

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Phillips National, Inc.) ASBCA No. 53241
)
Under Contract No. N68711-96-C-2168)

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OPINION BY ADMINISTRATIVE JUDGE TING

Phillips National, Inc. (PNI) was awarded a design-build contract to renovate 102 housing units at the Naval Air Facility (NAF), El Centro, California. Six months after construction began, PNI submitted, and the Navy approved, a new schedule projecting 29 July 1998 as the completion date. PNI actually completed on 21 May 1998, 69 calendar days early. PNI contends that early completion was the result of constructive acceleration on the part of the Navy. In May 1999, PNI submitted a six-part certified claim for over \$2 million. The parties settled all but the constructive acceleration issue. The contracting officer (CO) subsequently issued a final decision denying PNI's claim on that issue. This appeal followed. Entitlement and quantum are before us for decision.

FINDINGS OF FACT

1. In April 1996, Naval Facilities Engineering Command (NAVFAC), Southwest Division, in San Diego, California (the Navy), issued RFP No. N68711-96-R-2168 for the design and repair of 102 existing family housing units at the NAF, El Centro, California. The RFP indicates "THIS IS A DESIGN/BUILD CONTRACT." (R4, tab 1) It also indicates that the contractor shall begin performance within 15 calendar days (CDs) and complete the work within 449 CDs after receiving award. (R4, tab 1 at 1-1, ¶ 1A.2; SF 1442 at ¶ 11)

2. The RFP includes three items of work: Base Offer Item 0001 is for work in the existing housing units with the exception of relocation of utility rooms, altering of carports, landscaping and yard improvements. Option Items 0001 and 0002 cover the excepted items. (R4, tab 1 at 1-1, ¶ 1A.3)

3. PNI submitted its best and final offer on the base and option items in the amount of \$7,563,491.00 on 30 July 1996 (R4, tab 1, Amendment 0007 at 4 of 5). The Navy accepted the offer and, by letter dated 7 August 1996, established 30 October 1997 as the contract completion date. (R4, tab 7BJ)

4. Part 1 of the contract is entitled “ACQUISITION REQUIREMENTS.” Paragraph 1D.2.1 pertains to “PHASED CONSTRUCTION SCHEDULE.” (R4, tab 1 at 1-1, 1-14) The 449-day contract performance period is divided into two subphases: Subphase A is the DESIGN phase, and Subphase B the CONSTRUCTION phase. The DESIGN phase is required to be completed, culminating in the issuance of a Notice to Proceed for Construction, on the 174th day after the Scheduled Start Date. Construction is to begin on the 175th day and last for 274 days. (*Id.* at 1-14, 15) Paragraph 1D.2.1 provides “[w]ithin the overall project schedule, commence and complete the work in phases. Each phase of work shall be within the number of calendar days stated in the following schedule” (*id.* at 1-14, 15).

5. Paragraph 1D.2.1c.B provides the following “Construction Schedule Parameters and Restrictions”:

1. The total duration for the construction subphase shall not exceed a total of 274 calendar days.

2. The Contractor shall be given 10 units after notice to proceed with construction. The Contractor shall start construction in Phase 1 as shown on the following table and proceed logically through the site as numbered, ending construction in Phase 5.

| <u>Phase</u> | <u>Phase Duration</u> |
|--------------|-----------------------|
| 1 | 55 |
| 2 | 55 |
| 3 | 55 |
| 4 | 55 |
| 5 | 55 |

3. The Contractor shall have a minimum of 10 units (to be identified as a sequence), ready for resident occupancy within 60 calendar days from the start of construction. This time includes government inspection and approval.

4. Once the first sequence of the minimum of 10 units, have been accepted by the Government, a new sequence of a minimum of 10 new units, will be given to the Contractor, and so on. This allows the contractor to always have a

minimum of 10 units under construction at one time. The Contractor's schedule shall show these as sequences and they shall be numbered in numerical sequence.

5. The contractor shall submit a construction schedule (using CPM) to the Government for approval during the submittal phases.

6. Once Government approval has been obtained, a bilateral modification to the contract will be issued, incorporating the approved schedule into the contract. Liquidated damages shall be applied to each sequence at a rate of \$250 per unit per day. For example, if the Contractor's schedule shows 10 units in sequence 1, and 20 units in sequence 2, the liquidated damages shall be assessed at \$2,500 per day for sequence 1 and \$5,000 for sequence 2.

(R4, tab 1 at 1-15-16)

6. The contract incorporated by reference FAR 52.243-4, CHANGES (AUG 1987), which authorizes the CO to make changes in the work within the general scope of the contract. The contract also incorporated by reference FAR 52.236-15, SCHEDULE FOR CONSTRUCTION CONTRACTS (APR 1984), which provides, in part, as follows:

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. . . .

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps

necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor . . . to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(R4, tab 1, CONTRACT CLAUSES (Architect-Engineer) (Design Build) at 4)

7. PNI submitted its practicable schedule on 8 January 1997. The schedule included five bar charts, one for each phase of the contract. The schedule shows that PNI planned to mobilize on 6 January 1997, begin work on a model unit on 7 January 1997, and complete it on 6 March 1997. The schedule shows the following start and complete dates for each phase:

| Phase | Start | Complete |
|-------|-----------------|-----------------|
| 1 | 6 January 1997 | 11 April 1997 |
| 2 | 14 April 1997 | 6 June 1997 |
| 3 | 2 June 1997 | 8 August 1997 |
| 4 | 11 August 1997 | 10 October 1997 |
| 5 | 14 October 1997 | 4 December 1997 |

The Navy’s Resident Officer in Charge of Construction (ROICC) approved the schedule “as submitted” on 13 January 1997. (R4, tab 4) PNI did not submit a CPM schedule as required by Paragraph 1D.2.1c.B of the contract; hence no bilateral modification was issued incorporating an approved CPM schedule into the contract.

8. So that there is no confusion, the contract actually required two separate schedules: FAR 52.236-15 required a “practicable schedule,” and ¶ 1D.2.1c.B5 required a construction schedule using CPM which, when approved by the Navy, would be incorporated as a part of the contract by way of a bilateral modification. We find the schedule PNI submitted on 8 January 1997 was a “practicable schedule,” not a CPM schedule. This finding is based on the fact that the schedule was in the form of a progress chart not in the form of a CPM and was approved by the Navy without it being in a CPM format. Moreover, the Navy did not issue a bilateral modification when it approved the schedule, and PNI registered no complaint at the time about the lack of a bilateral modification.

9. After award of the contract, PNI hired an architect (A/E). When the A/E went out to the site, he discovered floor plans and an engineering study that were not referenced in the RFP. Thus, the A/E had to incorporate what was in the floor plans and

engineering study into the design drawings he was preparing for PNI. (Tr. 348-49) To bring the units into compliance with the Uniform Building Code applicable at the time, the A/E designed into the drawings seismic ties, hold-downs and straps (tr. 81, 349).

10. On 22 January 1997, PNI submitted a Revised Phase 1 Construction Schedule showing a start date of 29 January 1997 and a completion date of 26 March 1997. The ROICC approved this schedule on 24 January 1997. (R4, tab 41) This schedule incorporated the A/E's design (tr. 55).

11. NAVFAC Drawing No. 8092367 (the Site Plan) shows that the housing units to be renovated are located in nine areas (Areas A, B, C, D, E, F, G, H and I). Essentially, there are two main areas since Areas A, B, C, D and E are closely clustered, as are Areas F, G, H and I. Of the 102 housing units to be renovated, Phase 1 covers 20 units in Areas H and I; Phase 2 covers 26 units in Areas F, G and E; Phase 3 covers 20 units in Areas C and D; Phase 4 covers 20 units in Area B; and Phase 5 covers 16 units in Area A. (R4, tab 231)

12. So that the Navy could have an idea of what PNI's work was like, the Navy gave PNI a unit for a model and instructed PNI "to go ahead and do a finished product" (tr. 78). This model unit (a Plan G), located in Area E (No. 3041A), was originally a part of Phase 2 work. PNI began work on the model unit on 8 January 1997. (R4, tab 231) After PNI began work on the unit, it discovered additional structural work that needed to be done "to bring the units up to a standard required by the contract" (tr. 349). Doing a model unit was by mutual agreement of the parties; there was no contract requirement to do so.

13. When it became obvious that the model unit would take some time, the Navy turned over 20 or so units to PNI (tr. 78). Thus, at the time PNI was working on the model unit, it was working on these 20 or so units as well (tr. 357). The Phase 1 units were all in one area, next to each other in a circle (tr. 219).

14. After PNI began work on the model and first few units, it ran into other "unforeseen" work such as missing gas lines, top plates, and shear panels, uneven roofs, and asbestos-laden drywalls and floor tiles (tr. 99, 171-74, 350-51).

15. According to Michael W. Phillips (Phillips), president of PNI, it took from January to July or August 1997 "to identify all the different unforeseen site conditions that we eventually ended up getting paid for in the end" (tr. 32). Phillips testified the "unforeseen site conditions" had two impacts: first, "to the extent that they were on the critical path¹. . . we needed additional days per unit to complete this work." Second, PNI had "a terrible time" in getting the Navy to issue modifications for the added work. (Tr. 32-33)

¹ Although PNI referred to a critical path, it never identified what the critical path was.

16. PNI planned to have a majority of the work, such as cement work, plumbing, electrical and landscaping, performed by subcontractors (tr. 89). It had planned to do some of the work, such as framing, demolition and some of the concrete work, itself (tr. 166). PNI did not enter into some of its subcontracts until February, March and April of 1997 (tr. 394-95). We find that not having subcontractors in place in January 1997 when construction began contributed to the delay in completing Phase 1.

17. On 10 March 1997, PNI provided a schedule showing Phase 1 completion by mid-May 1997 and overall completion in January 1998 (R4, tab 50). No justification for this schedule revision was provided.

18. In a letter dated 18 March 1997, the CO advised PNI that she had grave concerns with PNI meeting its proposed construction schedule approved on 24 January 1997. The letter said that “[i]n review of the approved schedule, every house in phase one is behind schedule.” The letter also pointed out that PNI’s daily production reports did not show plumbing, electrical, cabinets or flooring materials being received, and its cabinet submittal was received two weeks after they were supposed to have been installed. The letter reminded PNI that its Procurement Plan had not been received. PNI was instructed to submit the Procurement Plan and “a revised schedule with actual work performed to date” by no later than 24 March 1997. (R4, tab 208) We find not having construction materials on site contributed to the delays in completing Phase 1.

19. Charles Knief (Knief) was appointed as PNI’s project manager of the El Centro project. He worked “part-time, off-site.” (Tr. 294) Deputy ROICC Robert K. Keiser (DROICC Keiser) testified that Knief and PNI’s superintendent blamed each other’s poor management for not having subcontractors lined up and for not having materials delivered (tr. 611).

20. DROICC Keiser testified that when he assumed his duties in April 1997, PNI was “behind schedule” because it had missed the completion date for Phase 1 and no units had been returned to the Navy. In addition, a number of subcontractors had not been put in place for various items of work, and materials for work that was supposed to have been completed had not been delivered to the site. (Tr. 607)

21. The parties met on 2 May 1997. At this meeting PNI promised to provide an updated schedule. (R4, tab 210) As of 2 May 1997, PNI had not completed or returned any of the Phase 1 units (tr. 609-10). By this time the Navy had repeatedly asked PNI for a schedule update (R4, tab 210).

22. The record shows that, as a result of their negotiations on 3 April 1997, the parties agreed to two bilateral modifications. Bilateral Modification No. A00001 signed by both parties on 9 April 1997, reduced the contract price by \$64,554.00 with no change

in performance period. Bilateral Modification No. A00002, signed by the parties in mid-May 1997 increased the contract price by \$50,528.00 with no change in contract performance period. (R4, tab 2 at 1-4)

23. At the negotiations held on 9 May 1997 on Modification Nos. A00003, A00004, A00005, A00006, and A00007, the Navy gave PNI “all the time that they’d asked for and an agreed-upon price” (tr. 626). As we find *infra*, PNI ultimately refused to sign these modifications (finding 37).

24. Modification No. A00003 (issued 12 August 1997) increased the contract price by \$48,332.00. This modification covered PC #000006 for relocating gas lines running into the kitchens of all but the G units; PC #000008 for placing additional shear blocking on bedroom wall in each unit; and PC #000009 for installing 3” P-traps with hubs at the kitchen sink in 100 units. Each phase of the contract was extended as follows:

- Phase 1 extended 5 CD to 60 days ending 31 March 1997
- Phase 2 extended 1 CD to 56 days ending 26 May 1997
- Phase 3 extended 1 CD to 56 days ending 21 July 1997
- Phase 4 extended 1 CD to 56 days ending 15 September 1997
- Phase 5 extended 2 CD to 56 days ending 10 November 1997²

The modification extended the contract performance period by 10 CDs from 30 October 1997 to 9 November 1997. (R4, tab 2 at 5-6)

25. Modification No. A00004 (issued 12 August 1997) increased the contract price by \$79,161.00. This modification covered PC #000014 for attaching the masonry structure at the ends of each unit to the roof and footings using plywood shear panels and hardware. The modification stated that “[t]he contract period of performance is hereby extended by 34 calendar days as shown below”:

- Phase 1 extended 12 CD to 72 days ending 12 April 1997
- Phase 2 extended 8 CD to 64 days ending 15 June 1997
- Phase 3 extended 5 CD to 61 days ending 15 August 1997
- Phase 4 extended 5 CD to 61 days ending 15 October 1997
- Phase 5 extended 4 CD to 60 days ending 14 December 1997

(R4, tab 2 at 8-9)

² If Phase 5 was extended to 56 days from 55 days, it would only be a one CD extension instead of two. Phase 5, therefore, should end on 9 November 1997 which was a Sunday.

26. Modification No. A00005 (issued 12 August 1997) increased the contract price by \$69,559.00. It covered the replacement of drywall in 79 units beginning with Phase 2. The modification stated that “[t]he contract period of performance is hereby extended by 25 calendar days as shown below”:

Phase 1 extended 5 CD to 77 CD ending 17 April 1997
Phase 2 extended 6 CD to 70 CD ending 26 June 1997
Phase 3 extended 5 CD to 66 CD ending 31 August 1997
Phase 4 extended 5 CD to 66 CD ending 5 November 1997
Phase 5 extended 4 CD to 64 ending 8 January 1998.

(R4, tab 2 at 10-11)

27. Modification No. A00006 (issued 12 August 1997) increased the contract price by \$29,829.00. This modification covered PC #000011 for installing new 3” Wye for clean-outs under each kitchen sink, and PC #000012 for relocating and adding light fixtures in each unit. The modification stated that “[t]he contract period of performance is hereby extended by 25 calendar days as shown below”:

Phase 1 extended 5 CD to 82 CD ending 22 April 1997
Phase 2 extended 6 CD to 76 CD ending 7 July 1997
Phase 3 extended 5 CD to 71 CD ending 16 September 1997
Phase 4 extended 5 CD to 71 CD ending 26 November 1997
Phase 5 extended 4 CD to 68 CD ending 2 February 1998

(R4, tab 2 at 12-13)

28. Modification No. A00007 (issued 12 August 1997) increased the contract price by \$40,529.00. It covered PC #000019 for installing insulation where drywalls were being replaced, and PC #000020 for removing and relocating power pole at one address for access to a new driveway and carport. The modification granted no extension to the contract performance period. (R4, tab 2 at 14-15)

29. There is no evidence that in negotiating and agreeing on time extensions for various phases, the parties took into consideration factors other than how long it would take PNI to complete its work. There is no evidence that the parties considered the extent to which PNI itself might have been responsible for delay to each phase or the project overall.

30. On 7 May 1997, PNI’s Subcontractor Daily Report reported that “production has slowed and [its crews] are upset” when they were told “fringes were no longer being paid as cash.” It was reported on 9 May 1997 that “due to payroll dispute,” crew had to be sent home early, and there was “no production.” Also, there was no roof work done

on the same day pending resolution of a safety issue with Occupational Safety & Health Administration (OSHA)³. It was reported on 12 May 1997 that “again loss of production no roof work due to OSHA. Figure 6 day’s lost from payroll & OSHA, sofar [sic].” (R4, tab 134 at 17, 19, 20) We find labor disputes and OSHA violation also delayed PNI’s work.

31. In a letter to PNI dated 20 May 1997, DROICC Keiser stated:

We note that 63 percent of the contract time has elapsed since your notice to proceed, and to date you have put in place only 39 percent of the work. Your last approved schedule shows you should have completed Phase I over 50 calendar days ago. It is apparent that unless you take corrective action, the remaining phases of the contract will not be completed on time.

Failure to diligently prosecute the work may lead to termination of the contract for default, as described by the “Default” clause (FAR 52.249-10). Failure to complete the work by the contract completion date will result in the assessment of liquidated damages in accordance with Section 1D.16 of the contract specifications (\$250/unit for each calendar day of delay).

We are aware that you believe you have justification for an extension of time. However, since our meeting 2 May 1997, after repeated requests for a revised schedule, and promises from Phillips National, Incorporated to provide said schedule, a schedule has not been forthcoming.

PNI was instructed to submit a revised progress schedule within seven days. (R4, tab 210)

32. DROICC Keiser testified that although PNI was prosecuting the work, PNI was behind schedule inasmuch as it “didn’t even have some of [its] materials on site” (tr. 634), and it was “not forthcoming with a new schedule” that it had promised for weeks (tr. 634, 637). The purpose in writing the 20 May 1997 letter was to let PNI senior management know “we were still looking for a schedule, that none had been forthcoming, and that we were concerned about that” (tr. 638).

³ PNI was assessed and paid a fine to OSHA for the May 1997 violation (R4, tabs 80, 135).

33. In a letter dated 20 May 1997 to the CO, PNI project manager Knief forwarded “Primavera Critical Path Schedule” of “all twenty-one units of Phase One, their original work schedule, and most of the changes on a unit-by-unit representation.” The schedule showed Phase 1 commencing on 29 January 1997 and completing about mid-June 1997. It added durations for additional work such as shimming, shear blocking and masonry wall attachment. The letter stated that he was currently working on rescheduling Phase 2 and would follow with Phases 3, 4 and 5. Knief complained that the Navy’s requests for “a forensic schedule before the completion of the work were actually counterproductive, and most certainly succeeded in tying-up the project manager in the non-productive role of historian at a time when his presence was critically needed at the site, working with subcontractors, superintendents and foreman.” (R4, tab 209 at USN00290-291) Knief did not finish rescheduling Phases 2, 3, 4, and 5

34. At the hearing PNI counsel focused on one paragraph of Knief’s 20 May 1997 letter as evidence that the Navy had accelerated its performance (tr. 40). That paragraph states:

The second schedule, entitled “Start Dates,” demonstrates that Phillips National made multiple starts on the same dates, averaging three crews. This was as we had planned. Later, when it became clear that we would not make the contractual dates, and as requested by the Government, PNI added other crews, increasing our work force to meet the challenge. By that time we were well under way, facing an increased work load due to unforeseen site conditions not known at the time of our proposal, and we reacted to the Government’s request as quickly as possible.

(R4, tab 209 at USN00290)

35. The most significant work PNI had to do involved “seismic upgrade involving hold-downs, sheer [sic] panel[s], attachment to existing walls, blocking” (tr. 99). Phillips testified that in May 1997, PNI was picking up most of the seismic/structural work. This, together with the Navy’s perception that PNI was behind schedule and the uncertainty of what the schedule was, caused it to “throw more bodies at the problem, attempting to accelerate the process.” “We were just trying to do what we could to accommodate the increase in the work and get more done than we had been getting done.” (Tr. 40-41) To the extent PNI threw “more bodies at the problem,” we are unable to find that it did so solely as a result of having to do more work. We find at least a part of the acceleration effort PNI claimed to have expended was to overcome its own failure to have all of the subcontractors and material in place at the start of the construction phase of the project.

36. On 15 May 1997, PNI submitted Invoice No. 003 for \$799,276.86. On 23 May 1997, DROICC Keiser authorized payment in the amount of \$769,276.86. He retained \$30,000 and explained that the “[r]etention is for LDs.” (R4, tab 136; tr. 43) PNI viewed this retention as “adding insult to injury” because it was having “enough trouble managing the financial aspects of the job” in financing all of the modifications with no agreement at that time that it would be compensated (tr. 42).

37. PNI refused to sign Modification Nos. A00003 through A00007. At the hearing, PNI explained that it refused to sign these modifications because the Navy did not agree to pay what it “believed to be a correct rate of field overhead per day” (tr. 141) DROICC Keiser testified that he believed “overhead was part of these modifications” (tr. 627). In reviewing the proposals its project manager submitted in April 1997 for the modifications, we find that PNI at that time was proposing field overhead as 10 percent of its estimated direct materials, labor and equipment (R4, tab 140). PNI’s director of construction, Steven A. Johnson (Johnson), testified that field overhead became an issue when PNI realized that due to the volume of added work, there was a “tremendous increase in the time frame to complete this job” (tr. 142). We find that Modification Nos. A00003 through A00007, as negotiated between the parties on 9 May 1997, included field overhead. We find, based on PNI’s sudden shift in position, the Navy decided to wait until the extent of the contract time extension became clear so that it could more precisely determine PNI’s daily field overhead rate.

38. DROICC Keiser explained that as of 20 May 1997, PNI had not completed Phase 1, and since “[t]hose units were late,” “no matter what the contractor did, he was never going to be able to get back on schedule for Phase 1.” Keiser testified that he felt he had “no choice but to retain some monies for units that were late that we’re never going to get back on time.” When asked whether the Navy delayed PNI, DROICC testified “at the time I had no substantiation from Phillips nor even a request to extend their Phase 1 completion date to a point that would erase any L.D.s.” (Tr. 644) According to Keiser, \$30,000 was a small portion of the amount the Navy could have retained for liquidated damages for the number of days the Phase 1 units were late (tr. 669). Since the contract provided for and authorized liquidated damages for each unit of each sequence of the five phases of construction, we find the DROICC properly retained money for liquidated damages when none of the units turned over to PNI were completed.

39. By letter dated 18 June 1997, PNI advised its kitchen cabinet subcontractor that “you are in default of your contract by not manning the project properly and the work done is not acceptable” (R4, tab 64).

40. DROICC Keiser authorized a retention of \$45,000 more from PNI’s June 1997 invoice (No. 004) (R4, tab 136). Not all of the retention was for liquidated damages (tr. 646). An explanatory note on the invoice stated, “Contractor should have used entire

value of Mod 1, has incorrect amount for Mod 2, and is in LD situation at present” (R4, tab 136).

41. By letter dated 3 July 1997, PNI protested the retention on the ground that no liquidated damages may be assessed since no bilateral modification of an approved schedule existed (R4, tab 7BL at PNI00017).

42. By letter dated 2 July 1997 to the ROICC, PNI’s project manager complained that the Navy had failed to act on its requests “of an extended schedule arising from changes, and our estimated costs of the additional work, some of which was unforeseen site conditions, and some of which was requested by the government.” The letter stated that the Navy’s failure to act had caused its inability to invoice for work completed, and because the schedule had not been changed to reflect the additional work, “the government has taken substantial amounts of money from our monthly invoices.” The letter complained that “[a]ll the time the government refused to deal with the modifications and the time issue, it pushed us into a larger and larger crew, demanding that we accelerate the schedule.” (R4, tab 7BM)

43. The Navy did not respond directly to this letter. DROICC Keiser testified that about this time Phillips had told the Navy to “disregard anything that we got from Knief” (tr. 653), because he was “making some adjustment in management” (tr. 654). With respect to acceleration, DROICC Keiser testified that other than the allegations in Knief’s letter, “there was never any substantiation . . . or demonstration of that acceleration to me.” (Tr. 655)

44. Because the Navy was unable to reach project manager Knief to have him execute Modification Nos. A00003 through A00007 the parties negotiated on 9 May 1997, DROICC Keiser by letter dated 3 July 1997, forwarded the five modifications to PNI’s headquarters in Solana Beach, California, with the following instruction:

Upon execution of these modifications the contract completion date will be extended as noted in A00006 with the final phase ending on 2 February 1998. If you do not agree with our extension days, we will appreciate you contacting us as soon as possible so we can get these modifications executed and begin paying you for the work.

Payment for work included in this modification will not be processed until this modification is executed by the Government.

(R4, tab 69) According to DROICC Keiser, he forwarded the modifications because the Navy “wanted to give Phillips the opportunity to be able to bill for work which we agreed was changed and now part of the contract” (tr. 611-12).

45. The parties met on or about 10 July 1997 at NAVFAC’s Southwest Division in San Diego. At the meeting, the Navy expressed concern about where PNI was on the project, and what it was going to do to bring the project on schedule. (Tr. 58, 114, 186)

46. A second meeting was held in El Centro on 17 July 1997. At this meeting, PNI presented two alternative schedules to complete the project: Plan A – Single Track, and Plan B – Double Track. (R4, tab 211) By July 1997, PNI had a “pretty solid” idea of what additional work needed to be incorporated into the project and what might be the impact (tr. 61, 116).

47. Under Plan A, PNI proposed to complete by 31 July 1998. This plan contemplated “Current PNI crews and on-site management/overhead.” It depended upon Navy Housing providing a continuous flow of 26 unoccupied units, with PNI receiving and returning one building⁴ each seven to eight days. Under Plan B, PNI proposed to complete by 31 January 1998, six months earlier. This plan would require a significant increase in “Current PNI crews and on-site management/overhead.” It depended upon Navy Housing providing a continuous flow of 52 unoccupied units with PNI receiving and returning two buildings every seven or eight days. Both plans called for abandoning the phase requirement and assessing liquidated damages only for periods beyond the contract completion date, as extended. (R4, tab 211; tr. 668) Johnson, PNI’s director of construction, who was at the meeting, testified that the Navy was not interested in Plan B (tr. 119).

48. On 18 July 1997, one day after the El Centro meeting, John V. Cowles, III, (Cowles) relieved Knief as project manager (R4, tab 213). Based on the evidence in the record, we find Knief’s failure to line up subcontractors, his failure to have materials on site, and his failure to update PNI’s schedule contributed significantly to the lack of direction the project experienced up to July 1997.

49. As a result of discussions held at El Centro on 17 July 1997, PNI prepared a progress schedule (the July 1997 Schedule) and submitted it to the DROICC on 28 July 1997 for approval (R4, tab 5; tr. 613). In developing this schedule, PNI had consulted with Base Housing about having the units released in a manner most conducive to a “serpentine” production sequence (tr. 665-66). The July 1997 Schedule shows 29 July 1998 as the completion date.

⁴ A majority of the buildings are duplexes with two units. Some buildings have only one unit. (See R4, tab 231)

50. DROICC Keiser's 30 July 1997 letter to PNI stated:

Your Progress Schedule dated 28 July 1997 is approved as to general sufficiency for planning and control in accordance with FAR Clause 52.236-15, "SCHEDULE FOR CONSTRUCTION CONTRACTS," (APR 1984) of the Contract Clauses subject to compliance with detailed requirements of the contract plans and specifications. It is understood by the Government that the 29 July 1998 completion date includes time required for all proposed changes known to date.

Returned with the letter was a copy of the progress schedule with the notation "Approved by RK Keiser." (R4, tab 17)

51. Phillips testified when he received this letter, he understood that PNI had been given a time extension until 29 July 1998 (tr. 63-64). ROICC Keiser testified that he viewed the July 1997 Schedule as PNI's "best estimate of when it would complete the work was July 1998" (tr. 656). He testified that in approving the July 1997 Schedule, the Navy did not "see this as a change to the contract for which we're going to not assess liquidated damages" (tr. 662).

52. According to DROICC Keiser, before he approved the July 1997 Schedule, the parties had "considerable discussion of this schedule" even to the point of how his acceptance letter should be worded:

Both parties were concerned that this schedule might be misconstrued. Phillips was concerned that in presenting this schedule, which we understood to be Phillips' new management's best estimate of when they were actually going to complete the project, the Government was concerned that the schedule might be considered a change to the contract, even though it was not incorporated via an SF-30 into the contract.

We were concerned that it might be considered an extension of the contract time. And Phillips was concerned that if they ran into further differing site conditions, that this schedule would constrain them to the ending date that is stated on the schedule.

(Tr. 613-14)

53. The phrase “approved as to general sufficiency for planning and control” was crafted by three individuals: DROICC Keiser, project manager Cowles, and Thomas J. Lamary, PNI’s director of operation, housing maintenance (Lamary) (tr. 614). All three agreed the phrase “sounded appropriate for the purposes of the letter” (tr. 661). Since Phillips does not appear to have been “in the loop” on the discussions, and since both Cowles and Lamary did not refute DROICC Keiser’s testimony in this regard, we find that approval of the July 1997 Schedule did not represent a contract time extension to 29 July 1998. Rather, that date was PNI’s new management team’s best estimate at the time as to when the project would be completed. Before PNI switched from its incomplete phase-based schedule to the non phase-based July 1997 Schedule, there was no accounting of which party was responsible for what delay.

54. PNI submitted its Invoice No. 005 on 16 July 1997. Consistent with the parties’ agreement at the 17 July 1997 meeting not to attach liquidated damages to phases, DROICC reduced the \$75,000 total retention as of the June 1997 invoice by \$45,000 to \$30,000 (R4, tab 136; ex. 1010). He continued to retain the \$30,000 for Phase 1 since PNI could not “get back on schedule for Phase 1” (tr. 644).

55. Unable to get PNI to sign Modification Nos. A00003, A00004, A00005, A00006, and A00007, the CO issued these modifications unilaterally on 12 August 1997 (R4, tab 2 at 5, 8, 10, 12, 14; tr. 69).

56. The parties entered into bilateral Modification No. A00008 effective 12 September 1997. This modification substituted FAR 52.211-12, LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984) for “any other Liquidated Damages Clause” in the contract. The substituted clause provides, in part, as follows:

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of \$180.00 per unit for each day of delay.

....

(c) If the Government does not terminate the Contractor’s right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

(R4, tab 2 at 16-17) The Navy’s withholding of \$30,000 since May 1997 did not appear to be at issue at this juncture.

57. A 5 August 1997 memorandum to PNI from the Director of Housing at NAF, El Centro, indicated that of 22 housing units, a majority of them had been turned over to PNI as of that day or would be turned over on 7 August 1997, and several would be turned over as soon as renovation of other units was completed. (R4, tab 73) Based on the Site Plan (R4, tab 231), we find these 22 units were located in Areas A, B, and C, within close proximity to each other.

58. At a meeting held on 15 August 1997, the Navy indicated to PNI that it would turn over buildings “one for one” and would stage the buildings in groups of four in the same location as a minimum but “with no precise locations identifiable other than what comes up.” At a meeting held on 28 August 1997, PNI advised the Navy that “[a]s of this date we have not received any additional units in the agreed upon sequence which would allow us to have 4 buildings in a group.” The minutes of the 28 August 1997 meeting mentioned that receiving buildings in groups of four would be precluded if the Navy decided not to occupy the completed units until air conditioning was installed. PNI warned that:

if these conditions continue we will have to initiate manpower layoffs of a magnitude that will literally destroy our ability to accurately schedule and subsequently perform future work on this job. We would like to work with your office to eliminate that costly probability.

(R4, tab 216 at 4)

59. PNI also advised the Navy that in just 60 days, it would be placed in a position of financing 100 percent of “the unabsorbed future overhead which was not provided for in the original bid for the extended performance due to contract changes and scheduling disruptions.” PNI asked that the parties negotiate a daily field overhead rate as soon as possible “as we can no longer afford these out of pocket expenses.” (R4, tab 216 at 5)

60. In a letter dated 3 September 1997 to the CO, PNI’s project manager requested “an additional 30 days of extended schedule and moneys [sic] to fund the additional overhead” (R4, tab 215). Apparently, the Navy decided not to relocate families into houses without air-conditioning, and that had caused a lack of houses being released to PNI.

61. By letter dated 5 September 1997 to the ROICC, PNI stated that the Navy’s inability to provide units on a “double track” basis caused it to pursue a “single track” where “one (1) crew for each trade or segment of work follows in order through the project.” PNI stated that the one track sequencing “shows a completion date of 9 March 1998,” and “requires the contractor to have in its possession a minimum of

20 units at all times, plus an additional 8-9 units held unoccupied and in reserve.” PNI’s letter went on to request a time extension of 150 CDs, at a “negotiated per day field overhead rate,” plus G&A, profit and bond premium. The letter said that “[u]pon resolution of this basic concept, we should be ready to address the effects of disruption, delay, additional work and current ongoing delays to the schedule, and then the costs of those effects.” (R4, tab 7BP)

62. By letter dated 1 October 1997, PNI notified the CO that it had experienced “cost due to out of sequence work and delay due to design in footings.” PNI stated that the out-of-sequence work was caused by the late turnover of 10 buildings and remedial work on the footings. The letter said that due to “the scattering of these houses,” PNI had incurred “added costs” with supervision, clean up, logistics, security and subcontractor cost in the estimated amount of \$23,148.72. PNI asked the CO to “issue additional funds to cover the above costs.” (R4, tab 219)

63. According to a 4 November 1997 memorandum, Base Housing planned to turn over two houses to PNI on 5 November, six houses on 6 November, and four houses on 10 November 1997 (R4, tab 89). Based on the Site Plan, we find these houses are located in Areas B and D. They are located either next to, or across the street from, each other. (R4, tab 231; tr. 619)

64. As far as whether the Navy turned over housing units in the sequence set out in the approved July 1997 Schedule, PNI’s witness testified “Some of the time they were provided in order. Some of the time they were provided at different parts of the facility. Sometimes we had more than we asked for. Sometimes we had less.” (Tr. 134) PNI’s on-site superintendent testified that when he first arrived at El Centro in July 1997, and towards the end of the project, housing units were provided by street. In between, however, “it was completely just back and forth everywhere.” Although it did not take more hours to renovate each unit, it took extra time to set up and travel from house to house. (Tr. 316, 332) Rather than wait to work on a unit until it fit into a more sequential pattern, PNI decided to work on the out-of sequence units because it was “a function of having something to do rather than nothing to do” (tr. 135).

65. The Navy did not have problems getting the residents out of the housing units. Generally, turnover of the units to PNI “went very smoothly.” DROICC Keiser testified that the order in which the Navy provided the units, while not exactly as contemplated in the July 1997 Schedule, nonetheless “fairly closely matched what’s in the schedule,” and those out-of-sequence housing units were “very close together.” He also testified “we never had any indication that the manner in which . . . Phillips was proceeding was being impeded by the number of units that we were giving them or the order that we were giving them.” (Tr. 675-76)

66. Based on our evaluation of the testimony of various witnesses, and PNI's annotated Site Plan (showing the dates PNI began work on various buildings) (ex. 1012), we find that the actual turnover of housing units, while not exactly as contemplated in the July 1997 Schedule, was not totally out of sequence in terms of timing and location. While the sequence of performance might not have been ideal for PNI, it was not as chaotic as PNI would have us believe.

67. By letter dated 19 November 1997 to DROICC Keiser, PNI's project manager advised:

As of July 27, 1997, we accelerated our work force to accommodate the government's interest in a finish date prior to July 29, 1998. This Revised Schedule reflects that acceleration, plus added acceleration to overcome delays not initiated or sponsored by Phillips National. Please note that added time has been added to the Original Duration due to the HVAC delay. These and other delays have been overcome by aggressive acceleration and added personnel.

(R4, tab 7BM at 3) PNI did not substantiate and has not since substantiated the allegations in this letter by any documentary evidence or schedule analysis.

68. In reply to PNI's 19 November 1997 letter, DROICC Keiser's 1 December 1997 letter stated that the schedule PNI forwarded "does not represent fact in a number of instances." The letter pointed out that the schedule showed 8 January through 5 May 1997 as devoted solely to the model unit, but PNI was actually "working on all the homes in Phase I, and . . . most of the homes from Phase II." The letter disputed PNI's assertion that to finish prior to 29 July 1998 was for the Government's interest inasmuch as that date was proposed by PNI, when it was "significantly behind the contractually agreed upon schedule" due to "material delivery and site work." (R4, tab 224)

69. With respect to PNI's 19 November 1997 letter, DROICC Keiser testified that "[w]hile we might have been interested in a completion date sooner than that [29 July 1998], we certainly did not direct the contractor to complete any sooner than what he told us he was going to complete" (tr. 683).

70. When asked why PNI was accelerating to finish prior to 29 July 1998, Lamary (PNI's Director of Operation) testified "They showed an interest . . . they gave us a date, but they insinuated or indicated that they wanted completion earlier if possible." Lamary explained "there's so much ambiguity surrounding the project . . . So we had to take every precaution to be proactive to help ourselves and accommodate our customer." (Tr. 207)

71. According to Lamary, in its effort to finish early, PNI stacked its trades. It crammed “a lot of craft tradesmen into a unit because there’s just no other way to do it” (tr. 216). According to project manager Cowles, acceleration involved using PNI’s work force to do some of its subcontractors’ work “[i]nstead of sending them home” (tr. 274). PNI “did do a bit of overtime,” and it worked some Saturdays (tr. 274, 299). When it worked overtime, it did so to keep pace with the subcontractor’s work (tr. 220). Other than this general testimony, there is no specific evidence of when and where acceleration occurred. DROICC Keiser testified that he never requested PNI to work overtime, and he observed no acceleration (tr. 616, 687). PNI’s payrolls and daily reports do not substantiate PNI accelerated (tr. 690).

72. Over PNI’s objection, the Board received into evidence as Ex. 2000 a summary of PNI’s work hours and work force throughout the project (from 8 January 1997 to 22 May 1998). The summary is based on the Contractor Production Reports already in the Rule 4 file (R4, tab 132). The accuracy of the summary, therefore, can be verified from the underlying reports from which the summary was compiled (tr. 587-88). We have randomly checked the summary against the Contractor Production Reports and are persuaded that the summary is reliable. PNI has not disputed the accuracy of the contractor production reports nor the summary in Exhibit 2000.

73. The summary shows that after a slow start, PNI gradually increased its work force to 30 by late April 1997. From April 1997 to late March 1998, PNI’s work force fluctuated mostly from the mid 20’s to the low 30’s. PNI’s work force dropped off to the high teens in late March 1998, and gradually decreased to the mid teens through mid-May 1998. PNI’s average daily work hours hovered around seven or eight hours, with rare spikes to 9, 10, 11 and 12 hours. (Ex. 2000) PNI’s total work force, including its subcontractors, fluctuated to a higher degree. The record does not allow us to attribute the fluctuations to specific causes. Based on what the numbers show, we are unable to find support for acceleration. To the contrary, we find PNI proceeded at a fairly even pace, and by 22 May 1998, it and its subcontractors simply ran out of work.

74. PNI’s El Centro Hire/Termination log in the record for the period 1 January 1997 to 30 May 1998 shows that subsequent to 30 July 1997 when DROICC Keiser approved PNI’s July 1997 Schedule, PNI hired 7 new workers but terminated 52 workers, 25 of whom were terminated after April 1998 when the project was nearing completion. (R4, tab 131) Thus, the record does not support that PNI accelerated by hiring additional workers.

75. An internal PNI memorandum dated 22 December 1997 indicated that PNI had a budget of \$10,700,000, “inclusive of some contingency,” based on completing the contract on 30 April 1998, and that budget had been exhausted four months early as of December 1997 (R4, tab 227; tr. 223). Lamary testified that PNI felt pressured to finish early because the Navy was unwilling to acknowledge that PNI was entitled to extended

field overhead associated with the additional work. PNI believed that by refusing to address extended field overhead, the Navy was spending its money and making PNI finance the additional work. Lamary testified PNI attempted to finish early following approval of the July 1997 Schedule “in an effort to try to minimize our costs” and because “We were paying overhead . . . and we didn’t know how many years it would take to get paid” (tr. 205). In this regard, Phillips and Johnson both acknowledged that no one in the Navy told them to accelerate the El Centro project (tr. 83, 154). Project manager Cowles acknowledged that Phillips and Johnson told him to finish the job as quickly as possible and to get PNI out of El Centro (tr. 296)

76. In a memorandum dated 26 February 1998 to his superiors at PNI, project manager Cowles reported that PNI had completed 71 units, expected to complete 12 units in March 1998 and 19 units in April 1998, and to finish all 102 units by the end of April 1998. The memorandum stated that “[t]he end date is still the same, but we will have more manpower as soon as the demo start to let off.” (R4, tab 232) Cowles explained that without further demolition required, “we can use the people from the demolition to do other tasks” such as moving materials, framing and helping subcontractors (tr. 287-88). Cowles testified “*we just stayed with our original plan, just rearranged some items. I think we were shooting for getting out in April in any case. We were looking at an April date*” (emphasis added) (tr. 285). We find that PNI’s management directed and advanced the completion of the project to April 1998 from 29 July 1998 in order to minimize the expenditure of daily field overhead.

77. After refraining from retaining any money from PNI’s invoices from July 1997 through March 1998, DROICC Keiser increased the Navy’s retention from \$30,000 to \$188,132 against Invoice No. 014 dated 30 April 1998 (ex. 1010). When contacted by PNI, DROICC Keiser indicated that the retention was for “possible liquidated damages at \$180 per day for the days past the contract completion date” (R4, tab 7BL).

78. PNI’s 1 May 1998 letter objected to the increase in retention, and requested its elimination. The letter stated that as of the invoice date, the Navy had beneficial occupancy of 87.2 percent of the units, and the remaining units “will all be completed and turned over within 2 weeks.” PNI argued that the Navy had approved a 29 July 1998 completion date, and that the Navy had agreed that PNI had performed additional work for which no time extension had yet been granted. (R4, tab 7BL)

79. PNI had the last house signed off by the Navy on 21 May 1998 (tr. 347). Thus, it finished the contract 69 CDs earlier than it projected in the July 1997 Schedule.

80. The parties negotiated on 30 July 1998 and were unable to agree on additional time to which PNI was entitled for the changes to the contract. On 26 August 1998, the CO unilaterally issued Modification No. A00017. The modification extended the contract performance period by 49 CDs from 2 February to 23 March 1998. At \$1,660

per day, the modification granted \$81,340.00 (\$1,660 x 49 days) in extended field overhead. (R4, tab 2 at 35-36)

81. By the time the Navy processed Invoice No. 014 in May 1998, the renovation project was less than three weeks from completion. The summary of Contractor Production Reports shows that PNI's total work hours (including subcontractor work hours) dropped from over 400 to around 250 hours per day. PNI's own work hours dropped from around 250 to around 125 hours per day. The numbers of PNI and total workers dropped by a half. Average work hours of all workers remained at eight and occasionally nine hours per day. (Ex. 2000) From these numbers, we find that the Navy's retention of \$158,132 more from PNI's 30 April 1998 invoice (No. 014) did not cause PNI to accelerate.

82. DROICC Keiser notified PNI by letter dated 15 October 1998 that "settlement of the remaining contract issues does not seem likely. The Disputes clause, FAR 52.233-1, provides appropriate remedies." (R4, tab 7BR) On 14 May 1999, PNI submitted a certified claim in the amount of \$2,266,367. The claim consists of six parts:

| | |
|---|---------------------|
| [I.] Additional structural work | \$ 529,168 |
| [II.] Asbestos premium for removal of drywall | \$ 203,338 |
| [III.] Removal of additional VAT flooring and mastic | \$ 317,434 |
| [IV.] Installation of gas-line | \$ 13,374 |
| [V.] Relocation of fire hydrant | \$ 4,112 |
| [VI.] Schedule changes | <u>\$ 1,198,941</u> |
| GRAND TOTAL | \$ 2,266,367 |

(R4, tab 7 at 74)

83. PART VI of PNI's claim deals with "SCHEDULE CHANGES IMPOSED BY THE NAVY." A part of PART VI deals with acceleration. Essentially, PNI argues in its claim that after the Navy approved the July 1997 Schedule, it failed to recognize 29 July 1998 as the contract completion date and pay all delay costs incurred by PNI through 29 July 1998. PNI alleged that "[t]his forced PNI to complete the contract on May 21, 1998, 69 calendar days earlier than the date approved by the Contracting Officer." PNI alleged that this forced early completion constituted constructive acceleration on the part of the Navy. (R4, tab 7 at 69)

84. PNI alleged in its claim that by accelerating completion of the contract by 69 CDs, it was forced to dedicate "an additional 18,029 labor hours to the contract beyond what would have been necessary to complete the contract by July 29, 1998" (R4, tab 7 at 72).

PNI contends that it is entitled to \$514,908.24 ($\$28.56^5 \times 18,029$ hours) plus \$28,422.94 in home office G&A costs, \$49,947.47 in profit, and \$38,083.86 in bond for a total of \$631,362.51.⁶ (Tr. 522-27)

85. After PNI filed its claim, the parties were able to settle all but the issue relating to acceleration. As shown in bilateral Modification No. A00020, signed by the parties in early May 2000, the contract price was increased by \$1,192,532.00. This amount included removal of additional asbestos floor tiles (PC #000054), additional work for seismic upgrades (PC #000055), removal and replacement of drywall sheets (PC #000056), using hot taps on 12 units (PC #000058), extended field overhead for 203 days⁷ “due to Government caused delay on the above changes” (PC #000059), and \$82,941.00 in interest charges “from the date the contractor’s claim was received until the expected pay date of 17 May 2000.” (R4, tab 2 at 43) At some point, the Navy released the money it retained for potential assessment of liquidated damages (tr. 74).

86. Bilateral Modification No. A00020 included a release with the following exception:

With the sole exception of PNI’s claim of acceleration by the government, this modification reflects the settlement of all contract issues and disputes and is full and complete compensation for all liabilities, obligations, claims and demands, without reservation The alleged Government’s acceleration of PNI remains unresolved and is the only issue that PNI may still pursue, through Contract Disputes procedures, after execution of this modification. PNI may seek a contract adjustment for all costs, profit, interest and attorneys fees arising from the unresolved acceleration issue.

(R4, tab 2 at 43)

87. By letter dated 20 November 2000, NAVFAC contracting officer, Paul J. Kennedy (CO Kennedy) issued his final decision on the remaining acceleration claim.

⁵ PNI claims this amount as its average fully burdened labor rate (tr. 523).

⁶ The other part of PART VI deals with “Delay Costs.” PNI claimed \$1,198,941 for all of PART VI. (R4, tab 7 at 73)

⁷ Presumably, the 203 CDs covered the period from 30 October 1997, the original contract completion date, until 21 May 1998, the date PNI completed the El Centro contract.

Although the CO acknowledged that “some of the elements of acceleration appear to be present,” he found that PNI “ha[d] not furnished any convincing evidence that it suffered damages as a result of being accelerated by the government.” (R4, tab 14 at 3) As his reasons for denying the acceleration claim in its entirety, CO Kennedy pointed out that while PNI’s subcontractors were performing a large portion of the renovation work, there was no indication of increased costs paid to subcontractors, and while PNI increased its work force, there was no proof that it did so as a result of Government pressure. As for PNI’s claim of experiencing inefficiencies as a result of the alleged acceleration, the CO contended that there was “no detailed explanation as to how the inefficiencies occurred given that the housing units are separate and distinct from one another and were ultimately made available to the contractor faster than required by the contract.” (*Id.* at 3)

88. PNI filed a timely notice of appeal by letter dated 23 January 2001.

89. CO Kennedy elaborated at the hearing why he was not persuaded that PNI accelerated at the Navy’s direction. First, he testified he “did not see anything in the file or the record . . . that indicated that the Government ever directed Phillips National to accelerate,” and that PNI did not provide “any specific information regarding any specific direction” (tr. 537). Second, he testified he saw no evidence of acceleration: there was no evidence of any substantial amount of overtime pay (tr. 533), there were no subcontractor complaints that indicated they were impacted (tr. 534), and there was no proof that “additional manpower was being brought to the job specifically to accelerate performance” (tr. 538). Third, PNI provided no schedule analysis, or even its original estimate so that the Navy had a basis for comparison of the impact of any alleged acceleration (tr. 540).

90. PNI has never presented any schedule analysis, CPM or otherwise, to the CO or to the Board, to support its contention that it was entitled to a contract time extension to 29 July 1998, due to excusable delays.

DECISION

A brief overview of this case might be helpful: PNI was awarded a design/build contract to renovate 102 housing units. The contract was divided into a design phase and a construction phase. The contract further divided the construction phase into five phases. The Navy approved PNI’s practicable schedule submitted in January 1997. No CPM schedule required by Paragraph 1D.2.1c.B was submitted; hence no bilateral modification was issued incorporating an approved schedule into the contract (finding 7). As PNI began the construction phase of the contract, it found numerous unforeseen conditions that required contract modifications. PNI was slow in incorporating its actual progress into a progress schedule when directed by the DROICC to do so. As a result, neither party had a sense of when the contract might be completed. In July 1997, after it

obtained a “pretty solid” idea of what additional work needed to be incorporated into the project (finding 46), PNI proposed abandoning the phase-based schedule and substituting one of its two non phase-based schedules. The Navy approved Plan A – Single Track, based on PNI’s then existing “crews and on-site management/overhead” as PNI’s “best estimate” that it would complete the contract by 29 July 1998 (findings 47, 51), but did not agree that PNI was entitled to a contract time extension to that date. PNI actually completed the project on 21 May 1998, 69 CDs ahead of its projected completion date. It claims that it did so because the Navy constructively accelerated its work.

PNI contends that given the amount of additional work it had to perform as of 28 July 1997, when it submitted its July 1997 Schedule, a 29 July 1998 completion date was reasonable. It contends that it was entitled to an equitable adjustment of \$631,362.51 under the theory of constructive acceleration when it “completed construction on 21 May 1998, 69 days earlier than the planned 29 July 1998 completion date because it became clear to PNI in August 1997 that the Government was not using the 28 July 1997 schedule as a baseline.” According to PNI, it “decided to finish the project as quickly as it could to mitigate any possible damages.” (App. br. at 19, ¶ 62)

To recover for increased costs of acceleration under the Changes clause, a contractor must establish that: (1) any delays giving rise to the order were excusable, (2) the contractor was ordered to accelerate, and (3) the contractor in fact accelerated performance and incurred extra costs. *Norair Engineering Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981).⁸ A constructive order to accelerate differs from a direct order to accelerate in that a constructive order to accelerate “need not be couched in terms of a specific command. A *request* to accelerate, or even an expression of concern about lagging progress, may have the same effect as an order” (emphasis in text). *Id.* at 549.

Has PNI Established That It Was Excusably Delayed?

As PNI itself recognizes, in order to establish constructive acceleration, it has to show that its contract should and would have been excusably extended to 29 July 1998. In this regard, it is generally recognized that a contractor is not entitled to a time extension upon the mere occurrence of an event. The contractor must show that the event

⁸ As indicated in footnote 5 of the *Norair* opinion, the court considered two more elements—that the contractors specifically request an excused delay and that the request be denied—to have been “in effect equivalent” to the second element. 666 F.2d at 548. The ASBCA has set out a similar five-element test for constructive acceleration. *Fermont Division, Dynamics Corporation of America*, ASBCA No. 15806, 75-1 BCA ¶ 11,139 at 52,999-53,000, *aff’d*, 216 Ct. Cl. 448 (1978); *Commercial Contractors Equipment, Inc.*, ASBCA Nos. 52930 *et al.*, 03-2 BCA ¶ 32,381 at 160,261.

caused delay to the overall completion of the contract and must establish the number of days of relief to which it is entitled. JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 579 (3d ed. 1995); *Essential Construction Co.*, ASBCA No. 18491, 78-2 BCA ¶ 13,314 (to establish entitlement to a time extension, there must be (1) identification of the work controlling the overall completion of the contract, and (2) a showing that this controlling work was delayed).

In this case, the Navy ordered a substantial amount of additional work uncovered during the design and construction phases of the contract. Modification No. A00020 acknowledged responsibility for delay to 21 May 1998. PNI, however, must show excusable delay to 29 July 1998. The mere ordering of additional work did not in and of itself entitle PNI to a time extension to 29 July 1998. The evidence shows after repeated requests by the Navy, PNI finally submitted a “Primavera Critical Path Schedule” for Phase 1 only in May 1997. Notwithstanding its promise, PNI never completed an updated schedule for the other four phases. As a result of two meetings in July 1997, PNI came up with a non phased-based schedule and submitted it on 28 July 1997. This schedule projected a 29 July 1998 completion date. (Finding 49) The record leaves no doubt that approval of the 29 July 1998 completion date was not a definitive time extension to that date. We have found this schedule to be PNI’s new management’s best estimate at the time as to when the project would be completed. (Findings 50-53)

The record in this appeal established that PNI itself was responsible for delays. We have found that PNI did not enter into some of its subcontracts until February, March and April of 1997, and not having subcontractors in place when construction began contributed to the delay in completing Phase 1 (finding 16). We have found that not having construction materials on-site also contributed to the delay in completing Phase 1 (finding 18). Moreover, labor disputes and OSHA violations in May 1997 delayed PNI’s work (finding 30). There was no accounting of which party was responsible for what delays when PNI switched from its incomplete phase-based construction schedule to the non phase-based July 1997 Schedule (finding 53). Although much of PNI’s own delays appear to have occurred during the first five months of the construction phase (January to May 1997), a part of the acceleration effort PNI claimed to have expended was required to overcome its own initial delays (finding 35).

Ultimately, entitlement to a time extension to a specific date – in this case 29 July 1998 – due to excusable reasons must be based on particulars, not generalities. There must be a demonstration of which housing units were critical, to what extent the critical units were delayed, taking into account those delays the contractor itself had caused. PNI has not done that in this case.

Because PNI has never presented a schedule analysis, CPM or otherwise, to the CO or to the Board, to separate the delays caused by the changes from its own delays

(finding 90), we conclude that it has failed to establish that it was entitled to an excusable contract time extension to 29 July 1998.

Has PNI Established That The Navy Through Its Actions Pressured It Into Completing The Contract By 21 May 1998?

In *Norair*, The Court of Claims stated that “[t]he pressure applied, even if it were merely implicit . . . is particularly strong where liquidated damages hover in the background,” 666 F.2d at 549. PNI alleges that it was pressured into accelerating to complete on 21 May 1998 because the Navy retained money for liquidated damages (app. br. at 16).

The Navy first retained \$30,000 against Invoice No. 003 on 23 May 1997 (finding 36). PNI contends that since no bilateral modification incorporating an approved schedule was issued, no liquidated damages should have been retained (app. br. at 47). We cannot place the blame for the lack of a bilateral modification at the Navy’s doorstep. We have found the contract required two separate schedules: FAR 52.236-15 required a “practicable schedule,” and ¶ 1D.2.1c.B5 required a construction schedule using CPM. We have found the schedule PNI submitted on 8 January 1997 and approved by the ROICC on 13 January 1997 was a practicable schedule. (Finding 8) Even though it ultimately reluctantly submitted a Primavera Critical Path Schedule on 20 May 1997, five months after construction started, that schedule was for Phase 1 only. PNI never completed a CPM schedule for the entire project as required by ¶ 1D.2.1c.B5. (Finding 33) Without a CPM schedule, there was nothing to approve, and it follows no bilateral modification incorporating an approved CPM schedule could have been issued.

Because PNI was the one that failed to comply with ¶ 1D.2.1c.B5, we cannot reward it by relieving it from the liquidated damages provision of the contract at ¶ 1D.2.1c.B6 (*see* finding 5). The question then becomes whether the Navy was justified in retaining the \$30,000 from PNI’s 15 May 1997 invoice. The answer depends on whether PNI was behind schedule as of the time of withholding, *i.e.*, on 23 May 1997.

The practicable schedule PNI submitted on 8 January 1997 and which was approved by the ROICC on 13 January 1997 shows 11 April 1997 as the Phase 1 completion date (finding 7). On 22 January 1997, PNI submitted a revised practicable schedule for Phase 1 that the ROICC approved on 24 January 1997. This schedule shows 26 March 1997 as the Phase 1 completion date. (Finding 10) When the Government approves a substituted schedule without manifesting its intention to maintain the original schedule, it is bound by the substituted schedule for purposes of assessing liquidated damages. *JEM Development Corporation*, ASBCA No. 42872, 92-1 BCA ¶ 24,709 at 123,338; *La Grow Corporation*, ASBCA No. 42386, 91-2 BCA ¶ 23,945 at 119,914; *D&S Roofing Company, Inc.*, ASBCA Nos. 28130, 29109, 85-2 BCA ¶ 18,114 at 90,947.

The evidence shows that on 9 May 1997, using 26 March 1997 as the starting point, the parties negotiated several modifications (Modification Nos. A00003, A00004, A00005 and A00006) extending the Phase 1 completion date to 22 April 1997 (findings 24-27). Even though PNI later refused to sign these modifications, its refusal was unrelated to whether an extension to 22 April 1997 was appropriate (finding 37). With 22 April 1997 as the Phase 1 completion date, the evidence shows that as of 20 May 1997, PNI had not completed Phase 1 (finding 38). We conclude, therefore, DROICC Keiser properly retained \$30,000 for liquidated damages from PNI's May 1997 invoice. The retention was in accordance with ¶ 1D.2.1c.B6 of the contract. As far as retaining \$158,132 more from PNI's Invoice No. 014, dated 30 April 1998, is concerned, we have found that by May 1998 the project was less than three weeks from completion, and the evidence does not support that PNI accelerated (finding 81).

Moreover, inasmuch as the original contract amount was in excess of \$7.5 million (finding 3), we do not believe that withholding \$30,000 (0.4 percent of the contract amount) could have placed so much pressure on PNI to cause it to embark on a \$600,000 acceleration effort. The real reason PNI completed the project on 21 May 1998, 69 CDs ahead of its own estimate of 29 July 1998, was that it did not provide for enough contingency to fund a large amount of the changes, and what it did provide for was exhausted in December 1997 (finding 75). In this regard, PNI's director of operations acknowledged that PNI accelerated "to help ourselves" (finding 70). While this might have been a prudent business decision, it does not follow that the Navy should pay for it. Even though the changes ordered by the Navy were substantial, PNI has not taken the position that the changes ordered were beyond the general scope of the contract or the permissible limits of the CO's discretion. The right to order changes is an open-ended right, and there is no reasonable interpretation of the Changes clause that would limit that right numerically. *Seeger v. United States*, 469 F.2d 292, 302 (Ct. Cl. 1972) (holding no recovery unless "the number of changes went beyond the permissible limits of the contracting officer's discretion").

We conclude the Navy's action in withholding liquidated damages in May 1997 and April 1998 did not cause PNI to finish the project early, on 21 May 1998. Rather, PNI's completion of the project 69 CDs earlier than it had projected was driven by its management's decision to minimize its field overhead, due to the large volume of legitimate changes it did not anticipate.

Has PNI Proved That It In Fact Accelerated?

Exhibit 2000, a summary based on the Contractor Production Reports, shows that after a slow start, PNI's work force fluctuated from the mid 20s to the low 30s from April 1997 to late March 1998. There was a drop off to the high teens in late March 1998, and a gradual decrease to the mid-teens through mid-May 1998. (Finding 73) PNI's Hire/Termination log shows that subsequent to 30 July 1997 when

DROICC Keiser approved PNI's July 1997 schedule, PNI hired 7 new workers but terminated 52 workers, 25 of whom were terminated after April 1998 when the project was nearing completion (finding 74). We found that PNI proceeded at a fairly even pace, and by 22 May 1998, it and its subcontractors simply ran out of work (finding 73). On the record before us, we cannot conclude that PNI accelerated to meet the otherwise unachievable 21 May 1998 completion date.

PNI contends that the primary way it accelerated was by "rolling employees back into the job" rather than laying them off (app. reply br. at 34). Inasmuch as PNI accelerated not as a result of Navy direction or pressure but as a result of its management's decision to get out of El Centro as quickly as possible to minimize funding more change orders (finding 75), we conclude that its decision not to lay off employees was undertaken to advance its own goal, not the Navy's.

CONCLUSION

Because PNI has failed to prove the essential elements for constructive acceleration, we hold it is not entitled to the equitable adjustment claimed. The appeal is, therefore, denied.

Dated: 16 March 2004

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
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. 53241, Appeal of Phillips National, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals