

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -)
)
Marine Hydraulics International, LLC) ASBCA Nos. 63429, 63511
)
Under Contract No. N00024-19-C-4450)

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OPINION BY ADMINISTRATIVE JUDGE MCLISH

Appellant Marine Hydraulics International, LLC (MHI) appeals from a Navy contracting officer's final decision, denying three claims arising from a contract for the restoration of the USS *Gunston Hall*. The parties agreed that we would only address entitlement at this stage. We held a four-day hearing and received post-hearing briefing. We sustain the appeals in part and deny them in part.

FINDINGS OF FACT

I. The Contract

On February 1, 2019, the Navy awarded MHI firm-fixed-price Contract No. N00024-19-C4450 for repair and alterations onboard the USS *Gunston Hall* (LSD 44), a Whidbey Island Class dock landing ship. The Navy's Mid-Atlantic Regional Maintenance Center would administer the contract. (R4, tab 1) Most of the work, and most of the events relevant here, occurred while the ship was in dry dock in Norfolk, Virginia.

As relevant here, the contract required MHI to perform the work that was set out in specified "work items" (R4, tab 1 at 35). Among them were items for preservation work (blasting and coating) of the freeboard and underwater hull (R4, tab 2 at 3082-83, 3086-87), the installation of a new stern flap on the aft end of the ship (*id.* at 169-70), extensive work on the *Gunston Hall's* controllable pitch propeller (*id.* at 1743-77), and repair of the starboard rudder (*id.* at 2953-55, tab 6

at 4580-86).

MHI subcontracted the drydocking and much of the dry dock work items to Colonna's Shipyard, Inc. (CSI) via a purchase order (R4, tab 483). CSI in turn subcontracted some of that work to others, including International Marine & Industrial Applications, LLC (IMIA) (R4, tab 508). For ease of reference, we will sometimes refer to MHI and its subcontractors collectively as MHI.

CSI submitted a certified claim to MHI on February 16, 2022 (R4, tab 92), which MHI passed through to the Navy via its certified claim to the contracting officer on February 25, 2022 (R4, tab 91). The submission asserted seven separate claims for relief, three of which the contracting officer denied and are at issue here.

II. The Freeboard Blasting

The contract required MHI to prepare the outside of the ship for new exterior coatings and required removal of the existing coating by abrasive blasting (R4, tab 2 at 3086-87; tab 1410 at 22042; tr. 1/53:16-23, 2/47:4-6, 50:3-12). MHI subcontracted this work to CSI, which in turn subcontracted it to IMIA (R4, tabs 483 (line item 91), 511 at 39-40 (line items 50-51)). IMIA elected to use an abrasive grit, which it would blast at the exterior of the hull to achieve the required surface preparation (tr. 1/49:19-50:24). The contract required the use of proper containment methods to prevent the grit from escaping the work area and getting into the air or water (tr. 2/53:22-54:6).

When IMIA began blasting the hull, it discovered that the hull's exterior structural plating was so degraded in places that the blasting was puncturing the metal, allowing grit into the interior of the ship. This occurred in the "freeboard," which is the above-water part of the hull. One place affected by the grit penetration was the state room of the *Gunston Hall*'s Executive Officer. Each time a penetration occurred, IMIA had to stop blasting, assess the damage, and clean the invasive grit from the ship's interior. (R4, tabs 829, 831; app. supp. R4, tab 12; tr. 1/49:9-51:18, 2/53:2-21, 55:13-56:6)

When the unexpected hull penetrations began, IMIA prepared "condition found reports" (CFRs), which were passed up to the Navy through CSI and MHI. The CFRs advised that the hull breaches were occurring due to the deteriorated condition of the steel substrate, continued blasting would cause additional holes and that IMIA was cleaning affected areas inside the ship. They further stated that IMIA would document its labor hours and submit a quote when it knew the full impact. (R4, tabs 597, 828-30)

MHI recommended that the Navy issue a “request for contract change” (RCC)¹ for the contractor to “provide additional rover/s during blasting operations, to quickly identify any breaches and minimize potential of damages” and to “[c]ompensate [contractor] for cleaning of spaces affected by structural breaches due to blasting” (R4, tab 829 at 5775). In other words, under the proposed change, IMIA would station individuals inside the ship who would watch for hull penetrations. These “rovers” would quickly call a halt to the blasting in the affected areas and thereby minimize the amount of necessary cleanup inside the ship (*see* tr. 2/55:16-56:12, 67:6-68:5). The CFRs indicated that MHI and its subcontractors considered this work to be “Growth/New Work” (R4, tabs 597, 829).

The Navy’s Project Manager, Sam Samonte (PM Samonte), responded that blasting should continue and directed the issuance of an RCC “to add additional rover to quickly identify breaches, clean up once breach[es] occur and submit report with repair recommendations” (R4, tab 828 at 5777). The Navy then issued RCC 539G, which sought MHI’s price proposal to add a requirement to “[p]rovide additional personnel to walk the interior of the ship during blasting evolution and clean up when a breach of the ship occurs. Submit report with damage and a recommended repair to the SUPERVISOR if a breach occurs.” (R4, tab 1814) In the meantime, MHI was to continue abrasive blasting (R4, tab 828 at 5777-78; tr. 1/58:3-59:15).

An RCC is not itself a change to the contract. Rather, it triggers an obligation by the contractor to submit a price proposal (R4, tab 1 at 38-39). RCC 539G stated that it was “for pricing only” (R4, tab 1814). Only the contracting officer is authorized to make contract changes and the contract expressly provides that “[i]n the event the contractor effects any change at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price to cover any increase in charges incurred as a result thereof” (R4, tab 1 at 39-40).² PM Samonte was not a contracting officer.

¹ The Navy can generate an RCC when there is growth work or new work which has been “validated and fully scoped.” The contractor is required to submit a Change Order Price Analysis (COPA) within seven calendar days of RCC issuance. RCCs are formalized via a contract modification or Technical Direction Letter. (R4, tab 1 at 38-39; tr. 4/48:12-20)

² The full clause (Section C, Paragraph 1.14) states:

AUTHORIZED CHANGES ONLY BY THE CONTRACTING OFFICER -

No order, statement, or conduct of Government personnel who visit the Contractor’s facilities or in any other manner communicates with Contractor personnel during the performance

MHI prepared the required pricing proposal for RCC 539G (R4, tabs 1811-13). In the interim, as directed by PM Samonte, the blasting continued (tr. 3/163:3-9). Halting the blasting operations while the RCC was being negotiated was unacceptable to Mr. Samonte. He also found it unacceptable to continue blasting without monitoring for and cleaning up after hull breaches (tr. 3/163:10-164:1, 164:18-22, 1/65:3-66:4). This necessitated that IMIA provide the rovers and perform the cleanups before the proposed contract change was finalized (tr. 2/65:6-66:2). That is what IMIA did (tr. 2/57:7-19, 79:9-15). The evidence indicates that IMIA provided rovers and cleanup personnel for this purpose for at least some period of time, the specifics of which are disputed (app. supp. R4, tab 32; app. demonstrative ex. 4; R4, tab 1813; tr. 2/67:6-68:5, 83:5-24).³

In the meantime, the parties attempted to negotiate pricing for RCC 539G (tr. 4/48:8-20). After a “scoping” session with MHI, however, the Navy’s contracting officer, Myra Jackson (CO Jackson), “voided” RCC 539G (R4, tab 1815; tr. 1/63:15-23, 73:8-16). CO Jackson testified that she voided it because “the maintenance team did not concur with MHI’s pricing. We couldn’t come to an agreement and we didn’t have the funding to support it” (tr. 4/53:4-8). She also testified that she could not properly price the proposed change because the amount of additional work that would

of this contract shall constitute a change under the “Changes” clause of this contract. The Contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as a part of this contract. The Contracting Officer is the only person authorized to approve changes in any of the requirements of this contract and, notwithstanding provisions contained elsewhere in this contract, the said authority remains solely the Contracting Officer’s. In the event the contractor effects any change at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price to cover any increase in charges incurred as a result thereof. The only exception to this is if the contractor is ordered to stop for a safety reason.

(R4, tab 1 at 39-40)

³ As we are addressing entitlement only, we do not resolve here the parties’ disputes over the precise amount of labor IMIA expended on these tasks, which is an issue for the quantum stage. We find only that IMIA provided some amount of the work for which MHI contends it is entitled to an equitable adjustment.

be necessary was uncertain (tr. 4/49:16-50:8). In a later email, she indicated that it was voided due to lack of funding (app. supp. R4, tab 29). Whatever the precise reason, CO Jackson did not void the RCC because the work specified in the RCC was unnecessary or was already required by the contract. To the contrary, she left the impression on MHI and its subcontractors that the Navy would modify the contract when the work was completed and the final costs known (tr. 1/63:15-23, 73:18-24, 2/58:16-60:21, 79:7-20).

At the time of the RCC negotiation, CO Jackson was aware that MHI was already providing rovers and performing cleanup at PM Samonte's direction and would continue to do so because it was necessary work. While her testimony about what she knew at the time was somewhat evasive (tr. 4/76:1-10, 77:9-15, 78:3-13, 78:25-79:17, 80:2-25, 81:1-10), it is implausible that she could have held a scoping session about RCC 539G without learning that the blasting was continuing and that this necessitated rovers and cleanup inside the ship. The RCC itself made clear that this work was needed during the blasting and the contracting officer must have been aware that the blasting had not stopped, as such a halt in operations would have been a major development that would not escape her attention. She also must have known that the need for rovers and interior cleanup would continue whether or not a contract modification was finalized (tr. 4/81:1-10).

When the contracting officer "voided" the RCC, therefore, she did not expect that work to stop but rather understood that it had to continue. The contracting officer made clear in her testimony that she deferred to the PM on all technical matters, including what work needed to occur (tr. 4/53:9-54:11, 61:12-62:2, 4/42:10-11). PM Samonte had clearly decided that the work described in the RCC had to be done and could not stop, and CO Jackson did not countermand that decision even as she voided the RCC. She never directed that the work stop (tr. 1/64:20-25, 66:12-19, 73:18-24, 2/60:12-15, 128:23-129:6). Considering all of the circumstances, we find that the contracting officer agreed with and adopted, at least implicitly, PM Samonte's determination that the rovers and cleanup work were necessary and should be performed.

After the contracting officer voided the RCC, PM Samonte continued to direct MHI to proceed with the blasting, providing rovers and cleaning up the ship interior when there were breaches (tr. 1/63:15-23, 64:25-65:2). The Navy directed MHI to continue submitting CFRs documenting the hull breaches (tr. 2/129:25-130:11, 4/81:1-10). Had MHI stopped blasting operations because of the absence of an agreed contract modification, PM Samonte would have considered MHI to be performing deficiently and issued notices to that effect (tr. 1/65:9-66:4, 3/163:17-164:22). Accordingly, IMIA continued blasting and continued to employ rovers to spot grit penetrations and other personnel to clean up when penetrations occurred (tr. 1/64:25-65:2, 2/79:9-20, 67:2-68:18, 3/162:14-163:16). PM Samonte's actions

were consistent with the impression left by the contracting officer that she recognized that rovers and cleanup were additional work for which MHI should be compensated once the costs could be quantified and the modification priced (tr. 1/63:15-23).

IMIA submitted additional CFRs advising that the grit penetrations were continuing to occur and that it would need to be compensated for the additional labor it was incurring to provide the rovers and cleaners (app. supp. R4, tabs 19-20; tr. 2/60:22-61:13). MHI again requested an RCC (app. supp. R4, tab 22; tr. 1/67:17-68:1, 3/165:1-6)). The Navy did not respond for approximately two months, by which time the blasting operations were completed (app. supp. R4, tab 22). PM Samonte could not explain the two-month delay (tr 3/165:8-166:11). When he eventually responded, PM Samonte changed his position and rejected MHI's request for compensation on the ground that the contract had all along required the contractor to protect the interior of the ship from grit intrusions (app. supp. R4, tab 22).

Nothing in the solicitation or the contract put MHI or its subcontractors on notice that the ship's freeboard was deteriorated to the point that it would fail during abrasive blasting. The contract did not require any structural repairs to the freeboard or an assessment of whether any replacement or repair of the hull plating was necessary. (R4, tab 2 at 3082-83; tr. 1/46:25-47:6, 76:15-17, 2/50:13-21) Nor did the contract contemplate that containment measures would be necessary to prevent grit from entering the ship; the prescribed containment measures were designed to protect the external environment and would not have been effective at preventing the blast media from penetrating the ship (tr. 1/69:13-70:22, 2/53:22-54:6, 63:17-65:5, 70:23-71:18). During the blasting work, the Navy never took issue with the blasting and containment methods IMIA employed, nor did it contend that MHI should have anticipated the hull failures or otherwise was at fault for the hull failures or the grit penetrating the ship's exterior (tr 1/70:23-71:10, 2/62.24-63:5, 4/179:25-180:20).

The Navy eventually modified the contract to require MHI to repair the deteriorated freeboard plating and to compensate it for that extra work (app. Supp. R4, tabs 25, 33; tr. 1/71:11-12, 2/72:19-73:23). MHI was directed not to include the costs of the rovers and interior cleanup in its price proposals for the steel repairs, and it did not include those costs (tr. 2/73:24-74:8, 74:12-75:16, 130:15-131:21, 3/177:16-178:22). Thus, while MHI was compensated for repairing the steel that failed during the blasting, it was not compensated for the work it did to deal with the penetration of the blasting grit into the ship's interior that resulted from the steel failures.

MHI submitted a claim seeking compensation for the alleged additional cost of supplying the rovers and performing the cleanups necessitated by the grit penetrations through the freeboard plating (R4, tabs 91-92 at 5683-86). The contracting officer denied the claim on the ground that the alleged additional work had not been authorized by the contracting officer. The contracting officer's decision did not

address the question of whether the work at issue had been required by the original contract. (R4, tab 94 at 5717)

III. The Stern Draft Marks

In addition to repair work, the contract also tasked MHI to make certain alterations to the ship. One of those tasks was to fabricate and install a “stern flap” at the aft end of the *Gunston Hall* (R4, tab 2 at 169-70). The stern flap was a wedge-shaped, horizontal structure designed to make the ship more fuel efficient by reducing underwater turbulence (R4, tab 2020; 3/283:4-24, 108:7-16).

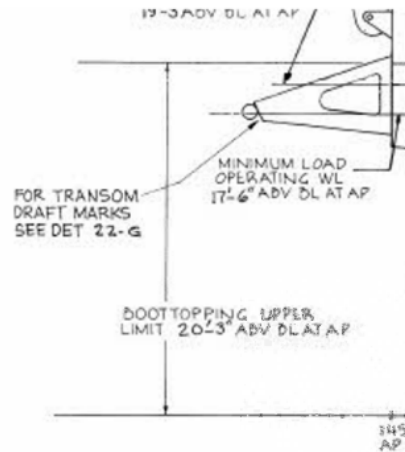
As MHI neared completion of the stern flap installation, the Navy voiced a concern that the stern flap did not have draft marks (R4, tab 1041; tr. 1/86:23-87:11). Draft marks are numerical markings on a ship’s hull that are used to indicate the depth of the ship under the water (*i.e.*, the ship’s draft). Prior to the installation of the stern flap, the *Gunston Hall* had visible draft marks on its transom, which is the vertical surface at the rear of the hull (tr. 1/82:16-83:7). The contract did not require the removal of those marks and MHI did not remove them. The stern flap, however, covered the existing marks, rendering them no longer visible. (Tr. 1/83:9-14, 3/288:8-289:22)

In response to the Navy’s concern, MHI took the position that the contract did not require the installation of draft marks on the stern flap (R4, tabs 1040, 1041). The Navy disagreed and the parties argued their respective positions to each other in writing and in meetings (R4, tabs 1040, 1044, 1750, 2020). Over MHI’s objections, the Navy unilaterally directed MHI to install draft marks on the new stern flap (R4, tab 1040; tr. 1/97:9-14). After further discussion about the details, MHI fabricated and installed the draft marks as directed (tr. 1/97:15-98:7, 98:19-100:12, 127:10-12). To do this, MHI had to remove certain coatings that had already been applied to the stern flap, install the draft marks and then reapply the coatings (tr. 1/99:3-100:4, 4/183:13-184:8, 187:5-188:5). MHI contends that this delayed achievement of a key contract milestone—the “undocking” of the ship from dry dock and its return to the water—and resulted in additional costs, including extended drydock costs.

Several contract documents are relevant to whether the contract required the new draft marks. First is the work item that required the installation of the stern flap, which was numbered 110-90-001 (Stern Flap Work Item). The Stern Flap Work Item references two other documents relevant here, a drawing the Navy calls the Stern Flap SCD, which specifies the details for the stern flap, and a document called Draft Marks Ships Name & Distinguishing Marks (the Markings Drawing). (R4, tab 2 at 169-70)⁴

⁴ Under contract clause HQ C-2-0051 SPECIFICATIONS AND STANDARDS (NAVSEA) (AUG 1994), specifications, standards or

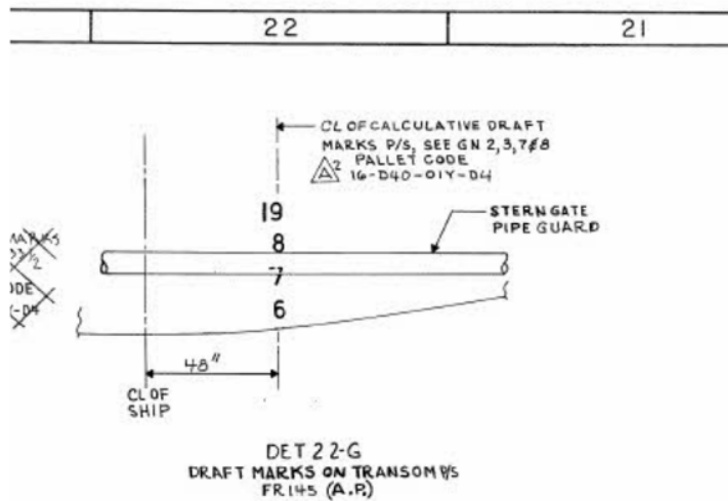
General Note 2.19 of the Stern Flap SCD states: “reinstall draft marks in accordance with Reference 4” (R4, tab 1377 at 6220). Reference 4 is the same Markings Drawing referenced in the Stern Flap Work Item. The Markings Drawing depicts how the original draft marks were to be configured and installed on the vertical surface of the transom, not how the draft marks should appear on the stern flap after it was added to the back of the ship (tr. 3/288:8-17). Elevation 15-A of the Markings Drawings shows a starboard elevation of the ship and states “for transom draft marks see Det 22-G,” with an arrow pointing at an existing structure under the stern gate:



(R4, tab 1385 at Elevation 15-A, Frame 18-B). The structure at which the arrow points was in the location where the new stern flap was to be installed. As laid out in the Stern Flap SCD, installing the stern flap involved removing parts of the existing structure and adding the various components making up the stern flap (R4, tab 1377).

Detail 22-G, labeled “Draft Marks on Transom P/S”, shows a set of numerals arranged vertically 48 inches to the right of the ship’s centerline and crossing a horizontal item labeled “Stern Gate Pipe Guard,” which was part of the existing structure:

drawings referenced in Work Items were “zero-tier” references and mandatory for use (R4, tab 1 at 54-55). Because the Stern Flap SCD and Markings Drawing are referenced in the Stern Flap Work Item, they are mandatory.



(R4, tab 1385 at Detail 22-G, Frame 22). “P/S” refers to port and starboard, thus indicating that an identical set of draft marks would appear 48 inches to the left of the ship’s centerline.

Detail 22-G references “GN 2, 3, 7 & 8,” which are general notes on the Markings Drawing. Those notes describe the materials, sizing, and welding for various markings, including draft marks. (R4, tab 1385). They provide in pertinent part:

- “Calculative draft marks are to be cut from Item 1.” Item 1 is medium steel. (R4, tab 1385 at General Note 2 and Item 1)
- “Calculative draft marks shall be block Arabic numerals, 6” in vertical projected height” (*id.* at General Note 3).
- “The bottoms of the [calculative draft mark] figures shall correspond to multiples of one foot of draft” (*id.*).
- “The vertical centerline of each set of draft marks shall be in a plane perpendicular to the ship’s centerline plane and to the molded baseline” (*id.* at General Note 7).
- “Draft marks on shell and well BHDS shall be secured by continuous fillet welding around periphery of each figure” (*id.* at General Note 8).⁵

⁵ Although MHI contends the new draft marks were larger and differently configured than the originals (app. br. at 20, 53-54), it failed to prove they were inconsistent with the Markings Drawing’s requirements, such as the mandate for a “6” vertical projected height” (R4, 1387 at General Note 3). MHI also

The Stern Flap SCD references another document, known as the General Specification for Overhaul of Surface Ships (GSO).⁶ General Note 1.02 of the Stern Flap SCD states “[t]his drawing is based upon the requirements of [the GSO], whose provisions shall prevail in areas where this drawing is silent” (R4, tab 1377 at 6220). The GSO is a first-tier reference and therefore mandatory.⁷ Paragraph 603b of the GSO explains that draft marks are required on ships “to indicate the draft above the bottom of the keel and to determine displacement and trim” (R4, tab 2020 at 57106). GSO paragraph 603e (Calculative Draft Marks) states: “Calculative draft marks shall be provided, port and starboard, as near the bow, the stern, and amidships as practicable with due regard for external fittings and the shape of the hull” (R4, tab 1044 at 5815).⁸

MHI submitted a claim to the Navy seeking \$435,301.01 in compensation for the draft mark work, consisting of \$411,324.01 for eleven days of extended dry dock charges and \$24,067 of alleged extra work (R4, tab 92 at 5687-90). The contracting officer denied the claim on the ground that the draft marks were required by the contract and therefore MHI was responsible for the cost of providing them and any delay was MHI’s responsibility (R4, tab 94 at 5720-21).

IV. The CPP Overheating Incident

The contract required repairs, upgrades and refurbishments to the two Controllable Pitch Propellers (CPPs) aboard the *Gunston Hall*, one of which was on the port side and the other one on the starboard side. The CPP changes the angle of the propeller when the ship is at sea. Among the components of a CPP is the oil

failed to rebut the Navy’s evidence that the contract documents were sufficient to determine the marks’ proper size and configuration (R4, tabs 1044, 1377, 1385, 1750; tr. 4/29:24-30:12).

⁶ NAVSEA S9AAO-AB-GOS-010/GSO 2016 EDITION, REVSION 09.

⁷MHI does not dispute the Navy’s assertion that the GSO is a “first-tier reference,” which the contract makes mandatory along with “zero-tier references” (R4, tab 1 at 54-55). Nonetheless, it argues that the GSO was “not part of item 110-90-001” and therefore “not applicable” (app. reply br. at 9). For this it relies on imprecise testimony from witnesses who were not asked to explain the basis for their understanding (app. br. at 18). We find that testimony to be of little weight. Because the Stern Flap SCD specifically references the GSO, we find it is a mandatory, first-tier reference. In any event, even as a lower-tier reference, the GSO would remain relevant as guidance (R4, tab 1 at 54-55).

⁸Although the GSO was not entered into the record, the Navy relies on quotations and descriptions of it from other record documents. Because MHI has not objected to this approach or disputed the accuracy of those excerpts, we accept them as accurate.

distribution box, which sends hydraulic pressure to the valve rod inside the propeller shaft. (Tr. 3/43:21-46:24; R4, tab 1387 at 15224-27, 15620)

MHI was required to conduct an operational test of the oil distribution box. This requirement appears in Work Item 245-12-001, section 3.9. That work item is not labelled as “Drydock Required,” unlike some other Work Items related to the CPP work. (R4, tab 2 at 1743-45). On February 25, 2020, the day before scheduled undocking, MHI conducted an operational test of the oil distribution box for the port CPP system that failed because system pressure could not be attained. Later that day, an overheating incident occurred on the port CPP system. (R4, tab 1065)

No eyewitnesses to the incident testified at the hearing. Various documents in the record purport to describe what happened but all but two of them are based either on what the authors were told by unknown others or are speculation. The two exceptions are reports authored by Yancey Wisenbaker, a representative of Rolls-Royce, the system’s original equipment manufacturer (OEM). Mr. Wisenbaker was present to oversee the test as the OEM representative that MHI was required to provide to supervise the test (R4, tabs 2 at 1743-45, 624 at 28279-80, 1069). Mr. Wisenbaker’s first report, dated February 25, 2020, primarily reports what the representative was told by *Gunston Hall* crewmembers and notes that the details were “not witnessed by Rolls Royce” (R4, tab 1069 at 5746). The second Rolls-Royce report, dated March 6, 2020, is more detailed and appears to be largely based on the representative’s personal knowledge (R4, tab 624 at 28279-80). Thus, the only first-hand account of what occurred is the second Rolls-Royce report, which we find is the best evidence in the record of what occurred.

In preparation for the operational test of the port CPP system, the oil needed to be heated (*see* tr. 3/54:25-55:8). Ship crewmembers (“ship’s force,” in the parlance) turned on the sump heaters to begin warming the oil.⁹ MHI was not required to, and did not, work on the sump heaters as part of its contract work (tr. 1/155:7-158:8). The test was postponed because of a problem with the system pressure. The system was not immediately turned off, however, because the Navy’s Chief Engineer wanted the crew to get some experience logging information about the system. Mr. Wisenbaker also wanted to continue setting the pressures on the port system later that day, after attending to some work relating to the starboard CPP system. (R4, tab 624 at 28279-80)

With the sump heaters still running, Mr. Wisenbaker moved to the starboard system, while the ship’s crew monitored the port system. Upon returning to the port side some time later, Mr. Wisenbaker and the Navy Chief Engineer confirmed that the

⁹ During such a test, the ship equipment is operated by members of the ship’s force, under the direction of the contractor (tr. 3/207:6-8, 215:20-24).

port system was operating correctly and the oil had warmed appropriately. At that point, Mr. Wisenbaker instructed the Navy personnel to shut down the system and he witnessed the Navy Chief Engineer turn the switch on the sump heater controller. (R4, tab 624 at 28279)

Mr. Wisenbaker returned to the starboard side. While there, a ship crewmember came in and reported oil leaking in the location of the port CPP system. He then heard an alarm go off and a ship announcement that there was white smoke in that location, followed by another stating that the smoke was from a faulty sump heater in the CPP sump. Meanwhile, crew members were reporting to the representative that the sump heater gaskets were leaking hot oil and they could hear the oil boiling in the sump. Mr. Wisenbaker went to the port side CPP system, saw some remaining white smoke in the air and oil in the bilge around the sump heaters. The pump strainers were hot to the touch. The system was not operating at that time. (R4, tab 624 at 28279-80)

Mr. Wisenbaker sought guidance from Rolls-Royce engineering, who recommended that the oil be changed, the system re-tested with the new oil, and the pump checked for damage. Mr. Wisenbaker passed these recommendations on to CSI, along with a recommendation to renew the sump heater gaskets that had reportedly been leaking. (*Id.*) He also relayed what he had been told by ship's force that day but had not witnessed himself, which included:

1. The engine room filled with white smoke.
2. The sump heaters were found left on.
3. The sump heaters were turned off.
4. The sump tank was leaking hot oil from the sump heater gasket.
5. The oil could be heard boiling.
6. The HOPM¹⁰ standby pump was started to cool the oil for an unknown time period.
7. The HOPM standby pump was shut down once the temperature on the thermometer spiked at 160 degrees.
8. The bypass valve was open during the operation of the standby pump.

(R4, tab 1069 at 5745-46)

The day after the incident, February 26, 2020, CSI submitted a CFR to MHI regarding the incident, which MHI submitted to the Navy on February 27 (R4, tab 1065). The CFR reported that the operational test on February 25, had failed and

¹⁰ Hydraulic oil power module (*see* R4, tab 1387 at 15243).

described the overheating incident that occurred later that day. Its description of the incident largely tracked with Mr. Wisenbaker's report and noted that the sump heaters "may have inadvertently been left energized after the earlier [operational test]." (*Id.*) The CFR said that the incident would delay the undocking scheduled for February 27, 2020, but did not say why.

In another CFR on February 26, which MHI passed on to the Navy on February 27, CSI relayed Mr. Wisenbaker's first report and Rolls-Royce's recommendations, which included new oil and new sump heater gaskets. It requested that the Navy issue an RCC for the recommended actions. The Navy, after consulting with its own internal experts and testing the oil, disagreed with the recommendation to replace the oil and directed MHI on February 28 "to proceed with CPP testing using existing oil in the system." (R4, tab 1068 at 5849) The Navy response noted that the Chief Engineer intended to use the ship's on-board purifier to renovate the oil when the ship was in the water (see tr. 3/65:5-23). The Navy response did not address the recommendation to replace the sump heater gaskets (R4, tab 1068 at 5849).

By this time, the February 27 undocking milestone had been missed and the ship was still in drydock. The undocking eventually occurred on March 12, 2020 (R4, tab 1777). We find that the CPP overheating incident and the issues surrounding it did not cause the undocking delay. While it did delay the reperformance of the oil distribution box operational test while the parties addressed whether to replace the oil (which was resolved on February 28), that test was not required to be performed in drydock and could have been performed when the ship was in the water. All of the CFRs and responses prior to undocking relating to the overheating incident are designated as being in connection with Work Item 245-12-001, section 3.9, which refers to the operational test for the port oil distribution box (R4, tab 2 at 1743-45). Under the contract, that test did not need to be completed before the ship could be taken out of dry dock (R4, tab 12 at 5372; tab 480 at sheet MRL, row 17254, column AM (showing the Key Event for this test is PCD); tab 1410 at 21807-08 (Test and Inspection Plan (TIP) requirements), 22129 (definition of PCD), 22197 (Master Requirements List).

On March 2, MHI passed to the Navy another CFR from CSI relating to the oil distribution box operational test for the port CPP system and the February 25 overheating incident. CSI again requested an RCC to replace the oil as Rolls-Royce recommended and noted that the Navy had not responded to the recommendation to replace the sump heater gaskets. The CFR did not say that the oil issue was preventing undocking. PM Samonte responded the same day, stating that the Navy stood by its prior decision and that MHI should "[p]roceed with testing using existing oil." His response said nothing about replacing the gaskets. (R4, tab 1075 at 14591-92)

CSI performed the operational test again on March 3 and reported to MHI that it was satisfactory but that certain conditions, including leaking sump tank heaters, required repair. CSI recommended the issuance of an RCC to, among other things, replace the sump heater gaskets. (R4, tab 1089) MHI passed the recommendation on to the Navy. PM Samonte's March 6 response rejected the request for an RCC but directed MHI to make the recommended corrections and provide a report (R4, tab 1088).

On March 9, CSI again recommended that the oil in the port CPP system should be replaced, which MHI passed on to the Navy (R4, tabs 1103-04). Again, there was no assertion that the issue was delaying the undocking. PM Samonte reaffirmed the Navy's prior rejections of that recommendation. He also reiterated his March 6 directive to correct the issues identified after the March 3 oil distribution box operational test, which included replacing the sump heater gaskets. (R4, tab 1103) After the ship left drydock on March 12, 2020, the oil was purified using the ship's onboard purifier (tr. 3/78:2-20).

As detailed below, MHI continued to notify the Navy of oil leaks at the sump pump heaters for the port CPP system and continued to clean up the leaking oil. The evidence indicates, and we find, that the leaks were caused by sump heater gaskets damaged as a result of the February 25 overheating incident. There is no evidence that the Navy's decision not to replace the oil in the system as MHI had recommended contributed to the oil leaks.

On March 28, a CSI CFR reported oil in a void in the vicinity of the port CPP sump. After inspection, CSI concluded that oil was leaking from the sump heater gaskets "as previously reported in several CFR's" (R4, tab 1150). CSI recommended an RCC to clean up the oil, inspect the pipes and hoses and submit a report with any repair recommendations. PM Samonte rejected the request for an RCC and instead again directed MHI to proceed with the corrections of the issues identified after the March 3 test, which included replacing the sump heater gaskets. (R4, tab 1149 at 5818)

CSI submitted another CFR on April 22, 2020, relaying a report from Rolls-Royce following an operational test of the port CPP standby pump. The report was from David Mason, who apparently had replaced Mr. Wisenbaker as the OEM representative from Rolls-Royce. The report indicated that the test revealed evidence of loss of oil in the system, that there was oil flooding the bilge area around the sump heaters as a result of leaking sump heater gaskets, requiring repeated cleanups. The report stated that the leaking oil gaskets must be corrected to ensure the reliability and integrity of the system and recommended removing the leaking sump heaters to "inspect and replace the gaskets." (R4, tab 1178) MHI requested an RCC to follow those recommendations. PM Samonte did not concur. His response indicated that he

believed any leakage was a result of the overheating incident in February and that MHI was responsible for that incident and therefore should bear the cost of fixing it. He directed MHI to “provide way ahead on how to correct discrepancies.” (R4, tab 1177 at 5831) CSI submitted another CFR a day later that included photographs of oil leakages and recommended an RCC to clean up the leaking oil and make the repairs necessary to stop the leakage (R4, tab 1183 at 5839). PM Samonte again denied the RCC and referred MHI to his response to the prior CFR, which directed MHI to propose a way to correct the discrepancies (R4, tab 1182).

At some point after this, the leaking gaskets were addressed and the leaking stopped (tr. 1/153:25-54:18). On September 17, 2020, MHI submitted Rolls-Royce’s report indicating that the work on the CPP system was complete and all requirements had been satisfied. The Navy accepted the report. (R4, tab 1200)

MHI submitted a request for equitable adjustment to the Navy dated September 22, 2020. Among other things, it sought \$120,152 in compensation for extra costs (including for oil leakage cleanups) and a six-day undocking delay arising from the CPP overheating incident (R4, 624 at 28277-82). When the Navy’s contracting officer asked MHI for a breakdown of the claimed costs, MHI responded by email on April 7, 2021, that previous RCCs “took care of everything except docking time related to the parent issue of the burned oil” and said that CSI had failed to remove this item from the REA. MHI concluded that “[t]he government’s position of no additional consideration can be agreed to for this item, except for time related to the vessel staying on dock.” (R4, tab 1852)

MHI’s February 16, 2022, claim to the contracting officer sought a total of \$315,405.46 relating to the CPP overheating incident, of which \$91,096 was for allegedly extra work and \$224,309.46 was six days of delay to the undocking at a rate of \$37,384.91 per day (R4, tabs 92 at 5695, 624). At the hearing, MHI modified its claim to seek \$199,832.75 in total, of which \$87,678.02 is for extra work performing oil cleanups and \$112,154.73 for three days of extended dry dock time (tr. 2/122:13-123:12; app. demonstrative ex. 4; R4, tab 92 at 5691-95).

The contracting officer’s final decision denied the delay portion of the CPP overheating claim on the ground that the extended dry dock was not caused by the CPP incident, because “there is evidence that CSI had late discovery of required rework on the starboard rudder that led directly to the ship remaining in dry dock” (R4, tab 94 at 5721). The claim for oil cleanup costs was denied because MHI’s April 7, 2021 email had acknowledged that no additional compensation was due except for the extended dry dock time (*id.*).

V. Delay Analysis

The Navy called Joseph M. Andres as an expert in critical path method scheduling and delay analysis, and the Board admitted him as such. Mr. Andres performed a forensic schedule analysis that considered all potential delays to the undocking milestone (R4, tab 623 at 9; tr. 4/122:9-20). Mr. Andres' analysis concluded that the undocking milestone was delayed 14 calendar days, from February 27, 2020 to March 12, 2020 (R4, tab 623 at 1; tr. 4/112:21-13:1; gov't ex. A at 7). He opined that MHI did not perform any type of delay analysis to determine the critical path to the undocking milestone, did not consider all possible delays, and did not adjust its claims to account for any concurrency between its discrete delay claims (R4, tab 623 at 1; gov't ex. A at 3). Finally, he opined that repair work on the starboard rudder was on the critical path and drove the 14-day undocking delay. That starboard rudder repair work was ongoing until March 11, 2020, the day before undocking on March 12, 2020. (R4, tab 623 at 13-14; gov't ex. A at 25-34; tr. 4/136:23-137:19, 145:16-147:7, 171:7-14). We find Mr. Andres' testimony to be credible and persuasive and his opinions to be based on a thorough and comprehensive analysis.¹¹

DECISION

To prevail on its claims, MHI must demonstrate entitlement by a preponderance of the evidence, which is sufficient evidence to establish that its position is more probable than not. *See Lockheed Martin Aeronautics Co.*, ASBCA No. 62209, 24- 1 BCA ¶ 38,590 at 187,608 *citing Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001); *Trade West Constr., Inc.*, ASBCA No. 61068, 22-1 BCA ¶ 38,214 at 185,596 (*citing Jack Heller, Inc.*, ASBCA Nos. 14300, 14376, 72-2 BCA ¶ 9,477 at 44,147).

MHI's sole legal theory for each of its claims is constructive change.¹² The government constructively changes a contract when "a contractor performs work

¹¹ Mr. Andres' expert report said that MHI was the "sole cause" of the starboard rudder delay, presumably because neither MHI's claim or complaint contended that the delay was government-caused (R4, tab 623 at 2). In his testimony, Mr. Andres made clear that he was not offering an opinion on the party responsible for that delay and instead was accepting the government's position that it was contractor-caused (tr. 4/154:10-20, 155:14-19, 166:24-168:7).

¹² The Navy's post-hearing brief persuasively argued that, despite references to "unknown conditions" in MHI's initial post-hearing brief, MHI had not advanced a differing site conditions claim and instead had "hung its hat on a constructive change theory" (gov't br. at 148-49). MHI's reply brief did not disagree.

beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.” *Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017), quoting *Int’l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). The elements of a constructive change are: (1) work performed beyond the contract requirements, and (2) the additional work was expressly or impliedly ordered by the government. *BGT Holdings LLC v. United States*, 984 F.3d 1003, 1012 (Fed. Cir. 2020). “As to the second element, the directive ordering the additional work must come from an individual having actual authority to bind the government.” *Id.*

I. The Freeboard Claim

MHI has established that the Navy constructively changed the contract to require MHI to provide rovers and cleanup services when blasting grit penetrated the *Gunston Hall*’s hull and contaminated the ship’s interior.

First, the rovers and interior cleaning services were not required by the contract. The Navy points to no contract specification expressly directing the contractor to provide these services. Indeed, nothing in the contract suggested that the freeboard was so deteriorated that contractually-required blasting operations might cause the hull plating to fail and allow blasting grit into the ship. As a result, there was not even an implicit requirement to provide such services.

In its post-hearing brief, the Navy does not defend the Project Manager’s eventual position that the contractor’s ‘containment’ obligation included the rovers and cleanup services (*see* gov’t br. at 153-57). The Navy PM adopted that position after initially acknowledging that the need for those services constituted a change to the contract. The Navy does not point to any contract language that supports the PM’s changed position. Unrebutted testimony establishes that the containment measures contemplated by the contract were to ensure that the grit did not escape into the exterior environment and were not designed to, and would not have been effective in, preventing interior intrusions due to deteriorated freeboard plating. Moreover, during the blasting work, the Navy never cited MHI for inadequate or improper containment measures. Instead, the Navy PM adopted that position only after blasting was complete.

The Navy appears to contend that MHI should have anticipated the possibility that the freeboard would be in poor condition. It notes that the contract contemplated “growth work,” meaning work that was not expected at the outset but is later found to be necessary. (Gov’t br. at 154) While true, this does not help the Navy here. Under the contract, if the work grew or new work was added, the contractor was to receive additional compensation (R4, tab 1 at 38). As the Navy acknowledges, it issued contract modifications to pay MHI to repair the structural steel deficiencies revealed

by the blasting because this was growth work not contemplated by the original contract. The Navy fails to explain why the same treatment was not given to the additional cleanup work and rovers made necessary by the same structural steel deficiencies.

Second, the rovers and additional cleanup work were expressly or impliedly ordered by the government. While initially directed by PM Samonte, the contracting officer, who had the requisite authority to bind the government, effectively ratified that direction. “Ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority.” *Winter v. Cathedral/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007). *See also Futures, Inc.*, ASBCA No. 61566, 26-1 BCA ¶ 39,401 at 190,164; *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119,717. Here, the contracting officer knew all of the material facts. She knew the PM had directed MHI to provide rovers and cleaners, that this work was necessary to continue blasting, and that MHI was performing the work as directed while the RCC was pending and would need to continue doing so in order to satisfactorily complete the blasting.¹³

In these circumstances, by doing nothing to countermand the Navy PM’s direction or inform MHI that it would not be compensated, the contracting officer signaled her agreement with and approval of the Navy PM’s direction and thus ratified his order to perform the additional work. Conversely, the contracting officer never adopted the Navy PM’s post-blasting view that the rovers and cleanup work had been required by the unmodified contract all along. While she “voided” RCC 539G, she did not do so because she determined that the work did not need to be done or because it was already required. To the contrary, her testimony made clear that she always defers to the PM’s judgment as to what work needs to be performed. By voiding the RCC on the ground that she could not price future work, she indicated that she agreed that MHI should perform the work and be paid for it, but after the work was completed so that the final amount could be determined.

The Navy argues that MHI has not proved that it actually incurred uncompensated costs to employ rovers and cleaners (gov’t br. at 156). We have found otherwise, based on unrebutted testimony. The Navy also disputes MHI’s and its

¹³ The Navy acknowledges that a contracting officer can ratify an unauthorized directive, but it argues the facts do not support ratification here (gov’t br. at 155). While MHI does not expressly use the term “ratification,” it contests the Navy’s factual conclusion (app. reply br. at 7-9). We interpret MHI’s argument that “the Navy” directed the work as a contention that the contracting officer did so, at least implicitly (app. reply br. at 34). Because the record contains evidence of ratification and the Navy had a full opportunity to address the issue, applying the doctrine is appropriate.

subcontractors' calculations of the amount of labor time they ultimately devoted to roving and cleaning (*id.*). The evidence establishes, however, that IMIA performed at least some amount of this work, which suffices to establish entitlement to an equitable adjustment. Disputes over the actual amount of time spent go to quantum, which is not presently before us.

II. The Stern Draft Marks Claim

MHI has failed to carry its burden to demonstrate that the Navy constructively changed the contract when it directed MHI to install draft marks on the stern flap.

The issue here is one of contract interpretation. “Contract interpretation begins with the language of the written agreement.” *NOAA Md., LLC v. Adm’r of Gen. Servs. Admin.*, 997 F.3d 1159, 1165-66 (Fed. Cir. 2021) (quoting *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004)). If unambiguous, the plain meaning of a contract controls. *Id.* We must construe the contract to “effectuate its spirit and purpose giving reasonable meaning to all [of its] parts,” *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002), and in a manner that gives meaning to all of its provisions and makes sense. *Langkamp v. United States*, 943 F.3d 1346, 1353 (Fed. Cir. 2019); *Hunkin Conkey Constr. Co. v. United States*, 461 F.2d 1270, 1272 (Ct. Cl. 1972) (rejecting contract interpretation that would render a clause in the contract meaningless).

Read as a whole, the contract clearly required the installation of visible draft marks where the new stern flap was installed. MHI’s argument that it met its obligation because the existing draft marks were still present, even though they were now obscured by the new stern flap, cannot be squared with the contract documents it was required to follow. The Stern Flap SCD required MHI to “reinstall” the draft marks as part of the stern flap installation. This clearly indicated that the Navy realized that the stern flap was going to cover up the existing draft marks and therefore simply leaving them where they were, as MHI contends was all that was required, was unacceptable. After all, the purpose of the draft marks is for them to be visible to observers not on the ship (*see* R4, tab 2020 (draft marks are to “indicate the draft”)). The Stern Flap SCD cannot reasonably be read to mean that MHI did not need to provide visible draft marks.

By prescribing that the draft marks were to be reinstalled “in accordance with” the Markings Drawing, the contract further indicated that draft marks on the stern flap were required. The Markings Drawing specifically identified the placement of “transom draft marks” at the precise location where the stern flap was to be installed. The accompanying detail, Detail 22-G, shows how the marks were to be oriented relative to the ship’s centerline and how they should appear. It also referenced the general notes that described how the marks were to be fabricated and what they should

look like. While MHI is correct that the Markings Drawing depicts the existing marks prior to the stern flap addition, it incorrectly asserts that means the drawing does not apply. It is specifically referenced in both the Work Item and the Stern Flap SCD, making it a “zero-tier reference” that is mandatory for the contractor to follow. MHI’s argument that it can be dismissed as irrelevant is inconsistent with the contract’s clear requirements and would render the references to it superfluous. (R4, tab 1385)

Accordingly, MHI is not entitled to compensation for its work adding draft marks to the stern flap or for any delays caused by that work.

III. The CPP Overheating Claim

MHI’s claim arising from the CPP overheating incident has two components. First, MHI contends that the incident caused a three-day compensable delay to the ship’s undocking. Second, MHI contends that the incident, and the Navy’s response to it, resulted in repeated oil leaks that MHI incurred extra costs to clean up. We find that MHI has not proved the delay component of its claim, but has proved entitlement to compensation for the oil cleanups.

To begin with, the parties dispute who was responsible for the overheating incident. The parties appear to agree that the sump heaters (which MHI had performed no work on) were left on too long, causing the oil to overheat. The Navy contends that the Rolls-Royce representative overseeing the test preparation failed to tell the ship’s crew operating the equipment to turn the sump heaters off and MHI is therefore responsible for any resulting delay or extra costs. We have found, however, that the best evidence in the record establishes that the Rolls-Royce representative told the Chief Engineer to turn the heaters off and witnessed him turning the switch. MHI theorizes the switch malfunctioned, which explains why the sump heaters were still on when the overheating occurred. Because MHI performed no work on the sump heaters or the switch, MHI argues, the government is responsible for the failure of its equipment, the overheating that resulted, and any ensuing delay or extra costs. This theory is the most plausible based on the totality of the record before the Board.¹⁴ In

¹⁴CSI’s Contract Manager, Randall Crutchfield, testified that “[i]t was later found that the actual switches for the sump heaters were stuck to [the] on position.” (Tr. 1/155:16-20). No other evidence of this supposed finding is in the record and Mr. Crutchfield was not asked to explain the basis for his assertion. Like many of the hearing witnesses, Mr. Crutchfield testified (without objection) about matters outside his personal knowledge. We do not rely on this testimony in finding the switch malfunction theory to be the most plausible explanation of what occurred.

any event, we find that, regardless of whether the switch malfunctioned, there is no persuasive evidence that MHI was at fault for the sump heaters being left on.¹⁵

MHI failed, however, to prove its contention that the overheating incident caused a compensable delay to the ship's undocking. "A contractor seeking to prove the government's liability for a delay has the burden of proving the extent of the alleged delay, the causal link between the government's wrongful acts and the delay in the contractor's performance, and the alleged harm to the contractor for the delay." *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1316 (Fed. Cir. 2000). To establish that "causal link, the contractor must show that the government's actions affected activities on the critical path of the contractor's performance of the contract." *Id.* at 1317. MHI "must prove that the government was the sole cause of the delay and that [it] did not contribute to or concurrently cause such delay." *ECC Int'l Constructors, LLC*, ASBCA No. 59586, 25-1 BCA 38,812 at 188,779 (quoting *Insulation Specialties, Inc.*, ASBCA No. 52090, 03-2 BCA ¶ 32,361 at 160,101).

MHI did not meet its burden to prove compensable delay arising from the overheating incident. It did not demonstrate that any work delayed by the overheating incident was on the critical path to undocking. To the contrary, while the overheating incident appears to have delayed the completion of the operational testing of the port oil distribution box, completion of that testing was not required before undocking and could have been completed after the ship was returned to the water. It therefore was not on the critical path. MHI presented no evidence that the ship needed to remain in dry dock until the Navy decided whether to agree with MHI's recommendation to replace the oil. Nothing in the record indicates that the oil replacement could not also have been accomplished out of drydock. Because MHI failed to prove that any delay arising from CPP overheating incident was critical to undocking, it cannot recover on its claim for extended dry dock costs.¹⁶

¹⁵The Navy PM raised procedural issues, noting the Rolls-Royce representative was not on the approved list and that MHI failed to give notice of after-hours work (R4, tab 1075 at 14591-92). However, no evidence links these issues to the cause of the overheating incident. The Navy does not argue otherwise in its post-hearing brief.

¹⁶ Mr. Andres's report attributes a five-day delay to the Undocking Milestone to the CPP overheating incident, based on a five-day delay to the operational test (R4, tab 623 at 9, 15; tr. 4/128:11-25). However, his analysis does not address the contractual question of whether that test could occur after undocking. We therefore interpret his opinion as quantifying the delay if the CPP overheating incident were found to have delayed the undocking.

In addition, MHI's delay analysis is inadequate because it does not account for all potential concurrent delays, including the delay caused by the work on the stern flap draft marks that was occurring at the same time as the alleged delay from the overheating incident. MHI's failure to address its own delay via a proper critical path analysis is fatal to its claim. *Wright Bros., the Bldg. Co., Eagle LLC*, ASBCA No. 62285, 23-1 BCA ¶ 38255 at 185,776.¹⁷

MHI has, however, proved entitlement to compensation for its oil cleanup costs. The leaks were caused by damage to the sump heater gaskets as a result of the overheating incident. MHI was not responsible for the overheating incident, had not worked on the sump heaters, and was not contractually required to replace the gaskets. The government does not dispute that the oil leaks needed to be cleaned up and it directed MHI to do so, nor does it otherwise contend that MHI should not have performed this work in the circumstances.

The oil leaks likely could have been avoided if MHI had replaced the sump heater gaskets as repeatedly directed by PM Samonte. We cannot fault MHI for not doing so, however, because the contract provided that "[t]he Contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as a part of this contract" (R4, tab 1 at 39-40). Because the direction to perform this extra-contractual work came from the Navy PM, who was not authorized to require extra-contractual work, MHI was within its rights to decline to do it absent direction from the contracting officer.¹⁸

The Navy argues that MHI was compensated for the oil cleanups via certain RCCs issued by the contracting officer and points to the fact that, while its REA was under review by the contracting officer, an MHI representative said in an April 2021 email that "RCCs 844G, 899G, 937G, 938G, 950G and 951G took care of everything except docking time related to the parent issue of the burned oil" (gov't br. at 165-66 (quoting R4, tab 1852)). While MHI's email is an admission, the better evidence is the

¹⁷ Because we deny MHI's claims for delay compensation on other grounds, we do not reach the parties' disputes over the starboard rudder delay, the government's related jurisdictional challenge, or the government's contention that MHI released its delay claims in Modification No. A00028.

¹⁸ Unlike its position on the freeboard claim, the government does not argue that MHI's claim for compensation for the oil cleanup work is barred because the work was not authorized by the contracting officer. As a result, it has waived that argument. *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990); *First St. Contractors, LLC*, ASBCA No. 64028, 26-1 BCA ¶ 39,073 at 190,331.

cited RCCs themselves. The Navy fails to demonstrate that any RCCs, including the ones cited in the email, accounted for any of the cleanup costs in MHI's claim. The Navy neither argues that the email was a binding admission nor shows it detrimentally relied on the statement, which would be required to estop MHI from arguing to the contrary. The email, therefore, is not fatal to MHI's subsequent claim in which it effectively retracted the incorrect admission.

Finally, the Navy argues that MHI has not proved that it incurred all of the costs it claims for oil cleanups, but that is a quantum issue not presently before us. It is sufficient for entitlement purposes that MHI demonstrated it incurred some costs performing oil cleanups, which it has done.

CONCLUSION

We grant MHI's appeal as to entitlement on its freeboard blasting and CPP overheating claims, except as to the delay components of those claims. We otherwise deny MHI's appeal. We remand the matter to the parties to determine the quantum due to MHI consistent with our decision here.

Dated: August 6, 2026



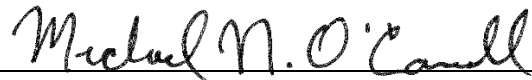
THOMAS P. MCLISH
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur



MICHAEL N. O'CONNELL
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. 63429, 63511, Appeals of Marine Hydraulics International, LLC, rendered in conformance with the Board's Charter.

Dated: August 6, 2026



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals