

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
Red Sea Engineers & Constructors, Inc ) ASBCA Nos. 57448, 57589, 57590  
 ) 57591, 57592, 57593  
Under Contract No. W91B4M-09-C-7340 )

APPEARANCES FOR THE APPELLANT: R. Dale Holmes, Esq.  
Louisville, KY

Terence J. Kelley, Esq.  
New Bern, NC

Neil Kelley, Esq.  
Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
MAJ Joon K. Hong, JA  
MAJ Samuel E. Gregory, JA  
MAJ K.L. Grace Moseley, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Red Sea Engineers & Constructors, Inc. (Red Sea) appeals the termination for default of the captioned contract (Contract 7340) (ASBCA No. 57448) and the deemed denials of its claims for breach damages and compensable extensions of time (ASBCA Nos. 57589-57593). Only entitlement is before us on the monetary claims. We deny entirely the appeals in ASBCA Nos. 57448, 57590, 57591 and 57592. We dismiss with prejudice the appeal in ASBCA No. 57593. We sustain in part and deny in part the appeal in ASBCA No. 57589.

FINDINGS OF FACT

1. On 28 September 2009, the government awarded Contract 7340 to Red Sea. The contract required Red Sea to demolish existing structures, and design and construct 65 pre-engineered buildings (PEBs). Sixty (60) of the PEBs were for billeting and latrines at Camp Phoenix, Kabul, Afghanistan. Five (5) of the PEBs were for billeting and a latrine at Camp Alamo, Kabul, Afghanistan. (ASBCA No. 57448, compl. & answer ¶¶ 4-5) The total contract price at award was \$12,900,612 "EST" (R4, tab 1 at 2).

2. The FAR 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) clause of the contract required Red Sea to commence work within seven days after receiving notice to proceed (NTP), “prosecute the work diligently,” and “complete the entire work ready for use not later than the required calendar days specified for each CLIN” (R4, tab 1 at 66). The specified completion dates at award for the 37 building construction contract line item numbers (CLINs)<sup>1</sup> ranged from 70 to 260 calendar days from receipt of NTP (*id.* at 63-66).

3. Contract 7340 also included, among other provisions, the FAR 52.211-12, LIQUIDATED DAMAGES-CONSTRUCTION (SEP 2000) clause; the FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002) clause; the FAR 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (OCT 2008) clause; the FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause; the DFARS 252.222-7002, COMPLIANCE WITH LOCAL LABOR LAWS (OVERSEAS) (JUN 1997) clause; and, a Special Contract Requirements clause entitled COMPLIANCE WITH LAWS AND REGULATIONS (MAR 2009) which stated in relevant part:

(a) The Contractor shall comply with, and shall ensure that its employees and its subcontractors and their employees, at all tiers, are aware of and obey all U.S. and Host Nation laws, Federal or DoD regulations, and Central Command orders and directives applicable to personnel in Iraq and Afghanistan, including but not limited to USCENCOM, Multi-National Force and Multi-National Corps operations and fragmentary orders, instructions, policies and directives.

(R4, tab 1 at 66, 76, 79-80)

4. On 10 October 2009, Red Sea received NTP for the building construction in the Camp Phoenix Northern Expansion Area (CLINs 0001-0008) (R4, tab 1 at 3-7, tab 116). On 8 November 2009, Red Sea received NTP for the building construction at Camp Alamo (CLINs 0035-0037) (R4, tab 1 at 22-23, tab 117). The parties refer to the CLINs for which these two NTPs were issued as “Phase 1” of the contract. The remaining 26 building construction CLINs that were not included in the 10 October and

---

<sup>1</sup> Twenty-eight (28) of the 37 building construction CLINs were for two buildings each. Nine (9) of the building construction CLINs were for one building each (latrines). (R4, tab 1 at 3-23)

8 November 2009 NTPs are referred to by the parties as Phase 2 of the contract. (Tr. 1/48)<sup>2</sup>

5. On 20 January 2010, the government issued a revised Statement of Work (SOW) for Contract 7340 (R4, tab 12). The revised SOW included, among others, the following provisions:

SECTION 1: SUMMARY OF WORK

....

