

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF ADMINISTRATION**

T.S.A., INC.

v.

DEPARTMENT OF CORRECTIONS.

OAH No. 07-0078 CON  
Contract No. 2064860

**DECISION**

**I. Introduction**

T.S., Inc. (TSA) contracted to provide an electronic procurement software system and associated professional services to the Department of Corrections. The department terminated the contract, asserting that TSA had breached it by failing to complete its work on schedule and in a satisfactory manner. TSA contested the termination and filed a claim for the remaining amount due under the contract, which was denied. The department filed a claim for reimbursement of the amount paid prior to termination. Both matters were referred to the Office of Administrative Hearings. The assigned administrative law judge conducted a hearing on July 30-31, 2007.

The department argues that implementation of TSA's electronic procurement software system failed because TSA's system was not capable of complying with the requirements of the solicitation without substantial modifications that rendered the system inefficient and cumbersome, and that as finally installed the system was deficient. TSA argues that the department caused delays in the implementation of the system and demanded changes in the system that were outside the scope of the contract.

Because the system as finally installed failed to provide performance in substantial compliance with the contract terms, the department established grounds for

termination for cause. Therefore, TSA's appeal of the decision to terminate and its claim for the remaining amount due under the contract are denied. However, because the department has not shown that TSA was paid sums it was not entitled to under the terms of the contract, the department's claim for reimbursement is denied.

## **II. Facts<sup>1</sup>**

### **A. Procurement Process and Contract Provisions**

The Department of Corrections issued Request for Proposals (RFP) No. \*\*\*\*-\*\*\*\*-\*\*\*\* on September 30, 2005.<sup>2</sup> The RFP solicited proposals to provide and implement a procurement software system, including training, product support and maintenance,<sup>3</sup> anticipating completion of the implementation by May 31, 2006.<sup>4</sup> The RFP advised prospective offerors that the department did not have an existing "procurement software solution."<sup>5</sup> It described mandatory performance capabilities that the system was required to provide in twelve general areas.<sup>6</sup> In addition to these mandatory system performance capabilities, the RFP listed three additional highly desirable features,<sup>7</sup> as well as two other desired options.<sup>8</sup>

The method of implementing the new system was to be proposed by the offeror; the RFP suggested a pilot implementation allowing the primary administrator and other key users to gain advance proficiency in the system, but offerors were allowed to propose a single, system-wide implementation if they preferred.<sup>9</sup>

The department was required to "provide access to hardware and staff, as needed, to assist...in implementation of the system."<sup>10</sup> The department's information technology

<sup>1</sup> The following factual findings are based on the record. Specific portions of the record supporting many of the findings have been identified in the footnotes for reference, but do not indicate that those portions contain the only, or most persuasive, evidence relied on. Where the evidence relating to particular findings is conflicting, the omission of any reference to or discussion of the conflicting evidence is not an indication that the administrative law judge failed to consider the conflicting evidence, but an indication that the administrative law judge found the conflicting evidence unpersuasive in light of the record as a whole.

<sup>2</sup> R. 1.

<sup>3</sup> R. 2 (RFP § 1.03).

<sup>4</sup> R. 46 (RFP § 5.02).

<sup>5</sup> R. 3 (RFP Am. 1, Q. B(3)).

<sup>6</sup> R. 33-38 (RFP § 5.01-[B] [1-13]).

<sup>7</sup> R. 38-39 (RFP § 5.01[B] [14-16]).

<sup>8</sup> R. 39-40 (RFP § 5.01[B][17-18]).

<sup>9</sup> R. 46 (RFP § 5.02).

<sup>10</sup> R. 47 (RFP § 5.05).

staff was required to "become familiar with the software system and [to] provide technical expertise...to facilitate installation and deployment."<sup>11</sup>

After issuing the RFP, the department conducted a pre-proposal conference and provided bidders with written answers to questions they submitted, including more specific information concerning the department's expectations in the areas of product catalogue integration and forms automation.<sup>12</sup>

TSA submitted a responsive proposal offering its proprietary procurement software, known as Puridiom 3.O.<sup>13</sup> It offered a project team described as having "extensive experience in the successful implementation of Puridiom in a variety of customer environments," with a concomitant "significant reduction in risk for the [department's] implementation."<sup>14</sup> With respect to purchase approval paths, the proposal stated that "Puridiom supports unlimited approval levels", and observed that the system "forc[es] orders and contracts that exceed an individual[s] warrant to be sent to authorized personnel for review and approval."<sup>15</sup> With respect to reports, the proposal observed that reporting needs vary greatly and that flexibility in report capability is important; it stated: "TSA can provide...custom-developed reports as part of Puridiom's implementation...to address unique reporting requirements outlined by the [department]."<sup>16</sup> Regarding forms, the proposal states: "Each type of procurement document has a customized form meeting the standards and requirements of the [department]."<sup>17</sup>

The proposal included a two-page description of the implementation process,<sup>18</sup> and a graphic representation of the timing of events.<sup>19</sup> According to the text, implementation "is flexible based on the requirements of each installation."<sup>20</sup> The usual

<sup>11</sup> R. 47 (RFP §5.05).

<sup>12</sup> R. 13 (RFP §2.02); R. 90-97. Answers to questions were provided to the prospective offerors as Amendment 1 to the RFP. Although Amendment 1 states it includes a summary of the pre-proposal conference, the summary is not a part of the record submitted to the Office of Administrative Hearings.

<sup>13</sup> R. 105 (RFP §2).

<sup>14</sup> R. 106 (Proposal §2[A](2)(a)).

<sup>15</sup> R. 112-113 (Proposal §2[A](2)(c7)).

<sup>16</sup> R. 113 (Proposal §2[A](2)(c8)).

<sup>17</sup> R. 114 (Proposal §2[A](2)(c10)).

<sup>18</sup> R. 122-124 (Proposal §2[A](2)(g)).

<sup>19</sup> R. 135 (Proposal Exhibit A).

<sup>20</sup> R. 122 (Proposal §2[A](2)(g)).

first event was an on site preparation consultation, followed by installation, setup, and configuration.<sup>21</sup> After installation, the proposal indicated that a "key" to successful implementation, "will be the planning and execution of the system's roll-out."<sup>22</sup>

After reviewing TSA's proposal, the department asked for additional information regarding TSA's past experience<sup>23</sup> and for clarification of its proposal in a number of respects, including reports, forms, and the specific features and functions being offered.<sup>24</sup> In response, TSA provided more detailed information,<sup>25</sup> and the department issued a notice of intent to award the contract to TSA. The parties entered into a contract that went into effect on January 19, 2006.<sup>26</sup>

The contract documents include the signed contract executed in January, 2006, the requirements and specifications set forth in the RFP, and the features and services set forth in the proposal and subsequent questions by the department and clarifications by TSA. In the event of any differences in the relevant terms, the signed contract governs first, and then the RFP, over the proposal.<sup>27</sup>

The contract calls for TSA to "provide [the department] with an electronic purchasing system solution utilizing Puridium 3.0,"<sup>28</sup> including "consulting, customization, configuration, [and] installation."<sup>29</sup> The contract provided for contract amendments "including, but not limited to, an increase (or decrease) to the services, adding optional components and adding or changing software features, [and] customized programming related to this project."<sup>30</sup> Both the department and TSA were aware that neither of them had any experience in the use of the 11-digit National Institute of Governmental Purchasing (NIGP) commodity codes<sup>31</sup> (which had only recently been

<sup>21</sup> R. 123 (Proposal §2[A](2)g).

<sup>22</sup> R. 123 (Proposal §2[A](2)g).

<sup>23</sup> R. 161.

<sup>24</sup> R. 164-166.

<sup>25</sup> R. 167-188.

<sup>26</sup> R. 189, 210-211. *See* Contract App. C, Par. 1.

<sup>27</sup> R. 194 (Contract App. C, Par. 5).

<sup>28</sup> R. 193 (Contract p. 5).

<sup>29</sup> R. 194 (Contract p. 6, 6).

<sup>30</sup> R. 193 (Contract p. 5, 4).

<sup>31</sup> *See, e.g.*, J.R. testimony [hereinafter JR], Digital Hearing Recording [hereinafter DR] #2 at 1:30, 1:55; R. 93 (Contract Am. 1, §B(3)) ("The State Department of Administration utilizes a 5-digit NIGP structure for keeping track of vendors who have registered with the State of Alaska to express their interest

created). However, TSA had experience with the 5- and 7-digit NIGP codes and was confident that Puridiom would effectively process the 11-digit NIGP code. The 11-digit NIGP code was specified as the basis for commodity and services code integration and management.<sup>32</sup> TSA's description of the performance capabilities of the Puridiom system, as set forth in TSA's clarification in response to the department's questions, was included in the contract.<sup>33</sup>

The contract states that "[scheduling delays that are due to [department] staffing availability or coordination conflicts shall not be cause for action or penalty against [TSA]."<sup>34</sup> Following successful installation, the department was to issue a written acceptance, followed by training and leading to eventual "go live".<sup>35</sup> Payment of \$77,985 (50% of the contract amount) was due upon "completion/acceptance of initial installation," with two additional payments (25% apiece) following "go live".<sup>36</sup>

The department was entitled to terminate the contract for convenience when in the best interests of the state, in which case the department was liable for payment "in accordance with the payment [schedule]...for services rendered before the effective date of termination."<sup>37</sup> In the event of breach by TSA, the department was entitled to terminate the contract upon 30 days' notice.<sup>38</sup> In the event of termination for substantial non-performance, the department was entitled to reimbursement of sums paid for unacceptable work, plus "associated damages."<sup>39</sup>

#### B. Installation, Setup and Configuration

After contract award, the department informed TSA that its project manager would be A.S., the department's procurement manager, working with two project assistants, S.F. and J.G.<sup>40</sup> None of the three had any relevant special technical expertise or experience in implementing a major software

in being solicited for bids, but that is the only use that [the department] is aware of for that coding structure.").

<sup>32</sup> R. 194 (Contract p. 5,16.2); R. 93 (Contract, A.m. 1, §B(3).

<sup>33</sup> R. 195-198. *See*R. 180-188.

<sup>34</sup> R. 199 (Contract p. 11,16.3).

<sup>35</sup> R. 199 (Contract p. 11,16.5).

<sup>36</sup> R. 202 (Contract App. D, 11.1).

<sup>37</sup> R. 193 (Contract p. 5,13).

<sup>38</sup> R. 206 (Contract App. E, Section B, 14).

<sup>39</sup> R. 23 (RFP §3.14).

system.<sup>41</sup> A.J., a vice president of TSA, was the individual with primary supervisory responsibility for TSA's implementation of the system. Mr. J. had 19 years' experience in application and software product design and development, systems implementation, project management, procurement practices, and related areas, eighteen of which were at TSA.<sup>42</sup> He had managed implementation of Puridion software for around 200 customers, including six or seven public sector clients.<sup>43</sup>

Mr. J. conducted an on site consultation with the department on February 13-17, 2006. The on site consultation is generally critical to a successful implementation, and provides the foundation for all of TSA's work.<sup>44</sup> The purpose of the on site consultation was to acquire information specific to the department's work processes in order to enable TSA to set up and configure Puridion in a manner that would effectively deal with most of the department's work.<sup>45</sup> Based on the information obtained at the meeting, TSA represented that it would "come up with a plan for implementation and outline everyone's duties for a successful deployment."<sup>46</sup> Nothing in the department's processes, as described to Mr. J. at the time, was substantially different from what he had previously encountered.<sup>47</sup>

Attending the on site consultation for the department were Mr. S., Ms. F., and Mr. G., two IT staff, an accounting staff person, four primary administrative managers, and four procurement specialists, including S.M.<sup>48</sup> Mr. M. had recently retired and had been rehired on a temporary contract to work on this and other special projects; he was scheduled to go on leave for the summer beginning in June, 2006.<sup>49</sup> At the on site consultation, the department described the procurement

<sup>40</sup> R. 1168 (email, A.S. to A.J., 1/20/06 @ 3:45 p.m.).

<sup>41</sup> See, e.g., A.S. testimony [hereinafter AS], DR #6 at 1:49.

<sup>42</sup> R. 147-148 (Proposal Exhibit E).

<sup>43</sup> AI Jacobs testimony [hereinafter AJ], DR #3 at 3:10.

<sup>44</sup> AJ, DR #2 at 2:21,2:31.

<sup>45</sup> AJ, DR a#212:30-2:37; see R. 135 (Proposal Exhibit A).

<sup>46</sup> R. 1052 (email, J.R. to S.F., 1/10/2006 @ 10:36 p.m.).

<sup>47</sup> AJ, DR #2 at 3:19.

<sup>48</sup> R. 284; R. 460 (email, S.M. to A.J., 3/10/2006 @ 11:06 a.m.). The attendee list was slightly expanded from earlier plans. See R. 1168 (email, A.S. to A.J., 1/30/2006 @ 3:45 p.m.).

<sup>49</sup> S.M. testimony [hereinafter SM], DR #7 at 0:47; S.F. testimony [hereinafter SF], DR #4 at 0:52.

processes it would follow, including the department's business rules for approving requisitions and purchase orders. The department informed TSA that approvals would be generated based on two separate criteria: (1) a combination of commodity and collocation<sup>50</sup> codes; and (2) warrant authority.<sup>51</sup>

Following the on site consultation, A.N. of TSA, working in consultation with Mr. J. and notes he provided, began preparing an implementation workbook containing a comprehensive description of the Puridiom configuration to be provided to the department, based on the description of the department's needs obtained at the on site consultation.<sup>52</sup> Mr. N. had ten years' experience in information technology, including four years at TSA, where he was responsible for initial installations, training, and system implementation.<sup>53</sup> Mr. N. was the individual at TSA with hands-on responsibility for TSA's side of the implementation process, particularly with respect to technical matters. The department identified S.M. as the person responsible for data acquisition and as the primary point of contact for the implementation project.<sup>54</sup> Consistent with those responsibilities, Mr. N. identified Mr. M. as the department's Puridiom system administrator.<sup>55</sup>

TSA provided the department with an implementation workbook dated March 20, 2006.<sup>56</sup> The workbook included Mr. N.'s notes regarding the department's

<sup>50</sup> "The eight-digit collocation code identifies the fund, appropriation, organization, and program structures to which the financial activity is recorded." State of Alaska Accounting Procedures Manual, Section 3 ([http://fin.admin.state.ak.us/dof/accounting\\_procedures-manual](http://fin.admin.state.ak.us/dof/accounting_procedures-manual); accessed July 27, 2008).

<sup>51</sup> AJ, DR #2 at 2:55-2:56, 3:40; AN, DR #3 at 0:06, 2:39, 2:47, 3:05-3:06, 3:23. See R. 271 ("End Approvals When Dollar Amount is reached")-272 (User Defined Fields for Collocation and Commodity), R. 280 ("Buyer assignment will be based on 11-digit NIGP code first. Mainly IT, telecommunications, and vehicles will be assigned to specific buyers at central office locations. If no buyer associated with commodity, then will assign based on suggested buyer filed."), R. 281 ("Buyer warrant amounts will control who can award the order and the list of approvers that the order can be forwarded to."), R. 283 (workflow chart).

<sup>52</sup> R. 213-277.

<sup>53</sup> R. 149 (Proposal Exhibit E).

<sup>54</sup> A.N. testimony [hereinafter AN], DR #3 at 0:05-0:06, 0:28.

<sup>55</sup> R. 275. See AJ, DR #2 at 2:55-2:57. "[T]he 'DOC Puridiom Administrator'...is a person appointed by [the department] to act as the liaison between [the department's] Procurement [staff], [the department's] IT [staff], and TSA. It is the first person(s) we train and an integral part of the initial discussions to set-up the system." R. 171, Clarification, P D.

<sup>56</sup> R. 213-286. Once the notebook had been prepared, Mr. J. was no longer focused on the project. AJ, DR #2 at 3:17.

procurement process and approval rules, and a flow chart describing the approval rules to be implemented by TSA. Mr. J. described the workbook to the department as:

worksheets as to what we discussed [at the on-site meeting] (label changes, rules, etc.). This is what we will be using to tailor your system. Along with that information will be the table information we will need for those that will be imported and not hand entered.<sup>1571</sup>

S.M. was the only department employee who reviewed the workbook in any detail. He and the other key personnel were unsure of what to make of it.<sup>58</sup> Mr. M. continued to anticipate the arrival of a template or spreadsheet identifying the specific information that TSA would need to configure the system: he told TSA that he was looking for further direction with respect to any action required on the department's side, particularly with respect to approval paths.<sup>59</sup> Although he had anticipated that this project would call for a bit more handholding than most, A.J. saw nothing in Mr. M.'s response to the workbook that was out of the ordinary.<sup>60</sup>

On March 16, 2006, Mr. J. provided the department with a spreadsheet identifying 35 forms that TSA had received;<sup>61</sup> he observed that in his view the department was paper/form intensive, and he suggested consolidating or eliminating as many forms as possible as part of the transition to an electronic procurement process.<sup>62</sup> In response to Mr. J.'s observation, the parties held a teleconference to consider consolidation or elimination of some of the forms and to provide TSA with an understanding of their

<sup>57</sup> R. 458 (email A.J. to S.M. *et al.*).

<sup>58</sup> S.M. testimony [hereinafter SM], DR #7 at 2:00-2:01, 2:06-2:08; SF, DR #4 at 0:30-0:31, 1:27-1:28; AS, DR #5 at 1:03-1:04, DR #6 at 0:06, 0:25-0:28.

<sup>59</sup> R. 467 (email, S.M. to A.J., 4/7/2006 @ 3:18 p.m.) ("not quite sure if...you are expecting some kind of info from us, or if some of that [information] would get entered by the user(s) in the normal course of operations - or perhaps both...It seems there's probably a lot we could discuss on those pages."); R. 478 (email, S.M. to A.J., 4/12/2006 @ 4:34 p.m.) (asking for "a worksheet...to setup the various systems user access rights, dollar limitations, approval paths, etc.... Is that something we can get now...so A. [S.] can start looking at and assembling the necessary criteria, options, etc.?").

<sup>60</sup> AJ, DR #2 at 3:00-3:02.

<sup>61</sup> The forms had been provided to the department at various times. Cover pages for ITB's and RFP's were provided to TSA on February 16. R. 424 (email, S.F. to A.J., 2/16/2006 @ 5:07 p.m.). On February 28, 2006, the department provided electronic copies of various forms used in the procurement process. R. 425 (email, S.M. to A.J., 2/28/2006 @ 11:05 a.m.). Additional forms were provided on March 8 and 10. R. 450 (email, S.M. to A.J., 3/8/2006 @ 5:07 p.m.); R. 458 (email, S.M. to A.J., 3/10/2006 @ 12:16 p.m.). On March 13, the department provided updated versions of some of the forms. R. 450 (email, S.F. to A.J., 3/13/2006 @ 3:44 p.m.).

<sup>62</sup> R. 468-469 (email, A.J. to A.S., S.F., S.M., 3/16/2006 @ 3:07 p.m.).



purpose.<sup>63</sup> On March 31, the department provided TSA with an updated, slimmed-down list of forms for incorporation into the system, with some general questions regarding how the changes and notes to existing documents would be handled in the new system.<sup>64</sup>

Based on the information it had received and in accordance with the workbook contents, and in the absence of any further direction from the department regarding the approval rules as described in the notebook, TSA began working to configure the system to meet the department's requirements.

The department provided TSA with remote access to its server on Wednesday, April 5, 2007.<sup>65</sup> Until the department's database administrator had created the necessary tablespaces, etc., however, TSA could not complete installation.<sup>66</sup> The system was installed on the department's hardware on about April 19, 2006.<sup>67</sup> On April 27, at TSA's request, the department authorized the initial 50% payment due under the contract "upon completion/acceptance of initial installation."<sup>68</sup>

#### C. System Administrator Training, Data Entry, and Customization

Under the contract, implementation was scheduled to be completed no later than May 26, 2006, 100 days after the system was installed. At the time of installation on April 19, both TSA and the department recognized that the project was behind schedule. As of May 1, TSA estimated that the project was 3-4 weeks behind schedule, due to three "critical factors": availability of the hardware for installation (particularly access to the LDAP<sup>69</sup> server to load user profiles); availability of conversion data (particularly NIGP codes), and coordinating schedules for training and consultation.<sup>70</sup> At that time, the department had not yet provided three key data sources to TSA: AKSAS<sup>71</sup> data (which as

<sup>63</sup> R. 471 (email, S.M. to A.J., 4/7/2006 @ 6:18 p.m.); R. 1092 (email, A.J. to A.S. *et al*, 3/16/2006 @ 3:07 p.m.); *see* R. 1046-1051.

<sup>64</sup> R 467-468 (email, S.M. to A.J., 3/31/2006 @ 12:26 p.m.).

<sup>65</sup> R. 470 (email, A.J. to S.M., 4/10/2006 @ 5:35 p.m.).

<sup>66</sup> R. 470 (email, A.J. to S.M., 4/10/2006 @ 5:35 p.m.).

<sup>67</sup> R. 505-506 (email, J.R. to S.F., 4/26/2006 @ 1:12 p.m.).

<sup>68</sup> R. 507 (email, S.F. to J.R., 4/27/2006 @ 9:18 p.m.).

<sup>69</sup> LDAP is an acronym for Lightweight Directory Access Protocol. Wikipedia, accessed August 6, 2008. The LDAP is the security firewall. It provides the means of authentication and controls user id and password access to the system. JR, DR #1 @2:05-2:06; SF, DR #4 at 1:16.

<sup>70</sup> R. 509 (email, J.R. to S.F. *et al*, 5/1/2006 @ 9:59 a.m.); *see also* SF, DR #4 at 1:19-1:20.

<sup>71</sup> AKSAS is an acronym for Alaska Statewide Accounting System. AKSAS Handy Guide at p. 1 (accessed at <http://fin.admin.state.ak.us/dof/updates/index.isp>. August 6, 2008).

of April 27, 2006, the department had yet not been able to obtain from another state agency),<sup>72</sup> NIGP code data (which as of April 26 the department had acquired, and had offered to input but had not provided to TSA),<sup>73</sup> and LDAP data (used to create user profiles).<sup>74</sup> Other data, such as addresses, had also not been provided to TSA.<sup>75</sup> To speed up data entry, on May 1 Mr. N. added S.M., A.S., and S.F.

as system administrators.<sup>76</sup> Mr. M. immediately accessed the system and began entering some data.<sup>77</sup> On May 3, 2006, the department provided TSA with access to the 11-digit NIGP codes.<sup>78</sup> That same day, the department was advised that the "extract files" necessary for the AKSAS data transfer were under development, with "sample data files" anticipated by May 12;<sup>79</sup> Mr. M. informed TSA that the AKSAS data "should be available" by that date.<sup>80</sup> He again asked for a template to used by the department in providing user profile information to TSA, repeating his earlier request in April.<sup>81</sup>

TSA loaded a subset of the NIGP codes into the system on May 4,<sup>82</sup> and department staff hand-entered some AKSAS data.<sup>83</sup> Department codes ("autopay hierarchy") provided to TSA on April 14 were also entered into the system by TSA prior to the system administrator training.<sup>84</sup> The department anticipated that it would formally

<sup>72</sup> R. 507.

<sup>73</sup> R. 470-471 (email, A.J. to S.M., 4/10/2006 @ 5:35 p.m.); R. 534 (email, S.M. to A.N., 4/26/2006 @ 8:55 p.m.); R. 500 (email, S.M. to A.N., 4/27/2006 @ 1:21 p.m.).

<sup>74</sup> R. 509 (email, J.R. to S.F. *et al.*, 5/1/2006 @ 9:59 a.m.); R. 542 (email, A.J. to S.M., 5/4/2006 @ 7:51 a.m.).

<sup>75</sup> Some addresses were provided in Excel spreadsheet format in April. *See* R. 471 (email, A.J. to S.M., 4/10/2006 @ 5:35 p.m.). However, because that information was not provided in an electronic format, it was not entered into the database until sometime after May 4, and possibly as late as November. *See* R. 542 (email, A.J. to S.M., 5/4/2006 @ 7:51 a.m.), R. 665 (email, D.F. to J.G., 6/2/2006 @ 8:07 a.m.), R. 1197 (email, S.F. to J.R., 11/3/2006 @ 3:22 p.m.).

<sup>76</sup> R. 533-534 (emails, S.M. to A.N., 4/26/2006 @ 8:55 p.m. & 4/27/2006 @ 5:21 p.m.).

<sup>77</sup> R. 532 (emails, A.N. to S.M., 5/1/2006 @ 1:32 P.m.); S.M. to A.N., 5/3/2006 @ 2:26 p.m.).

<sup>78</sup> R. 540 (email, S.M. to J.H., 5/3/2006 @ 5:15 p.m.). By June 21, TSA had all of the 11 digit codes. *See* R. 693 (email, A.N. to J.L., *et al.*, 6/21/2006 @ 7:50 a.m.).

<sup>79</sup> R. 539 (email, G.W. to B.W., 5/3/2006 @ 10:41 a.m.).

<sup>80</sup> R. 540 (email, S.M. to J.H., 5/3/2006 @ 5:16 p.m.).

<sup>81</sup> R. 540 (email, S.M. to J.H., 5/3/2006 @ 5:16 p.m.); *see* note 59, *supra*.

<sup>82</sup> R. 542 (email, A.J. to S.M., 5/4/2006 @ 7:51 a.m.).

<sup>83</sup> R. 540 (email, S.M. to J.H., 5/3/2006 @ 5:16 p.m.).

<sup>84</sup> R. 542 (email, A.J. to S.M., 5/4/2006 @ 7:51 a.m.).

"document acceptance" of the installed system at the system administrator training session.<sup>85</sup>

A.N. conducted a system administrator training session by webinar on May 4-5 which was attended by A.S., S.F., J.G. and S.M..<sup>86</sup> The session included training in the use of the system administration module for setting up and maintaining user profiles, tables, access rights, and approval paths.<sup>87</sup> Thereafter, key department staff (primarily S.M.) began to access the system for testing purposes. Department personnel did not follow any formal testing process; they tested the system by creating dummy requisitions and attempting to run them through the system as end users.<sup>88</sup>

By May 9, users had encountered a variety of problems. Testing was complicated by the fact that data was incomplete: failure to limit testing to the available data would cause the system to generate exceptions, and testers did not always test "around" the data.<sup>89</sup> As a result, many perceived problems were related to gaps in the available data.<sup>90</sup> Other perceived problems were the result of user error<sup>91</sup> or were minor system problems typically confronted in the implementation process.<sup>92</sup> However, users identified a significant problem affecting the basic functionality of the system, related to the NIGP codes.<sup>93</sup> TSA's own tests, however, were uneventful, and TSA did not recognize any

<sup>85</sup> R. 509 (email, S.F. to J.R., 4/27/2006 @ 9:18 p.m.).

<sup>86</sup> R. 426-429 (email, S.M. to S.F., A.S., J.G., 4/19/2006 @ 12:38, p.m.); see S.M., DR #7 at 2:33-2:39.

<sup>87</sup> R. 426-437 (emails, A.N. to A.S., 4/19/2006 @ 7:04 a.m., A.S. to A.N., 4/18/2006 @ 4:33 p.m.). See generally, R. 188 (describing Puridiom System Administration & Security module).

<sup>88</sup> See, e.g., SF, DR #4 at 0:08-0:09; JR, DR #6 at 2:38.

<sup>89</sup> AJ, DR #2 at 2:48, 3:41. See R. 470 (email, A.J. to S.M., 4/10/2006 @ 5:35 p.m.) ("[S]ome of the fields where [sic] identified as a mandatory & validate entry rule. If no table data exist, these rules will fail.").

<sup>90</sup> Cf. SF, DR #4 at 0:37-0:38.

<sup>91</sup> See, e.g., R. 547-548 (emails, S.M. to A.N., 5/9/2006 @ 8:35 p.m.; A.N. to S.M., 5/10/2006 @ 1:01 p.m.; A.N. to S.M., 5/15/2006 @ 12:41 p.m.) (items #2, #6: improper log-out, reset button); R. 532 (email, S.M. to A.N., 5/3/2006 @ 2:26 p.m.) (access for data entry); R. 542 (email, A.J. to S.M., 5/4/2006 @ 7:51 a.m.).

<sup>92</sup> See, e.g., R. 547-548, 550 (items #1, #3, #5, #7: "save" function"; pagination errors/browser compatibility; navigation concerns; display).

<sup>93</sup> R. 548 (email, S.M. to A.N., 5/9/2006 @ 8:35 p.m.) (item #4).

significant issue regarding the NIGP codes<sup>94</sup>. Thus, on May 15, TSA deemed that "the system setup is complete," although data entry was incomplete.<sup>95</sup> Later that same day, however, Mr. M. repeated his concerns about the lack of depth in the NIGP codes, as well as bringing up a new concern regarding the routing of approvals, another issue that affected the basic functionality of the system.<sup>96</sup>

Power user training was conducted as planned by webinar on May 18-19.<sup>97</sup> During that session, the department asked that program codes be added to the approval rules.<sup>98</sup> As power users began to test the system, the number of problems identified increased. It became apparent that the problems with approvals were not isolated instances,<sup>99</sup> and that the full 11-digit NIGP codes was not an efficient code structure for the department to use in the absence of an electronic search capability.<sup>100</sup> Still, apart from problems attributable to the lack of full 11-digit NIGP code functionality, most of the problems encountered during May occurred for a variety of reasons not attributable to any sort of deficiency in the Puridom system as installed, including the parties' failure to achieve a complete and comprehensive shared understanding of the business rules governing the approval process prior to the initial setup (*e.g.*, lack of reference to program codes or institutional hierarchies as basis for approval),<sup>101</sup> the lack of data entered into the

<sup>94</sup> R. 547 (email, A.N. to S.M., 5/10/2006 @ 1:01 p.m.) (item #4); R. 1097 (email, A.N. to S.F., 5/1/2006 @ 3:56 p.m.); R. 550 (email, A.N. to S.M., 5/15/2006 @ 12:41 p.m.) (item #4).

<sup>95</sup> R. 550 (email, A.N. to S.M., 5/15/2006 @ 12:41 p.m.).

<sup>96</sup> R. 553 (email, S.M. to A.N., 5/15/2006 @ 5:13 p.m.).

<sup>97</sup> R. 545 (email, S.F. to DOC key personnel, 5/8/2006 @ 2:02 p.m.); R. 325.

<sup>98</sup> See R. 325; R. 586 (email, A.N. to S.F., 5/23/2006 @ 10:58 a.m.) As previously noted, collocation codes generally identify a program for expenditures. However, "The optional five-digit program code may be entered to specify a different program than identified by the collocation code." recorded." State of Alaska Accounting Procedures Manual, Section 3 ([http://fin.admin.state.ak.us/dof/accounting\\_procedures-manual](http://fin.admin.state.ak.us/dof/accounting_procedures-manual); accessed July 27, 2008).

<sup>99</sup> R. 586 (email, A.N. to S.F., 5/23/2006 @ 10:58 a.m.); R. 606 (email, J.L. to A.S. *et al*, 5/25/2006 @ 9:28 a.m.); R. 607 (email, A.N. to J.L. *et al*, 5/25/2006 @ 9:37 a.m.); R. 611 (email, S.M. to A.N., 5/25/2006 @ 10:30 a.m.).

<sup>100</sup> R. 610 (email, S.M. to J.L., 5/25/2006 @ 10:30 a.m.). See JR, DR #1 at 1:30-1:32.

<sup>101</sup> The department changed the approval rules from those described at the on-site meeting and set out in the implementation workbook on several occasions. Following the power user training, the department asked that program codes be included as part of the approval process. JR, DR #7 @ 3:02; AJ, DR #2 at 3:35-3:36; see R. 325, R. 586 (email, A.N. to S.F., 5/23/2006 @ 10:58 a.m.). This was not the only change made in response to a request by the department. See J.L. testimony [hereinafter JL], DR #6 at 2:35 (initially, approvals were not restricted to proper chain of command); R. 325 (during the remediation process, warrant approval amounts changed from individual items to total amount).

system (*e.g.*, lack of AKSAS data, including collocation codes),<sup>102</sup> the parties' mutual lack of experience in the use of the 11-digit NIGP codes,<sup>103</sup> differences between the manner in which Juneau and Anchorage procurement staff operated,<sup>104</sup> incomplete or inaccurate user profile or other setup-related matters<sup>105</sup> (*e.g.*, the absence of comprehensive and complete buyer assignments by commodity codes),<sup>106</sup> and user error.

Notwithstanding the existing deficiency in the system's ability to efficiently process the 11-digit NIGP codes and the other problems identified by the department, TSA indicated that with the new data and completed changes, the system would be essentially complete when updated on Tuesday, May 30, except for "special requests," *i.e.*, enhancements.<sup>107</sup> By Tuesday, May 30, however, the department's concerns had only increased. By that time, Mr. M. was "not aware of anyone in our department who has been able to get a [requisition] all the way thru to P.O. completion."<sup>108</sup>

On Thursday, June 1, 2006, the department notified TSA that it viewed the system as not ready for presentation to end users. It observed that it was "continuing to experience difficulties" on a scale that prevented comprehensive testing prior to rollout.<sup>109</sup> TSA and the department teleconferenced on Friday, June 2, to discuss the situation.<sup>110</sup> Following the conference, Mr. R. provided a summary of action items, which included: (1) sharing a master list of issues; (2) conducting a webinar to review

<sup>102</sup> For example, approvals could not be generated for any transaction for which the collocation data had not been entered. JR, DR #1 at 1:22. Collocation, account, and supplier codes from AKSAS were not provided until May 26. R. 629 (email, S.M. to A.J., 5/30/2006 @ 8:40 a.m.) (confirming collocation codes, program codes, ledger codes, account codes, and supplier information was sent on prior Friday, May 26). *See also* R. 618 (email, S.M. to A.J., 5/26/2006 @ 4:51 p.m.), R. 625 (email, S.M. to A.J., 5/26/2006 @ 4:02 p.m.), R. 626 (email, S.M. to A.J., 5/26/2006 @ 5:00 p.m.).

<sup>103</sup> Problems caused by the inability of TSA's system to efficiently and effectively deal with the 11-digit code are attributable to TSA alone. However, use of that coding also resulted in the generation of multiple approvals: a problem of that nature is not attributable solely to TSA; it reflects lack of experience with the coding on the department's side, as much as on TSA's. *See* R. 325; JR, DR #7 at 3:04.

<sup>104</sup> *Cf.* AN, DR #3 at 0:30.

<sup>105</sup> R. 287 (email, S.F. to A.N., J.R., A.J., 6/1/2006 @ 4:33 p.m.) ("Granted, some of the problems were due to the way user profiles were set up...").

<sup>106</sup> *See, e.g.*, R. 607 (email, A.N. to J.L., 5/25/2006 @ 9:37 a.m.). The department did not provide TSA with buyer assignments by commodity code until June 23; that information was incorporated into the system for the first time on July 31. *See* note 134, *infra*.

<sup>107</sup> R. 627 (email, A.N. to A.J., S.M., 5/26/2006 @ 5:18 p.m.).

<sup>108</sup> R. 638 (email, S.M. to A.N., 5/30/2006 @ 12:00 p.m.).

<sup>109</sup> R. 287 (email, S.F. to A.N., J.R., A.J., 6/1/2006 @ 4:33 p.m.).

<sup>110</sup> R. 663 (email, J.R. to S.F., A.N., A.J., 6/2/2006 @ 7:22 a.m.).

approval workflows; (3) increased access to the department's server; and (4) department response regarding L D A P .<sup>111</sup> In addition, T S A agreed to send A.N. back to Alaska to discuss issues, troubleshoot the system, and provide additional training.<sup>112</sup>

On June 3, the department provided T S A with a master list of concerns.<sup>113</sup> After that date, the department continued to identify issues as they arose.<sup>114</sup> Many of the issues identified on the master list and subsequently involved missing data,<sup>115</sup> display,<sup>116</sup> navigation,<sup>117</sup> user misunderstanding or error,<sup>118</sup> or other similar issues not affecting the basic functionality of the system.<sup>119</sup> However, the two major areas of concern that had previously been identified remained: lack of 11-digit NIGP code functionality,<sup>120</sup> and improper approval pathways.<sup>121</sup> All of these problems, coupled with the more substantive matters, resulted in users experiencing a high degree of dissatisfaction and frustration with the system.

As the department's concerns were passed back to T S A, the impression Mr. J. had was that the department was seeking enhancements.<sup>122</sup> Mr. R.'s view was that the department was getting bogged down in relatively minor issues and was insufficiently focused on the primary issues of "accountability, workflow and visibility."<sup>123</sup> Mr. N. conducted another webinar on June 8 to review the approval

<sup>111</sup> R. 667 (email, J.R. to S.F., A.N., A.J., 6/2/2006 @ 11:42 a.m.).

<sup>112</sup> R. 679 (email, A.S. to J.R., A.N., A.J., 6/3/2006 @ 12:21 p.m.).

<sup>113</sup> R. 679 (email, A.S. to J.R., A.N., A.J., 6/3/2006 @ 12:21 p.m.).

<sup>114</sup> See, e.g., R. 681 (email, S.F. to A.J., A.N., 6/9/2006 @ 4:09 p.m.); R. 699 (email, J.L. to A.N., A.S., J.G., S.F., 6/27/2006 @ 8:58 a.m.).

<sup>115</sup> See R. 288 ("missing NIGP code (3-digit)").

<sup>116</sup> See, e.g., R. 288 ("Payment method selection..."; "table listings...cutoff short"; "comma separators"), R. 289 (supplier information replaced by contract information; "checkboxes should be hidden"; "Create PO from 'nothing'"), R. 290 ("Reason for savings should be hidden"; "Reservation # field shows up as a pull-down"; "PO does not bear much resemblance to our old 'delivery orders'"; "Asset box within 'Receiving screens'"; "Tax code field should be hidden").

<sup>117</sup> See, e.g., R. 289 ("Several screens have no 'BACK' button").

<sup>118</sup> See, e.g., R. 669 (misinterpretation of message, emails, S.M. to A.N., 6/2/2006 @ 5:36 p.m.; A.N. to S.M., 6/2/2006 @ 1:47 p.m.).

<sup>119</sup> See, e.g., R. 288 ("Security Item field needs to have a 'NO' default"; "address[es] do not carry over from requisition to P.O."), R. 289 ("cross-referencing between the requisitions and P.O."), R. 290 (emailing multiple solicitations or to co-workers; "Multiple Account numbers for suppliers").

<sup>120</sup> See R. 288 ("does not give results for anything described in digits 4 thru 11").

<sup>121</sup> SF, DR #4 at 0:44-45. See R. 288 ("Multiple approval routing issues"), R. 289 ("staff.. were able to create a requisition under someone else's name"), R. 290 ("Approvals are not working correctly").

<sup>122</sup> A.J., DR #2 at 3:18.

<sup>123</sup> R. 679 (email, J.R. to A.S., A.J., 6/6/2006 @ 12:23 a.m.).

rules.<sup>124</sup> In addition, he met on site with department staff the week of June 12-16.<sup>125</sup> During the course of these meetings, the department requested various changes to the approval rules.<sup>126</sup> To assist the department in creating a structured testing process, Mr. N. provided copies of TSA's standard testing protocols.<sup>127</sup> After Mr. N.'s return, on June 27 TSA provided a second system update.<sup>128</sup> Following the update, most of the items identified on the June list had been corrected, along with other issues raised at the meeting;<sup>129</sup> again, however, the update did not resolve either of the two major issues that had been identified: the approval flow and lack of depth in the NIGP codes.<sup>130</sup>

From Mr. N.'s visit through the end of July, there was little contact between TSA and the department, as the department was busy with end of fiscal year work<sup>131</sup> and S.M., TSA's primary contact in the department and the primary day-to-day non-technical participant in the implementation process on the department's side, was on extended leave from June 5 through September 1.<sup>132</sup> TSA completed work on customized forms, and it continued testing the system and provided "new processing features." The system was updated for the third time on July 31, and TSA invited the department to test it and report back with any questions or problems.<sup>133</sup> The July 31 update included entry of the full 11-digit NIGP code data, along with the buyer codes that

<sup>124</sup> See R. 667 (email, J.R. to S.F., *et al*, 6/2/2006 @ 11:42 a.m.); R. 680 (email, A.N. to J.G. *et al*, 6/8/2006 @ 5:48 a.m.) (setting meeting re "Alaska DOC Requisition Approval Authority and Buyer Warrant Authority").

<sup>125</sup> R. 683.

<sup>126</sup> See, e.g., AN, DR #3 at 0:26; SF, DR #4 at 0:45.

<sup>127</sup> R. 682 (email, A.N. to J.G. *et al*, 6/12/2006 @ 6:41 a.m.).

R. 698 (email, A.J. to S.F., A.S., J.G., 6/23/2006 @ 2:58 p.m.).

<sup>129</sup> SF, DR #4 at 0:11, 0:48; R. 1069-1071; R. 700 (email, A.J. to S.F., 6/27/2006 @ 9:19 a.m.).

<sup>130</sup> *Id.* Concerns relating to the inability to assign buyers to certain NIGP codes may have been related to the lack of full 11 digit NIGP code functionality, or to missing data. See R. 288 ("Need to be able to assign certain NIGP codes..."); R. 289 (screen display "preventing us from seeing where we can assign buyers to certain NIGP codes"); R. 702 (email, J.L. to A.N., 6/27/2006 @ 12:58 p.m.) ("Assigning a buyer to a requisition question").

<sup>131</sup> The record does not include any emails dated from June 28 through July 10. Mr. N. contacted the department on July 12, and still had not received any response as of July 27. R. 704, 727.

<sup>132</sup> R. 1077; SM, DR #7 at 1:01. Mr. M. returned for the office on two days, July 1 and August 1.

<sup>133</sup> R. 738 (email, A.N. to A.S. *et al*, 7/31/2006 @ 11:28 a.m.). The update apparently also included corrections to a number of problems identified by J.L., generally consisting of minor display, format, or form-related concerns. See R. 706-710 (emails, J.L. to A.S., J.G, A.N., 7/17/2006); R. 712-713 (emails, A.N. to J.L., 7/18/2006); R. 717 (email, A.N. to A.J. *et al*, 7/27/2006 @ 3:55 p.m.).

the department had provided to TSA on June 23,<sup>134</sup> and updates to the approval rules that had been discussed in June.<sup>135</sup> On August 4, the department advised its power users to access the system and report back any problems, in order to prepare for "go-live."<sup>136</sup>

The department's power users encountered a variety of problems, including anomalies caused by use of the full 11-digit NIGP codes.<sup>137</sup> Use of the full coding caused data overloads and created exceptions. TSA did not diagnose and solve this problem until September.<sup>138</sup> In addition, as on other occasions when the system was updated, users found that after updating the email system was non-functional.<sup>139</sup> Testing continued to be *ad hoc*, as previously, and in the absence of S.M. the department's response to TSA regarding problems it identified was uncoordinated. Issues reported to TSA by various users included purchase order numbers not printing correctly,<sup>140</sup> scanned signatures not printing,<sup>141</sup> user profile information not provided by default,<sup>142</sup> and other matters (some of which were the result of user error).<sup>143</sup> Mr. N. scheduled a fourth system update for August 25; he asserted that "[a]ll of the items submitted have been addressed."<sup>144</sup> After the update, however, the department continued to encounter problems.<sup>145</sup> The department began preparing an updated list of problems to provide to TSA.<sup>146</sup>

#### D. Remediation

On September 15, 2006, A.S. sent an email to J.R. expressing considerable concern over the lack of resolution of problems that had been identified. He

<sup>134</sup> R. 744 (email, A.N. to T.W., *et al*, 8/1/2006 @ 1:08 p.m.).

<sup>135</sup> See R. 727 (email, A.N. to A.J. *et al*, 7/27/2006 @ 3:55 p.m.) (update to include "changes for...rules and processes").

<sup>135</sup> R. 745 (email, A.S. to T.W. *et al*, 8/4/2006 @ 8:41 a.m.).

<sup>137</sup> See generally, JR, DR #2 at 0:45, 1:45, 1:55, 2:08, DR #7 at 3:05; R. 884 (email, J.R. to A.S., 9/29/2006 @ 12:27 p.m.). See also, R. 710, 771-772.

<sup>138</sup> See R. 1189 (email, J.H. to S.F., 9/21/2006 at 7:26 a.m.); R. 884 (email, J.R. to A.S., 9/29/2006 @ 12:27 p.m.); JR, DR #7 at 2:08.

<sup>139</sup> R. 753.

<sup>140</sup> R. 754, R. 781.

<sup>141</sup> R. 755.

<sup>142</sup> R. 756.

<sup>143</sup> R. 793-799; R. 10832-1085 (email, J.L. to A.N. *et al*, 8/21/2006 @ 2:54 p.m.).

<sup>144</sup> R. 809 (email, A.N. to T.W. *et al*, 8/24/2006 @ 3:51 p.m.).

<sup>145</sup> R. 818, 824, 826, 829-833, 837 (email and printing); R. 838 (email, A.S. to J.L., A.N. *et al*, 8/31/2006 @ 7:34 a.m.); R. 848-449, 852 (September 14); R. 857 (email, J.H. to D.R., 9/15/2006 @ 8:14 a.m.).



expressed the department's view that the system as originally installed did not provide the functionality promised, and that customization by TSA had rendered it "ineffective and cumbersome" and left it with a number of recurring or unresolved problems<sup>147</sup>

Mr. R. responded that TSA shared the department's sense of frustration, but that the system contained all the features specified in TSA proposal, even if "they do not do things exactly the way you wanted them....[T]he system you have today is miles away from the system you initially discussed with A. [J]."<sup>148</sup> Notwithstanding Mr. R.'s view that the system contained all of the specified features, it was not providing the necessary functionality: TSA had still not yet resolved the memory issues relating to use of the full 11-digit NIGP codes (those issues were finally resolved by the end of the month)<sup>149</sup> and in addition problems with the approval paths still existed due to the failure of the department and TSA to reach a complete, accurate, and shared understanding of the department's business rules.

On September 29, 2006, the department provided TSA with an updated list of perceived problems, building on the June 2 list.<sup>150</sup> The department notified TSA that the project was "seriously behind schedule" due to the various problems that had been identified, and that if the problems were not resolved within 30 days after the department accepted a remediation plan, the department would consider termination of the contract for cause under sections 3.14 or 3.15 of the RFP.<sup>151</sup> After reviewing the list, Mr. N. requested clarification on certain items, and asked, "[W]hat is creating problems with the proper approval process?"<sup>152</sup> S.M. responded, providing an informal narrative description of the department's approval process.<sup>153</sup> Mr. R. on October 6 wrote back

<sup>146</sup> R. 846 (email, S.M. to J.L., *et al*, 9/13/2006 @ 4:24 p.m.).

<sup>147</sup> R. 291 (email, A.S. to J.R., 9/15/2006 @3:52 p.m.).

<sup>148</sup> R. 862 (email, J.R. to A.S., 9/15/2006 @4:22 p.m.).

<sup>149</sup> *See*R. 884, R. 1189; JR, DR #7 at 3:11.

<sup>150</sup> R. 296-321.

<sup>151</sup> R. 865 (email, S.M. to A.S., 9/16/2006 @4:38 p.m.); R. 293-295 (letter, A.S. to J.R., 9/29/2006).

<sup>152</sup> R. 896 (email, A.N. to S.F., A.S., S.F., 10/2/2006 @1:20 p.m.).

<sup>153</sup> R. 895-896 (email, S.M. to A.N., 10/3/200 @4:01 p.m.). This is apparently the first time that the department had provided TSA with a written description of the approval process.

to Mr. S., committing to provide a functional system within the time allowed,<sup>154</sup> but specifically limited to the contract requirements in order to avoid "a pervasive cycle of change requests with subsequent changes to the changes [that] is contributing to the current state of affairs."

With Mr. R.'s letter were a proposed remediation schedule ("Corrective Actions Plan") and two exhibits that set forth TSA's understanding of the department's approval rules for purchase requests (requisitions) and purchase orders, along with proposed solutions: TSA asked that the department either accept TSA's exhibits as the approval rules or provide documentation for another approach. In response to the department's request to provide additional limitations on buyers' purchasing authority, TSA proposed use of an "administrator's flag" to allow only specified buyers to bypass the normal (default) approval process.<sup>155</sup>

Mr. S. responded on October 27.<sup>156</sup> Mr. S. expressed concern that TSA apparently intended to deal with a number of the listed concerns "by placing them in RFE (Request for Enhancements) status," and expressed the department's view that none of the work requested to date was outside the scope of the original contract.

The parties conducted a teleconference on November 1 in an attempt to reach an agreement on a remediation plan and schedule. TSA forwarded a revised remediation schedule and exhibits setting out the department's approval rules (as TSA understood them).<sup>157</sup> Those approval rules, reflecting the parties' ongoing discussions, were further changed from the rules originally established following the on site meeting and modified in June.<sup>158</sup>

<sup>156</sup> R. 322 ("Please accept this letter...as a confirmation of our commitment to resolve current issues [*i.e.*, the issues identified on the September 29 list] and to deliver a Procurement System in accordance with the specifications set forth in the AK DOC contract...within the proposed 30-day deadline.").

<sup>155</sup> R. 323. *See* JR, DR #7 at 1:59-2:03. From the department's perspective, the changes to the approval rules at this stage were a belated effort by TSA to resolve longstanding issues, not changes in response to requests for revisions by the department. *See*, AS, DR #6 at 0:47-0:48.

<sup>156</sup> R. 329-331.

<sup>157</sup> R. 332-338.

<sup>158</sup> The requisition approval rules set forth in the revised plan placed collocation and program codes as the first level of approval, with total dollar amount as second. Commodity code approval, where necessary, was treated as an extension. *Id.* Treating commodity codes as an extension appears to be a change from the rules as originally described in the workbook, which appears to treat commodity codes as part of the first level buyer approval. *See* R. 280-283.

The department responded to TSA's proposed remediation plan in a letter dated November 7.<sup>159</sup> The letter "[generally]" accepted TSA's plan, and notified TSA that the 30 day period for curing its alleged default would begin on November 8. The department advised TSA that assuming all of the problems identified on the September list were corrected by the end of the 30 day period, and that no new problems were created in the process, "other system corrections and/or adjustments may be necessary...— all of which may have an impact on final system acceptance." The department provided additional information regarding the invoice module, which TSA had indicated in the teleconference was still being worked on. The department also provided Excel spreadsheets with its employees' LDAP attributes.<sup>160</sup>

At a second teleconference on November 9, the principals discussed implementation of the invoice module and the approval rules.<sup>161</sup> Within a day or two, however, TSA and the department were beginning to recognize that implementing the invoice module within the department's accounting environment would be problematic.<sup>162</sup>

A.N. went to Juneau for an on-site consultation with key department staff from November 13-17, 2006. Following his visit, it appeared to the department that the issues on its September 29 list had been largely rectified; the remaining issues to be resolved concerned the reports and invoice modules, and final changes to the approval rules.<sup>163</sup> On November 16, the updated and corrected approval rules were installed.<sup>164</sup> Further testing of the punch out catalog revealed that entities not using the NIGP commodity codes could not utilize the system.<sup>165</sup> TSA updated its version of the problem list on November 27, concluding that all of the outstanding issues had been resolved, required training, or were requests for enhancement.<sup>166</sup> A final webinar to review the

<sup>159</sup> R. 339-341.

<sup>160</sup> R. 1202 (email, S.M. to J.R., 11/7/2006 @ 8:53).

<sup>161</sup> R. 989 (email, S.M. to J.R., 11/9/2006 @ 3:43 p.m.); R. 994 (email, S.M. to J.R., 11/9/2006 @ 4:53 p.m.).

<sup>162</sup> R. 998 (email, J.G. to D.R. *et al*, 11/11/2006 @ 9:47 p.m.); R. 995 (email, D.R. to S.M. & J.R., 11/11/2006 @ 3:46 p.m.). *See* AN, DR #3 at 0:41.

<sup>163</sup> SF, DR #4 at 0:59-1:00; AN, DR #3 at 0:35-0:36, 0:38-39.

<sup>164</sup> R. 1012-1013 (email, J.H. to S.M., 11/16/2006 @ 9:09 a.m.).

<sup>165</sup> R. 1229 (email, S.M. to E.D., 11/17/2006 @ 11:53 p.m.).

<sup>166</sup> R. 1094-1102.

status of the system resulted in identification of a minor form change that required some new coding;<sup>167</sup> in addition, Mr. N. was advised to remove the ability of buyers to create an RFQ from nothing, unless marked as a buyer administrator.<sup>168</sup> Other problems experienced by department users could not be replicated by TSA;<sup>169</sup> some minor details were left unresolved.<sup>170</sup>

E. Notice of Default and Termination

On December 8, the 30 day remediation period expired. The parties exchanged letters: TSA's letter notified the department that it had completed remediation in conformity with the remediation plan (except for items pending action by the department or cancelled) and was awaiting the results of the department's testing; the department's letter notified TSA that it had failed to cure, and offered TSA five days to establish that the cause for its failure to perform was excused.

On December 14, Mr. N. advised the department that he had tested the system using TSA testing protocols and that "everything on the list worked according to my expectations."<sup>171</sup> He provided customized testing scenarios to the department on December 15.<sup>172</sup>

From December 9-19, department personnel tested the system as it had previously, in an *ad hoc* fashion working it through "real world" scenarios, and by using the TSA-provided testing scenarios, in a good faith effort to determine whether the system as installed was capable of providing satisfactory performance in accordance with the terms of the contract.<sup>173</sup> While the issues identified on the September 29 list appeared to have been substantially resolved, and approvals generally appeared to work properly, the department deemed the performance of the system deficient with respect to reports, forms, the invoice module, and the number of errors and exceptions generated.<sup>174</sup> The

<sup>167</sup> R. 1130, 1288-89, 1131-1132 (emails, A.N. to J.G., et al., 12/8/2006 @ 11:02 a.m. (Ex. A.), S.F. to A.N., 12/5/2006 @ 5:01 p.m., S.F. to A.N., 12/4/2006, 2:26 p.m. (Ex. AJ)).

<sup>168</sup> R. 1133. *See also* A.N., DR #3 at 0:16.

<sup>169</sup> R. 1237 (emails, S.F. to A.N., 12/4/2006 @ 2:26 p.m. (Ex. AJ); A.N. to S.F., 11/29/2006 @ 11:25 a.m.).

<sup>170</sup>

R. 1133 (option to manually create PO number; buyer administrator option to choose numbering).

<sup>171</sup> R. 1028.

<sup>172</sup> R. 1030.

<sup>173</sup> *See, e.g.*, AS, DR #6 at 1:29-30; SF, DR #4 at 1:04-1:06; SM, DR #7 at 1:41.

<sup>174</sup> SF, DR #5 at 0:26-28.

department terminated the contract for default on December 20. The department provided TSA with a partial list of outstanding issues as of that date.<sup>176</sup> At the time of termination, the electronic procurement system as installed was acceptable for purposes of initial installation, but did not substantially comply with the requirements of the contract for purposes of final acceptance.

### III. Discussion

#### A. Scope of Work

Both parties argue that damages should be awarded under the terms of the contract.<sup>177</sup> The contract is interpreted in accordance with standard rules of contract interpretation. A contract is interpreted to give effect to the reasonable expectations of the parties.<sup>178</sup> The parties' reasonable expectations are determined in light of the written documents (in this case, the signed contract, the RFP, and TSA's proposal and written clarification), the object to be accomplished, and the relevant extrinsic evidence (including the surrounding circumstances, the course of dealing and the parties' expressed intentions prior to the date the contract was executed). When there is no conflict in extrinsic evidence, the interpretation of the contract is a question of law.<sup>180</sup> The language of the written contract is the most important evidence of the parties' intentions.<sup>181</sup>

The signed contract states:

The purpose of this contract is for [TSA] to provide the [department] with an electronic purchasing software system solution utilizing Puridiom 3.0.

<sup>175</sup> R. 391.

<sup>176</sup> R. 393-397. See Ex. 34,35.

<sup>177</sup> The department has not asked for damages beyond reimbursement of the payment previously made to TSA. See, Department of Corrections' Supplemental Response (4/16/2007) at 2; Department's Claim (3/16/2007) at page 5. Therefore, it is unnecessary to determine whether, in an administrative claim under AS 36.30, the commissioner may award damages beyond the terms of the contract.

<sup>178</sup> See, e.g., Southwest Marine Inc. v. State. Department of Transportation and Public Facilities, 941 P.2d 166, 173 (Alaska 1997); Stepanov v. Homer Electric Association, 814 P.2d 731, 734 (Alaska 1991).

<sup>179</sup> See Monzingo v. Alaska Air Group, Inc., 112 P.3d 655, 660 (Alaska 2005), citing Craig Taylor Equipment Co. v. Pettibone Corporation, 659 P.2d 594, 597 (Alaska 1983); Harris v. Antha, Inc., 107 P.3d 271, 274 (Alaska 2005) ("Reasonable expectations may be ascertained through the language of the contract, the behavior of the parties, case law, and any relevant extrinsic evidence."); Lesnoi v. Stratman, 945 P.2d 452, 454 (Alaska 1998).

<sup>180</sup> Exxon Corporation v. State, 40 P.3d 786, 792 (Alaska 2001), citing Lesnoi, Inc. v. Stratman, 956 P.2d 453, 454, (Alaska 1998); see also, Peterson v. Wirum, 625 P.2d 866, 871 (Alaska 1981).

<sup>181</sup> Still v. Cunningham, 94 P.3d 1104, 1109 (Alaska 2004), citing RESTATEMENT (2D) OF CONTRACTS, §212, comment b.

More details regarding the project requirements are outlined in the Statement of Work...<sup>[182]</sup>

The Statement of Work describes the purpose of the project as follows:

[TSA] shall provide [the department] with Puridiom 3.0 software, ...consulting, customization, configuration, [and] installation...services as defined in this contract and referenced documents.<sup>[183]</sup>

1. *System Performance and Customization*

The signed contract did not call for extensive reprogramming of the existing Puridiom system in order to meet the department's existing practices or specialized needs. It stated:

[TSA] shall meet with [the department's] key personnel to configure Puridiom to best meet the needs of [the department]. This consultation will entail tailoring Puridiom's security and access privileges, defining [the department's] work-flow requirements, confirming reporting requirements, initializing Puridiom tables and similar types of activities.<sup>[184]</sup>

Both parties would reasonably have anticipated that if TSA's Puridiom system provided the basic functionality requested in the RFP and described by TSA in its own written documents, only a relatively small amount of special programming by TSA would be required. The provision of the signed contract specifically governing additional work supports this view. It states, in relevant part:

Anticipated amendments may include, but not be limited to, an increase ...to the services, adding optional components and adding or changing software features, [and] customized programming related to this project....<sup>[185]</sup>

Thus, the signed contract expressly provides that "customized programming related to this project" would be an anticipated amendment; by contrast, work required to

<sup>182</sup> Contract, App. C (R. 193).

<sup>183</sup> R. 194 (Contract, Appendix C, 16).

<sup>184</sup> R. 199 (Contract, Appendix C, *fb.4*). The statement indicates that "specialized configuration of Puridiom for [the department]" would precede initial installation and setup. *Id.* See also, R. 123 (Proposal, §2A(2)(g)).

<sup>185</sup> R. 193 (Contract, Appendix C, 14). See also, R. 24 (RFP Sec. 3.19) ("Features, components or services (including customized programming related to this project)...offered by or available from the contractor but not selected for the initial contract may be added to the contract at any point during the contract.").

"configure Puridiom to best meet the needs of [the department]" is work within the scope of the anticipated implementation process.

Both parties' understanding of the contract was in conformity with this reading.<sup>186</sup> Therefore, to the extent that the system as configured and installed included the components listed in the written contract and the RFP, and in that configuration it provided the basic functional capabilities described in the written contract and the RFP, TSA satisfied its obligation with respect to the provision of software at the original contract price. But off-the-shelf electronic procurement software is not designed to replicate manual procedures and cannot be expected to meet all of a particular customer's idiosyncratic standard procedures without modification.<sup>187</sup> To the extent that Puridiom as configured and installed did not provide the specific functional capabilities described in the written contract, TSA was required "customize" its system to provide that functionality, but it was not required to do so at no additional cost. Under the contract, the department was obliged to accept the Puridiom system's operating limitations unless it wanted to pay for the cost of "customized programming related to this project", *i.e.*, customization to provide functional capabilities that were not provided in the system as installed, but that were specifically required by the contract.

## 2. *Implementation Support Services*

The Statement of Work in the signed contract calls for TSA to provide "consulting" and other services "as defined in this contract."<sup>188</sup> It describes the parties' duties during the implementation stage in this language:

Implementation: [TSA] shall meet with [the department's] key personnel to configure Puridiom to best meet the needs of [the department]. This consultation will entail tailoring Puridiom's security and access privileges, defining [the department's] work-flow requirements, confirming reporting requirements, initializing Puridiom tables and similar types of activities. [The department] will assure access to appropriate personnel during this on-site consultation.<sup>[189]</sup>

<sup>186</sup> See, e.g., R. 291 (email, A.S. to J.R., 9/15/06 @ 3:52 p.m.); JR, DR #1 at 1:48.

<sup>187</sup> See A J, DR #2 at 2:36-2:37; A N, DR #2 at 2:40.

<sup>188</sup> R. 194 (Contract, Appendix C, 16).

<sup>189</sup> R. 199 (Contract, Appendix C, 16.4).

Responsibilities of the Department of Corrections:...The [department] will provide key personnel to work with TSA in the planning and execution of the implementation....[The department] shall provide IT staff that will become familiar with the Puridiom system and provide technical expertise to the contractor to facilitate installation and deployment. [The department's] IT staff will provide [database] administration and the basic Tier I support...<sup>190]</sup>

This language does not place any discernable obligation on TSA to manage the implementation process. By stating that "[T]he [department] will provide key personnel to work with TSA in the planning and execution of the implementation," the statement of work indicates that the parties were to work jointly to plan and execute the implementation process, but does not suggest that TSA was taking on primary responsibility for the ultimate success or failure of the implementation process. Because it had overseen the implementation process for its own software on multiple occasions, TSA had superior knowledge regarding that process, but the contract does not indicate, and TSA's proposal does not suggest, that TSA was to provide overall project management, or that it had any authority to direct the work of department personnel.<sup>191</sup> At the same time, however, in light of TSA's superior knowledge of its own product, TSA's extensive experience in implementing that system, and TSA's specific representations,<sup>192</sup> the department reasonably relied on TSA to provide appropriate general direction and to bring any perceived shortcomings in the department's side of the implementation process to the timely attention of the department's project manager.<sup>193</sup>

**B. The Department Had Grounds For Termination for Breach**

The contract provides for termination by the department "for breach by TSA of its obligations under [the contract] upon thirty (30) days written notice describing the breach in reasonable detail if TSA fails to cure such breach within the thirty (30) day notice period."<sup>194</sup>

The department's notice of breach under this provision of the contract was its letter of September 29, 2006. In that letter, the department notified TSA that it deemed

<sup>190</sup> R. 201 (Contract, Appendix C, f7).

<sup>191</sup> Cf. AS, DR #6 at 1:43; JR, DR #2 at 0:46..

<sup>192</sup> See, e.g., *supra*, notes 14, 46.

<sup>193</sup> See, e.g., A3, DR #2 at 3:10.

<sup>194</sup> R. 206 (Section B, 14).



performance to date unsatisfactory and that the department would allow 30 days for a cure, starting with the date that TSA provided the department with an acceptable remediation plan. That letter identified two primary reasons for the department's action: (1) untimely implementation; and (2) system deficiencies, as identified in the September 29 problem log. The department advised TSA that it would extend the time for completion of end user training and "Go Live" if within the time allowed, "Puridiom...perform[s] according to [the department's] requirements, in all elements and components, without system problems, errors and exceptions."<sup>195</sup> In its December 8 letter notifying TSA that it had failed to cure, the department advised TSA that it would review the facts to determine "whether your failure to perform arose from causes beyond your control and without fault or negligence on your part, and whether you are capable of completing performance."<sup>196</sup>

*I. Excuse*

TSA argues that, to the extent it had not substantially performed by December 8, 2006, its failure to perform is excused due to delay and lack of adequate support from the department during the implementation process, and the department's insistence on changes outside the scope of the original contract,

*(a) Delay*

With respect to delays, TSA points to the department's delayed delivery of data, untimely response to TSA requests for information regarding LDAP authentication, alleged changes in the approval paths from those identified in the implementation workbook, and scheduling problems caused by Mr. M.'s lengthy absence and unavailability of key personnel at critical times.

The record supplies ample support for concluding that the department's own actions were a significant contributing factor in delaying the implementation process beyond the originally scheduled date for completion, May 29, 2006. At the time that Puridiom was initially installed on April 19, it appears that the department had not yet even acquired the NIGP codes.<sup>197</sup> The department did not provide TSA with AKSAS

<sup>195</sup> R. 294 (letter, A.S. to J.R., 9/29/2006).

<sup>196</sup> R. 379 (letter, S.F. to J.R., 12/8/2006).

<sup>197</sup> See notes 73, 82, *supra*.

data information in a usable form until May 26.<sup>198</sup> Buyer assignment information was not provided until June 23, two months after installation.<sup>199</sup> Signature templates were provided in August.<sup>200</sup> The department did not provide TSA with an Excel spreadsheet including LDAP attributes until November 7.<sup>201</sup> Mr. M.'s lengthy absence during the summer further delayed and adversely affected implementation, since he was the primary point of contact between the parties and the key participant in the implementation process on the department's side.<sup>202</sup>

Clearly, to the extent that the department's own actions caused a delay in the implementation of the system, TSA is excused from untimely performance: the signed contract specifically states that "[scheduling delays that are due to [department] staffing availability or coordination conflicts shall not be cause for action or penalty against [TSA]."<sup>203</sup> But even though TSA is not liable for delays caused by the department, it is liable for delays resulting from its own actions, and there is evidence that TSA's actions contributed to delay: in particular, TSA's failure to provide full 11-digit functionality with the initially-installed version of Puridiom certainly caused some delay; in addition, TSA's response to the department's concerns was not always timely.<sup>204</sup>

But it is not necessary to determine whether the department's actions excuse delays that occurred prior to November 8, because at that point the parties reached an agreement to extend the time for an acceptable installation to December 8, 2006. TSA committed to the new date. In light of their mutual agreement to extend the time for performance, neither TSA nor the department may now be heard to complain of delays that occurred months previously. Assuming that TSA did not timely complete

<sup>198</sup> See notes 72, 79, 102, *supra*.

<sup>199</sup> See note 134, *supra*; see also, R. 697 (email, A.S. to A.N., A.J., 6/23/2006 @ 9:36 a.m.).

<sup>200</sup> R. 815 (emails, S.F. to A.S. *et al*, A.S. to T.W. *et al*, 8/28/2006).

<sup>201</sup> R. 1202 (email, S.M. to J.R., 11/7/2006 @ 8:53).

<sup>202</sup> See notes 131-132, *supra*.

<sup>203</sup> R. 199 (Contract p. 11,16.3).

<sup>204</sup> For example, in the June list, the department pointed out that using commodity codes as an approval extension would require adding the ability to designate commodity codes within the approval pool set. TSA acknowledged this in August, but it was still an outstanding issue during the remediation period. See R. 290; R. 339; R. 786 (email, A.N. to T.W., *et al*, 8/15/2006 @ 4:15 p.m. ("Need to add commodity code to the approval pools setup - Need to explain to [*sic*] process to AKDOC."); R. 1071, R. 1078-1079 (email, A.N. to R.R., *et al*. (8/9/2006 @ 8:57 a.m.) (item 4); R. 1096 (item 34).

installation of a satisfactory system, to excuse its untimely performance TSA must show not that the department's actions delayed the project past the original due date, but rather that the department's actions after November 8 caused TSA to miss the extended date for completion. TSA has not shown that the department's actions after November 8 impeded TSA's ability to complete the project in the extended time that the parties had mutually agreed upon, except insofar as last minute weather problems may have added a day or two to the schedule.

(b) Department Support

TSA contends that it has successfully implemented its proprietary software for many entities, including a number of public sector entities, and that if the new procurement system failed to provide the performance that the department wanted, it was primarily because the department did not appropriately manage its side of the implementation process. TSA argues that it was buffeted by multiple and at times conflicting or untimely requests for changes, fixes, or enhancements, and the project morphed into a customization project rather than a project to implement an off-the-shelf system.

None of the department's personnel with management responsibilities had any experience in the implementation of a major software system, and there is substantial evidence to support TSA's argument that the department's own actions (in particular lack of a structured testing process, failure to prioritize issues of concern, delay in providing data, and a lack of clarity or finality in the description of its own approval rules) were a substantial contributing factor in the ultimate failure of the implementation project.<sup>205</sup> Furthermore, there is little to support the department's suggestions that TSA failed to appreciate the special needs of the public procurement process,<sup>206</sup> or that Puridiom

<sup>205</sup> C/JR, DR #2 at 1:47-1:49.

<sup>206</sup> The only specific issue raised by the department in this regard concerns the ability of an individual who lacks delegated procurement authority to enter a requisition or purchase order on behalf of another individual. In the department's operating environment, such a transaction should not occur; Puridiom allowed it because, as Mr. R. pointed, in the private sector individuals with procurement authority routinely delegate the entry of a particular request to another individual, typically an administrative assistant. JR, DR #2 at 1:34. Nothing about this particular issue suggests that it could not have been resolved, or that it was entirely up to TSA to identify it and provide a solution. Furthermore, as Mr. J. pointed out, the private sector has its own special requirements, and the department failed to communicate

system as purchased could not have provided performance consistent with the terms of the contract.

Nonetheless, TSA's own actions were also a contributing factor in the project's ultimate failure. The Puridiom system at the time it was offered was not capable of handling the full 11-digit NIGP coding.<sup>207</sup> Once the system was configured to accept the full 11-digit codes, the system suffered periodic interruptions due to lack of memory capacity, a problem that was not resolved until late in September. The 11-digit NIGP coding also created unforeseen problems with approvals and signatures.<sup>208</sup> More importantly, under the contract TSA bore equal responsibility with the department for the implementation process, since the parties were to plan and execute implementation jointly, and TSA plainly had superior expertise and experience in the implementation of its own procurement system. TSA specifically touted that expertise and experience as grounds for the award of the contract to it, and it acknowledged that this particular contract would require more than the usual "handholding". Despite this, TSA took no special steps ensure that the department was effectively managing its side of the implementation process, or to avoid or alleviate the inevitable frustrations resulting from exposure of the system to the power users before TSA had resolved the existing issues with the NIGP codes, updated the approval rules, and fully incorporated data. Under these circumstances, the department's alleged failure to provide adequate support for the implementation process does not excuse any deficiencies that may have existed in the system at the time of termination.

(c) Changes

Both TSA and the department have at one time or another identified TSA's attempts to customize its system to meet the department's needs as the source of much of the problem. TSA argues that the department's insistence on changes excuses any defects in performance resulting from those changes.

any special requirements to TSA at the initial on-site meeting. AJ, DR #2 at 3:19. *See also*, JR, DR #2 at 0:45.

<sup>207</sup> JR, DR #2 at 1:45.

<sup>208</sup> *See, e.g.*, SM, DR #7 at 1:09.

TSA's argument that its attempts to meet the department's requests for changes excuse the deficiencies in the system is unpersuasive. The argument is inconsistent with TSA's express contractual agreement to customize its system (for a fee) to meet the department's needs. The contract specifically prohibited changes absent a request for change and approval by the contracting officer, and TSA never requested a change order for work it performed.<sup>209</sup> TSA did not identify any of the issues on the department's June 2 list as a request for enhancement.<sup>210</sup> Two months later, on August 15, it provided an update and again did not identify any pending issues as a request for enhancement.<sup>211</sup> Not until after it responded to the September 29 list did TSA specifically identify particular items as requests for enhancement.<sup>212</sup> At that point, it made some of the requested changes without a formal request for enhancement or requesting additional payment.<sup>213</sup>

By promising to provide features requested by the department without requiring payment for the cost of customization, TSA obscured the cumulative impact and cost of the department's requests, hindered appropriate project management on the department's side,<sup>214</sup> and implicitly conceded its ability to provide the functionality requested without substantially degrading its off-the-shelf product.<sup>215</sup> If it is true that the customization efforts rendered the system inefficient, unstable or otherwise deficient, TSA's own failure to follow the contractual provisions regarding changes bars its invocation of the doctrine of excuse as a defense to that defective performance.

<sup>209</sup> On one early occasion, TSA identified a request by the department as outside the scope of the original contract, but it waived any additional fee. *See* R. 443 (email, J.R. to S.M., 3/17/2006 @ 12:30 p.m.).

<sup>210</sup> Exhibit I; R. 1069-1071.

<sup>211</sup> R. 786 (email, A.N. to T.W., *et al*, 8/15/2006 @ 4:15 p.m.).

<sup>212</sup> *See, e.g.*, R. 1095 (additional navigation links); R. 1096 (system flow overview; add "asset" box on some screens); R. 1097 (reference contract number on requisitions & purchase orders); R. 1099 (item 80; export spreadsheet of bid information) (item 64; multi-line item approvals cumbersome); R. 1101 (item 73; automatic data entry on requisition) (item 76; navigation to error screen). TSA had previously identified some issues as "MOD", but it is unclear whether it had informed the department of its view. R. 1079 (*e.g.*, item 15, export of bid information).

<sup>213</sup> *See, e.g.*, R. 1098 (item 55: unhide the auto-number box for purchase order numbering). *See also* R. 1101 (item 72). It is unclear why this was considered an RFE, since the contract clearly called for sequential automatic numbering. TSA had previously listed this as a problem to be corrected, without mentioning an RFE. *See* R. 1079 (item 1).

<sup>214</sup> *Cf.* AJ, DR #2 at 1:48, 2:36. Mr. J. testified that effective project management on the vendor's side requires that the vendor's project manager curb demands for excessive customization. Plainly, part of that task involves critical review of the vendor's own procedures in light of the electronic system's functional capacities.

## 2. System Deficiencies

At the hearing, TSA asserted that the procurement system as finally installed was fully functional in accordance with the contract terms,<sup>216</sup> while the department asserted the system was useless. Plainly, the fundamental issue in this case is whether, when the department terminated the contract, the electronic procurement system was capable of providing substantial performance in compliance with the contract terms.<sup>217</sup> At that point, although the system need not have performed flawlessly, in order to avoid grounds for termination for cause the system must have performed in at least a minimally acceptable fashion for purposes of final acceptance.

TSA's final update to the system, including the last-minute addition of REQ and RFQ numbers on purchase order forms, was to be placed on the department's system on December 8, 2006.<sup>218</sup> TSA informed the department that the system had been updated and was ready for testing as of December 10, 2006.<sup>219</sup> TSA ran its own tests on the system, using its own testing scenarios, and on December 14 informed the department that "everything on the list worked according to...expectations."<sup>220</sup> The report of the testing indicates that TSA was able to successfully create requisitions and obtain the appropriate approvals, with fields displaying correct information, and with alternative actions (*e.g.*, rejection, rerouting) appropriately handled.<sup>221</sup> The reports document that as far as TSA was concerned, the problems identified on the department's September list of

<sup>215</sup> Cf. AN, DR #3 at 0:51.

<sup>216</sup> See JR, DR #2 at 0:12-0:13; AN, DR #3 at 0:11.

<sup>217</sup> TSA argues under the remediation agreement (R. 332-341), it was required only to fix the items listed on the September 29 list it had received from the department. However, TSA's letter of October 6 expressly committed to provide a fully functional system by the end of the remediation period. *Supra*, note 152. Similarly, the department's November 7 letter accepting the remediation process clearly conditions acceptance of the system at the conclusion of the remediation period on the provision of a fully functional system. *Supra*, note 157. The remediation agreement plainly did not abrogate the department's fundamental right to terminate the contract for substantial non-performance at the conclusion of the remediation period. See AS, DR #5 at 1:28-1:29.

<sup>218</sup> R. 1018 (email, A.N. to J.G., *et al.*, 12/8/2006 @ 11:02 a.m. [Exhibit A1]).

<sup>219</sup> R. 390 (letter, J.R. to S.F., 12/8/2006).

<sup>220</sup> R. 1028 (email, A.N. to S.M. *et al.*, 12/14/2006 @ 10:41 a.m.).

<sup>221</sup> Exhibit AF. The test report does not show that email notifications were accomplished, however: "NA" is entered for that portion of the report.

problems had been corrected, to the extent that the alleged problems were within the scope of the contract.<sup>222</sup>

Beginning on or about December 9 and continuing through December 19, the department continued to test the system in an *ad hoc* fashion, not following any particular prescribed test scenario or sequence. While it is undisputed that there were many problems during the course of the contract, the department has not shown that all of those problems were still in existence at the time of termination, and the department itself acknowledged that most of the items listed on the September 29 list had been corrected prior to termination.<sup>223</sup> However, the department determined during testing that the system did not conform with the requirements of the contract in a variety of aspects, and it provided a list of 48 specific problems alleged to exist as of December 20, 2006.<sup>224</sup>

The record regarding the problems identified by the department on its December 20 list as grounds for termination is not well developed. While various department employees testified that the problems were encountered, and the record includes documentary evidence to support the existence of some problems, the testimony and evidence is counterbalanced by testimony by TSA employees to the effect that the system functioned properly in TSA's testing scenarios, and that the problems identified by the department and evidenced in the record were largely attributable to operator error or setup, or were requests for enhancement outside the scope of the contract.<sup>225</sup> The problems shown to have existed,<sup>226</sup> grouped by category, and their status as grounds for a finding of breach, are as follows:

(a) Email Functionality<sup>227</sup>

The Puridiom system as installed had recurring email failures throughout the time the department was using it.<sup>228</sup> These recurring problems apparently occurred because

<sup>221</sup> Ex. AF, Ex. AG. *See also*, Ex. AA; JR, DR #2 at 1:45.

<sup>223</sup> *See, e.g.*, SF, DR #5 at 0:26.

<sup>224</sup> R. 393-397.

<sup>225</sup> *See generally*, Ex. AH.

<sup>226</sup> The department asserted that some users were unable to access the system through LDAP. R. 395 (item 25). There is evidence to support that claim. *See* R. 1284, 1404, 1405, 1407, 1409. However, TSA tests showed no such issue existed. *See* Exhibit AG. The preponderance of the evidence is that if a problem existed, it was a setup issue, not grounds for termination.

<sup>227</sup> R. 393-397 (item 6, item 43).

email functionality was not always restored by TSA personnel after making updates or otherwise tinkering with the system. Consistent with these longstanding and repeated failures, it is undisputed that as of December 10, 2006, the system was unable to generate any email notices. The problem was not resolved until December 19, after Mr. L. brought the problem to TSA's attention.<sup>229</sup> The problem was apparently the result of a bug acquired during the testing process, and TSA characterizes it as a setup issue, but as the December 19 exchange illustrates, it was TSA, not the department, that was responsible for the existence of the problem. Nonetheless, the problem had been corrected prior to notice of termination. At that time, TSA was not in breach of the contract requirements regarding email functionality.

(b) Reports

Some of the department's dissatisfaction regarding the reports was due to the fact that it found TSA pre-set reports to be of relatively little value:<sup>230</sup> that would not have been a valid ground for a declaration of default, because all that TSA offered was its own pre-set reports, with an option to transfer data from those reports into spreadsheet form for manipulation by the department outside of the system.<sup>231</sup>

But in addition to finding the reports of limited value, the department's users also found in testing beginning on December 15, 2006, that numerous reports were not received<sup>232</sup> or if received contained invalid, blank, or improper data, that filters did not

<sup>228</sup> See, e.g. R. 753 (email, J.L. to A.N., 8/7/2006 @ 3:30 P.M.); R. 830 (email, S.F. to A.N., 8/30/2006 @ 3:04 p.m).

<sup>229</sup> R. 1036 (email correspondence, A.N. & J.L., 12/19/2006).

<sup>230</sup> R. 1286 (email, S.M. to A.S. & S.F., 12/17/2006 @ 2:32 a.m.) ("I guess this assumes that the 'reports' problems I've seen this evening aren't enough to tell [TSA it is] in default... Generally, some of the reports look useful, but quite a few of them seem like they would help us much at all. Also, the way you have to enter criteria...doesn't seem very useful."). Mr. M. noted that if the data were available in spreadsheet form and could be exported, "many of these reports would be extremely useful." *Id.*

<sup>231</sup> RFP §5.01[A], at 32 (R. 36) ("DOC does not stipulate to a specific set of built-in reporting capabilities, but instead expects offerors to articulate the nature of their solution's capabilities to produce reports in the product as delivered."; "Offerors need to indicate if the proposed solution has documented access to the datastore so that DOC IT staff can extract...the datastore..."). See also R. 169-170 ("Modifications to the pre-defined standard reports require programming changes by TSA."), R. 198, R. 1098 (email, A.N. to A.S., 9/7/2006 @ 1:37 p.m.) ("There is not a function in Puridium to generate custom reports, but you can use MS Excel or Crystal Reports to create your own custom reports.").

<sup>232</sup> Reports requested by email prior to December 19 would likely not have been sent, due to the lack of email capability. See, e.g., R. 397 (item 43; see R. 1367 [S.F.]), R. 1381-1385.



work, and that report format choices were unavailable, among other things.<sup>233</sup> TSA's response was that these problems were vague.<sup>234</sup> However, prior to the hearing the department provided evidence that the report module was not providing the functionality requested in the RFP and promised in the written contract: it lacked multiple display options<sup>235</sup> and on occasion failed to return data<sup>236</sup> or provided incorrect data.<sup>237</sup> TSA's testing scenarios, on which it based its claims of proper performance, did not include the report module,<sup>238</sup> and at the hearing it provided no testimony to explain the specific errors that had been identified by the department. The preponderance of the evidence is that the report module was not in substantial conformity with the contract requirements at the time the contract was terminated.

(c) System Errors and Exceptions

The department's extension of time for performance was conditioned on performance without system errors and exceptions. The department's December 20 list includes a variety of system errors and exceptions that were encountered during testing.<sup>239</sup> Some of the problems may have been due to setup or operator error,<sup>240</sup> which would not be grounds for a finding of default. But for the most part, TSA's response was that the asserted errors were vague.<sup>241</sup> However, the record includes documentation describing the circumstances in which most of those errors occurred,<sup>242</sup> and at the hearing TSA did not provide any explanation for them or demonstrate that they were the result of setup issues within the department's control, or operator error. While some bugs might have

<sup>233</sup> R. 394-395 (item 21).

<sup>234</sup> Ex. AH (item 21).

<sup>235</sup> R. 1367, 1369, 1383, 1388, 1390.

<sup>236</sup> R. 1368, 1375, 1391, 1394, 1397, 1399.

<sup>237</sup> R. 1386-1388.

<sup>238</sup> *See generally*. Exhibits AE, AF, AG.

<sup>239</sup> R. 393-397: Item 2 (session expiration, session exception, operation aborted); Item 3 (commodity code link not accessible); Item 15 (attempted to access "alerts configuration", received unknown system exception); Item 17 (attempt release request, received "net.sf.hibernate.JDBCException"); Item 31 (menu bar disappeared); Item 32 (session expiration); Item 34 (user booted out).

<sup>240</sup> Compatibility of Firefox and Internet Explorer browser operations had been identified by both TSA and the department as a potential problem. *See, e.g.*, R. 1263 (email, J.L. to A.S., 12/28/2006 @ 9:32 a.m.).

<sup>241</sup> Exhibit AH (items 2, 3, 15, 17, 31, 32, 34).

<sup>242</sup> R. 393-393: Item 2 (R. 1324-1326); Item 3 (R. 1327; Item 15 (R. 1356-1357); Item 17 (R. 1359); Item 31 (R. 1425-1429); Item 32 (R. 1430). *See also, e.g.*, R. 1404, R. 1407-1411. No documentation was found for Item 34.

been acceptable, the number of errors and exceptions documented by the department that are unexplained exceeds what would be reasonable for a finished product. Therefore, the preponderance of the evidence is that those errors and exceptions were grounds for rejecting the system as installed.

(d) Invoice Matching

The RFP did not call for the provision of any special accounts payable services, or for integration of the procurement data into the department's accounting system (AKSAS). It simply required that forms be accessible by department accounts payable staff to verify receipt of goods or services prior to paying invoices.<sup>243</sup> TSA offered to provide "invoice matching,"<sup>244</sup> which it described as a "process for recording invoices for the purpose of authorizing payment."<sup>245</sup> TSA did not offer electronic invoice presentment and payment.<sup>246</sup> The department accepted TSA's offer, and the invoice matching function became part of the contract.

Puridom's invoice matching functionality is provided by the Invoice Matching Module: this module, according to TSA's proposal, allows accounts payable personnel to view receipt data and purchase order data, "while entering invoice information through Puridom's Invoice Matching Module."<sup>247</sup> Thus, what TSA offered to provide was a view screen that would provide authorized personnel with the ability to view transaction history, manually enter invoice information, and print out an invoice voucher, but did not provide the ability for a resulting invoice to be electronically integrated into the department's accounts payable system. This was confirmed at the on site consultation and was documented in the implementation workbook.<sup>248</sup>

The department asserts that TSA breached the contract because it did not provide the capability to print out invoice vouchers.<sup>249</sup> However, the record indicates that

<sup>243</sup> R. 36, 37 (Contract §5.01[B](1)(10), (11)).

<sup>244</sup> R. 133, 178-179, R. 185, R. 197.

<sup>245</sup> R. 185.

<sup>246</sup> R. 185.

<sup>247</sup> R. 115 (Proposal at 15).

<sup>248</sup> R. 285.

<sup>249</sup> R. 393-397: Item 33 (invoice voucher will not print PDF). The department's December 20 list includes other items that may be related to accounting concerns, but those items are more accurately characterized as display or forms issues. *See*, Item 12 (R. 1352; return requisition does not indicate amount as credit, no "return purchase order") (TSA asserts item is request for enhancement Ex. AH]: lack of credit

printing capability was provided, although not in a form that would be efficient for purposes of interfacing with accounting staff.<sup>250</sup> TSA offered nothing more than its standard invoice matching system; anything more would be an enhancement. To the extent there was a problem in this area, the department has not shown that TSA breached the contract.

(e) Forms

The signed contract is silent with respect to the nature of the forms that must be provided. The RFP includes an extensive description of the nature of the forms desired, including a stated preference that they be "similar in appearance to those presently in use," that fields include drop-down options, and that "forms and fields...be linked so that the information entered into one can flow into another as applicable." The RFP includes some specific features that the forms must include: (1) saving in draft mode until finalized in PDF or Word form; (2) automatic application of the department's sequential numbers; (3) space for notes or comments, preferably in multiple fields and in line items.<sup>251</sup>

The department's intent was illustrated by an attachment displaying a copy of its standard delivery order, with accompanying text describing the department's preference for 51 separate fields, with specific features desired for each, as well as overall comments<sup>252</sup>. In substance, the RFP called for the ability to recreate the content of the department's existing forms, with the specific functionality mentioned, *i.e.*, (1) saving in draft and final; (2) automatic application of sequential numbers; and (3) space for notes or comments, preferably in multiple fields and in line items. The RFP expressed as preference for similar appearance, linked fields and forms, and drop-down options, did not require those features. In a written clarification, TSA stated that Puridion's forms would substantially incorporate the department's numbering system.<sup>253</sup>

memo is a display issue, and forms list does not include "return purchase order"); Item 45 (receipt of all items not shown; TSA asserts training issue [Ex. AH], no evidence to contrary).

<sup>250</sup> See R. 977,985,991.

<sup>251</sup> R. 36-37 (RFP §5.01 [B] 10).

<sup>252</sup> R. 82-89 (Contract Attachments 11, 12).

<sup>253</sup> R. 170-171.

A large proportion of the problems identified by the department during the testing stage after the declaration of default involved perceived inadequacies, errors, or deficiencies in the forms generated by Puridium.<sup>254</sup> Some of those issues are matters of display preferences that do not support a finding of substantial non-performance.<sup>255</sup> Some of the of the perceived inadequacies in the forms identified on the department's December 20 list are sufficiently serious to support a finding of substantial non-performance, but were characterized by TSA as caused by improper setup or operator error;<sup>256</sup> the preponderance of the evidence supports TSA's characterization for some of those issues<sup>257</sup> but not all of them.<sup>258</sup> Other alleged problems were identified by TSA as requests for enhancement, *i.e.*, requests for customization outside the scope of the original contract.<sup>259</sup> Although there is evidence that some of the items that TSA described as requests for enhancement were not required under the terms of the original contract,<sup>260</sup>

<sup>254</sup> R. 393-397: Item 7 (contract amendment not displayed); Item 8 (lack of final five digits of account coding); Item 9 (form paginated incorrectly); Item 10 (no indication that "purchase order" is actually confirmation, not new order); Item 11 (form contains unusable field); Item 12 (return requisition does not indicate amount as credit, no "return purchase order"); Item 13 (document titled "purchase" rather than "purchase requisition"; incorrect dollar amount shown in "overall account allocation" field; collocation code approver not shown); Item 16 (printed price request looks like requisition); Item 22 (signature display lacking); Item 23 (minimum approval authority not displayed properly after "FYI" action); Item 24 (multiple approvers displayed); Item 27 (multiple delivery addresses on electronic online purchase request, but only one on PDF requisition); Item 28 ("overall account allocation" display allegedly in error); Item 29 (time and location not correctly displayed); Item 40 (improper total costs displayed); Item 41 (no display of required delivery date); Item 42 (search for purchase order by solicitation number); Item 44 (preference for a different default setting); Item 45 (receipt of all items not shown).

<sup>255</sup> R. 393-397: Item 9 (pagination; this is a cosmetic issue, not a material breach of contract); Item 24 (multiple approvers displayed; no showing by department this affects system functionality or is contrary to terms of contract).

<sup>256</sup> Exhibit A H: Item 7; Item 23; Item 29; Item 40; Item 45. -

<sup>257</sup> See, e.g., SM, DR #7 at 2:50 (Item 29).

<sup>258</sup> See, e.g., JR, DR #2 at 1:35 (Item 7).

<sup>259</sup> Exhibit A H: Item 8; Item 11; Item 12; Item 13; Item 16; Item 22; Item 27; Item 28; Item 41; Item 42; Item 44; Item 46; Item 47.

<sup>260</sup> R. 393-397: Item 10: "purchase order" is actually confirmation, not new order (The department has not shown that the original contract required a "confirmation order" capability, and none of the forms submitted to TSA was for a "confirmation order."); Item 11: "purchase request information" screen contains unusable field for "authorized by phone" (Attachment 11, R. 82, does not include an "authorized by phone" field, and the department has not shown that one was required on any of its forms or that the contract required the ability to display this information); Item 12: "return requisition" does not indicate amount as credit, no "return purchase order" (lack of credit memo is a display issue; the forms list initially provided to TSA at R. 286 did not include "return requisition" or "return purchase order"); Item 16: printed price request looks like requisition (The department did not establish loss of functionality or an applicable contractual requirement); Item 27: Multiple delivery addresses on electronic online purchase request, but only one on PDF requisition ("ship to" information on attachment 11 does not indicate multiple addresses; see R. 82); Item 42: Ability to search for purchase order by solicitation number (The department did not

there is evidence that some of the were, including the display of complete and accurate account coding information.<sup>261</sup>

Given the central role that account coding plays throughout the procurement process, accurate and complete display of those codes on forms was a material element of the contract. The preponderance of the evidence is that at the time of termination, the forms module did not provide correct and complete accounting coding information in substantial compliance with the contract terms. The department therefore had grounds for a declaration of breach based on deficiencies in the production of forms.

(f) Approval Paths

The department's primary concern during much of the time that the contract was in effect concerned improper approval functionality.<sup>262</sup> Some of those problems may have involved setup issues, but most of them stemmed from the parties' failure to timely achieve a shared understanding of what the department's rules actually were. The parties did not achieve that shared understanding until a series of meetings, discussions, and written communications that occurred after TSA's letter of October 6, undertaking to correct the outstanding problems, in which TSA noted that it lacked "a formal step-by-step description of the workflow for approval of Purchase Requests."<sup>263</sup> Those communications, had they occurred prior to initial installation, might have prevented much of the subsequent frustration the parties experienced as a result of the shortcomings in the initial approval rules setup.

TSA and the department dispute which of them bears primary responsibility for their failure achieve a common understanding of the approval pathways involved. The department argues that the approval requirements for a public procurement entity are set by statute and regulation, and that TSA failed to comprehend the nature of the public

show contractual requirement for this search capability); Item 44: preference for a different default setting (department did not show contractual requirement for the desired default setting).

<sup>261</sup> R. 393-397: Item 8: Missing account codes (The delivery order provided as an attachment includes fields for the collocation code, program code, ledger code, and account code. R. 82 (Fields 40-43), R. 85. Since all of these codes were included on the form provided, none should be considered a request for enhancement); Item 22: Signature display (signature block is required and attachment 11 calls for bitmap signature); Item 28: "Overall account allocation" display allegedly in error (*see* item 8, *supra*); Item 41: Display of required delivery date (delivery date field is on attachment 11; *see* R. 82, field 4).

<sup>262</sup> *See, e.g.*, R. 1184 (email, S.F. to A.N., 9/18/2006 @ 12:05 p.m.).

procurement process. TSA argues that the department failed to follow up on the approval scenarios set out in the workbook, never provided a formal written description of the approval process it wanted, and changed its mind about the approval paths during the course of the contract.

There is ample evidence that the parties failed to communicate effectively regarding this issue,<sup>264</sup> and that information and data necessary for successful implementation of the approval rules was not provided in a timely manner.<sup>265</sup> It is also clear that revisions to the approval rules were a substantial cause of the difficulties TSA had in meeting the department's expectations for system performance and of the frustrations shared by the parties.<sup>266</sup> However, there is no need to decide whether the responsibility for prior failures in the approval process was mutual or singular: at issue is TSA's success in implementing the approval paths as of the date of termination, not at prior stages of the implementation process.

At the time of termination, the approval issues that had been identified during the course of the contract had been largely resolved. The only issues regarding approvals noted on the December 20 list involved TSA's addition of enhanced approval authority for a limited subset of buyers through an administrator's flag function: Item 39 (unauthorized buyer changed purchase criteria prior to contract award), Item 46 ("frequently ordered" screen allows buyer without administrator's flag to generate purchase order without requisition), and Item 47 ("recent purchase orders" screen allows

<sup>263</sup> R. 322. Ironically, this observation came only three days after Mr. M. had provided an informal written description of the process. *See* note 153, *supra*.

<sup>264</sup> A.J. testified that he had based the approval rules setup on business rules confirmed at the on-site meeting each of the department representatives attending the meeting. AJ, DR #2 at 2:41-2:42, 3:34-3:36. Those rules were revised at the department's request following power user training in May. *See, e.g.*, JR, DR #1 at 1:49-1:50. A webinar on that topic was scheduled for June 8, but there is no indication in the record that the webinar led to any changes in the approval flowchart TSA had prepared in March. R. 680 (email, A.N. to J.G., *et al*, 6/8/2006 @ 5:48 a.m.); *see* R. 1076. In mid-August, the approval path for amendments was still problematic. *See* R. 1082 (email, A.S. to S.F., 8/10/2006 @ 5:42 p.m.). Illustrative of the parties' mutual misunderstanding are their divergent characterizations of the changes to the approval rules implemented during the remediation. From TSA's perspective, those changes resulted from the department's prior failure to communicate its own rules; from the department's perspective, those changes were a belated effort by TSA to resolve longstanding issues. *Compare*, JR, DR #7 at 1:59-2:03, *with* AS, DR #6 at 0:47-0:48.

<sup>265</sup> *See* notes 89-90, 98-99, 101-102, 106, 153, *supra*.

<sup>266</sup> *See, e.g.*, JR, DR #7 at 2:00; SF, DR #4 at 0:55-0:56.

buyer without administrator's flag to generate purchase order without requisition).<sup>267</sup> These problems, it appears, are examples of the "purchase from nothing" issue that had been identified some time earlier,<sup>268</sup> and which the administrator flag was intended to resolve. That the system should not generate purchase orders without appropriate approvals is axiomatic. Although the precise nature of the problem is not clear from the department's cursory comments, by treating the alleged problem as a request for enhancement, TSA in effect admits the existence of a significant problem but does not accept responsibility for it. The preponderance of the evidence is that the administrator's flag did not function properly and that this was a material defect in the approval flow.

(g) Catalog Punchout

The department asserted that the system failed to provide a method for buyers to access and order from a supplier catalog (catalog punchout) for two suppliers, as had been promised.<sup>269</sup> TSA responds that the system provided the capability for catalog punchout,<sup>270</sup> but that those suppliers "do not support punch-out"<sup>271</sup> either by choice or because of licensing issues.

TSA notified the department on September 29 that it was terminating any further integration, pending notice from the department.<sup>272</sup> On balance, the evidence supports TSA's assertion that any catalogue punchout functionality deficiency as of December 20, 2006, was due to supplier issues over which it had no control.<sup>273</sup>

<sup>267</sup> See R. 396-397. Other issues concern improper display, but do not demonstrate that a buyer was either unable to obtain approval (or denial), or was able to purchase an item without first obtaining the necessary approval: (a) R. 395 (item 23) (minimum approval authority improperly displayed [testimony indicated this perceived error was the result of the user misreading the screen]); (b) R. 395 (item 24) (multiple unauthorized approvers displayed); (c) R. 397 (item 47) (purchase order displayed rather than requisition); and (d) R. 397 (item 48) (request for quotations duplicated).

<sup>268</sup> See, e.g., R. 1185 (emails, S.F. to A.N., 9/19/2006 @ 4:22 p.m. & 9/20/2006 @ 4:19 p.m.) (inability to "record a contract from nothing"; unsuccessful in "establishing a new contract from nothing").

<sup>269</sup> R. 396 (item 36).

<sup>270</sup> R. 396 (item 37).

<sup>271</sup> Exhibit AH (item 36). One supplier, both the department and TSA recognized, could not provide punch out access due to a licensing problem: the department utilizes the NIGP codes, and the supplier was not licensed to use those codes. *Id.*; see R. 1229 (email, S.M. to E.D., 11/17/2006 @ 11:53 a.m.). See JR, DR #2 at 0:25.

<sup>272</sup> R. 884 (email J.R. to A.S., 9/29/2006 @ 12:27 p.m.).

<sup>273</sup> See generally, R. 725, R. 787 (email, J.R. to M.D., 8/17/2006 @ 4:13 a.m.), R. 804 (email, A.S. to J.R. & M.D., 8/23/2006 @ 8:42 a.m.), R. 842 (9/11 email), R. 1182 (9/12 email).

C. The Department is Not Entitled to Reimbursement

Section 3.14 of the contract states:

The contractor is responsible for the completion of all work set out in the contract. All work is subject to inspection, evaluation, and approval by the project director, or designee. The State may employ all reasonable means to ensure that the work is progressing and being performed in compliance with the contract. Should the project director determine that corrections or modifications are necessary in order to accomplish its intent, the project director may direct the contractor to make such changes. The contractor will not unreasonably withhold such changes.<sup>[274]</sup>

Section 3.15 of the contract states:

If the project director determines that the contractor has refused to perform the work with such diligence as to ensure its timely and accurate completion, the State may, by providing written notice to the contractor, terminate the contractor's right to proceed with part or all of the remaining work.<sup>[275]</sup>

In the event that the contract is terminated for "[substantial failure...to perform the contract," the state "may require the contractor to reimburse monies paid (based on the identified portion of unacceptable work received) and may seek associated damages."<sup>[276]</sup>

In this case, the department gave the 30 day notice mentioned in Section 3.14 on November 8, 2006. It did not, thereafter, extend the time for compliance; it simply took additional time to review the status of the system before exercising its right, which had fully matured on December 8, to terminate the contract. Having reviewed the status of the system's performance, the department terminated the contract on December 20, 2006. By the terms of Section 3.14, under these circumstances the department was entitled to reimbursement of sums previously paid for "the identified portion of unacceptable work received."

The department paid TSA 50% of the contract price at TSA's request. That payment, under the terms of the contract, was due upon "completion/acceptance of initial installation." The vendor was entitled to payment upon installation,<sup>[277]</sup> and the

<sup>274</sup> R. 23 (RFP Section 3.14).

<sup>275</sup> *Id.*

<sup>276</sup> R. 23 (RFP Section 3.14).

<sup>277</sup> SF, DR #4 at 0:24-0:25.



department elected to make the payment without formally documenting its acceptance of the initial installation for purposes of that payment. The department's failure to inspect the system prior to payment does not mean that it has waived the right to seek reimbursement for a unacceptable work,<sup>278</sup> and given the system's difficulties in processing the full 11-digit NIGP codes at the time of installation, the system at the time of installation was obviously incapable of satisfactorily providing the commodity code management services called for in the written contract.<sup>279</sup>

But acceptance of the initial installation and acceptance of the completed system are not the same thing. The department is not entitled to reimbursement of the initial payment if the system as installed was "acceptable" for purposes of the initial payment, and delay in the provision of an acceptable initial installation is not equivalent to a failure to provide an acceptable initial installation at all. Although the department has established that the system at the time of termination did not provide substantial performance, and it was therefore "unacceptable" for purposes of payment of the full contract price, the department did not show that the system as initially installed was "unacceptable" for purposes of the initial installation. More importantly, the preponderance of the evidence is that at the time of termination the system was at least equivalent to what the department and TSA had anticipated it would be upon initial installation: largely functional, but lacking adequate functionality in some modules, containing a variety of bugs, and clearly not yet capable of providing substantially complete performance. An "acceptable" system for purposes of initial installation is not a finished product: bugs are always present. Because the department has not shown that at the time of installation, the system was unacceptable for purposes of initial installation, and TSA has shown that at the time of termination, the system was acceptable for purposes of initial installation, TSA is entitled to retain the initial payment.

#### **IV. Conclusion.**

The electronic procurement system as installed on the department's server on December 20, 2006, was not capable of performance in substantial conformity with the contract requirements, and the system's deficient performance was not excused by the

<sup>278</sup> SF, DR #4 at 0:26.

department's actions during the time the contract was in effect. The department therefore had grounds for termination for cause. Because the department has not shown that the system as of December 20, 2006, would have been unacceptable for purposes of initial installation, the department is not entitled to reimbursement of the amount previously paid. Both the department's and TSA's claims are therefore denied.

DATED August 7, 2008.

Andrew M. Hemenway  
Administrative Law Judge

<sup>279</sup> Cf. JR, DR#1 at 1:45.

**Adoption**

On behalf of the Commissioner of Administration, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of September. (Monday)

By: Annette Kreitzer  
Commissioner

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

W.C.  
R.W., AAG  
9/23/08