

Neal Puckett, Esq.
BAR: VA

Haytham Faraj, Esq.
BAR: IL, MI, DC



THE LAW FIRM OF PUCKETT AND FARAJ, PC

November 11, 2009

Via Facsimile @ 703-684-0060

Via Email @ herbert@hsrlawpc.com

Mr. Herbert S. Rosenblum
Post Office Box 58
Alexandria, VA 22313-0058

Re: 3D Global v. MVM; Case No. 1:06cv00722; Requests for Admissions

Dear Mr. Rosenblum

Enclosed please find Plaintiff's requests for admissions.

I am available at 888-970-0005 ext.2 or at haytham@puckettfaraj.com if you have questions.

Sincerely,



Haytham Faraj

Copy to: Client

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Civil Division)

3D GLOBAL SOLUTIONS, INC.)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 1:06-CV-722(GK)
)	
MVM, INC.)	
)	
Defendant)	
<hr/>		

Requesting Party: 3D Global, Inc.
Responding Party: MVM, Inc.

REQUESTS FOR ADMISSIONS

The Requesting Party, 3D Global, by and through its attorneys, hereby requests pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, that the Responding Party, MVM, Inc., within 30 days from the receipt of this request, admit the truth of each of the following requests for purposes of this action only, and subject to all pertinent objections as to the admissibility thereof that may be interposed at trial:

Request No. 1

You are requested to admit that as of this date, after a reasonably diligent search and/or investigation, neither you nor any agents, employees, or representatives acting on your behalf are aware of any evidence that the alleged "Exhibit B" was attached to the Agreement for Recruiting Services –attached hereto as exhibit "A" consisting of 6 pages including the fax cover sheet- and transmitted by facsimile by MVM, Inc. or anyone acting on MVM's behalf to 3D Global on September 29, 2005.

Response

Request No. 2

You are requested to admit that as of this date, after a reasonably diligent search and/or investigation, neither you nor any agents, employees, or representatives acting on your behalf are aware of any evidence showing that an alleged “Exhibit B” to the “Agreement For Recruiting Services” between MVM and 3D Global, setting forth the language requirement for third country nationals (TCN) recruited by 3D Global for service in Kabul was ever mailed, transmitted, emailed, or communicated to 3D Global.

Response

Request No. 3

You are requested to admit that the letter dated January 20, 2006 from Mr. Joseph Morway, Executive Vice President of MVM, Inc. to Mr. Christopher Sager, Regional Procurement Support Office, Department of State, along with the attached Legal memorandum prepared for MVM, Inc. by the law firm of Dickstein, Shapiro, Morin, & Ohinsky LLP, attached hereto as “Exhibit B” is a true copy.

Response

Request No. 4

You are requested to admit that “Exhibit B” attached hereto is a document that was kept in the ordinary course of business and that all of its contents are admissible as evidence for purposes of trial and summary disposition motions, if any.

Response

Request No. 5

You are requested to admit that the contract faxed from 3D to MVM on September 26, 2005, and MVM, Inc. to 3D on September 29, 2006, consisted of exactly six pages, including the cover page. Attached here as Exhibit A.

Response

Request No. 6

You are requested to admit that between September 2005 and January 2006, Jaysen Turner, an employee working as Operations Director of MVM, Inc., personally oversaw the delivery from Peru and deployment to Afghanistan of approximately 230 Third Country Nationals (“TCN’s”) provided by 3D.

Response

Request No 7.

You are requested to admit that no MVM employee, including Jaysen Turner, ever informed 3D, either orally or in writing, of any language deficiency or problem regarding any of the 230 TCN’s provided by 3D until at least December 2, 2005.

Response

Request No. 8

You are requested to admit that MVM, Inc. never informed 3D of any alleged language deficiency with any TCN’s 3D had provided until after the U.S. Government moved to terminate its Embassy Security Force Contract at the U.S. Embassy in Kabul, Afghanistan with 3D (Contract No. SGE500-05-C-I071—hereafter “Embassy Contract”).

Response

Request No. 9

You are requested to admit that MVM, Inc. maintained, in correspondence to the State Department or its representatives, that it had not breached the Embassy Contract and claimed that, in fact, "State's determination to terminate the Contract for default based on MVM's alleged failure to meet the language requirements was a pretext for its true and improper reason for terminating the contract, that is, to avoid MVM's provision of Namibians for the Supervisory Guard and ERT positions."

Response

Request No 10

You are requested to admit that Peruvian guards with the same language skills as the TCN's provided by 3D in this case served effectively as guards in Rustumiyah, Iraq, during the same time period in which the Government claimed a breach by MVM, Inc.

Response

Request No. 11

You are requested to admit that, even after MVM, Inc. hired an outside agency to test the Peruvian and South African TCN's delivered by 3D following the Government's complaint, the majority of those TCN's did not need to be replaced and were qualified to assume their duties with mere remedial training.

Response

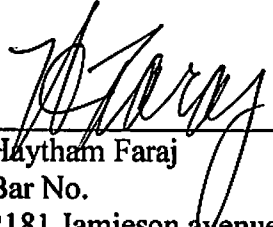
Request No. 12

You are requested to admit that MVM tendered to the Government a 21-page remedial plan on December 9, 2005, in which it claimed that there would have been no harm to the Government if it had permitted MVM to remediate the language skills of even those TCN's whose language skills were in issue.

Response

Dated: December 11, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'H. Faraj', is written over a horizontal line.

Haytham Faraj

Bar No.

2181 Jamieson avenue

Suite 1505

Alexandria, VA 22314

760-521-7934

202-280-1039 (fax)

Attorney for 3D Global Solutions Inc.



MVM, Inc.
1693 Spring Hill Road
Suite 700
Vienna, VA 22182
703-790-3138 • Fax: 703-790-9526

Facsimile Transmittal

To: Mike Dodd	Fax:
	Phone:
From: Peter Rice	Date:
Re:	No. Pages, including cover sheet: 6
CC:	

Mike -

Executed Agreement and
first Task Order.

Please sign TO and return.

Other to follow shortly. Thanks -
Peter

CONFIDENTIALITY NOTICE

The documents accompanying this telecopy transmission contain confidential information belonging to the sender, which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of action in reliance on the contents of this telecopied information is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone at (703) 790-3138 to arrange for return of the original documents to us.

WARNING

Interception of telephonic communication could be violation of State and Federal Law.

AGREEMENT FOR RECRUITING SERVICES

THIS AGREEMENT FOR SERVICES ("Agreement") by and between MVM, Inc., a California corporation with offices at 1593 Spring Hill Road, Vienna, Virginia 22182 ("MVM") and 3D Global Solutions Inc, a Indiana corporation with offices at 12898 Pontell Place, Westfield, Indiana 46074 ("3D") is dated as of September 26, 2005.

WHEREAS, 3D has competence, capability and experience relating to recruiting of security personnel; and

WHEREAS, 3D is prepared to make such competence, capability and experience available to MVM by recruiting third party nationals ("TCNs") as security personnel in support of an MVM contract with the US Department of State (the "DOS"); and

WHEREAS, MVM desires to use 3D to provide such recruiting services;

THEREFORE, the parties agree to the following the terms and conditions in connection with the provision of such recruiting services by 3D:

A. SCOPE OF SERVICES.

3D shall recruit, provide specified pre-deployment services and provide specified post-deployment support services to MVM. The personnel supplied by 3D will become employees of MVM and will perform as security personnel in support of MVM's contract with the DOS Embassy Security Force, Kabul, Afghanistan (the "Services").

The services to be provided by 3D are described in Exhibit D.

MVM shall request 3D to recruit such TCNs, on an ongoing basis, in the number and for the duration specified by MVM in Task Orders issued to 3D from time to time. The form of such Task Order is set forth in Exhibit A hereto. The terms and conditions of employment 3D shall offer such TCNs will be provided to 3D with each Task Order.

B. QUALIFICATIONS OF TCNs.

1. Each TCN (i) shall be in good general health without physical or mental disabilities, either temporary or long lasting, that would interfere with the performance of his assigned duties including standing for prolonged periods of time in performance of guard duty, (ii) shall be free from communicable disease, (iii) shall have binocular vision correctable to 20/30 Snellen and shall not be colorblind (iv) shall be capable of hearing ordinary conversation. 3D shall provide evidence of physical fitness of each TCN by a certification from a licensed physician within such TCNs country of origin, based on a physical examination conducted prior to the TCN's assignment.

2. Each TCN shall be free of all Schedule I-V drugs which are covered in the Federal Drug Testing Program, as detected in such TCNs urine or saliva sample, unless such drug is validly prescribed for such TCN by a licensed physician. 3D shall provide evidence of testing for such drugs, which testing shall be conducted in such TCNs country of origin and in accordance with the US Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs. These Guidelines can be

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3D Global Solutions Inc

866-238-6761

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reviewed at www.health.org/workplace. MVM will supply a list of drugs for which tests will be conducted.

3. Each TCN shall receive all DOS recommended inoculations for Afghanistan. 3D shall provide evidence that each TCN has received all recommended inoculations for Afghanistan. MVM will supply a list of required inoculations to 3D.

4. 3D shall provide evidence of criminal and pre-employment background checks for each TCN conducted in the TCN's country of origin, in form and substance satisfactory to MVM.

5. In addition to the qualifications set forth in this Paragraph B, each TCN shall meet the qualifications of the position for which he is applying, which qualifications and positions are set forth in Exhibit B hereto.

6. In addition to the qualifications set forth in this Paragraph B, no TCN (i) shall have been convicted of any felony or any misdemeanor involving moral turpitude during the five year period prior to the date of employment application, (ii) shall have been declared by any court of competent jurisdiction incompetent by reason of a mental condition or defect or (iii) shall suffer from habitual drunkenness or narcotics addiction or dependence as evidenced by the drug testing procedure in Paragraph B2, above, or information developed in the vetting process.

7. 3D shall certify to MVM that each TCN meets each of the qualifications set forth in this Paragraph B.

C. PROCEDURE.

1. 3D shall provide to MVM an application package for employment, and an application package for Medium Risk Public Trust Certification, completed by each TCN as well as the certifications and evidence of various tests and background checks required by Paragraph B of this Agreement, in English and in the format required by MVM (the "Employment Package").

MVM shall review each Employment Package and shall submit to the DOS Employment Packages for TCNs that MVM determines meet the requirements contained in this Agreement. Upon approval by the DOS of an Employment Package, MVM will offer employment to such TCN conditioned on the satisfactory completion in English of the forms listed in Exhibit C hereto and the final approval by the DOS. The decision to hire a TCN recruited by 3D shall be made solely by MVM following the approval of such TCN by the DOS.

2. MVM agrees to reimburse 3D for the cost of obtaining a passport for any qualified TCN candidate who does not have a passport and is unable to pay for one in advance of employment. The Employee Agreement that MVM will sign with each employee will state that MVM will recover this cost from the employee's initial pay check.

D. FEE FOR SERVICES

1. On the condition that 3D fully and faithfully performs the Services, MVM shall pay 3D fees in the amounts and types shown in Exhibit E.

For pre-deployment services:

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3D Global Solutions Inc

866-238-6761

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- MVM will pay the specified per person fee for each fully qualified TCN who receives a final employment offer from MVM and deploys to Kabul, Afghanistan.
- 3D will invoice once deployment has occurred

For post-deployment services:

- MVM will pay the specified monthly fee for each TCN supplied by 3D who is deployed to Kabul in a given calendar month. For administrative convenience, if a TCN is on duty in Kabul for 15 days or less in a given calendar month, this will not count toward the fee calculation. If a TCN is on duty in Kabul for 16 days or more in a given calendar month, this will count toward the fee calculation.
- 3D will invoice monthly.

2. MVM shall pay all approved invoices within thirty days of receipt.

B. INDEPENDENT CONTRACTOR.

3D is retained as an independent contractor solely to provide the Services and the Recruitment Consultant. No agency is created by the terms of this Agreement and 3D shall not hold itself out to others to be an agent of MVM. 3D shall not have the power to execute any document or agreement on behalf of MVM or to otherwise bind MVM in any respect.

F. TERM OF AGREEMENT.

The term of this Agreement shall commence on the date hereof and shall continue until terminated. Either party may terminate this Agreement immediately by written notice to the other party in the event of a material breach of this Agreement by such other party. MVM may terminate this Agreement immediately by written notice to 3D in the event MVM's contract with the DOS is terminated. Either party may terminate this Agreement by providing thirty days written notice to the other party.

G. NON-EXCLUSIVE ARRANGEMENT.

During the term of this Agreement, 3D shall not accept assignments from other clients if such assignments would interfere with the performance by 3D of the Services required hereby.

H. CONFIDENTIAL BUSINESS INFORMATION.

3D agrees that it will hold in confidence all information provided to 3D by MVM (including the terms of this Agreement) concerning MVM's business including, but not limited to, MVM's contracts, personnel and operations (the "Confidential Business Information"). 3D agrees not to disclose such Confidential Business Information to any person without MVM's consent. 3D agrees that it will not use any Confidential Business Information for any reason other than for the performance of the Services. 3D's obligation under this Paragraph H shall survive for three years after the termination of this Agreement.

I. NOTICES.

Any notices required or permitted to be given hereunder shall be given in writing and delivered to a party in person or at such party's address (or facsimile number) stated below

MVPD

Sep 26 05 11:37a 3D Global Solutions Inc 866-238-6781

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or to such other address (or facsimile number) as such party shall advise the other party in writing, and will be deemed received when tendered in person or when sent by facsimile or by certified mail:

MVM, Inc.
1593 Spring Hill Road
Vienna, Virginia 22182
Attention: Clyde Silek
Facsimile: (703) 827-0780

3D Global Solutions, Inc.
12898 Pontell Place
Westfield, Indiana 46074
Attn: Mike Dodd

J. MISCELLANEOUS.

This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia without regard to its conflicts laws.

The exhibits to this Agreement are incorporated herein by this reference.

This Agreement supersedes all prior arrangements and understandings between the parties in respect of the subject matter hereof and constitutes the entire agreement between the parties in respect of such subject matter.

This Agreement may be executed in counterparts, each executed counterpart constituting an original but all together constituting only one Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

MVM, INC.

Signed:



Name:

ROBERT L. RUBIN

Title:

Senior Vice President

3D GLOBAL SOLUTIONS INC.

Signed:



Name:

Michael F. Dodd

Title:

President

EXHIBIT A

TASK ORDER

In accordance with the Agreement for Recruiting Services dated September 26, 2005 by and between MVM and 3D, MVM hereby instructs 3D to recruit TCNs to fill the security personnel positions listed below:

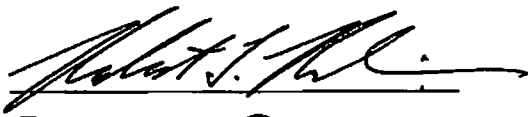
<u>Number of TCNs</u>	<u>Type of Position to be Filled</u>
65	TCN Guard

TCNs covered by this Task Order shall report to Jorge Chavez International Airport, Lima, Peru on or about 10 November 2005 for deployment to Kabul, Afghanistan.

All of the requirements in Section B of the Agreement for Recruiting Services must be met.

AGREED:

MVM, INC.

Signature: 

Name: ROBERT L. RUBEN

Title: Senior Vice President

Date: 29 SEPT 05

3D GLOBAL SOLUTIONS INC.

Signature: _____

Name: _____

Title: _____

Date: _____



**Regional Procurement Support Office
American Consulate General
U.S. Department of State
Geissener Strasse 30
60435 Frankfurt am Main, Germany**

December 21, 2005

**Dario Marquez
President
MVM, Inc.
Suite 700, 1593 Spring Hill Road
Vienna, VA 22182**

**Contract No. SGE500-05-C-1071
Embassy Security Force Contract for Kabul, Afghanistan**

Dear Mr. Marquez:

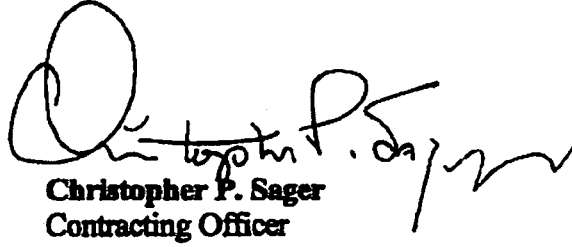
Effective immediately Contract No. SGE500-05-C-1071 ("the Contract") is completely terminated for default per clause 52.249-8. Your firm's right to proceed under the Contract is terminated in its entirety. All work should immediately stop.