4.1 Period of Performance. Upon receipt of Notice to Proceed, Contractor shall have **573 calendar days** at Camp Phoenix and **150 calendar days** (concurrent) at Camp Alamo to complete all requirements of this project. Delivery of individual PEBs shall be in accordance with specified contract delivery dates.

....

SECTION 8: PROJECT PROGRESS AND PAYMENT MILESTONES

1. Payment Method and Progress Payments: The contractor shall prepare a Schedule of Values (SoV) that shall be reviewed and approved by both the Garrison Engineer/COR and the Contracting Officer. Contractor will invoice monthly a percentage of work completed against each appropriate CLIN and sub-category of scope of work.

(*Id.* at 3, 24-25) (Emphasis in original)

6. On 4 March 2010 bilateral Modification (Mod.) No. P00002 incorporated the revised SOW into Contract 7340 with price and time adjustments for the Camp Phoenix Phase 1 building construction CLINs (R4, tab 16). With the Mod. No. P00002 price adjustments, the total contract value (price) of all of the Phase 1 building construction CLINs at both Camp Phoenix and Camp Alamo was \$4,074,323.47 (R4, tab 1 at 22-23,

---

<sup>2</sup> Attachment 2 to the contract refers to Phases 1 through 11 at Camp Phoenix and Phases 1 through 5 at Camp Alamo. Those phases were never implemented and have no relevance to the present appeals.

tab 16 at 2). With the Mod. No. P00002 time adjustments, the specified Phase 1 building construction individual CLIN completion dates were in chronological order as follows:

<u>Site</u>	<u>CLIN</u>	<u>Completion Date</u>
Camp Alamo	0036	17 January 2010
	0037	17 January 2010
	0035	7 April 2010
Camp Phoenix	0001	7 May 2010
	0002	20 May 2010
	0003	30 May 2010
	0004	4 June 2010
	0005	11 June 2010
	0006	18 June 2010
	0007	18 June 2010
	0008	25 June 2010

(R4, tab 1 at 66, tab 16 at 3-6)

7. Between 18 October 2009 and 19 April 2010 Red Sea submitted seven progress payment invoices to the government in the total amount of \$4,129,995.96. The total amount in these invoices for the earned value of the acceptable work on the Phase I building construction CLINs was \$2,213,156.52. The balance of the earned values in Invoice Nos. 1-7 (\$1,916,839.44) was for the mobilization, 65 percent design drawing completion and delivered roof material earned values that were allocable to the Phase 2 building construction CLINs.<sup>3</sup> Each of the first seven invoices was accompanied by a DD Form 250 Material Inspection and Receiving Report signed by the contracting officer's representative (COR) stating that the claimed work was acceptable and conformed to the contract. (R4, tabs 2, 3, 7, 10, 13, 20, 23) Invoice Nos. 1-7 were paid in full (R4, tabs 5, 6, 8, 11, 18, 29, 31). The payments for the Phase 1 building construction CLINs in these invoices (\$2,213,156.52) were 54 percent of their total contract value (\$4,074,323.47).

8. On 30 March 2010, the contracting officer (CO) issued a stop work order for all work within a 12-foot radius of overhead electric power lines in the Camp Phoenix Phase 1 construction area (R4, tab 21; tr. 1/58-60). This order remained in effect until 6 June 2010. Red Sea claims that this order caused a 68-day delay in completion of the Camp Phoenix Phase 1 building construction CLINs (R4, tab 113 at 4). The SOVs, however, show that the stop work order had only minimal impact on the completion of the roofs

<sup>3</sup> No formal NTP was issued for the Phase 2 CLINs. However, the approval of progress payments allocating to all of the building CLINs in the contract the earned values for mobilization, design completion and delivery of roofing materials was a limited NTP for the Phase 2 CLINs to the extent of their allocated earned values.

and buildings. For the period 19 April-16 May 2010 roof systems installation on Buildings A and B (CLINs 0001 and 0002)<sup>4</sup> increased from 20 percent complete to 98 percent complete, on Building C (CLIN 0003) the increase was from 80 percent complete to 98 percent complete, on Buildings D and E (CLINs 0004 and 0005) the increase was from zero percent complete to 95 percent complete, and on Building G (CLIN 0008) the increase was from 20 percent complete to 85 percent complete. The only building in the Camp Phoenix Phase 1 CLINs that had no progress on its roof systems installation during the 19 April -16 May 2010 period was Building F (CLINs 0006 and 0007). Although it was not in the stop work order zone, Building F's roof systems installation was zero percent complete on 19 April 2010 and zero percent complete on 16 May 2010. (R4, tabs 238 at 2-8, 246 at 4-9, ex. G-1, tr. 1/60, 194-96). As of 12 June 2010, six days after the stop work order was withdrawn, the roof systems installation was 100 percent complete on Buildings A through E (CLINs 0001-0005), 85 percent complete on Building G (CLIN 0008), and still zero percent on Building F (CLINs 0006 and 0007) (R4, tab 50 at 3-8). The lack of any progress on roof systems installation on the one building (Building F) that was not within the zone of the stop work order indicates that the stop work order was not a cause of the delay of the Camp Phoenix Phase 1 work as a whole, and Red Sea has offered no credible critical path analysis to the contrary.

9. The Camp Phoenix "officer-in-charge" was the functional equivalent of a base commander in the United States. Force protection was one of his responsibilities. (Tr. 2/209) On 24 April 2010, the Camp Phoenix officer-in-charge implemented new security procedures that required a biometric iris scan for daily entry of Afghan workers into Camp Phoenix (R4, tab 45 at 1; tr. 1/211-14). The iris scan requirement was applicable to all Afghan workers on Camp Phoenix and not just to Red Sea's Afghan workers (tr. 1/226-27, 313). Red Sea alleges that the iris scan requirement caused 490 hours or an average of 4.8 hours delay in the start of work on each of 102 work days from 30 April to 29 August 2010, and claims a resulting delay to completion of the Phase 1 work of 61.3 days (R4, tab 113 at 4, 8-13). Several hours might be required to get a new employee or group of new employees biometrically enrolled at the main gate of Camp Phoenix and escorted to the construction site (tr. 2/146-49). However, enrollment was accomplished within one week and thereafter the enrolled employee could enter at the construction site entrance and work on the construction site without escort (tr. 2/216-17). The entry procedure at the construction site gate for 100 to 150 enrolled employees, including the iris scan, "would take about an hour" (tr. 1/219). There is no

---

<sup>4</sup> The SOVs used a letter designation for the buildings under construction. Buildings A through E, and G on the SOVs were respectively CLINs 0001 through 0005 and 0008 on the contract schedule. CLINs 0006 and 0007 on the contract schedule were latrines and were constructed and designated on the SOVs as a single building "F." (See R4, tab 50 at 6)

credible evidence that work could not start until the last worker cleared the entry procedure.

10. On 24 April 2010, the CO sent a letter to Red Sea expressing concern about the lack of progress on the contract. At that time all three of the Phase 1 Camp Alamo building construction CLINs were in default on their contractually specified completion dates and the Camp Phoenix Phase 1 building construction CLINs also appeared to be behind schedule. The 24 April 2010 letter noted the liquidated damages provisions of the contract for delayed completion and required Red Sea to provide a corrective action plan. (R4, tab 24)

11. On 14 May 2010, the government payment office (DFAS) by mistake made a duplicate payment of Invoice No. 7 in the amount of \$925,529.82 to Red Sea (R4, tab 177 at 3). As of the date of this decision, Red Sea has not returned to the government the duplicate payment or any part thereof as required by paragraph (l) of the Prompt Payment for Construction Contracts clause of the contract (*see* finding 3). Paragraph (l) states in relevant part:

(l) Overpayments. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the —

(i) Circumstances of the overpayment...

....

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

FAR 52.232-27.

12. On 18 May 2010, Red Sea submitted to the COR an SOV purporting to support Invoice No. 8 for work completed on the Phase 1 building construction CLINs during the period 20 April-16 May 2010. The claimed amount in the invoice was \$619,406.01. The claimed amount in the SOV was \$613,805.98. The difference is not explained. (R4, tab 246; app. supp. R4, tab 1000; ex. A-1) On 23 May 2010, the COR approved by email the SOV for Invoice No. 8 (R4, tab 249 at 1). However, when informed shortly thereafter of a report of cracks in the ECOPAN wall and roof panels, the

COR withdrew his approval, and did not sign the DD Form 250 accepting the Invoice No. 8 claimed earned values (tr. 1/228-32, 239). The claimed earned value for the ECOPAN work completed during the period covered by Invoice No. 8 was \$315,560.<sup>5</sup> This amount was 51.9 percent of the total requested payment (\$619,406.01) in the invoice.

13. On 23 May 2010, the CO directed Red Sea to show cause why the contract should not be terminated for default for failure to perform “within the time required” (R4, tab 37). This show cause letter concluded with the express notice to Red Sea that:

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(*Id.* at 2)

14. On 2 June 2010, Red Sea replied to the 23 May 2010 show cause letter. Red Sea alleged that force protection delays, material transport delays, late payment of invoices, and the order stopping work within the 12-foot radius of the overhead power lines were the cause of lack of progress on the work (R4, tab 43). On 8 June 2010, Red Sea told the government that the three Camp Alamo Phase I building construction CLINs would be completed on 11, 16, and 21 July, respectively (R4, tab 158 at 9). On 13 June 2010, Red Sea submitted schedules with various options showing completion of all of the Phase I building construction CLINs no later than 15 July 2010 (R4, tab 48, encls. 1 at 2, 2 at 2, 3 at 3, 4 at 3).

15. On 12 June 2010, Red Sea submitted to the COR and the CO “our SOV as of 12 June 2010 for your review and approval, for us to proceed with the invoices.” This SOV claimed a total earned value of \$5,576,024.30 from award of the contract on 28 September 2009 to 12 June 2010. (R4, tab 50 at 1, 11) The CO assigned to Contract 7340 at this time (TSgt Lewis) had succeeded the original contracting officer at the end of March 2010 (tr. 1/45), and was unaware that the claimed total earned value in the SOV included the earned values allocable to the Phase 2 CLINs (\$1,916,839.44) and paid in Invoice Nos. 1-3 and 6 (*see* finding 7). By email dated 14 June 2010, TSgt Lewis told Red Sea that the total claimed earned value on the SOV “exceeds the total contract value

---

<sup>5</sup> This amount is the difference between the total claimed earned values for ECOPAN manufacture and installation in the Invoice No. 7 SOV (R4, tab 238), and the total claimed earned values for those activities in the Invoice No. 8 SOV (R4, tab 246; ex. A-1).

of the Phase 1” CLINs and requested Red Sea to “Please review your contract, SOV, and previously submitted invoices and advise accordingly.” (R4, tab 50 at 1; tr. 1/89-91) Red Sea did not respond to this request and in the absence of a response the government took no further action in processing the SOV.

16. After 12 June 2010, Red Sea continued work on the Phase 1 CLINs through the months of June, July, August and the first two weeks of September 2010. However, Red Sea during this entire period did not submit any invoices for progress payments supported by SOVs approved by the COR for earned value exceeding the 54 percent of the total Phase 1 contract value already paid by the government in Invoices 1-7.<sup>6</sup> On 4 July 2010, Red Sea submitted a report stating that the Phase 1 building construction CLINs were “overall” 72.13 percent complete. On 17 July 2010, Red Sea submitted a report stating that the Phase 1 building construction CLINs were “overall” 73.88 percent complete. Neither of these reports was submitted with a supporting SOV approved by the COR. (R4, tabs 289, 290) By email dated 17 July 2010, Red Sea requested the status of Invoice No. 8 (R4, tab 66 at 3). The CO at this time was MSgt Huffstutter who had succeeded TSgt Lewis at the end of June 2010 (tr. 1/305). MSgt Huffstutter replied to Red Sea’s request by email on the same date stating that the progress payments to date had been overpaid and that “until Red Sea can provide documentation of where the funding has gone...the [government’s] position will stand firm with no further payments being certified” (R4, tab 66 at 2).

17. Also on 17 July 2010, the COR stopped electrical installation on the Camp Phoenix Phase 1 building construction CLINs because there was no “licensed” electrician on site. The supervisory electrician at the time had a journeyman certification, but the COR was “concerned as to whether or not he [was] a licensed electrician” (R4, tab 66 at 2-3; tr. 2/102-08, 184-85).<sup>7</sup> Since the supervisory electrician was not acceptable to the COR, Red Sea hired a US State licensed electrician but that electrician did not start work until 27 August 2010 (R4, tab 97). Red Sea claims 42 days of delay in completion of the Camp Phoenix Phase 1 building construction CLINs as a result of the government requiring replacement of its certified journeyman electrician (R4, tab 113 at 4, 14-16; app. br. at 16). The claimed delay, however, is not supported by the daily reports for the period in question, nor by Red Sea’s president who testified that electrical work proceeded during the purported delay period under the supervision of the project manager

---

<sup>6</sup> On 16 September 2010, Red Sea did submit invoices for alleged earned value as of 14 September 2010 but those invoices were unsupported by SOVs approved by the COR or by DD Forms 250 signed by the COR accepting the work for which the earned value was claimed (*see* finding 20 below).

<sup>7</sup> Section 4.4.2 of the SOW stated that the supervisory electrician could be “certified as a journeyman or commercial electrician by the International Brotherhood of Electrical Workers (IBEW) Union and/or hold a current US State issued electrician’s license” (R4, tab 12 at 14).

(R4, tab 185 at 64-113, tab 186 at 2-93; tr. 3/169-70). On this evidence, Red Sea has failed to prove a 42-day delay in completion of the work caused by the directed replacement of the supervisory electrician.

18. On 31 July 2010, the Corps of Engineers (COE) Afghanistan Engineer District North issued a detailed 11-page report finding that as of 29 July 2010, the completion of the Camp Phoenix Phase 1 building construction CLINs ranged from 35 to 65 percent with an overall average completion rate of 45 percent (R4, tab 82). These findings substantially confirmed the contentions of the COs in their respective emails of 14 June 2010 and 17 July 2010 that progress had been overpaid (*see* findings 15, 16). As of 29 July 2010, the progress payments paid to date for the Phase 1 building construction CLINs (\$2,213,156.52) were 54 percent of their total contract value (\$4,074,323.47) (finding 7). If the duplicate payment of Invoice No. 7 retained by Red Sea (\$925,529.82) is counted (finding 11), the progress payments for the Phase 1 building construction CLINs paid to date were 77 percent of their total contract value.

19. On 15 August 2010, Red Sea submitted a progress report stating that the Phase 1 building construction CLINs were “overall” 82.86 percent complete (R4, tab 170 at 4). On 22 August 2010, Red Sea submitted a progress report stating that the Phase 1 building construction CLINs were “overall” 85.5 percent complete (R4, tab 292). Neither of these reports was supported by an SOV approved by the COR. On 29 August 2010, 125 Red Sea workers at Camp Phoenix went on a one-hour strike to protest a nine-week arrears in Red Sea’s payment of their wages (R4, tab 203 at 89). This strike was the culmination of a history starting in May 2010 of Red Sea’s failure to pay its workers in the timely manner required by the Afghanistan labor law (R4, tabs 164 at 9, 165 at 6-7, 166 at 6, 168 at 6, 169 at 5, 170 at 6, 172 at 6; Bd. ex. 2) On the same day, the CO issued a notice to Red Sea to show cause why the contract should not be terminated for default “[s]ince Red Sea has failed to pay its workers their due wages in a timely manner and is thereby seriously endangering the performance of this contract” (R4, tab 99).

20. On 16 September 2010, Red Sea submitted to the CO progress payment Invoice Nos. 9, 10 and 11 in the total amount of \$1,290,979.69 for work performed from 16 May 2010 through 14 September 2010. These invoices were dated respectively 22 June, 24 July and 14 September 2010. The delayed submission of Invoice Nos. 9 and 10 is not explained. None of the invoices was submitted with a supporting SOV or a DD Form 250 signed by the COR.<sup>8</sup> On 16 September 2010, the CO summarily rejected these invoices. (R4, tabs 52, 75, 109, 112 at 1; tr. 2/46-48, 168-69)

---

<sup>8</sup> The last COR on the contract was assigned to that position from 7 July to 3 September 2010. He did not see any SOVs during his period as COR. (Tr. 2/141, 168-69)

21. On 22 September 2010, Contract 7340 was terminated for default for failure to comply with the terms and conditions of the contract, failure to complete the work within the required times, and failure to show that these failures were excusable or otherwise beyond its control (R4, tabs 110-11). On 20 November 2010, Red Sea appealed the termination (ASBCA No. 57448).

22. On 25 September 2010, Red Sea submitted a certified claim to the CO for the government's alleged breach of contract in failing to pay Invoice Nos. 8, 9, 10 and 11. The damages claimed were \$1,910,385.70 for the face amounts of the invoices less the duplicate payment of \$925,529.82 on Invoice No. 7 for a net claimed amount of \$984,855.88. (R4, tab 112 at 1) The total face amount of Invoice Nos. 8-11, less \$259,728.82 in Invoice No. 9 for 95% design drawing completion allocable to the Phase 2 CLINs, plus the amount paid by the government for the earned value of the Phase 1 CLINs in Invoice Nos. 1-7 equals a total Red Sea claimed earned value for its work on the Phase 1 CLINs as of 14 September 2010 of \$3,863,813.40. This claimed amount is 94.9 percent of the Phase 1 CLIN total contract value (\$4,074,323.47). There is no credible evidence in the record that the construction of the Phase 1 CLINs was 94.9 percent complete as of 14 September 2010 (see finding 23 below).

23. On 30 September 2010, an Army Engineer Battalion conducted an assessment of the percentage of completion and remaining work to be performed on both the Camp Phoenix and Camp Alamo Phase 1 CLINs. The average percentage of completion of the Phase 1 CLINs at termination as determined by the Engineer Battalion was 73 percent. (R4, tabs 174-75) That percentage of completion equals a total earned value for the Phase 1 CLINs at termination of \$2,974,256.13.<sup>9</sup>

24. On 4 October 2010, Red Sea submitted a certified claim to the CO in the amount of \$1,212,811.12 for 143 days of delay in completion of the Phase 1 CLINs allegedly caused by (i) replacement of the supervisory electrician; (ii) the stop work order for areas under power lines; (iii) the biometric scanning requirement for Afghan workers' access to the Camp Phoenix construction site; and (iv) delayed government documentation for customs clearance of imported materials. Red Sea claimed an extension from 25 June 2010 to 20 November 2010. (R4, tab 113)

25. On 11 April 2011, Red Sea appealed the deemed denial of its 25 September and 4 October 2010 claims. The appeals of those claims were docketed as follows: (i) non-payment of Invoice Nos. 8-11 (ASBCA No. 57589); (ii) replacement of the supervisory electrician (ASBCA No. 57590); (iii) the stop work order for areas under power lines (ASBCA No. 57591); (iv) the biometric scanning requirement for site access; (ASBCA No. 57592); and (v) delayed documentation for customs clearance of imported materials (ASBCA No. 57593). At hearing, Red Sea withdrew its claim for the customs

---

<sup>9</sup> \$4,074,323.47 x .73 = \$2,974,256.13.

clearance documentation delay (ASBCA No. 57593), and agreed to a dismissal of that appeal with prejudice (app. br. at 2 n.1).

### DECISION

It is not disputed that when Contract 7340 was terminated on 22 September 2010, none of the Phase 1 building construction CLINs had been completed within their contractually specified completion dates (*see* finding 6). Red Sea contends that its failure to complete within the specified times was caused by the government's failure to make timely progress payments. We do not agree. The government's withholding of (i) payment of Invoice No. 8 and (ii) processing of the 12 June 2010 SOV were justified by the reported defects in the ECOPAN panels and Red Sea's failure to respond to the contracting officers' concerns that the progress payments paid on Invoice Nos. 1-7 had substantially overpaid the actual progress made. Those concerns were expressed in TSgt Lewis' 14 June 2010 email and MSgt Huffstutter's 17 July 2010 email. (Findings 12, 15, 16)

The 14 June and 17 July 2010 emails were inaccurate as to the extent of overpayment, but they were not in error as to the fact of overpayment. The fact of overpayment was substantially confirmed by the inspection report of the COE Afghanistan Engineer District North that as of 29 July 2010 the overall completion of the Camp Phoenix building construction CLINs was 45 percent (finding 18). The progress payments paid to that date for the Phase 1 building construction CLINs were 54 percent of their total contract value or 77 percent if the duplicate payment of Invoice No. 7 retained by Red Sea is included in the overpayment computation (*id.*).

Red Sea continued working on the contract for three and one-half months after its Invoice No. 8 and 12 June 2010 SOV were rejected by the government. However, during this period up to 16 September 2010, Red Sea did not submit to the contracting officer any new invoice supported by an SOV approved by the COR showing that the earned value of the work performed on the Phase 1 CLINs to date exceeded the 54 percent earned value paid by the government in Invoice Nos. 1-7 for that work (finding 16). Moreover, when Red Sea did submit Invoice Nos. 9, 10 and 11 on 16 September 2010 for the alleged earned value of work performed from 16 May to 14 September 2010, those invoices similar to Invoice No. 8 were not supported by SOVs approved by the COR (finding 20).

On these facts we conclude that the government did not improperly withhold any progress payments due and that the government was not responsible for any lack of financing for timely completion of the work. We also find no merit in Red Sea's claims for compensable extensions of time. The delay in completion of a minimal part of the roof systems installation on those CLINs affected by the 30 March 2010 stop work order is not shown to have been on the critical path for completion of the Camp Phoenix Phase

Phase 1 CLINs (finding 8). The iris scan requirement was a force protection measure implemented by the officer-in-charge of Camp Phoenix and applicable to all Afghan workers at Camp Phoenix and not only the Red Sea workers (finding 9). Compliance with that requirement was within the scope of Red Sea's duties and responsibilities under the Compliance with Laws and Regulations clause of the contract, and is no basis for additional compensation or extension of time (*see* finding 3). The claim for a 42-day delay in completion of the contract due to the replacement of the supervisory electrician is unproven (finding 17).

Red Sea argues that the termination on 22 September 2010 was premature because the contract completion date for Camp Phoenix specified in paragraph 4.1 of the SOW in Mod. No. P00002 was 573 days after NTP (9 May 2011). We do not agree. The contract completion date specified in the cited paragraph was expressly conditioned by the following sentence in the same paragraph: "Delivery of individual PEBs shall be in accordance with specified contract delivery dates" (finding 5).<sup>10</sup>

Red Sea's contention that the government waived its right to terminate the contract by waiting six months after the initial default of the Camp Alamo building construction CLINs to exercise that right is without merit. Absent "unusual circumstances" indicating that time is no longer of the essence, a reasonable forbearance from terminating a delinquent construction contract is not a waiver of the contract completion date. *AmerescoSolutions, Inc.*, ASBCA No. 56811, 10-2 BCA ¶ 34,606 at 170,549-51. There are no unusual circumstances in Red Sea's case. When three of the eleven Phase 1 building construction CLINs were in default in April 2010, the CO's 24 April 2010 letter expressed his concern over the lack of progress, noted the liquidated damages provisions of the contract and required Red Sea to provide a corrective action plan (finding 10). When five of the eleven Phase 1 building construction CLINs were in default on 23 May 2010, the CO's letter of that date directed Red Sea to show cause why the contract should not be terminated for default. This letter concluded with the statement that "it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract." (Finding 13) Four months later on 22 September 2010 the government terminated the contract for default. During that four-month period of forbearance, Red Sea issued a series of optimistic reports on its progress, the last of which on 22 August 2010 stated that the Phase 1 buildings were "overall" 85.5 percent complete. (Findings 14, 16, 19, 21) The government's forbearance for four months after its express reservation of rights was not unreasonably long, particularly in light of Red

---

<sup>10</sup> The contract delivery dates for the PEBs (pre-engineered buildings) were the dates specified by the CLINs to which the PEBs were assigned.

Sea's optimistic reports encouraging forbearance rather than termination as the most expeditious way of completing the project.<sup>11</sup>

In its post-hearing brief, Red Sea asserts a claim for breach or Suspension of Work for the government's failure to issue an NTP for Phase 2 of the contract (app. br. at 36-37). This claim was not submitted to the CO for decision, and we accordingly have no jurisdiction to consider it here. *See Facilities Engineering & Maintenance Corp.*, ASBCA No. 39405, 91-3 BCA ¶ 24,239 at 121,212-14.

For the reasons stated above, we (i) dismiss with prejudice the appeal in ASBCA No. 57593, (ii) deny entirely the appeal of the default termination in ASBCA No. 57448, and (iii) deny entirely the appeals of the deemed denials of the claims for excusable and compensable delay in ASBCA Nos. 57590, 57591 and 57592. We deny the appeal in ASBCA No. 57589 to the extent the appeal seeks credit for the full face amounts of Invoice Nos. 8-11. However, a construction contractor who has been properly terminated for default is nevertheless entitled to payment for work that was properly performed in accordance with the contract prior to the default termination. *See J. G. Enterprises, Inc.*, ASBCA No. 27150, 83-2 BCA ¶ 16,808 at 85,543; *Ventilation Cleaning Engineers, Inc.*, ASBCA No. 18580, 74-2 BCA ¶ 10,873 at 51,754-55. Accordingly, we sustain the appeal in ASBCA No. 57589 on entitlement to the extent of any unpaid earned value of work completed by Red Sea at termination. We remand ASBCA No. 57589 to the contracting officer for determination of quantum consistent with this opinion.

Dated: 21 February 2013

  
MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

---

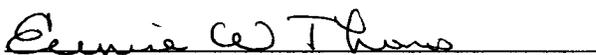
<sup>11</sup> Waivers of construction contract completion dates have been found where the period of forbearance from default to termination was 27 months (*B.V. Construction, Inc.*, ASBCA No. 47766 *et al.*, 04-1 BCA ¶ 32,604 at 161,350); 10 to 13 months (*Technocratica*, ASBCA No. 47992 *et al.*, 06-2 BCA ¶ 33,316 at 165,187); and 6½ months (*Overhead Electric Company*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,457, finding 118, at 90,472-73, *aff'd*, 795 F.2d 1019 (Fed. Cir. 1986) (table)). In *Overhead*, however, the government neither reserved its right to terminate when the default occurred nor assessed liquidated damages during the forbearance period.

I concur



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

I concur



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 Nos. 57448, 57589, 57590, 57591, 57592, 57593, Appeals of Red Sea Engineers & Constructors, Inc., rendered in conformance with the Board's Charter.

Dated:

---

JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals