



## II. FACTUAL BACKGROUND

TIC filed this Dispute with the ODRA on October 9, 2008, alleging that the Region was not justified in terminating the Contract for an alleged failure of TIC to timely provide required performance and payment bonds for the Project. TIC contends that the Region issued defective bid documents and that TIC had bid without knowing the scope of work required due to the Region's failure to clarify its drawings and specifications. *See* Dispute at 1. TIC further alleges that its ability to timely provide the required bonds was delayed as a result of: (1) the Region's post-award issuance of drawings and specifications that altered the scope of work of the Contract; and (2) its failure to respond to requests from TIC's bonding company. *Id.* The Dispute seeks reinstatement of the Contract, or alternatively, that the Contract be terminated for the convenience of the Government. *Id.* at 2. In subsequent filings, TIC asserts that: the Region failed to give TIC proper notice of the termination, *see TIC Opposition* at 4; and that the Region's alleged failure to provide consistent information about the scope of work under the Project prevented TIC from obtaining the required bonds. *Id.* at 5.

The Region submitted its Dispute File on January 5, 2009 ("Dispute File"). The Dispute File included a statement of the Region's legal position on the Dispute as well as the relevant documents required by the ODRA Procedural Regulations. The Region's Dispute File takes issue with several of TIC's factual allegations. In addition, the Region asserts that, after terminating the Contract, it entered into a replacement contract for the Project with a company that had been the second-lowest bidder for the work ("Replacement Contract"). The Region seeks to have TIC reimburse it for the additional cost of the Replacement Contract. *See* Dispute File at 9, 10.

TIC filed its supplement to the Dispute File on April 13, 2009 ("Supplement"). The Supplement included: an Affidavit of the Principal of TIC, Jeffrey Jenkins ("Jenkins Affidavit"), together with a Statement of Facts in support of TIC's Dispute ("TIC Statement of Facts"), as well as a copy of an assignment of claims form and a Postal

Service receipt.<sup>1</sup> The Jenkins Affidavit alleges, among other things, that “[I]n late June 2008, TIC was awarded the contract to perform the work. In July 2008, the Government mailed a set of drawings and set of specifications on this project.” *See Jenkins Affidavit* at Paragraph 3. The Jenkins Affidavit also alleges that TIC “forwarded a set of drawings and specifications to our Bonding Company for evaluation, as part of the bond process.” *Id.* at Paragraph 4.

Significantly, for purposes of the instant Motion, The Jenkins Affidavit further alleges that:

the specifications and drawings provided as part of the solicitation were different than the specifications and drawings provided to TIC after the contract was awarded and forwarded to TIC’s bonding company for evaluation.

*Id.* at Paragraph 5. The Affidavit further alleges that “the specifications differed from the scope of work detailed in the contract and TIC’s bonding company required clarification.” *Id.* at Paragraph 6. The Affidavit also asserts that “TIC contacted Mr. Shepard, the contracting officer on several occasions requesting clarification on the differences between the specification and the scope of work contained in the contract. Mr. Shepard failed to respond to the request for information that was submitted.” *Id.* at Paragraph 7. The Affidavit goes on to allege that: TIC’s potential surety company had requested, but had not received from the Government, an assignment of claims form; and that TIC failed to provide any submissions to the Government because the Government had not addressed TIC’s questions regarding alleged differing scope of work, and because the Government had not issued a notice to proceed. *Id.* at Paragraphs 9, 11, and 12. Finally, the Jenkins Affidavit alleges that “the Government was informed that the

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<sup>1</sup> The ODRA revised the Hearing Schedule in this matter after TIC missed an established deadline to file its Supplement to the Dispute File, failed to serve a timely copy of its explanatory letter to the regional counsel, and failed to participate in a status conference with the Hearing Officer and opposing counsel. *See ODRA Status Conference Memorandum of March 30, 2009*. Notwithstanding the failure of this *pro se* contractor to comply with ODRA procedures, the Hearing Officer, in the interest of justice and the development of an adequate record, extended the deadline for filing the Supplement to the Dispute File with the admonishment that the “... parties must comply with deadlines the ODRA orders. Further, all submissions to the ODRA’s adjudication Dispute Resolution Officer must also be provided on a timely basis to the opposing party.” *Id.* at 3.

bond was being issued within the time requirements but there were questions that needed answers on the project.” *Id.* at Paragraph 13.

In addition to the Affidavit, the TIC Supplement included the TIC Statement of Facts, in which it alleged, among other things, that:

the specifications and drawings listed in the scope of work were outside the original specification issued with the project solicitation. The scope of work specifically included electric work that was not addressed in the original specifications issued with the project solicitation and consequently not addressed during a site visit.

*See TIC Statement of Facts* at Paragraph 3. TIC further alleges that it requested clarification in writing from the contracting officer regarding the scope of work but never received such clarification. *Id.* at Paragraphs 4 and 5. Specifically, TIC alleges that “the Government failed to provide the surety agent with the necessary clarification and information required for the surety agent to issue the required bond.” *Id.* at 5. Essentially, TIC claims that the Government’s actions prevented TIC from obtaining the required bonds for the contract. *Id.* at Paragraphs 8, 10.

The Region’s Motion seeking summary judgment was filed with the ODRA on April 24, 2009. The Region’s Motion alleges that there are no genuine issues as to any material fact and that it therefore is entitled to a judgment as a matter of law in this case. The Motion explains that the Region:

terminated the contractor for its default in failing to provide the payment and performance bonds, which were a requirement of the contract. There is no dispute that the bonds were required within 15 calendar days of award and the contractor failed to provide those bonds within that time, and, in fact, at anytime. The information demonstrates that the default was not due to unforeseeable causes beyond the contractor’s control, but rather, was attributable to the contractor.

*Motion* at 1. The Region’s Statement of Facts contained within the Motion alleges that the Region had forwarded a letter of award of the Contract to TIC on June 12, 2008 and that the letter was received by TIC on June 14, 2008. *See Region’s Statement of Facts*, at Paragraphs 9, 10. The Region further contends that under the Contract, TIC was required

to submit the performance and payment bonds by June 29, 2008 and it failed to do so. *Id.* at Paragraph 15. The Region further alleges that it forwarded a cure notice by facsimile to TIC on July 2, 2008, requiring that TIC cure its deficient performance by submitting performance and payment bonds within 5 days. *Id.* The July 2 letter informed TIC that “TIC’s failure to provide the payment and performance bonds was endangering the performance of the contract, and that, unless the condition was not [sic] cured after 5 days of receipt of this Letter, the Government may terminate for default.” *Id.* at 15. The Region states that TIC responded on July 7, 2008 indicating it had not received the Region’s award letter until June 23, 2008, allegedly because the Region had forwarded the letter to an incorrect address. *Id.* at 16. The Region takes the position that the award letter had been forwarded to the address provided by TIC on its proposal. *Id.* at 17. The Region further states that “even if TIC did not receive the award Letter until June 23, 2008 as TIC claims, there was still time, 6 days, for TIC to submit the bonds.” *Id.*

The Region’s Statement of Facts further asserts: “with regard to TIC’s assertion that TIC had not received the drawings and specifications, the contracting officer stated that the drawings and specifications to prepare its submittals were the same drawings and specifications to prepare TIC’s price proposals.” *Id.* at 17. According to the Region, the contracting officer in the July 22<sup>nd</sup> Letter again “advised TIC that unless TIC cured its failure to submit the information within 5 calendar days of receipt of the Letter, the Government may terminate the contract for default.” *Id.* According to the Region, TIC failed to respond to the contracting officer’s letter of July 22, 2008, and the contracting officer, therefore, forwarded another letter to TIC on July 29, 2008 stating:

since you have failed to cure the conditions endangering performance under contract no DTFACE-08-C-00040 as described to you in the Government’s Letters of July 2 and July 22, 2008, the Government is considering terminating the contract under the provisions for default of this contract. Pending a Final Decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present in writing, any facts bearing on the question to CO Shepard, Federal Aviation Administration....within 10 days after receipt of this notice.

*Id. at 18.* TIC responded by Letter dated July 30, 2008 stating, among other things, that “[D]uring review of our bid on the subject project which took place while obtaining a performance bond, we discovered we made a mistake in our bid. We inadvertently left out the conduit and some other electrical work.” *Dispute File at Tab 74; Region Statement of Facts at 19.*

By Letter dated August 15, 2008, the Contracting Officer responded to TIC’s July 30, 2008 letter as follows: “[Y]our Letter of July 30, 2008 alleged a mistake in price, and requested your proposals in the amount of \$346,200 be rejected. Your alleged mistake in your proposal, has no bearing on your failure to provide payment and performance bonds.” *Dispute File at Tab 74.* The Letter went on to find TIC to be in default for failure to provide payment and performance bonds and terminated the contract for default effective August 13, 2008. *Id.* Finally, the letter notified TIC that “you are liable to the Government for any excess cost incurred in acquiring supplies and services similarly [sic] to those terminated for default, and any other damages whether or not re-purchase is effected.” *Id. at Tab 74, Page 2.*

In its Opposition to the Motion,<sup>2</sup> TIC points out that in a summary judgment context the adjudicating forum must determine whether there are material facts in dispute such that a decision on the merits is required. *TIC Opposition at 1-3.* TIC’s Opposition also includes a “Response to Defendant’s Statement of Facts” which states, among other things, that:

[TIC] disagrees with the statement that the drawings and specifications were the same. The drawings and specifications were reviewed by TIC

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<sup>2</sup> The ODRA conducted a status conference on April 29, 2009 for purposes of establishing a briefing schedule for the Motion. *Status Conference Memorandum of April 30, 2009 at 3.* On May 19, 2009, TIC timely filed its first “Response to Defendant’s Motion for Summary Judgment” via facsimile transmission to the ODRA. There is no indication on the cover or elsewhere that the Region’s counsel was provided a copy. On May 21, 2009, TIC filed a second “Response to Defendant’s Motion for Summary Judgment” via facsimile transmission to the ODRA, which included a certification that it had also been forwarded to the Region’s counsel on that day. The second filing did not include a request for additional time to file, nor a request to amend the prior response. It also did not provide any explanation or showing of good cause to grant an extension or state whether the Region was actually served with the first response. The ODRA declined to accept TIC’s untimely second response. Thus, TIC’s Opposition to the Motion is comprised of its first timely-filed Response. For purposes of the Motion, the ODRA also has considered the entire administrative record, including TIC’s Supplement, the Jenkins Affidavit attached thereto and its original Dispute filing.

and the bonding company and questions were raised regarding the scope of work due to discrepancies in the specs and drawings of electrical work that had not been previously revealed to TIC.

*TIC Opposition* at 6, Paragraph 23. TIC further states that “the bond was not submitted due to the contracting officer failure to acknowledge the assignment of claims and respond to request for information.” *Id.* at Paragraph 24. The TIC Opposition goes on to assert that the Region has not lived up to its legal responsibilities and cites to the Federal Acquisition Regulations. *Id.* at 6-8.<sup>3</sup>

The Region’s Reply to the TIC Opposition generally reiterates the arguments set forth in its Motion. *See Reply* at 1, 2. The Reply does not, however, further address the issue of alleged changes in the scope of the contract or discrepancies in pre- and post-award contract documents that allegedly impeded TIC’s submission of the bonds.

### **III. DISCUSSION**

It is well established under the ODRA Procedural Regulations that, upon a motion by a party, or acting on its own initiative, the ODRA may exercise its discretion to issue a summary decision in whole or in part in a matter. *See* 14 C.F.R. §17.29(c). In that regard, the ODRA recently held that:

The ODRA’s Procedural Regulations at 14 C.F.R. § 17.29, contemplate the issuance of summary judgment decisions in contract disputes. Summary judgment is proper under the Federal Rules of Civil Procedure [Footnote omitted] when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), *citing* Fed. R. Civ. P. 56(c); *see also, Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed.Cir.1987).

*Contract Dispute of Huntleigh USA Corporation and the Transportation Security Administration*, 04-TSA-008, and 06-TSA-025 (Consolidated). Similarly, the ODRA will

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<sup>3</sup> The FAA expressly has been exempted from the Federal Acquisition Regulation since 1996. Pub. L. No. 104-50, 109 Stat. 435, 450.

dismiss a case if it is untimely, without a basis in fact or law, or if it fails to state a claim upon which relief may be granted. See *Protest of CNI Aviation, LLC*, 07-ODRA-00428. The Procedural Regulations mandate that, “prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against whom the dismissal or summary decision is to be entered, the opportunity to respond to the proposed dismissal or summary decision.” *Id.* at 6.

When considering dispositive motions, the ODRA is “mindful of the Supreme Court’s guidance that trial courts ‘should act ... with caution in granting summary judgment.’” *Contract Dispute of Huntleigh USA Corporation, supra, quoting from Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). Thus, there is a strong preference at the ODRA and in the courts generally, for deciding cases on the merits, rather than by dispositive motion. See *Protest of Water & Energy Systems Technology Inc.*, 06-ODRA-00373.

It is axiomatic that the moving party in a summary judgment situation bears the burden of establishing that there are no issues of material fact to be determined and that the movant is entitled to judgment as a matter of law. See *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466, Decision on Summary Judgment dated July 10, 2009. In reviewing any motion for a summary decision, the ODRA accepts the non-moving party’s allegations as true for purposes of the motion, views the facts in the light most favorable to the non-moving party and draws any inferences in favor of that party in determining whether a summary decision is justified. See *ODRA Procedural Regulations*, § 17.29(b); *Protest of Northrop Grumman Corporation*, 00-ODRA-00159, Decision on Motion to Dismiss dated August 17, 2000.

The Region principally supports its summary judgment argument with citations to the Region’s Statement of Facts within the body of its Motion. The Region’s Statement of Facts asserts, among other things, that the contract specifications and drawings were provided to TIC on June 12, 2008 and that “as stated above, the specifications and drawings were first sent to TIC with the solicitation on April 28, 2008.” *Id.* at 9. The

Region also states that the award letter to TIC requested that performance and payment bonds be provided within 15 calendar days and that the award letter was received by TIC on June 14, 2008. *Id.* at 10. In the Region's view, based on the dates when TIC received notice of the award, the bonds were due to be provided to the Region by June 29, 2008. *Id.* at 13. While the Statement of Facts included some citations to documents in the record, no affidavits were supplied with the Motion.

Notwithstanding the assertions by the Region in support of its Motion, the ODR concludes that material issues of fact exist concerning: (1) whether the drawings and specifications supplied to TIC after the contract was awarded to it were different than the drawings and specifications that were supplied with the solicitation; and (2) what impact those alleged differences had on the scope of work and on TIC's ability to timely supply the required bonds.

The Region's Motion attempts to contradict the Jenkins Affidavit on the question of alleged changes to the drawings, specifications, and scope of work for the Contract. The Motion asserts in that regard that "the drawings pertinent to this contract are the drawings that were sent to TIC before the proposal were submitted. No work had been added and the drawings had not changed." *Id.* at 23. The Region's assertions in Paragraph 23 are not, however, clearly supported by a sworn statement or other documents in the record. As was noted above, there is no Affidavit included with the Motion. The Region did submit an Affidavit executed by the Contracting Officer with the Dispute File. *See Affidavit of Cornelius O. Shepard, Jr. dated January 2, 2009 ("Shepard Affidavit")*. The Shepard Affidavit, however, does not clearly and unequivocally state that the contract documents and the scope of work under the Contract did not change after the contract was awarded to TIC.

By contrast, the Affidavit of TIC's principal clearly states that "the specifications and drawings provided as part of the solicitation were different than the specifications and drawings provided to TIC after the contract was awarded and forwarded to TIC's bonding company for evaluation." *Jenkins Affidavit* at 5. The Jenkins Affidavit goes on

to state that “the specifications differed from the scope of work detailed in the contract and TIC’s bonding company required clarification.” *Id.* at 6. Additionally, the Jenkins Affidavit alleges that “TIC contacted Mr. Shepard, the contracting officer on several occasions requesting clarification on the differences between the specification and the scope of work contained in the contract. Mr. Shepard failed to respond to the request for information that was submitted.” *Id.* at 7. It also alleges that the failure of the Government to respond to additional information regarding discrepancies in the pre- and post-award specifications and drawings impacted TIC’s ability to provide requested bonds. *See Jenkins Affidavit* at 12, 13.

It is well established, as the Region points out, that failure of a contractor to supply mandated performance and payment bonds can provide a basis for a default termination. *See, Region Reply* at 2 *citing Airport Industrial Park, Inc. d/b/a P.E.C. Contracting Engineers v. United States*, 59 Fed. Cl. 332 (2004). It similarly long has been recognized, however, that default termination is a “drastic sanction” and that the terminating agency will be held “to strict accountability for its actions in enforcing this sanction.” *H. N. Bailey and Associates v. United States*, 449 F.2d 387, 391 (Ct. Cl. 1971); *Contract Dispute of Concrete Modular Systems, Inc.*, 03-ORDRA-00286. Moreover, the burden of proof is on the terminating agency to justify its actions. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Once this burden has been satisfied, the burden shifts to the contractor to establish that its failure to perform was due to excusable causes beyond its control and was caused by the Government. *Id.* More specifically, as the Region admits in its Motion, one of the grounds of defense that a contractor may assert in a termination for default situation is that, without its fault or negligence, the contractor was prevented from fulfilling its contractual obligations as a result of actions or inactions on the part of the Government. *See Reply* at 2, Paragraph 4; *Appeals of D.A. Services, Inc.* ASBCA No. 53138, 05-1 BCA ¶ 32820.

Here, TIC has alleged in a sworn statement<sup>4</sup> that the Government made a post-award change in the scope of work for its contract and its failure to clarify or explain the changes effectively prevented TIC from timely submitting the required performance and payment bonds. As noted above, for purposes of Summary Judgment the ODRA must accept TIC's supported allegation as true. Thus, the Region has not met its burden of demonstrating that there are no issues of material fact in dispute and that it is entitled to judgment of a matter of law.<sup>5</sup> The Motion for Summary Judgment therefore must be denied.

#### **IV. CONCLUSION**

For the reasons set forth above, the ODRA denies the Region's Motion for Summary Judgment on TIC's claim of wrongful default termination of the Contract. The ODRA directs the parties to prepare and file final submissions by no later than September 16, 2009 in accordance with the ODRA Procedural Regulations at 14 C.F.R. § 17.39(f). In addition to the elements of the submissions required by the ODRA Procedural Regulations, the parties specifically are directed in this case to address the issue of whether there was a change in the scope of work and in contract drawings and specifications after the award of the contract to TIC. TIC is directed to identify and provide all relevant portions of the pre- and post-award contract documents including drawings and specifications that it contends reflect a change in the scope of its work under the contract. TIC further specifically is directed to address the basis for its contention that the scope of work, in fact, changed post-award. The Region in its final submission is directed to provide appropriate documentary or evidence supporting its position that there was no post-award change in its scope of work under the contract. The

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<sup>4</sup> The ODRA notes in this regard that the Jenkins Affidavit submitted to the ODRA was signed under oath by the Principal of TIC. Such sworn statements are subject to the penalties for making false statements to federal officials set forth in 18 U.S.C. § 1001.

<sup>5</sup> It should be noted in this regard that even if the Region's Motion had included a sworn statement directly contradicting the sworn statement of the principal of TIC on the issue of post-award changes in the scope of work that impacted TIC's ability to timely obtain and submit the required bonds, the Motion for Summary Judgment still would fail on the current record.

ODRA will review the final submissions of the parties and determine what, if any, additional proceedings are necessary prior to issuing a final decision in this case.

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August 12, 2009