirements that DI screen its workers and safeguard personally identifiable information. R4, Tab R2, at 7-9. The government twice pointed out security concerns to DI--during the preaward survey and after the first preproduction test. Yet, DI performed the second test with an unlocked door and used some workers who had not been screened. The fact that DI still had not taken

In sum, we find that DI bears primary responsibility for failing the test, and therefore DI's nonperformance was not excusable.

The Cure Notice Was Adequate

DI complains that the contracting officer's failure to issue a cure notice after the second test deprived DI of an opportunity to cure the alleged deficiencies prior to default. DI Post-Trial Brief at 5.

The default clause in the contract provided that GPO could terminate the contract for default if the contractor failed to perform the services within the time specified, or failed to make progress so as to endanger performance. GPO Contract Terms, Contract Clause ¶ 20(a)(1). A cure notice was not required if the grounds for termination were the contractor's failure to timely perform services, but a notice was required if the grounds for termination were lack of progress or failure to perform other contractual provisions.³⁴ *Id.* ¶ 20(b). DI's conduct in failing to complete the preproduction test in the time specified fell under the first provision, which did not require a cure notice.

Nevertheless, GPO provided DI with a cure notice after the first test, identifying DI's "failure to perform the preproduction test in a timely manner" as the basis of concern. R4, Tab R10, at 117. In addition to the cure notice, the government communicated to DI its specific areas of concern, including DI's inability to program eRPA notices, fold and insert notices, meet the 100 percent validation requirement, have working equipment in place, and meet security requirements. R4, Tabs R10, R61, R63. This level of detail sufficiently put DI on notice of the issues that it needed to correct for the second test. Although DI corrected some of the issues,³⁵ it continued to experience problems in the same areas during the second test: production of eRPA notices, fold and insertion, verification, equipment, and security.

DI's argument that it should have been given another opportunity to cure the test deficiencies is unpersuasive. DI's opportunity to cure its performance was the second test. The contract did not require that GPO provide DI unlimited opportunities to repeat the test, and multiple cure notices were not required.

adequate security measures as of the second test evidences, on DI's part, a disregard for the sensitivity of the personal information it was processing.

³⁴ The Federal Acquisition Regulation (FAR) does not apply to this GPO procurement, so DI's reliance on the FAR default clause, FAR § 52.549-8, in support of its argument is misguided.

³⁵ For example, DI fixed the font issues in the eRPA notices and addressed some security matters.

Contracting Officer's Decision Is Reasonable

DI raises additional arguments in an attempt to undercut the contracting officer's decision to terminate its contract. We have considered and rejected all of DI's arguments.

For example, DI contends that the contracting officer's decision to terminate the contract is not adequately documented or explained. DI Post-Trial Brief at 23, 27. The contracting officer documented her decision in a memorandum to the GPO contract review board and in the termination notice sent to DI. R4, Tab R48, at 247; Tab R49, at 248. Although each and every detail supporting the termination decision is not reflected in these two documents, the record is replete with contemporaneous reports, correspondence, and witness testimony that fully support the contracting officer's decision to terminate the contract for default. E.g., R4, Tabs R34, R36, R41, R65, R66. We find this evidence credible and relevant to show the reasonableness of the contracting officer's decision.

DI also complains that internal discussions in the record show that the contracting officer "changed her mind" from a termination for convenience to default. DI Post-Trial Brief at 4. The record does not show a change of heart, but rather a thoughtful discussion among government personnel about whether to terminate the contract for convenience or default. See, e.g., R4, Tab R39. Although a GPO print specialist who observed the test initially recommended a termination for convenience, he testified at trial that he did so because he had recently moved to the government from the "contractor's side," so he "lean[ed]" toward the contractor. Tr. at 272.

Finally, DI asserts that the contracting officer's decision to terminate the contract is undercut by her admission that it would be unethical to award the replacement contract because of defective specifications, citing an email chain of correspondence from September 2009. DI Post-Trial Brief at 4; R4, Tab R39, at 215. It appears from this email chain that the contracting officer was discussing the conflicting fold requirements, which were corrected through a contract modification after DI raised this issue during the first test and before DI attempted the second test. The evidence confirms that no changes were made to the replacement contract, and that the replacement contract was issued with the same specifications and terms as those imposed on DI. Tr. at 273, 279. DI has not shown that the award of the replacement contract was improper or unethical.³⁶

³⁶ During the course of this litigation, DI deposed the contracting officer and placed her on the witness list for trial; however, DI chose not to call her as a witness. When DI's counsel began discussing this email chain at trial, the Board suggested that DI reconsider calling the contracting officer as a witness to ascertain the contracting officer's meaning. Tr. at 303-07, 335-37. DI's counsel declined to call the contracting officer.

CONCLUSION

For the above reasons, we uphold the termination for default and deny DI's appeal. DI's request for equitable adjustment is denied.

Dated: May 8, 2012

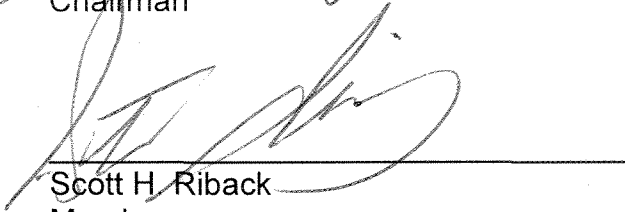


Sharon L. Larkin
Presiding Member

We concur:



James A. Spangenberg
Chairman



Scott H. Riback
Member