

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ellis Environmental Group, LC) ASBCA No. 55375
)
Under Contract No. N69272-04-C-1006)

APPEARANCE FOR THE APPELLANT: Charles M. Laycock, Esq.
Corporate Counsel

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TUNKS

Ellis Environmental Group, LC (appellant or Ellis) seeks \$91,129 in connection with a design/build contract for diesel exhaust ventilation systems. The claim consists of \$12,364 for preparing a “second” quality control plan allegedly not required by the contract, \$41,765 for alleged unreasonable delays in processing submittals and wrongful rejection of a request for a time extension, and remission of \$37,000 in liquidated damages. Only entitlement is before us.

FINDINGS OF FACT

1. On 9 June 2004, the government awarded Contract No. N69272-04-C-1006 to appellant in the amount of \$237,729 to design and build diesel exhaust ventilation systems in fire stations 105, 165, and 936 at the Naval Air Station, Jacksonville, Florida (R4, tab 1 at 1, 2 of 13). The contract completion date (CCD) was 8 November 2004, and the liquidated damages rate was \$200 per day (R4, tab 1 at 8 of 13).

2. The contract incorporated FAR 52.242-14, SUSPENSION OF WORK (APR 1984) by reference (R4, tab 1 at 7 of 13). The clause provided, in part, as follows:

b. If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or

interrupted (1) by an act of the [CO] in the administration of this contract, or (2) by the [CO's] failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly.

3. Clause 2-3, "Information Verification," provided as follows:

- (a) Contractor shall examine the...site.... Claims for additional costs due to conditions that could have been verified by site investigation will not be permitted.

(R4, tab 1, Guidance to Contractor at 4)

I. Contractor Quality Management System (CQMS)

4. Special Contract Requirements (SCR) 3-2 provided as follows:

The Contractor shall establish and maintain an effective quality management system in compliance with contract clauses, professionally accepted design and professionally accepted inspection of construction practices and as herein provided. The CQMS consists of plans, procedures, and organization necessary to provide a design and materials, equipment, workmanship, fabrication, construction and operations which comply with contract intent and specific requirements.

(R4, tab 1, SCR at 11-12)

5. SCR 3-4 of the CQMS provisions required submission of a Quality Management Plan (QMP) consisting of (a) a description of the quality management organization; (b) the number, classifications, qualifications, duties, responsibilities, and authorities of personnel; (c) the method of design review; (d) submittal procedures; (e) Quality Control (QC) activities to be performed for each phase of QC; (f) control testing procedures; (g) documentation format for QC activities; and (h) performance testing for acceptance of all electrical, mechanical, and other systems (R4, tab 1, SCR at 12-13).

II. Submittal Procedures

6. As part of the 100% Final Design, the contractor submitted a package of technical specifications for the construction phase of the work. Those specifications required that the following submittals, among others, be approved by the government prior to the start of construction: a construction schedule, a submittal register, an environmental protection plan (EPP), a QC plan, a health and safety plan (HASP), an Accident Prevention Plan (APP), and an Activity Hazard Analysis (AHA) (R4, tab 15, § 01320N, ¶ 1.2, § 01330, ¶ 1.4, § 01355A, ¶ 1.7, § 01450N, ¶ 1.2, § 01525, ¶ 1.2).

7. Paragraph 1.6.3.b. of specification section 01330, “SUBMITTAL PROCEDURES,” provided as follows:

Except as specified otherwise, allow review period, beginning with receipt by approving authority, that includes at least...20 working days for submittals for [CO] approval. Period of review for submittals with [CO] approval begins when Government receives submittal from QC organization. Period of review for each resubmittal is the same as for initial submittal.

(R4, tab 15, subtab specs.)

8. Paragraph 1.7.1 of specification 01330 required the submittals to be transmitted on the form prescribed for the project and to “include [the] information prescribed by [the] transmittal form” (R4, tab 15, subtab specs.).

9. When the contracting officer (CO) was the designated approving authority, paragraph 1.6.6f.(1) of specification section 01330 required that a submittal reviewer and a QC manager certify that the submittal was in compliance with the contract drawings and specifications before sending it forward for approval. Paragraph 1.6.6g. further required that the “person[s] signing certifying statements shall be QC organization member[s] designated in the approved QC plan,” that the signatures of the certifiers be in original ink, and that stamped signatures were not acceptable. (R4, tab 15, subtab specs.)