The Contract is being terminated due to your firm's failure to complete transition and commence full performance by December 22, 2005, the extended date to complete transition mutually agreed to in lieu of the date required by Section H.10 of the Contract. The Contract is terminated in full. Please note that the services terminated may be purchased against the contractor's account, and that your firm will be held liable for any excess costs. I have determined that your firm's failure to complete transition and commence full performance is not excusable. This notice of termination constitutes such decision. The Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs. This notice constitutes a decision that your firm is in default as specified. Your firm has the right to appeal under the Disputes clause.

Your firm shall present a plan to commence the immediate vacating of the Government provided facility in Kabul, Afghanistan. You shall complete the removal of all staff and employees no later than 25 days from this notice.

Exhibit B

You shall promptly replace the ammunition that MVM borrowed from DOS for training purposes and return to DOS (via the Regional Security Officer) all Government-furnished property in MVM's possession,



Christopher P. Sager
Contracting Officer



FOR SETTLEMENT PURPOSES ONLY

January 20, 2006

Regional Procurement Support Office
American Consulate General
U.S. Department of State
Geissener Strasse 30
60435 Frankfurt Am Main, Germany

Attention: Christopher P. Sager

Subject: Contract No. SGE500-05-C-1071 Termination for Default

Dear Mr. Sager:

Thank you for speaking with us on January 13, 2006 about establishing a framework for negotiating State's termination for default of MVM's contract to provide a guard force at the U.S. Embassy in Afghanistan. MVM desires to have the default termination converted to a termination for convenience and to negotiate a fair and reasonable financial settlement.

MVM is concerned about the profound financial impact of the default termination on our company. As a Government contractor with an otherwise sterling record, we are also concerned about the past performance implications of a default termination on our ability to secure future government contracts. Therefore, it is imperative that we resolve this matter as quickly as possible and on terms that are fair and reasonable to both MVM and the Government.

MVM believes that a default termination was not the appropriate remedy for the difficulties that occurred on this contract, particularly given the Government's actions that contributed to those difficulties. Attached please find a letter from MVM's counsel that sets forth our summary of the facts and counsel's legal position on the merits. As you will note, our counsel advises that the default termination likely would be converted to a termination for the convenience of the Government if the matter were litigated. Counsel also advises that we would have a strong claim against State for our start-up costs under the contract.

Nevertheless, we believe that it is in both MVM's and the Government's interests to resolve this matter amicably and without resort to litigation, which would be time-consuming, expensive, and burdensome for everyone. MVM will approach our settlement discussions with the same level of professionalism and integrity that we showed in connection with the post-termination transition which, as even the RSO recognized, was handled quickly and efficiency under the most trying circumstances.

Accordingly, our proposal for resolving this matter is as follows:

1. The Department of State will convert the default termination to one for the convenience of the Government.

MVM, INC.

1593 Spring Hill Road · Suite 700 · Vienna · VA · 22182
Tel (703) 790-3138 · Fax (703) 790-9526 · VA Lic. #11-1259

January 20, 2006
Mr. C. Sager
Page 2



2. The Department of State and MVM will negotiate a mutually acceptable financial resolution. MVM is willing to make substantial financial concessions from the claim amount advocated by our counsel to reflect savings in legal fees, avoiding the risk associated with litigation, and as an accommodation for resolving this matter quickly.

We look forward to meeting with you in early February to resolve this matter. Thank you for your cooperation.

Sincerely,

MVM, Inc.

A handwritten signature in cursive script, appearing to read 'Joseph W. Morway', is written over a large, stylized initial 'J'.

Joseph W. Morway
Executive Vice President

Enclosure

Copy to: D. Nadler (Dickstein Shapiro)

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526

Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: (202) 828-2281

E-Mail Address: NadlerD@dsmo.com

January 20, 2006

Mr. Dario O. Marquez, Jr.
President
MVM, Inc.
1593 Spring Hill Road
Suite 700
Vienna, VA 22182

Re: Contract No. SGE500-05-C-1071; Termination for Default

Dear Mr. Marquez:

You have requested our views regarding the propriety of the determination by the Department of State, American Consulate General ("State" or "Government") to terminate Contract No. SGE500-05-C-1071 ("Contract") for default. The Contract was for an Embassy Security Force at the U.S. Embassy in Kabul, Afghanistan. Our investigation of this matter included interviews of MVM representatives and other individuals stationed in Kabul and Virginia, review of extensive correspondence and e-mails, and research of applicable procurement law.

In our view, the termination for default was improper, and there is a high probability that it would be converted to a termination for the convenience of the Government by the General Services Board of Contract Appeals ("GSBCA") or the U.S. Court of Federal Claims. Moreover, MVM has a viable claim against State for its costs incurred under the Contract in the amount of approximately \$5.6 million. Given the substantial financial impact of the termination on MVM and the past performance implications of a default termination on the Company's ability to secure future government contracts, we recommend that MVM appeal State's determination if the matter cannot be resolved promptly.

The primary grounds for an appeal are as follows: (1) the termination based on MVM's alleged failure to meet the language requirements of the Contract was a pretext for State's true and improper reason for terminating the Contract, that is, to avoid MVM's provision of Namibians (South Africans) for the supervisory guard positions and the Emergency Reaction Team ("ERT"); (2) State failed to properly consider MVM's Corrective Action Plan ("Plan") in response to State's Deficiency Notice, and its determination to terminate the Contract in the face of that Plan was arbitrary, capricious, and not in the best interests of the Government; and (3) the Contracting Officer's determination to terminate the Contract was unduly influenced by the Regional Security Officer ("RSO") and the U.S. Ambassador to Afghanistan, and was not the product of the Contracting Officer's independent judgment.

1177 Avenue of the Americas • New York, NY 10036-2714

Tel (212) 835-1400 • Fax (212) 997-9880

www.DicksteinShapiro.com

Mr. Dario O. Marquez, Jr.
President
January 20, 2006
Page 2

The Contract

On July 7, 2005, the Contract was awarded to MVM as the low priced technically acceptable offeror in the amount of \$23.7 million for the base year. The Contract was for a base year plus four option years and included a ninety (90) day Transition Period. The Contract required that MVM recruit, train, and manage the Embassy Security Force ("ESF") at the U.S. Embassy in Kabul, Afghanistan. The purpose of the ESF is to protect life and property, maintain order, and deter criminal activity in and around the U.S. Embassy in Afghanistan. MVM was required to furnish managerial, administrative, technical, direct labor, and subcontractor personnel to accomplish the work under the Contract. Contract, § C.1. The Contract required a Top Secret facility security clearance.

The work was to be performed at the direction of the Contracting Officer's Representative who was the RSO in Kabul. Contract, § C.1.1. MVM was required to provide trained guards for posts that were designated in the Contract. Each labor category under the Contract included qualifications for the position and the nationality required. Expatriate ("EXPAT") was defined to include citizens from native and non-native English-speaking countries, such as Australia, Canada, Ireland, New Zealand, the United Kingdom, and South Africa. Contract, § C.1.2. The nationalities required for the primary positions are: Supervisor (U.S. or EXPAT); ERT (U.S. for Supervisor and U.S. or EXPAT for ERT Guard); Guard (U.S. or EXPAT); and Guard (Third Country National ("TCN")). Contract, § C.1.2. Of significance here, MVM planned to use Namibians (South African citizens) for the Supervisory Guard and ERT Guard positions, and Peruvians for the TCN Guard positions.

On July 14, 2005, State issued a Limited Notice to Proceed, authorizing performance of transition activities. The Transition Period was subsequently extended twice by mutual agreement to December 22, 2005. By letter dated December 2, 2005, the Government issued a Deficiency Notice stating that MVM had not met the minimum language requirements set forth in Section H.5.1.4 (Senior Guard) and Section H.5.1.7 (TCN Guard) of the Contract. By letter dated December 9, 2005, MVM responded to State's Deficiency Notice and provided a detailed, twenty-page, Plan. On December 21, 2005, before commencement of full performance and before MVM formally delivered any services under the Contract, the Government terminated the Contract for default. The sole basis for the termination was MVM's alleged failure to complete transition and commence full performance by December 22, 2005 due to the purported language deficiency. The Government's termination letter includes no response to MVM's Plan or any analysis of why termination was in the best interests of the Government.

Prior to award of the Contract, the ESF was provided by Global Strategies Group ("GSG"), which was issued a non-competitive subcontract to the Embassy construction contract. GSG was not eligible to bid for the subject Contract because it does not possess a Top Secret facility security clearance. Nevertheless, in the wake of the termination of MVM's Contract, GSG continues to provide the ESF at a price that MVM believes to be approximately \$7 million per month, or approximately three times higher than MVM's price. For the Supervisory Guard and ERT positions, GSG provided

Mr. Dario O. Marquez, Jr.
President
January 20, 2006
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predominately white EXPATs. The Namibians provided by MVM are predominately black. The TCN Guard positions under the incumbent contract with GSG are staffed mostly with Nepalese who do not speak English and would not meet the language requirements of the Contract.

The Termination Was Based On An Improper Pretext

State's determination to terminate the Contract for default based on MVM's alleged failure to meet the language requirements was a pretext for its true and improper reason for terminating the Contract, that is, to avoid MVM's provision of Namibians for the Supervisory Guard and the ERT positions. The law precludes default terminations based on pretext, and such improper terminations will be converted to terminations for the convenience of the Government, *even if the contractor is technically in default under the contract*. Thus, a key corollary of this rule is that a contractor's failure to satisfy contract requirements alone is insufficient to support a termination for default.

In *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968), the U.S. Court of Claims converted a default termination to one for the convenience of the Government where the record demonstrated that the termination decision was based on a pretext. The Court found that "[p]laintiff's status of technical default served only as a useful pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance or the propriety of an extension of time." 390 F.2d at 709. Schlesinger was a cap manufacturer who won a contract to supply the Navy with 50,000 service caps for enlisted men and failed to deliver the first installment of caps as specified in the delivery schedule. At the time, Schlesinger was also a suspect in an ongoing U.S. Senate subcommittee investigation regarding textile procurement irregularities within the military. After Schlesinger testified before the Senate, the chairman of the subcommittee sent a letter to the Navy implying that Schlesinger's contract should be terminated. This information was communicated to the Contracting Officer, who promptly terminated Schlesinger's contract. The Court found that the termination for default on these facts was improper. As the Court stated:

[T]he Navy used the termination article as a 'device' and never made a 'judgment as to the merits of the case.' Such abdication of responsibility we have always refused to sanction where there is administrative discretion under a contract. This protective rule should have special application for a default-termination which has the drastic consequence of leaving the contractor without any further compensation.

Id. (citations omitted).

Later decisions have followed *Schlesinger* in holding that a Contracting Officer must make a "judgment as to the merits of the case" and may not terminate a contract for default based on pretext. In *Darwin Construction Co. v. United States*, 811 F.2d 593 (Fed. Cir. 1987), the U.S. Court of Appeals for the Federal Circuit found a default

Mr. Dario O. Marquez, Jr.
President
January 20, 2006
Page 4

termination improper under a contract to provide facilities upgrades at a Navy station. The Federal Circuit held that it was proper to consider the Government's motives for terminating a contract for default where the contractor was in technical default:

The Board's finding that the contracting officer abused his discretion provides the legal predicate for converting the termination for default into one for the convenience of the Government. As the court pointed out in *Schlesinger*, the default article of the contract does not require the Government to terminate on a finding of default, but merely gives the procuring agency the discretion to do so, and that discretion must be reasonably exercised. The facts of the case before us are almost identical to the salient facts in *Schlesinger*, where it was found that the contractor's status of technical default served only 'as a useful pretext for taking the action found necessary on other grounds unrelated to the plaintiff's performance or to the propriety of the extension of time.'

Id. at 596 (citations omitted).

According to the Federal Circuit, the Board's findings of fact made it clear that a default termination was inappropriate. For example, "[t]he failure of Darwin to complete the work on time did not interfere with the Navy's use of the building, which was still used for the production of explosives since Darwin had restored the building into usable condition." *Id.* at 595. Further, the Board found "[t]here was no urgency associated with the contract . . . [and] [a]t the time Darwin was performing work on the contract, many other construction contracts were being performed at the same ordnance station, and the Navy was content to collect liquidated damages for those contracts in which performance had been delayed." *Id.* at 595.

Similarly, in *Walsky Construction Co.*, ASBCA No. 41541, 94-1 BCA ¶ 26,264, the ASBCA converted a default termination to a convenience termination under an Air Force roof repair contract:

Notwithstanding that many of the grounds asserted by the Government for default termination are weak [including failure to provide certifications and purported deficiencies in Walsky's technical solution], we need not explore whether there existed any other conceivable technical grounds to default terminate this contract under the circumstances of this case. A technical reason for default, even if established by the Government, does not require a default termination. We must review the totality of the circumstances to ascertain whether the termination decision was a reasonable exercise of discretion. When we view the facts of this case in the context of the Government's predisposition against Walsky under this contract, the conclusion is inescapable that this default termination may not stand.

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Id. at 130, 625 (citing *Darwin* and *Schlesinger*).

The predisposition against Walsky was manifested in an instruction by the Director of Contracting to the Contracting Officer to terminate Walsky "if the smallest thing goes wrong." *Id.* at 130, 624. Of additional concern to the Board was an apparent rush to judgment by the Contracting Officer:

Barely two work days after appellant's timely reply to the cure notice, the ACO [Administrative Contracting Officer] decided to issue a show cause notice for default. About 70 percent of the contract time still remained. Notwithstanding that appellant had 10 days to reply to the show cause notice, a decision to default terminate, insofar as [the ACO] was concerned, was made prior to the date that appellant's reply was due. Apparently, [the ACO's] mind was already made up – nothing appellant could have said in the reply would have made any difference.

Id. (citations omitted).

Finally, in *SIPCO Services & Marine Inc. v. United States*, 41 Fed. Cl. 196 (1998), the U.S. Court of Federal Claims concluded that NASA abused its discretion in terminating a contract for the removal and replacement of a specialized coating at a NASA testing facility on a pretextual basis:

[T]he *Schlesinger* court found that '[p]laintiff's status of technical default served only as a useful pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance or the propriety of an extension of time.' Such a state of affairs seems echoed by the present case. The propriety of SIPCO's termination for default is brought into serious question by the acceleration of NASA's supervisory activities, its unilateral setting of a new completion date, and the timing of [the COTR's] discovery of the misapplication of the air monitoring guidelines. These appear to be more than mere coincidences but rather considered efforts to lay the predicate for SIPCO's default.

Id. at 221 (citation and footnote omitted).

Similarly, in this case, the record shows that the default termination based on alleged deficiencies in the language skills of the guards was a pretext and that there was a predisposition against MVM resulting from the RSO's objection to MVM's provision of South Africans, particularly for the ERT positions. Shortly after Contract award, a new RSO was assigned to the Contract. The new RSO was not involved in the preparation of the Solicitation for the Contract and had a vastly different conception of

the ERT skill level than was specified in the Contract.¹ As early as August 2005, and throughout MVM's tenure on the Contract, the RSO objected to MVM's use of Namibians and maintained that they were not qualified for the ERT positions. These objections had no basis in the Contract, which expressly allowed MVM to provide South Africans to fill EXPAT positions. Indeed, MVM's low price proposal was, in part, a function of its ability to provide South Africans to fill these positions, and State obtained substantial cost benefits on this Contract as a result.

The RSO's objections also had no factual basis as they were lodged months before the South Africans arrived in November 2005 when the Man Camp became available. It appears that the RSO had a preconceived opinion that the South Africans were unqualified and were less capable than Americans or the "true" EXPATs provided by GSG.² In fact, the Namibians were trained by the elite South African military and were well qualified to meet the Contract requirements. Nevertheless, on October 3, 2005, State advised MVM that "the RSO and ARSO in Kabul have decided that the Namibian/South African ERT candidates are not acceptable and will, therefore, not be suitable for the ERT." (E-mail from Jacqueline Richardson to MVM dated October 3, 2005.) MVM was directed to discontinue its efforts to recruit, train, and mobilize these individuals. However, the Contracting Officer recognized that the Contract permitted MVM to provide South Africans for the ERT and, by letter dated October 21, 2005, rescinded the October 3 directive. The RSO, thus, was in a bind: the Contract permitted MVM to provide South Africans, but State was unable or unwilling to modify the Contract to fund an ERT comprised exclusively of Americans or "true" EXPATs. MVM's days on this Contract were numbered.

The obvious solution to this quandary was to get rid of MVM by finding a basis to terminate the Contract before commencement of full performance so that State could continue to use the incumbent contractor (GSG) who had "true" EXPATs already in place for the ERT. At least as early as November 10, 2005, before MVM's guards arrived in Kabul and several weeks before the purported language deficiency issue was raised, State negotiated an extension of the GSG contract to January 31, 2006.³ This timeline demonstrates that the termination based on alleged language deficiencies was a sham and not a material default under the Contract. Indeed, State accepted non-English speaking Nepalese for the TCN Guard positions under the GSG contract and continues to do so now at three times the MVM price. Moreover, a month before award

¹ The RSO saw the ERT as three capable SWAT teams per shift. He expected proficiency in close quarters battle, motorized patrolling and escort duties, and all hands capable of functioning as decision makers during times of crisis.

² The RSO reportedly was concerned about the "appearance" of Namibians at the Embassy entry points. He was also concerned with not having a "homogeneous" guard force. Once the Namibians arrived in Kabul, one member of the RSO's office reportedly stated that "they look like a bunch of killers and murderers."

³ We are also investigating whether State negotiated a separate six-month extension to the GSG contract before the language issue was raised.

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of the Contract, State entered into substantially the same contract for a guard force at the U.S. Embassy in Baghdad, Iraq. We understand that there was no language requirement in that contract (or that it was waived). Peruvians with the same language skills as provided by MVM under the Contract are serving effectively as guards in Baghdad.

As discussed below, these events also show that State's Deficiency Notice was simply a *pro forma* step toward its predetermined decision to terminate the Contract for default. That decision was made before the language issue surfaced and before MVM submitted its December 9, 2005 Plan. Given the extension of the GSG contract, State could have extended the Transition Period at least through January 31, 2006 (and probably longer). Indeed, State's determination to terminate the Contract before full performance began was precipitous. As the potential term of the Contract was five years, there was more than ample time for MVM to have remedied any perceived shortfall in the language skills with no harm to the mission. However, as in *Walsky Construction Co., supra*, State's mind was already made up – nothing MVM could have said in its response would have made any difference.

State Failed To Properly Consider MVM's Corrective Action Plan

The Government's failure to properly consider MVM's Plan further demonstrates that the default was based on a pretext and also provides an independent basis for converting the termination to one for the convenience of the Government. The failure to provide a meaningful opportunity to cure will render a default termination procedurally defective. *Composite Laminates, Inc. v. United States*, 27 Fed. Cl. 310, 317 (Fed. Cl. 1992). Moreover, when an irrevocable decision to terminate is made before the end of the cure period and a contractor's timely efforts to cure are ignored, the termination is improper. *Cervetto Bldg. Maint. Co. v. United States*, 2 Cl. Ct. 299 (1983).

Immediately upon receipt of State's December 2, 2005 Deficiency Notice, MVM dispatched a team of senior executives to Kabul to assess any potential performance shortcomings. MVM's transition of executive decision making directly to Afghanistan enabled it to address any concerns in an expedited fashion and to ensure the effective implementation of appropriate remedial efforts. Further, on December 9, 2005, MVM submitted a twenty-page response to the concerns raised by State that included a Plan to fully remedy those concerns within sixty days. MVM proposed a rapid and rigorous program of testing and remediation to accurately identify and address any deficiencies in the language skills of the guard force. MVM's Plan was comprehensive and substantial – the anticipated cost to implement the Plan was approximately \$5 million (plus \$1.5 million per month in ongoing payroll costs).

As a key preliminary measure, MVM proposed to assess individually the language proficiency of each proposed guard candidate with the assistance of an independent contractor, ALTA Language Services ("ALTA"). ALTA's testing methodology evaluated the proficiency of candidates in four categories: comprehension, communication, grammar, and vocabulary, based on a twelve-level scale. The need for rigorous, independent testing was made clear by the circumstances

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under which the alleged language deficiencies were identified by State. The purported deficiencies in the language skills of the guard candidates were based almost entirely on anecdotal evidence and observation, rather than on any objective testing or measurement by State.

For instance, State identified poor performance by guard candidates on exams requiring English reading and writing comprehension levels that were not required by the Contract. Further, training on weapons systems and other security requirements is highly technical in nature, and under normal training procedures, that training is conducted with the benefit of native language translators. In this case, training was conducted in English only shortly after the arrival of guard candidates in Afghanistan. Guard candidates were intimidated and bluntly told that failure would result in their being sent home. Compounding these conditions, the training schedule was compressed as a result of State's delays in the availability of the Man Camp. The cumulative effect of these factors created a false impression of language deficiencies by fostering an environment hostile to the demonstration of English language proficiency.

Under these circumstances, a comprehensive and independent review of the guard candidates' language proficiency was necessary to identify the nature and extent of any deficiencies in the language proficiency of the guard force and to properly identify what, if any, remedial efforts were appropriate. After completing this testing, MVM proposed a detailed remediation plan to determine which candidates would be able to perform Contract requirements without remedial training and which candidates would be able to assume their duties with remedial training. Guard candidates completing remedial instruction would be subject to follow-on testing to ensure full proficiency. Further, MVM proposed to have ALTA screen additional guard candidates in their home countries to provide a readily available pool of additional guard candidates as necessary to replace candidates in Afghanistan who did not meet Contract requirements.

Given the compressed schedule and the lack of guidance from State during the period between the Deficiency Notice (December 2) and the termination (December 21), MVM moved forward with implementation of its Plan. Not surprisingly, MVM's objective, independent testing of the guards' skills demonstrates that State's assessment of the extent of the deficiencies was grossly exaggerated.⁴ Indeed, a majority of the Peruvians and South Africans did not need to be replaced and would have been eligible to assume their duties with remedial training. By contrast, the incumbent force provided by GSG is comprised of Nepalese that do not speak English, and there does not appear to be a plan for them to be brought up to the same language standards as required of MVM.

It is patently unreasonable for State to pay triple the cost to GSG for guards that do not speak English, and without any plan for them to learn English, rather than to adopt MVM's Plan which would meet the language proficiency requirements in sixty

⁴ The test results are included as an attachment to the Plan.

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days at one-third the cost. Moreover, since State had already extended GSG's contract to at least January 31, 2006, there would have been no harm to the Government if it accepted MVM's Plan. The protocol used by GSG was to communicate through an English-speaking Nepalese supervisor. There is no reason that MVM could not have used the same protocol with an English-speaking Peruvian supervisor pending full implementation of its Plan. Under these circumstances, State's failure to accept MVM's Plan was arbitrary, capricious, and not in the best interests of the Government.

State not only failed to accept MVM's Plan, it did not even consider it. As discussed above, this is because the language issue was a pretext, and State decided to terminate the Contract well before the Deficiency Notice was sent. Despite having the Plan for eleven days prior to the termination, State provided no substantive response to the Plan or analysis of why termination was in the best interests of the Government. State's failure to consider MVM's Plan is also shown by its actions after the Deficiency Notice was issued. For example, on December 8, 2005, a day before MVM's Plan was submitted, State requested a list of all equipment and ammunition that MVM shipped to Kabul. This request was reiterated to MVM on December 22, the day after the termination.⁵ Similarly, by letter dated December 12, 2005, three days after MVM's Plan was submitted, State requested a current listing of all MVM employees in Kabul who are assigned to the Contract and residing in the Man Camp. This correspondence confirms that State had predetermined to terminate the Contract without regard to MVM's Plan and was positioning itself in advance of the default. State's irrevocable decision to terminate before the end of the cure period and its failure to consider MVM's timely efforts to cure render the termination improper. *Cervetto Blåg. Maint. Co. v. United States, supra.*

The Contracting Officer Did Not Exercise Discretion And Independent Judgment

The decision to terminate a contract for default must be the result of the Contracting Officer's exercise of sound discretion and his own independent judgment. *Schlesinger v. United States, supra.* A key corollary of this principle is that the Contracting Officer cannot defer the decision to terminate a contract for default to others. *Id.* In *Schlesinger*, a default termination was converted to a convenience termination where the evidence established that the Contracting Officer was improperly influenced in his termination decision by a Senate subcommittee. Similarly, in *Walsky Construction Co., supra*, the ASBCA overturned a default termination where the termination decision followed an instruction by the Director of Contracting to the Contracting Officer to terminate Walsky "if the smallest thing goes wrong."

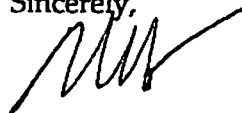
⁵ State has incorrectly asserted that it has title to all equipment that was delivered in support of the Contract. Section B.1.2 of the Contract provides that title passes to the Government for equipment acquired by the Contractor using Contract funds. As the Government has not paid MVM under the Contract, no Contract funds were used in the purchase of the equipment, and title remains with MVM.

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Here, the decision to terminate the Contract for default was unduly influenced by the RSO and the U.S. Ambassador to Afghanistan, and was not the product of the Contracting Officer's independent judgment. As discussed above, the RSO vehemently objected to MVM's solution to use Namibians on the ERT and in supervisory guard positions despite the fact that South Africans met the requirements of the Contract. It is apparent that the RSO pressured the Contracting Officer to terminate the Contract once it became clear that State could not legally prevent MVM from providing South Africans under the Contract. We also understand that the U.S. Ambassador to Afghanistan, State's most senior representative in the country, sent a cable to the Contracting Officer before MVM's Plan was submitted that instructed or further pressured the Contracting Officer to terminate the Contract. These circumstances indicate that the Contracting Officer abdicated his discretion to others and that the default termination was not the product of his independent judgment. As such, the default termination was improper and should be converted to one for the convenience of the Government.

Based on the foregoing, unless this matter can be settled promptly, we recommend that MVM appeal the termination decision to the GSBCA or to the U.S. Court of Federal Claims and file a claim with the Contracting Officer for the Company's costs incurred under the Contract. If you have any questions regarding this matter, please feel free to call me.

Sincerely,



David M. Nadler