10. Below the QC certification blocks, there was a block for the “NAME AND SIGNATURE OF CONTRACTOR” (hereinafter contractor block). The form identified five action codes: (1) A – approved as submitted; (2) B – approved, except as noted; (3) C – approved, resubmission required; (3) D – returned by separate correspondence; and (4) E – disapproved. (Supp. R4, tab 7)

III. Quality Control (QC)

11. Paragraph 1.2 of specification section 01450N, “QUALITY CONTROL,” required the contractor to submit a QC plan within 20 calendar days of receipt of the notice of award (R4, tab 15, subtab specs.).

12. Paragraph 1.4 of specification section 01450N required the contractor to “[e]stablish and maintain a QC program as described in this section.” The paragraph indicated that the program consisted of a QC Organization, a QC Plan, a QC Plan Meeting, a Coordination and Mutual Understanding Meeting, QC meetings, three phases of control, submittal review and approval, testing, completion, inspections, and QC certifications. Paragraph 1.4 also stated that “[n]o work or testing may be performed unless the QC manager is on the work site.” (R4, tab 15, subtab specs.)

13. Paragraph 1.4.2 of specification section 01450N required the QC plan to be approved “prior to the start of construction” (R4, tab 15, subtab specs.).

14. Paragraph 1.6.1 of specification section 01450N required the QC plan to include the following: (a) a chart showing the QC organizational structure; (b) the names and qualifications of each person in the QC organization; (c) the duties, responsibilities and authorities of each person in the organization; (d) a listing of outside organizations that will be employed and a description of the services they will perform; (e) letters appointing the QC manager and alternate QC manager; (f) submittal procedures; (g) testing laboratory information; (h) a testing plan and log; (i) procedures for rework items; (j) documentation procedures, including proposed report formats; and (k) a list of each definable feature of work. (R4, tab 15, subtab specs.)

IV. Test and Balance (TAB) Submittals

15. Paragraph 1.3 of specification section 15801N, “INDUSTRIAL VENTILATION AND EXHAUST,” and specification section 15951N, “TESTING INDUSTRIAL VENTILATION SYSTEMS,” required submission of the following test reports: fan tests (including sound power level tests); exhaust system start-up tests; preliminary review report; fan operating points report; static pressure report; volume and velocity flow rates report; pitot traverse report; and a TAB report. Except for the fan tests, start-up tests, and preliminary report, the tests had to be approved by the government. (R4, tab 15, subtab specs.)

16. Paragraph 1.3 of specification section 15951N also required that the following “Certificates” be submitted for government approval: test agency qualifications, record

of document submittal to testing agency, and list of test instruments (which included the work plan) (R4, tabs 7P, 15, subtab specs.).

17. Paragraph 1.4.2.1 of specification section 15951N required the TAB agency to have “5 years of experience as an agency in testing industrial ventilation systems or [be a] current member of either AABC [Associated Air Balance Council] or NEBB [National Environmental Balance Bureau].” For agencies being recertified, subparagraph 7 of that paragraph required submission of references from five facility managers of facilities with industrial ventilation systems that the test agency had tested. (R4, tab 15, subtab specs.)

V. Performance

18. Mr. Jeffrey Finn, appellant’s project manager, submitted the QMP on 12 July 2004. He signed the transmittal form as submittal reviewer and QC manager. The contractor block was not signed. ENS Courtney B. Stringham, the government’s construction manager (CM), coded the QMP “A” (approved as submitted) on 27 July 2004. (Ex. A, QMP at 3)

19. ENS Jeremy Theis replaced ENS Stringham in the fall of 2004 (R4, tab 12).

20. The government accepted appellant’s final design on or about 10 September 2004 (R4, tab 10, subtab F).

21. Appellant submitted its APP on 16 September 2004 (R4, tab 6, subtab 12).

22. On 28 September 2004, Mr. Finn requested an extension of the CCD due to weather delays. Bilateral Modification No. P00001, dated 1 October 2004, extended the CCD until 6 December 2004. (R4, tab 2)

23. Appellant’s APP was coded “C” (resubmission required) on 6 October 2004 because the signatures in the QC certification block were photocopied (R4, tab 10, subtab G at 2).

24. Mr. Rusty Dahms took over as CM on 25 October 2004 (R4, tab 6, subtab 13).

25. On 26 October, Mr. Finn notified Mr. Dahms that appellant’s subcontractor, Plymovent, planned to begin installation on 1 November 2004 (R4, tab 6, subtab 14). Mr. Dahms replied that work could not begin until the APP, EPP, QC plan, and NAS were submitted. He also asked for an updated submittal register. (R4, tab 6, subtab 16)

26. Mr. Finn submitted the EPP, the corrected APP, and the corrected AHA on 26 October 2004. He signed the QC certification blocks on all the transmittal forms as QC manager and submittal reviewer. The contractor blocks were not signed. (Supp. R4, tabs AG, AH)

27. On 1 November 2004, Mr. Finn requested that a preconstruction meeting be scheduled. Mr. Dahms replied that the meeting could not be held until appellant had submitted an APP, EPP, QC plan, and NAS and again asked for an updated submittal register (R4, tab 6, subtab 17). Mr. Finn replied that appellant's QC plan had been approved on 27 July 2004 (the date the QMP was approved), that the APP and EPP had been submitted for review, and that he would put an updated NAS in the mail (R4, tab 6, subtab 18).

28. Mr. Finn submitted the QC plan on 2 November 2004 (transmittal 002A) (R4, tab 6, subtab 19 at 2). Mr. Dahms coded the plan "C" (resubmission required) on 9 November 2004 and noted the following defects: (1) the QC manager, Mr. Neil Donley, was shown as subordinate to the PM on the organizational chart; (2) the alternate QC manager was not listed on the chart and no documentation of his qualifications was provided; (3) no submittal register or testing plan/log was provided; and (4) the submittal did not explain how transmittals would be numbered and tracked (R4, tab 7A).

29. On 4 November 2004, Plymovent began work without a superintendent or a QC manager. Plymovent also stored material at the site without coordinating with the government. Mr. Dahms shut the job down, informing Mr. Finn that "[n]o work on site is to be performed until such time as all admin submittals have been successfully completed and a QC Understanding/Prestart meeting has been held." (R4, tab 6, subtab 21)

30. On 5 November 2004, Mr. Finn requested Mr. Dahms to schedule a "precon/QC meeting" (R4, tab 6, subtab 22).

31. On 8 November 2004, Mr. Finn again requested Mr. Dahms to schedule a precon/QC meeting (R4, tab 6, subtab 24 at 2).

32. Mr. Dahms coded appellant's EPP, APP, and AHA "A" (approved as submitted) on 9 November 2004. The contractor blocks on the transmittal forms were not signed. (Supp. R4, tabs 7AG, AH)

33. On 10 November 2004, Mr. Finn requested Mr. Dahms to set up a precon/QC meeting (R4, tab 6, subtab 26).

34. On 12 November 2004, Mr. Finn e-mailed Mr. Dahms asking if he needed “anything else” before work could begin. If not, he asked that a precon/QC meeting be set up for the next week. (R4, tab 6, subtab 28) Mr. Dahms replied that he did “not monitor [appellant’s] contract on a daily basis” and that Mr. Finn should “query [his] QC and Superintendent, as they should know where they are as to admin submittals” (R4, tab 6, subtab 28).

35. On 15 November 2004, Mr. Finn asked Mr. Dahms if the EPP and APP had been approved. Mr. Dahms replied that “[b]oth plans were processed and placed downstairs for pickup on 09Nov04” (R4, tab 6, subtab 30 at 1). Mr. Finn replied that he had “sent someone to check on [the submittals on Friday, 12 November 2004] but none of [sic] the signed submittals were there” (R4, tab 6, subtab 30 at 2).

36. Mr. Finn re-submitted Ellis’ revised QC plan on 17 November 2004 (R4, tab 6, subtab 33). On 22 November 2004, Mr. Dahms returned the plan because the contractor block on the transmittal form was not signed. The submittal is not in the record. (R4, tab 6, subtab 35 at 1) The following e-mail exchange took place between Messrs. Finn and Dahms relative to the rejection:

[By Mr. Finn:]

Rusty, I just received the rejected submittals. Both the Submittal reviewer & QC Manager signed the [submittal]. No other signature has been required in the past....

[By Mr. Dahms:]

The Box that says “NAME AND SIGNATURE OF CONTRACTOR:” needs to be completed. The box has always been required to be filled in and signed by the preparer, apparently it hasn’t been and project managers, QC’s, and Government failed to catch it. It is necessary in the event [there] is a dispute, claim, or other contractual problem, which happens every once and a while.

(R4, tab 6, subtab 35 at 3)

37. Mr. Finn forwarded a second revised QC plan (transmittal No. 008B) to Mr. Dahms on 29 November 2004. Although the submittal is not in evidence, the record includes the following e-mail exchange regarding its rejection:

[By Mr. Dahms:]

We have a problem! The Transmittal is numbered 008B with the previous transmittal numbered 008A. The copy of my previous Transmittal Comment Sheet...[was] 002A.

What is going on. The transmittal was signed by both you and your approved QC Manager. This gives me concern regarding the level of Quality Control being performed on the contract...

...Your QC Plan is being sent back unreviewed.... No site work or other contract action will be done until such time as the Government can confirm that a qualified functioning QC organization is in place.

It is also noted you have submitted Mr. Donley to be QC on two different contracts which are running concurrently. The QC is required to be on site at all times work is being performed. As such, it is not normal to have him working on two different contracts concurrently. It is not contractually impossible, but while he is working on one job the others would have to be shut down. Additionally the schedules would need to reflect on which days he would be on which job. You will need to decide how you wish to proceed.

[By Mr. Finn:]

[ENS] Stringham told me to number every submittal as number 1 and any resubmittals as #2.... The QCP [quality control plan] was the major offender here. It was originally numbered as 002A and then 002B for the resubmittal. I changed the numbering after the last rejection to 008B since 002 was used for the [QMP].

(R4, tab 6, subtab 39 at 1-2)

38. Mr. Finn re-submitted transmittal 008B as transmittal 002B on 3 December 2004, proposing Mr. Thomas Thornburgh as QC Manager/Superintendent. Mr. Dahms coded the submittal "B" (approved as noted) on 13 December 2004. (Supp. R4, tab AK)

39. Bilateral Modification No. P00002, dated 1 December 2004, extended the CCD until 31 January 2005 (R4, tab 3).

40. On 13 December 2004, Mr. Dahms e-mailed Mr. Finn as follows:

Your QC plan has been processed and is downstairs for pickup. I believe this was the last item necessary to be approved to start field work....

Assuming it is, please have your QC/Superintendent contact Roberto Santos, ET [engineering technician], to set up a QC Understanding/Prestart Meeting....

(R4, tab 6, subtab 40). On 21 December 2004, Mr. Finn requested Mr. Santos to schedule the QC Understanding/Prestart Meeting for 27 December 2004 (R4, tab 6, subtab 41).

41. The precon/QC meeting was held on 27 December 2004 and the NTP was issued the same day (R4, tab 6, subtab 42, tab 10, subpart V). Although the CO's final decision indicated that the NTP could not be issued before 27 December 2004 because she was on leave the week of Christmas, she credibly testified at the hearing that she was mistaken about the year and that she was actually off only one or two days at Christmas in 2004 (R4, tab 9, ¶ 62; tr. 2/109).

42. Plymovant intended to begin installation on 3 January 2005, but was unable to do so because two of its installers were ill. Mr. Dahms agreed to a new start date of 17 January 2005. (R4, tab 6, subtab 44; tr. 1/140) As of 31 January 2005, appellant had started up all three systems (using a compressor for fire station 165) and concluded that they were capable of removing exhaust fumes (R4, tab 11, Contractor Quality Control Reports Nos. 18, 24, 27; tr. 1/82-85).

43. On 28 January 2005, appellant submitted Request for Information (RFI) No. 5:

The Electrical panel at firestation 165 was found to be modified and does not meet the code. The panel was labeled as a three phase system but one phase was completely disconnected.

(R4, tab 12, subtab 16)

44. Mr. Thornburgh, appellant's superintendent/QC, testified that the "bus" had been taken out of the third phase so that "the only three-phase that was available...was the top two breakers" (tr. 1/175). Mr. Rod Stewart, appellant's electrical engineer, participated in appellant's "original site visit." He confirmed that the panel was labeled as "a normal 208Y/120V 3 phase panelboard" during the site visit (R4, tab 12, subtab 18 at 1, 3).

45. Mr. Dahms replied that the problem "appears to be a design problem that should have been identified at time of site investigation/visit [and] is not a basis for change or time extension" (R4, tab 6, subtab 48).

46. On 11 February 2005, Assistant Fire Chief Duane R. Martorano e-mailed Mr. Dahms as follows:

[Plymovent] has finished the installation on two out of 3 Fire Stations. Use of the systems has been placed on hold until electrical panel issues located at Fire Station 2 [building 165] can be addressed. Sir, I am requesting the operational systems be inspected and activated.

(R4, tab 6, subtab 55 at 3)

47. On 14 February 2005, Mr. Finn advised Mr. Dahms that First Coast Test and Balance (First Coast), appellant's TAB agency, would start air testing on 16 February 2005. Mr. Dahms replied that "[n]o testing can be performed until...we have copies of approved submittals upon which that testing relies." (R4, tab 6, subtab 54)

48. Mr. Finn submitted Ellis' test agency qualifications (transmittal 010A) on 14 February 2005. The submittal, which is not in the record, was coded "E" (disapproved) because the expiration date on the TAB agency's certification sheets was missing. (R4, tab 7J) Appellant re-submitted its test agency qualifications (transmittal 010B) on 21 February 2005 and Mr. Dahms rejected the submittal on the grounds that it was unsigned and the certifications were improper. (R4, tab 7K)

49. On 16 and 17 February 2005, Mr. Ralph Katona, Ellis' architect/engineer (A/E), tested the exhaust systems in fire stations 105 and 936. No operational testing was performed in fire station 165 because the electrical panel had not yet been repaired. When the engines were turned on, he did not smell any diesel exhaust fumes, which indicated to him that the systems were operating properly. (Tr. 1/213, 218-23) Except

for a few minor items, he found that the systems met the specifications (R4, tab 13KK; tr. 1/219).

50. The government repaired the electrical panel in fire station 165 on 17 February and Plymovent connected the exhaust system on 18 February 2005 (R4, tab 11, Contractor Production Reports dated 2/17-18/2005).

51. On 18 March 2005, Mr. Dahms advised Mr. Finn as follows:

If your current TAB agency does not have the experience to meet the contract requirements, you may want to seek someone else who is qualified. I would assume your installation subcontractor could provide names of TAB firms that could meet requirements. As liquidated damages continue to accrue, resolution should be accomplished as quickly as possible.

52. Appellant re-submitted its test agency qualifications (010C) on 2 March 2005. On 21 March 2005, Mr. Finn requested the government to waive the letters of recommendation required by paragraph 1.4.2.1. of specification section 15951N relating to the recertification of First Coast. The government granted the waiver on the condition that First Coast and its lead test engineer met all the other requirements of that paragraph and that Naval Facilities Engineering Service Center (NFESC) be provided a copy of the submittal for comment. (R4, tab 6, subtab 66) Mr. Dahms coded appellant's test agency qualifications submittal "A" (approved as submitted) on 4 April 2005 (R4, tab 7L).

53. Appellant submitted its work plan (transmittal 010-1A) on 11 April 2005 (R4, tab 7M at 1). On 20 April 2005, Mr. Lucy of NFESC, the government's technical expert, advised Mr. Dahms that he did not "need a re-submittal of the test plan showing the changes" but that he would like a resolution statement for each of his comments, which could be e-mailed (R4, tab 7M at 3). Mr. Dahms coded transmittal 010-1A "C" (resubmission required) without advising appellant that it did not have to re-submit the changes to the test plan or that it could respond by e-mail (R4, tab 7M at 1). In connection with transmittal 010-1E, Mr. Lucy advised Mr. Dahms that "[i]f you want I would accept e-mailing of the re-submittals." Mr. Dahms did not accept this suggestion. (R4, tab 6, subtab 78) Ultimately, transmittal 010G was coded "B" on 23 May 2005 (R4, tab 7R).

54. Although the Acting Fire Chief testified that he directed the fire fighters "not to use [the systems] due to the fact that [they] hadn't been accepted," the evidence

suggests that they were in use for at least a portion of the time between February and May 2005 (tr. 1/76-77, 88-92, 106-11, 183, 2/71-72).

55. Mr. Frederick Hamrick of First Coast performed the TAB tests on 31 May 2005 (R4, tab 11, Contractor Production Report No. 147; tr. 1/228-29). The report, which was issued in June 2005, was prepared by Mr. Hamrick and certified by Mr. Steven T. Cascone (R4, tab 7V; tr. 1/230).

56. Mr. Cascone did not testify, but Mr. Hamrick testified that the testing was not performed earlier because of a delay in receiving First Coast's annual recertification documents. He also testified that First Coast was "not in bad standing with NEBB" and that it continued performing TAB work on the base from January through May 2005 without objection. (Tr. 1/234-36, 243)

57. On or about 11 June 2005, NFESC received a copy of the TAB submittal (transmittal No. 010H), which included the TAB report, fan operating points report, static pressure report, volume and velocity flow rates report, and pitot traverse report. Mr. Lucy coded the submittal "C" (resubmission required). (R4, tab 6, subtab 90 at 1-2)

58. Appellant re-submitted its TAB submittal on 23 June and again on 15 July 2005 (transmittals 010I and 010J) (R4, tab 6, subtab 103 at 7, tab 7V). On 27 July 2005, Mr. Lucy coded the static pressure tests, volume and velocity flow rates report, and pitot traverse report "A" (approved as submitted) and coded the TAB report and fan operating points report "C" (resubmission required) (R4, tab 6, subtab 103 at 7). His comments stated that "the system is functioning as specified in that the flow rates and volumes are satisfactory and within specification [and the] three systems are working properly." While the "operating points, fan curves etc., are nice to have for later trouble shooting," he stated that "[they] are not necessary at this stage" (R4, tab 6, subtab 103 at 5, note 5). He authorized Mr. Dahms "to change the action code from 'C' to what ever [he] think[s] will be best" (R4, tab 6, subtab 103 at 2). Mr. Dahms coded the TAB report and the fan operating points report "B" on 28 July 2005 (R4, tab, 7W at 3).

59. We find that substantial completion took place on 28 July 2005.

60. The government formally accepted the systems on 9 August 2005 (R4, tab 12, subtab 26).

61. On 14 September 2005, the government issued unilateral Modification No. P00004 assessing liquidated damages of \$37,000, from 31 January 2005, the extended CCD, through 4 August 2005, the date on which it allegedly took beneficial occupancy (185 days times \$200 per day) (R4, tab 5).

VI. The Claim

62. On 29 December 2005, appellant submitted a claim in the amount of \$93,404, which consisted of (1) \$12,364 for preparing a “second” QC plan; (2) \$44,040 for unreasonable delays in the approval of submittals and rejection of a request for a time extension; and (3) remission of \$37,000 in liquidated damages. The claim was signed by Charles M. Laycock, Esq., appellant’s corporate counsel and contracts manager. (R4, tab 8) The CO received the claim on 30 December 2005 (R4, tab 6, subtab 120).

63. On 5 January 2006, the CO rejected the claim, stating that it “must be signed by an officer of the company who is duly authorized to bind the company” and requested appellant to “provide a new cover letter with the signature of a corporate officer” (R4, tab 6, subtab 120). On 5 January 2006, Mr. Rusi Charna, appellant’s Chief Executive Officer, advised the CO that Mr. Laycock was appellant’s corporate counsel and that he was authorized to bind the company (R4, tab 8).

64. Among other things, appellant alleged that Mr. Dahms delayed the submittal process in retaliation for its refusal to pay bribes to Mr. Robert J. Cabral. Mr. Cabral was an employee of a contractor hired by the government to approve progress payment requests in connection with another Ellis contract (tr. 1/145-46, 194). Mr. Thornburgh, appellant’s superintendent/QC manager, testified that when he and Mr. Cabral walked the job to check the percentages for that contract, Mr. Cabral told him “to tell the Superintendent to have his check ready on Friday or something to that effect” (tr. 1/146). Mr. Thornburgh testified that Mr. Cabral later told him “he [Mr. Cabral] hadn’t received a check from the last time” (tr. 1/147-48). At the hearing, Mr. Cabral testified that he was joking and that he did not receive any payments from Ellis (tr. 1/195). Appellant has failed to prove that Mr. Dahms delayed the submittal process due to the alleged bribes.

65. The CO denied the claim on 2 March 2006 (R4, tab 9).

66. Ellis appealed the CO’s denial of its claim to this Board on 10 March 2006. We docketed the appeal as ASBCA No. 55375 on 13 March 2006.

67. In its post-hearing brief, appellant reduced its claim for delays to the submittal process by \$2,275, from \$44,040 to \$41,765 (app. br. at 1).

DECISION

Appellant alleges that it incurred \$54,129 in additional costs as a result of Mr. Rusty Dahms' unreasonable administration of the subject design/build contract for diesel exhaust ventilation systems. Mr. Dahms was the government's construction manager. In support of this contention, appellant cites 11 specific examples of alleged unreasonable conduct on the part of Mr. Dahms, each of which is discussed below. Appellant also asserts that the contract was substantially complete by 31 January 2005, the extended CCD, entitling it to recover all \$37,000 assessed in liquidated damages. The government argues that appellant's late performance was caused by the ineptitude of its project manager.

1. Second Quality Control Plan

Appellant first argues that Mr. Dahms required it to submit a second QC plan that was not required by the contract. In interpreting a contract, we must give reasonable meaning to all parts of the contract, and not render any portion meaningless. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *Christopher H. White*, ASBCA No. 56259, slip op. dated 12 June 2008 at 12. Here, as part of its design work, appellant submitted a package of technical specifications for the construction phase of the work. Paragraph 1.4 of specification section 01450N, "QUALITY CONTROL," stated that the QC plan was to be prepared "*as described in this section*" (emphasis added). We interpret the italicized language to refer to specification section 01450N. In addition, paragraph 1.6.1 of that section lists specific items that must be included in the QC plan. Appellant's interpretation would render all or part of these paragraphs meaningless. The claim is denied.

2. Revised Quality Control Plan

To prove entitlement under the suspension of work clause, the contractor must prove that the government suspended, delayed or interrupted its work "for an unreasonable period of time." Appellant submitted its revised QC plan on 17 November 2004. Mr. Dahms rejected the plan on 22 November 2004 because the contractor block on the transmittal form was not signed as required by paragraph 1.7.1 of specification section 01330. For unexplained reasons, appellant did not sign and return the form until 29 November 2004. We find that Mr. Dahms acted reasonably in rejecting the submittal and that the rejection did not unreasonably delay appellant's work. Claim 2 is denied.

3. Accident Prevention Plan

Appellant next argues that the government unreasonably rejected its APP because the signatures in the QC block were photocopied. Mr. Finn signed the submittal as submittal reviewer and QC manager and both signatures were photocopied. Paragraph 1.6.6f.(1) of specification section 01330 specifically prohibited photocopied signatures in the QC certification block. Accordingly, we find that the government properly rejected the APP. Claim 3 is denied.

4. Second Revised Quality Control Plan

Appellant submitted its second revised QC plan on 29 November 2004. Mr. Dahms rejected the submittal on 3 December 2004 because (1) it contained a numbering error; and (2) it identified Mr. Neil Donley as its OC manager despite the fact that appellant had submitted him as its QC manager on two different contracts that were running concurrently. Since the contract required appellant to have the QC manager on-site at all times work was being performed (finding 12), the rejection was proper. On 3 December 2004, appellant corrected the numbering error and changed its QC manager to Mr. Thornburgh and re-submitted the plan. Mr. Dahms coded the submittal as “B” on 13 December 2004. The contract allowed the government 20 working days in which to review submittals and resubmittals (finding 7). We find that the time taken in processing the submittal was reasonable. Claim 4 is denied.

5. Time Extension

Appellant seeks remission of 17 of the 185 days of liquidated damages assessed by the government, alleging that the government failed to repair a defective electrical panel in fire station 165. The CCD was 31 January 2005 and the panel was repaired on 17 February 2005. Liquidated damages are a legitimate technique for allocating the consequences of a breach of contract for late completion. *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 412 (Ct. Cl. 1978). However, not every delay will result in the remission of liquidated damages. We have found as fact that the contract was not substantially complete until 28 July 2005 and that the cause of that delay was appellant’s inability to submit compliant TAB submittals (findings 47, 48, 52, 53, 56, 58). As a result, we find that the government’s repair of the defective electrical panel neither caused nor contributed to late completion of the contract. Claim 5 is denied.

6. Delayed Precon/Quality Control Meeting and Notice to Proceed

Appellant argues that Mr. Dahms unreasonably delayed scheduling the precon/QC meeting and issuing the NTP from 13 December until 27 December 2004. Mr. Dahms

approved appellant's QC plan on 13 December 2004. Mr. Dahms advised Mr. Finn via e-mail of the same date to contact Mr. Santos to set up the precon/QC meeting. The QC plan was the last item remaining to be approved before the precon/QC meeting could be scheduled. Mr. Finn delayed contacting Mr. Santos until 21 December 2004 and, for unexplained reasons, he did not request that the precon/QC meeting be scheduled until 27 December 2004. On these facts, we would be hard-pressed to find that the government delayed the precon/QC meeting and issuance of the NTP. Claim 6 is denied.

7/8. Unnecessary Resubmittal/Resubmission by E-Mail

Appellant next argues that Mr. Dahms unnecessarily required it to resubmit its test plan and refused to allow it to re-submit via e-mail. In connection with appellant's work plan (transmittal 010-1A), Mr. Lucy, the government's technical expert, advised Mr. Dahms that he did not "need a re-submittal of the test plan showing the changes" and that he was willing to accept the resolution statements he had requested by e-mail. While he could have accepted Mr. Lucy's suggestions, the decision to demand the corrections on the submittal was within Mr. Dahms' discretion and we do not find that decision to be unreasonable. This aspect of appellant's claim is denied.

9. Liquidated Damages

Appellant argues that the work was suitable for its intended purpose on 31 January 2005, the extended CCD. In support of this contention, appellant points out that as of 31 January 2005 it had started up all three systems (using a compressor for fire station 165) and that they were capable of removing exhaust fumes. In appellant's view, this renders the government's assessment of liquidated damages improper.

The Court of Appeals for the Federal Circuit addressed the relationship of testing requirements to substantial completion in *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307 (Fed. Cir. 2000). In that case, the contractor argued that a fire alarm system was substantially complete because it was installed, operational, and capable of being successfully tested. The Court of Appeals for the Federal Circuit held that substantial completion did not take place until the testing had been successfully completed, stating as follows:

[I]n addition to bargaining for operational installation of the fire alarm system, the [government] bargained for testing of that system to demonstrate that the system was operational. Clearly, fire alarm testing was an important requirement to the [government] before the building could be used for its intended purpose. Consequently, the determination of when

the work on the fire alarm system was substantially complete requires more than evidence that the fire alarm system was installed, operational, or capable of being successfully tested.

Kinetic, supra, 226 F.3d at 1316; *see also Kato Corp.*, ASBCA No. 51462, 06-2 BCA ¶ 33,293 at 165,090-91 (work not substantially complete until the government retested and accepted a fire alarm system); *Toombs & Co., Inc.*, 91-1 BCA ¶ 23,403 at 117,426 (new roofs not suitable for intended purpose until proven watertight by specified tests). We find that substantial completion took place on 28 July 2005, the date on which Mr. Lucy considered the TAB report acceptable. Appellant is entitled to remission of liquidated damages from 29 July through 4 August 2005 (seven days), the number of days the government assessed liquidated damages after substantial completion.

10. Delay of Test and Balance Testing

Appellant argues that Mr. Dahms unreasonably delayed the start of TAB testing. Appellant did not submit acceptable test agency qualifications until 4 April 2005 and did not submit an acceptable test plan until 23 May 2005. As a result, the government properly refused to allow the TAB testing to go forward. Although the government suggested that it might want to consider using another TAB agency in order to mitigate its damages, appellant chose, for unexplained reasons, to use First Coast. Mr. Lucy accepted the TAB report on 28 July 2005. We find that appellant was responsible for the delay in the TAB testing.

11. Attempt to Delay Substantial Completion

Appellant next argues that the government improperly attempted to delay substantial completion by directing the firemen not to use the exhaust systems until the TAB report was approved. As stated previously, the work was not substantially complete until the systems were proven to remove the exhaust fumes by the specified tests. *Kinetic, supra*, 226 F.3d at 1316; *Toombs, supra*, 91-1 BCA at 117,426. Thus, it was not improper for the government to direct the firemen not to use the systems until the TAB report was approved. This aspect of appellant's claim is denied.

In addition, appellant argues that Mr. Dahms delayed approving submittals in retaliation for appellant's refusal to pay bribes to Mr. Robert J. Cabral, a contractor employee hired by the government contracting office. Mr. Thornburgh, appellant's superintendent/QC manager, testified that while he and Mr. Cabral were walking the job to check percentages of completion for a progress payment request on another Ellis contract, Mr. Cabral told him to "tell the Superintendent to have his check ready on Friday or something to that effect." On a second occasion, Mr. Cabral allegedly told

Mr. Thornburgh that he had not received his check from the last time. At the hearing, Mr. Cabral denied that he had requested bribes and stated that he was only making a joke. We find that the statements made by Mr. Cabral were, at best, unwise. However, these statements are insufficient to establish that a bribe was requested. Furthermore, appellant has not established any connection whatever between the alleged statements by Mr. Cabral and Mr. Dahms.

The appeal is sustained and denied as indicated below.

- | | | |
|------|---|---------------------|
| 1. | Second Quality Control Plan | - Denied |
| 2. | First Revised Quality Control Plan | - Denied |
| 3. | Accident Prevention Plan | - Denied |
| 4. | Second Revised Quality Control Plan | - Denied |
| 5. | Time Extension | - Denied |
| 6. | Delayed Precon/QC Meeting and Notice to Proceed | - Denied |
| 7/8. | Unnecessary Resubmittal/Resubmission by E-Mail | - Denied |
| 9. | Liquidated Damages | - Sustained in part |
| 10. | Delay of Test and Balance Testing | - Denied |
| 11. | Attempt to Delay Substantial Completion | - Denied |

Dated: 22 July 2008

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55375, Appeal of Ellis Environmental Group, LC, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals