ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Lebolo-Watts Constructors 01 JV, LLC	)	ASBCA Nos. 59740, 60378, 60459
	)	60507, 60508
Under Contract No. W912DR-11-C-0033	)	

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OPINION BY ADMINISTRATIVE JUDGE PAGE

These appeals arose from a contract between Lebolo-Watts Constructors 01 JV, LLC (LWJV, joint venture, appellant, or the contractor) and the United States Army Corps of Engineers, Baltimore District (government or USACE). The purpose of the contract was to construct "a Wideband Satellite Communication (SATCOM) Operations Center (WSOC) at Fort Meade," Maryland (R4, tab 2 at 6[1]). In summary, these appeals focus on claims by LWJV and two of its subcontractors concerning contract interpretation. Appellant charges it was made to perform beyond contract requirements and that the government caused delay in providing permanent power to the project. A hearing on entitlement was conducted and extensive post-hearing briefs were filed. We deny each of the appeals.

FINDINGS OF FACT

Background

1. In a procurement that was a 100% small business set-aside, the government on November 24, 2010 issued Request for Proposal (RFP) No. W912DR-11-R-0011 for

[1] We refer to the sequential numbers affixed by the parties during litigation for documents in the record that have been so marked.

the instant design-bid-build contract (R4, tab 2 at 1-2). The purpose of the project was "to replace the current Defense Satellite Communications System (DSCS) Operations Center (DSCSOC) with a new facility that will support the transition from DSCSOC" to a WSOC (*id.* at 6). The solicitation stated that site visits would be conducted on December 13, 2010 (*id.* at 33). However, there is no proof (and the government does not so argue) that prospective bidders were allowed to access Building 8905 or view the cubicles and switchgear depicted on Drawing (Dwg.) EP 601 of the RFP (*see, e.g.*, R4, tab 22 at 7-8).

2. The contractor was to construct "the WSOC, a single-story structure with concrete masonry bearing walls and foundation walls on concrete footings; a concrete slab-on-grade and steel roof joists supporting metal deck, roof board, rigid insulation and a membrane roofing system with a standing seam metal roof in two areas" (R4, tab 338 at 4). Other work included lighting, fire alarms, uninterruptible power supply (UPS), and mechanical systems and electrical work both inside and outside the building. In addition to the WSOC building, the contractor was required to construct duct banks running from the WSOC to a new electrical substation ("new substation" or "secondary substation"). The contract also called for more duct banks to run from the new substation to an existing substation in Building 8905, which is on adjacent property owned by the National Security Agency (NSA or agency). (R4, tab 338 at 4, 16-17, tab 426; tr. 1/57, 3/42, 4/15-22)

3. The new substation was constructed to house "two transformers with a substation room in the middle. The power would come into the transformers [which] would reduce it and send it over into the main switchgear and the switchgear sent it to the building with the correct power that the building needs." (Tr. 4/47)

4. The parties are in agreement that the new substation would have incoming and outgoing underground electrical duct banks to transmit the permanent power from a high-voltage source to a step down transformer and then to the low-voltage switchboards located in the new WSOC Building. The new substation would obtain its high voltage power from an approximately 30-year old primary power substation switchgear located in Building 8905. (App. br. at 1, ¶ 1; gov't br. at 1 (¶ 2)) One of LWJV's subcontractors, Enterprise Electric Company (Enterprise) (R4, tab 429), with which it signed a post-award subcontract on December 15, 2011 (*id.* at 12), was responsible for installing the new substation and "everything up to [Building] 8905 as well as any of the communication duct banks set up to typically five feet outside." Another subcontractor, Worch Electric (Worch) (R4, tab 49) "handled all power going into the building" (tr. 4/183).

5. Amendment No. 0003 to the RFP was issued by the government on November 24, 2010 (R4, tab 6). LWJV acknowledged receipt of this amendment in its proposal (R4, tab 9 at 5). Relevant to these appeals are changes made to contract

Drawing No. EP 601 "ELECTRICAL – POWER – ONE-LINE – SITE" (Dwg. EP 601) (R4, tab 6 at 8, tab 453 at 208). In accordance with note 68 of the amendment relevant to the electrical drawings, the drawing in the initial RFP was deleted "in its entirety," and a new Dwg. EP 601 dated December 15, 2010 was substituted (R4, tab 6 at 8). Along row C, the new drawing contains a cautionary triangle with words going vertically that identifies revisions made to the document (R4, tab 453 at 208; tr. 2/201-02). The versions of Dwg. EP 601 that appear at R4, tab 5 at 408 and tab 453 at 208 all carry this revision date.

Contract Award and Notice to Proceed

6. The government, through the Baltimore District of the United States Army Corps of Engineers, on August 8, 2011, awarded firm-fixed-price (FFP) Contract No. W912DR-11-C-0033 (the contract) in the overall amount of $18,392,000 to LWJV (R4, tab 1 at 1-2). Contract line item (CLIN) No. 0001 for $11,140,000 covers "[a]ll costs in connection with construction of the [WSOC], Fort Meade, MD, including utilities to points 5 feet outside the building lines, complete as shown on drawings and specified." CLIN No. 2 in the amount of $7,000,000 included "[a]ll costs in connection with construction of all outside utilities beyond points 5 feet outside the building lines and all site work, complete as shown on drawings and specified." (*Id.* at 3) LWJV's bid, which is broken down into separate prices for each of the four CLINs, does not contain sufficient detail to indicate whether appellant included replacement circuit breakers for cubicles 5 and 10 or not (*see*, *e.g.*, R4, tab 9 at 11).

7. The contractor received the Notice to Proceed (NTP) on September 6, 2011. With a contract duration of 600 days, the initial completion date was April 28, 2013. (R4, tab 4, tab 342 at 1)

Relevant Contract Provisions

8. The contract incorporates by reference several standard clauses from the Federal Acquisition Regulation (FAR). These include FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and FAR 52.243-4, CHANGES (JUN 2007). (R4, tab 1 at 15-16)

9. Also incorporated by reference is FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997) (R4, tab 1 at 15). For the reader's convenience, we produce the relevant text of the FAR provision below:

> (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer [CO] access thereto. Anything

> mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the [CO], who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The [CO] shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

10. Contract specification § 01 05 00 Job Conditions, ¶ 1.4.2 Interruption of Utilities: (1972), subparagraph (b) requires the contractor to submit written requests for permission to shut down utility services to the CO "not less than 17 days prior to proposed date of interruption" (R4, tab 451 at 18). The Maryland Procurement Office (MPO) was the upstream utility provider for the project. The MPO had to be consulted when such a power outage was requested. (Tr. 4/216-17, 5/89-90)

11. Contract specification § 01 32 01.00 10 Project Schedule (R4, tab 451 at 36-49) sets forth the requirements for preparing and updating the schedule. Among other things, ¶ 1.2 requires the contractor to "[d]esignate an authorized representative to be responsible for the preparation of the schedule and all required updating (activity status) and preparation of reports." Paragraph 3.1 makes the contractor responsible for developing and maintaining the schedule as a "forward planning as well as a project monitoring tool." Paragraph ¶ 3.1.1 calls for use of "the approved Project Schedule to measure the progress of the work and to aid [the government] in evaluating time extensions." It authorizes the CO to "withhold approval of progress payments until the Contractor submits the required schedule." The project schedule provides a basis for payment and cost loading, and the CO was allowed to retain funds until the schedule was properly updated (¶ 3.2). Paragraph 3.3 sets forth Project Schedule Detailed Requirements and acceptable scheduling software, and ¶ 3.3.1 calls for use of the "Critical Path Method (CPM) of network calculation to generate the Project Schedule." In accordance with ¶ 3.3.2.2, "The schedule must include activities associated with the submittal, approval, procurement, fabrication and delivery of long lead materials, equipment, fabricated assemblies and supplies. Long lead procurement activities are those with an anticipated procurement sequence of over 90 calendar days." Under ¶ 3.3.4, the contractor has to match actual start and actual finish dates with "those provided from Contractor Quality Control Reports" [QCRs]. (R4, tab 451 at 36-41) Paragraph 3.10 provides that "[f]loat available in the schedule, at any time, shall not be considered for the exclusive use of either the Government or the Contractor" (*id.* at 49).

12. Contract specification § 26 08 20 Commissioning of Electrical Systems (R4, tab 452 at 380-96; ¶ 1.3.1) defines "commissioning" as:

> A systematic process confirming that systems have been installed, properly started, and consistently operated in strict accordance with the Contract Documents, and manufacturer's instructions that all systems are complete and functioning in accordance with the Contract Documents at Substantial Completion, and that Contractor has provided Owner adequate system documentation and training. Commissioning includes deferred and/or seasonal tests as approved by Owner.

(*Id.* at 381) Paragraph 1.1 provides "Commissioning Phasing is detailed in Section 01 32 01.00 10 Project Schedule" (*id.* at 380).

13. Paragraph 2.1.1 Preconstruction and Pre-Testing Requirements of § 26 08 20 provides that:

> The Contractor is responsible to deliver equipment and services to meet the requirements and specifications of their respective contract. . . . The Government reserves the option to elect performance of acceptance testing by internal personnel, or a designated third party. Regardless of who performs the acceptance testing, the requirements of acceptance must be met by the Contractor.

(R4, tab 452 at 385) MPO is the designated "third party" referenced here that is authorized to "elect performance of acceptance testing" (tr. 4/109-16).

14. The contract also contains various standard clauses that are incorporated by full text. This includes Defense Federal Acquisition Regulations (DFARS) 252.236-7001, CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000), which provides:

> (a) The Government will provide to the Contractor, without charge, one set of contract drawings and specifications, except publications incorporated into the technical provisions by reference, in electronic or paper media as chosen by the [CO].
>
> (b) The Contractor shall –

(1) Check all drawings furnished immediately upon receipt;

(2) Compare all drawings and verify the figures before laying out the work;

(3) Promptly notify the [CO] of any discrepancies;

(4) Be responsible for any errors that might have been avoided by complying with this paragraph (b); and

(5) Reproduce and print contract drawings and specifications as needed.

(c) In general –

(1) Large-scale drawings shall govern small-scale drawings; and

(2) The Contractor shall follow figures marked on drawings in preference to scale measurements.

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

(e) The work shall conform to the specifications and the contract drawings identified on the following index of drawings:

Drawing No.	PLATES	DATE
PTN20557	1 Thru 247	NOV 2010

(End of Clause)

(R4, tab 1 at 29-30)

15. In sector C-1 of revised Dwg. EP 601, there is a triangle enclosing the number 1. To the immediate right, it states "EXISTING PARALLELING GENERATOR SWITCHGEAR IN BUILDING 8905." This triangular symbol appears elsewhere on the drawing, but only above cubicles 5 and 10. Note 1 of the three "GENERAL NOTES" on this sheet refers the reader to Dwgs. E000 and E001 for further information pertaining to electrical symbols, abbreviations, and general notes. (R4, tab 453 at 208)

16. Dwg. EP 601 carries the following "DRAWING NOTES," which are shown right below the "GENERAL NOTES" on the lower right portion of the drawing. Both the number preceding the drawing note and the reference to that note on the drawing are encircled to distinguish these from items listed in the "General Notes":

1. EXISTING FEED TO BUILDING 8904

2. FURNISH AND INSTALL 1 SET OF 3 #2/0-AWG-C and 1 #6-AWG-G.

3. UTILIZE EXISTING SPARE CUBICLE.

4. CIRCUIT BREAKER INSTALLED IN THE EXISTING SWITCHGEAR SHALL BE COMPATIBLE WITH THE EXISTING SWITCHGEAR. INCLUDE THIS WORK IN THE COORDINATION STUDY.

(R4, tab 453 at 208)

17. A reference to drawing note 3 appears under information on that portion of Dwg. EP 601 that pertains to cubicle nos. 5[2] and 10.[3] A reference to drawing note 4 points to a square box containing the number "52" that is within the area drawn in darker ink than other features on the drawing (hereinafter "heavy" or "bold lines") which denotes a circuit breaker. (R4, tab 453 at 208; *see also* "[Dwg.] E000

[2] The contractor was not allowed to use the existing breaker in cubicle 5 because it was slated by the government for other purposes (tr. 1/30).

[3] Dwg. EP 601 indicates that cubicles 5 and 10 are "spare" (R4, tab 453 at 208). During performance, it was learned that cubicle 11, not cubicle 10, was the location of the latter spare (tr. 5/50). This explains why some references to the spare cubicles are to Nos. 5 and 10 whereas others are to Nos. 5 and 11. In either event, the contract designated two "spare cubicles," and appellant has not argued that it was harmed by the misdescription of cubicle 10 as "spare" instead of cubicle 11 (*see*, *e.g.*, app. br. and app. reply br., *passim*).

ELECTRICAL – LEGEND and [Dwg.] E0001 ELECTRICAL - NOTES AND ABBREVIATIONS, R4, tab 453 at 179-80)

18. Although the versions of Dwg. EP 601 that appear at R4, tab 408 and tab 453 at 208 are the same, the document that appears under tab 5 differs significantly in that it does not depict the shaded or greyed area ("light lines") that are seen on R4, tab 408 and tab 453 at 208. This obscures distinctions between differentiated areas. All versions show the work in cubicles 5 and 10 drawn in heavy lines. (R4, tabs 5, 408, 453 at 208)

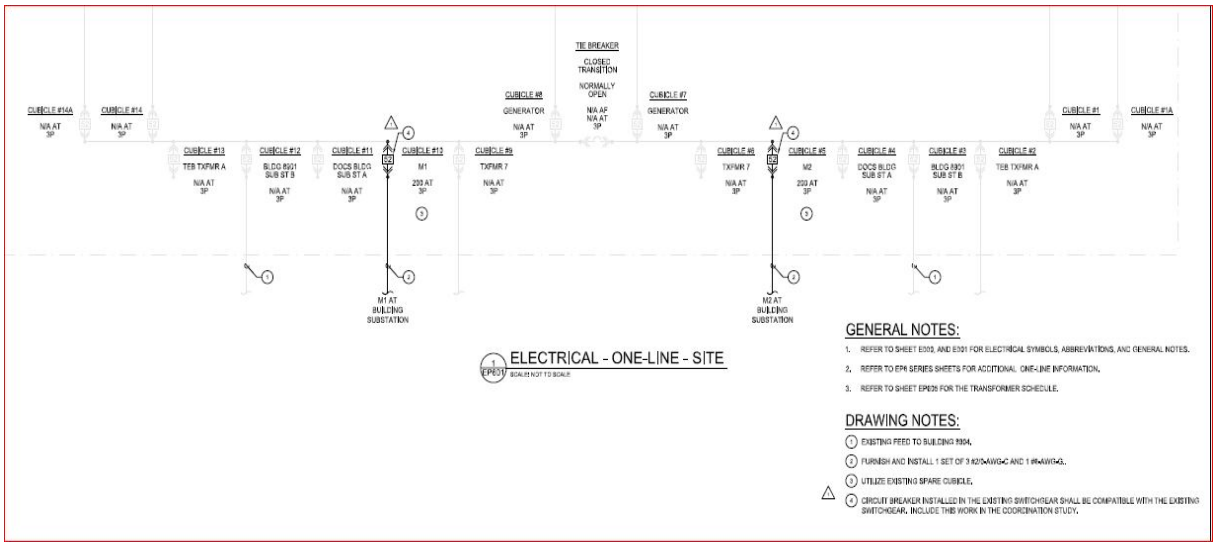
19. In its briefs, LWJV relies upon the drawing found at R4, tab 5 to make its case (*see, e.g.*, app. br. at 13-17, 62-63; app. reply br. at 8-15, 22-25). Conversely, the government relies upon the versions found at R4, tab 408 and tab 453 at 208 (*see, e.g.*, gov't br. at 28-29, 41, 52-58; gov't reply br. at 7-10, 16-17, 52-59). This disparity is important, as the government's argument regarding the contractor's obligation to provide replacement circuit breakers is premised in part upon the use of "light lines" and "heavy lines" on Dwg. EP 601 to distinguish certain types of work whereas LWJV rests similarly upon its position that the "shaded areas" are not present on tab 5 and do not carry the meaning urged by the government. With respect to the meaning of the shaded areas, we find credible the testimony of Mr. Jonathan Rozenblat, the government's project engineer, who explained that the government used heavy or bold lines to indicate new work required of the contractor, and lighter shading to depict existing work, consistent with convention in the trade (tr. 4/175, 199).

20. Although appellant did not offer an explanation for the absence of a distinction between heavy and light lines in R4, tab 5 (app. br.; app. reply br.; *passim*), Mr. Rozenblat said that the document as it appears in this tab of the Rule 4 file seems to be a "scanned copy" in which the "greyed-out lines were lost" (tr. 4/195). As there is no assertion by either party that Dwg. EP 601 was deliberately tampered with (although it may have changed or faded as part of the scanning process (tr. 4/195-96)), it is unnecessary that we determine why the contractor may have had a different version, only that we find which one is established as authentically part of the contract and therefor controlling.

21. At the hearing, the Board ordered the parties to address the differences between Dwg. EP 601 as it appears at R4, tab 5, tab 408, and tab 453 at 208 (tr. 6/116-26). Appellant offered no explanation for the disparity in tab 5, the version it urges, and the nearly identical ones found at tab 408 and tab 453 at 208. We accept the drawing as it appears in R4, tab 408 and tab 453 at 208 as authentic for contract interpretation purposes and in deciding these appeals. This drawing is part of an integrated, 250-page contract document containing numerous drawing sheets and other information that was also part of the bid documents (R4, tab 453). This is supported by the credible testimony of Mr. Rozenblat, who said that these are the versions that

were part of the contract and used during performance (tr. 4/194-96). For purposes of consistency, we hereafter cite Dwg. EP 601 as controlling as it appears in R4, tab 453 at 208, even though it is the same as R4, tab 408.

22. The following is an excerpt of relevant portions of Dwg. EP 601, as it appears in R4, tab 453 at 208:



LWJV, Its Subcontractors, and Key Personnel

23. LWJV is a joint venture between Lebolo Construction Management and Watts Constructors; the latter was then owned by the Weitz Company (Weitz) (*see Lebolo-Watts Constructors 01 JV, LLC*, ASBCA Nos. 59738, 59909, 19-1 BCA ¶ 37,301 at 181,439). The joint venture subcontracted with various companies to perform the work. LWJV's subcontract with Enterprise was for the latter to perform high voltage and secondary substation work (R4, tab 429). Enterprise agreed to provide "Site Connection for Primary Electrical Service and Communication to the building & substation and associated work." Part of this effort was installing a "complete duct bank system for both primary power and communications" that included but was "not limited to new medium voltage gear (substation)." (*Id.* at 16 (¶¶ 1.2, 1.2.2)) Enterprise was responsible for the electrical connection from an existing permanent high voltage power source in Building 8905, to a secondary new substation that it was to erect. This electrical connection passed through an existing underground duct bank to an existing manhole, where the power supply then connected to a new duct bank also built by Enterprise with a tie-in to the high voltage permanent power to the new secondary substation. (R4, tab 426)[4]

[4] *See also* app. br. at 6-7 (¶ 9), to which the government's reply brief did not object.

24. On October 21, 2011, LWJV subcontracted with R.W. Warner, Inc. (Warner) to perform mechanical and plumbing work (R4, tab 428). Among other things, this included providing "all materials, equipment and manpower to install a complete and fully functional HVAC [heating, ventilating, and air conditioning] system," all computer room air conditioning (CRAC) units, dampers, louvers, chilled and hot water piping, and a complete automated temperature controls system (energy control management system or EMCS) (*id.* at 16; tr. 2/187-88).

25. Key personnel for LWJV and its subcontractors included Randy Lebolo, joint venture manager for LWJV (tr. 1/168); John Sloss, initial project manager for Weitz (tr. 1/44-45); Michael Boettcher, project manager for Weitz who at first assisted then succeeded Mr. Sloss (tr. 1/73-74, 117); Shane Bauer, construction manager for Weitz (tr. 2/134-35); Christian Worch, vice president then president and project manager for Worch Electric (tr., 2/212-13); and Rex Camden, general manager for Warner's Capitol Division (tr. 2/177-78). Government employees who administered the contract included Mr. Rozenblat, an electrical engineer and the project engineer (tr. 4/173-75); James Neary, construction representative and inspector (tr. 4/11-14); and Oris Clary, resident engineer and CO's representative (COR) (tr. 5/71). Mr. Rozenblat and Mr. Neary were on the jobsite daily (tr. 1/124-25).

26. As summarized by Mr. Bauer in an email of November 12, 2012, LWJV had significant problems with several subcontractors. Their deficient work had to be corrected, cost the contractor an additional $1,025,000 (R4, tab 155), and resulted in project delays. Among problematic subcontractors were (1) 1st Electric, Inc. (1st Electric), which "defaulted and filed bankruptcy after underground, some site work and some masonry wall rough in. They were replaced with [Worch]," and LWJV "project[ed] a $25,000 overrun for this work"; (2) Calvin Construction, the "retaining wall subcontractor" that took bankruptcy "after only completing his shop drawings" and was replaced by Ivy Hill at an additional cost of $55,000; (3) Richard F. Cline, the "original civil Subcontractor," which was replaced for an additional $115,000; (4) Turnkey Roofing (Turnkey), which was to do the "metal wall panels" but refused to perform after it could not get a bond. "The over run on this is $530[,000]"; and, (5) Daly Masonry (Daly), whose surety did not want to complete the work after the company's default, and had a projected loss of $300,000 "if the surety does not step up." LWJV also projected a $350,000 overrun in labor costs. (R4, tab 113)

27. LWJV terminated 1st Electric for default (R4, tab 46, tab 113 at 1, tab 155 at 1). The joint venture then subcontracted on or about May 22, 2012 with Worch to perform the low voltage portion of the work for the new WSOC Building. Worch's two-page bid to LWJV in the amount of $7,792,000 included at line item, ¶ 10 that it would "Supply & Install power requirements as shown on drawings" (R4, tab 47 at 2), but is no more specific than that. Worch's contract, in the amount of $3,500,000,

included electrical work on the interior[5] of the WSOC as well as a new electrical duct bank to connect permanent power from the existing substation in Building 8905 to the new secondary substation. The new substation, to be built by Enterprise, was to connect to the new Worch-supplied switchboards in the WSOC Building. This was for electrical power distribution for running the electrical, lighting, security, UPS, fire alarms, and mechanical systems, including the EMCS. (R4, tab 49 at 1, 14-17, 44-53; tr. 3/18-20)

28. The joint venture terminated Daly for failing to prosecute the work in a timely and acceptable manner (*see, e.g.*, R4, tabs 107, 155). Worch employed subcontractor County Communications (County) to "r[u]n the work that came up through the [concrete] pad," after which the pad was to become LWJV's responsibility to finish so "Enterprise could set their substation on it" (tr. 4/52).

Contract Performance and the Subject Appeals

29. Disputes that arose during contract performance led to claims by LWJV and some of its subcontractors that matured into the subject appeals. In ASBCA No. 60459, LWJV and Worch seek a total of $37,213 for issues arising from exit door power, building automation system (BAS) controller power, and backbone cabling (R4, tab 102). In ASBCA No. 60508, a pass-through claim, Worch asks for $35,851 for air conditioning unit (ACU) control by the EMCS (R4, tab 425). Appellant claims $75,569 in ASBCA No. 60507 (including markups) for the cost of providing two replacement "gear breakers" or "circuit breakers"[6] (R4, tab 412). ASBCA Nos. 59740 and 60378 are primarily pass-through claims from subcontractors Worch (R4, tab 22) and Warner that include markups for LWJV (R4, tabs 77-78) and are largely predicated on alleged government-caused delays in providing permanent power. In ASBCA No. 59740, Worch seeks $630,472 for this and other additional electrical work, whereas Warner in ASBCA No. 60378 seeks $437,453 for mechanical work and the same purported delay; LWJV seeks overhead and profit on top of the subcontractors' claimed costs (R4, tab 22 at 5, tab 78 at 2). Appellant also claims that it was delayed by the

[5] Mr. Worch distinguished between the "inside" and "outside" work. The inside (interior) work included the "WSOC building and the duct bank to the new substation" whereas "[t]the outside work was the new substation itself and the duct banks associated with that, and communication duct banks all the way back to Building 8905." (Tr. 3/18) Appellant relied upon the document found at R4, tab 426 to delineate the interior and exterior work, and used a version of that contract drawing but annotated certain features using various colors (tr. 3/18-20).

[6] The terms "gear breakers" and "circuit breakers" have been used interchangeably in these appeals. The switchgear inside Building 8905 operated like a circuit breaker box (*see, e.g.*, R4, tab 405 at 1).

government "300 calendar days in completing the mechanical and electrical work" (R4, tab 441 at 1).

30. Because ASBCA Nos. 59740, 60378, and 60507 deal with the government's requirement that LWJV furnish two replacement circuit breakers in the existing substation in Building 8905, our findings address ASBCA No. 60507 first. This is because this claim by LWJV deals with the underlying dispute over responsibility for providing the circuit breakers. We next discuss ASBCA Nos. 59740 and 60387, which are derivative delay claims by subcontractors Worch and Warner respectively (although LWJV also seeks its own overhead and costs in these). The latter two appeals concern how work was allegedly delayed by the controversy over replacement circuit breakers as well as other issues associated with the availability of permanent power. We include in that section findings relating to contractor-caused delay, which the government contends adversely affected LWJV's ability to timely perform. As ASBCA Nos. 60459 and 60508 are unrelated to the delay allegations caused by the replacement circuit breakers, we conclude with those in a separate section.

ASBCA No. 60507: LWJV's Claim for the Cost of Providing Two Replacement Circuit Breakers

31. It is LWJV that seeks to recover $75,569 in additional costs (R4, tab 411) as part of this appeal (*see* R4, tab 412), even though the two replacement circuit breakers installed in the existing substation switchgear were provided by Enterprise (tr. 1/131).[7]

32. LWJV obtained bids from several electrical subcontractors prior to submitting an overall $18,392,000 bid to the government for the instant contract (R4, tab 9 at 11; tr. 1/55). Among these was 1st Electric's January 10, 2011 bid for the full scope of electrical work on the project, which included providing replacement breakers in Building 8905 in accordance with Dwg. EP 601 (R4, tab 45 at 5-6). 1st Electric's bid stated: "Existing spare cubicles located in the existing generator paralleling switchgear in Building 8905 [into] which new circuit breakers are to be installed in this scope of work are assumed to be prepared spaces. (Refer to notes 3 and 4 on drawing EP 601.[)]" (*Id.* at 5) After LWJV was awarded the contract, 1st Electric submitted a revised bid that again included this work (*id.* at 8, 11-12). 1st Electric was initially chosen by LWJV as the electrical subcontractor for interior electric work (tr. 1/55-56). LWJV also awarded Enterprise a subcontract for $3,550,000, which included the work shown on Dwg. EP 601 and building the new substation (R4, tab 429 at 1, 15-17; tr. 5/48-50). Eaton, a third tier subcontractor to Enterprise, manufactured and provided the substation (tr. 4/47, 58-59). Appellant offered no proof that it relied upon the bids of any of its subcontractors when it bid the job to the government (app. br.; app. reply br.; *passim*).

[7] LWJV has settled the replacement circuit breaker claim with Enterprise (tr. 1/131).

33. Appellant says that none of the four electrical subcontractors that submitted bids to LWJV indicated that these bids contained costs for these circuit breakers in cubicles 5 and 10 (app. br. at 8 (¶ 15)). LWJV disputes that 1st Electric included replacement breakers in its bid, and contends that the language from its bid is ambiguous and taken out of context (app. reply br. at 25, 54 (¶¶ 120-23)). However, as LWJV's denials cite nothing in the record to support this contention,[8] we find that 1st Electric did include these breakers in its bid based upon the language therein and the lack of evidence to the contrary (R4, tab 45 at 5, 8).

34. We do not find Mr. Sloss to be a credible witness on the matter of LWJV's bid, although he testified that he reviewed the subcontractors' bids after LWJV received the contract (tr. 1/45). He affirmatively denied on direct examination that LWJV's prospective electrical subcontractors included replacement circuit breakers in their bids (tr. 1/54-55). Yet, shortly thereafter on cross-examination, he testified "I don't remember right now" when again asked whether they did so. Government counsel had Mr. Sloss read into the record specific language from 1st Electric's initial and revised bids, both of which stated that "new circuit breakers are to be installed" (tr. 1/109-11, referencing R4, tab 45). As appellant cites no evidence to support its contention regarding context, or to contravene the plain wording of 1st Electric's bid or to explain Mr. Sloss's self-contradictory testimony, we find that 1st Electric's bid included replacement circuit breakers for cubicles 5 and 10 and that LWJV knew or should have known of this at bid.

35. According to Mr. Sloss, who reviewed the subcontractors' bids after LWJV was awarded the contract, subcontractors other than 1st Electric did not mention providing the replacement circuit breakers and LWJV did not include this work in its bid. Mr. Sloss said that he met with "members of the team"[9] who had reviewed potential subcontractors' submissions at the time LWJV made its bid, and that he looked at binders containing information about how the subcontractors arrived at their prices when he negotiated with these to do the work. (Tr. 1/45-49) Neither he nor any other witness for LWJV testified regarding its contemporaneous interpretation of Dwg. EP 601 at bid. Mr. Worch said that he did not include replacement breakers in his bid for the overall electrical work that eventually was given to Enterprise by LWJV (tr. 3/39). Appellant relies upon the testimony of Mr. Sloss and Mr. Worch in establishing LWJV's bid posture with respect to the circuit breakers in cubicles 5 and 10 (app. br. at 7-8, 16; app. reply br. at 23-24, 53).

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[8] The failure to cite to the record is discussed in detail in § 1.a of the Decision portion of this opinion.

[9] Mr. Sloss identified these "team members" as Randy Lebolo, Bill Horniday, and Dick Charleston (tr. 1/45).

36. While appellant mentions Mr. Bauer's testimony, like that of Mr. Sloss and Mr. Worch, to support its contention that Dwg. EP 601 did not call for replacement circuit breakers (*see, e.g.*, app. br. at 14 (¶ 43)), LWJV did not establish that any of these witnesses were involved with the bid submitted by appellant. In fact, their involvement in the project came about after contract award; *see, e.g.*, Mr. Sloss, tr. 1/118 (began in either June or July 2012), and Mr. Bauer, tr. 2/136 ("I came in, actually, shortly after Mike [Boettcher] did," which was later than bid submission). When asked whether he had "review[ed] the joint venture's bid with the estimating department" when he became involved with the contract after it was awarded, Mr. Bauer testified that he "did not," only "John" Sloss had done so. Mr. Bauer said that he did not "review the entire estimate [which] was already done prior to my time" (tr. 2/137). Nor is there proof Mr. Boettcher, who testified that he became involved in the project in "June or July 2012" (tr. 1/118) after the contract was awarded on August 8, 2011 (R4, tab 1 at 1-2), participated in or had particular knowledge of LWJV's bid. Although Mr. Worch testified that he reviewed the bid Worch Electric submitted to LWJV (tr. 3/22) and that his company used the version of Dwg. EP 601 found at R4, tab 5 in preparing its bid (tr. 3/26-27), appellant does not provide a factual basis to support a finding that LWJV used that version of the drawing in its own bid. Nor does LWJV furnish or cite to any proof of how its estimators prepared its bid, especially regarding their contemporaneous interpretations of Dwg. EP 601. (*See* app. br.; app. reply br.; *passim*)

37. LWJV furnished no other substantiation of assumptions made in its bid (such as bid papers) with respect to whether that price included providing replacement circuit breakers. Appellant did not show that it relied upon the interpretation of any particular subcontractor when making its bid. Lacking that information, and unwilling to afford any weight to the views of Messrs. Sloss, Bauer, or Boettcher as proof that LWJV did not bid those costs, we find that appellant has not proven how it interpreted Dwg. EP 601 at the time of bid and whether (or not) these breakers were included in its bid.[10] Further, while Mr. Sloss testified that he had post-award conversations with "Randy Lebolo, Bill Horniday, Dick Charleston – who were involved in the bidding process of the project" (tr. 1/45), LWJV did not provide testimony or other proof from any of these (or indeed anyone else) who was involved in making appellant's bid. Nor did appellant prove that it raised inquiry prior to submitting its bid regarding whether it or the government was to provide these circuit breakers, or what were the salient characteristics of these items.

[10] As discussed in Decision § 3.d.iii *infra*, further representations in appellant's briefs that are at odds with the statement in 1st Electric's bid containing replacement circuit breakers increase our concern and lessen the credibility of appellant's assertions.

38. In an email regarding the coordination study discussed in note 4 of Dwg. EP 601, Mr. Worch on February 1, 2013, advised Mr. Boettcher regarding contract requirements for the circuit breakers:

> All that means on note #4 [of Dwg. EP 601] is that when they are buying that breaker for that existing switchgear, it must be of that type of board that is existing. For example if it is an existing Eaton switchboard and Enterprise is buying a new breaker for that switchboard, they need to provide an Eaton breaker to be able to fit into that board. They couldn't buy a Sq. D breaker and try and fit it into an Eaton switchboard. This has nothing to do with the coordination study.

(R4, tab 124)

Mr. Worch later testified that he interpreted note 4 to mean "[t]hat the existing Cubicle[s] 5 and 10 had an existing breaker in that cubicle, and that that breaker had to be coordinated within the coordination study" (tr. 3/38).

39. LWJV told Enterprise on March 15, 2013 that it was responsible for providing replacement circuit breakers as called for in note 4 of Dwg. EP 601. The contractor said that the government had "communicated firmly [that] the breakers at the existing gear need to be furnished and installed and the existing spares can't be utilized." LWJV told the subcontractor that: "As we purchased all 'electrical related work' from the substation out with Enterprise we expect Enterprise to furnish and install these breakers. . . . [T]he new breakers will need to be similar in certain parameters to work with existing gear." (R4, tab 138)

40. On April 30, 2013, LWJV issued a cure notice to Enterprise that outlined various deficiencies in the subcontractor's work. The missing circuit breakers were among these: "There are also multiple other Enterprise Electric required Work related issues of concern to [LWJV] which could have impact(s) to the project including: 1. delivery dates and all required proper certifications and paperwork from circuit breakers required for existing gear." In ¶ b of this notice, LWJV "demand[ed]" that Enterprise provide "[h]ard delivery dates to the site and all required formal paperwork for the existing gear circuit breakers [as well as] [a]ny required expedited shipping or other efforts required so as not to create any schedule impact." (R4, tab 162 at 2)

41. According to the QCR, the circuit breakers were delivered to Building 8905 on June 11, 2013 (R4, tab 449 at 282). The contractor was not ready to energize the new substation then, as shown by Mr. Boettcher's emails of May 15, June 5, June 19,

and June 20, 2013 to Enterprise and Worch regarding outstanding work that had to be completed (R4, tabs 170, 183 at 1, 194, 196).

42. LWJV issued a second cure notice to Enterprise on July 24, 2013. It reiterated that Enterprise's failure to timely install the substation was "causing delay to the critical path of the project." Although it was to have been complete "roughly the middle of April," Enterprise still had not made good its commitment to complete the substation "no later than July 19, 2013 to minimize any impacts." There was the further issue that "the substation was not properly prepped to receive require[d] existing stub ups." (R4, tab 228 at 2)

43. Although a contemporaneous schedule report dated July 31, 2013 showed that installation had a late finish date of May 22, 2013 (R4, tab 391 at 3 (Activity LL 1550)), we find this is contradicted by the contractor's contemporaneous correspondence. The "Schedule Update" of July 31, 2013 shows installation of the new substation was complete on July 1, 2013 (*id.*, tab 391 at 4) regarding Activity PUE 1380. However, this is undermined by LWJV's July 24, 2013 Cure Notice to Enterprise, which stated the new substation was not finished (R4, tab 228 at 2). LWJV's "slow progress with critical electrical work involving setting the transformers and switchgear pushed the [overall] projected completion date from June 26, 2013." This delayed project completion by 128 calendar days and resulted in a projected completion date of November 1, 2013. (R4, tab 338 at 25-26[11])

44. NSA did not allow LWJV to use existing "spare breakers" in Building 8905, because the government said that new breakers were required under the contract. One of the existing spares was "being sent for maintenance" because it wasn't functioning properly, and the other was needed by the agency as a spare. (Tr. 4/191) LWJV tasked Enterprise with finding the replacement circuit breakers, but that subcontractor did not succeed. The government assisted appellant in locating the replacement breakers and having these refurbished. (Tr. 1/104-06, 4/191-92)

45. According to government scheduling expert Mr. Stuart Ockman of Ockman & Borden Associates, procuring the replacement circuit breakers did not delay the provision of permanent power (R4, tab 338 at 35-38), which was available in the spring of 2013, had LWJV been ready to receive it (tr. 4/62-63). This is because in addition to installing these breakers in Building 8905, appellant needed to complete the new substation so it could receive power from Building 8905, and install equipment at the WSOC so it could receive power from the new substation and distribute electricity throughout the WSOC. The breakers were delivered to Building 8905 on June 11, 2013 and Enterprise was still (among other things) terminating the high-voltage cable feeders

[11] *See also* findings 185-86, 194.

at the existing substation on June 28, 2013. (*See* QCRs of these dates, excerpted at R4, tab 338 at 35 in Mr. Ockman's expert report (the "Ockman Report"))

46. We find that procurement and delivery of the replacement circuit breakers did not delay the provision of permanent power by the government. As discussed in findings 45 and 132, the contractor was not prepared in June 2013 to receive permanent power due to multiple impediments for which it was responsible. *See also* Decision, §§ 3-10, *infra*.

47. On August 9, 2013, LWJV sent an "unsolicited pricing" letter that advised the government that it had cost the contractor an additional $75,569 "for furnishing, delivering and turning over to [the Corps] and/or NSA for installation" the "electrical gear breakers in Building 8905 for Cubicles #5 and #11 as directed." This price did "not include installation," which was done by NSA. (R4, tab 410 at 1)

48. The government disagreed that LWJV was owed for the replacement circuit breakers. It replied on October 31, 2013, and advised the contractor that information contained on Dwg. EP 601 obligated the contractor to provide new circuit breakers that were compatible with the existing switchgear:

> Contract Drawing EP-601 provides a one line diagram for the project and displays existing equipment along with new equipment, using traditional shading variations to depict new and existing equipment. This diagram shows two breakers, in darkened state (new work), and a reference to note #4 which states the following: "Circuit Breaker installed in the existing switchgear shall be compatible with the existing switchgear. Include this work in the coordination study." With the reference to the above sheet including the note on the drawings, it is the Government's position that the subject circuit breakers are part of the contract and within the scope of this project. Although a separate specification section was not included, the note indicates that the breakers must be compatible with the existing gear.

(R4, tab 411)

49. LWJV said that the $75,569 sought was for "labor, equipment, materials, and product data, refurbishment and testing information costs incurred by Contractor to furnish and deliver two refurbished electrical gear breakers to the project site" (R4, tab 412 at 1). LWJV alleged that it and its "electrical bidders" Enterprise, Worch, and 1st Electric all "reasonably interpreted the specifications as representing that there were

Government-provided 'existing spare breakers' available to install into the existing switchgear in the NSA Building" (*id.* at 2).

50. LWJV requested a final decision by the CO (COFD) by correspondence dated January 13, 2016 (R4, tab 412). It disagreed with the government's correspondence of October 31, 2013, which had advised that the use of "traditional shading variations to depict new and existing equipment" made the contractor responsible for the circuit breakers in cubicles 5 and 10. LWJV said that note 4 of Dwg. EP 601 was an "obtuse reference [] not sufficient to indicate [the replacement circuit breakers were] to be furnished and delivered by the Contractor." (*Id.* at 3)

51. LWJV said that, "[a]t best," the government's characterization of Dwg. EP 601's use of "'traditional shading' is ambiguous" (R4, tab 412 at 3). Appellant also complained that it was not allowed to utilize "spare" breakers that were onsite. It objected to the difficulty of having to obtain and refurbish the replacement circuit breakers. These were "unique, custom Westinghouse breakers not currently manufactured and not readily available in today's markets" and "took four months" to obtain. (*Id.* at 2) LWJV did not mention alleged government delays caused by the Phoenix Terminal (*id.*, *passim*).

52. The government on March 9, 2016 denied LWJV's circuit breaker claim (R4, tab 405). CO Gary Faykes cited information contained in Dwg. EP 601 for the proposition that this obligated the contractor to furnish replacement circuit breakers (*id.* at 2). The COFD explained that LWJV was required under § 00010 Price Schedule to include for CLIN 2 "[a]ll costs in connection with construction of all outside utilities beyond points 5 feet outside the building lines and all site work, complete as shown on drawings and [as] specified" (*id.* at 4). This

> included a connection to Building 8905, a power station that is part of the electrical grid maintained by the NSA. Inside Building 8905 was a switchgear, which operated like a circuit breaker box, into which the contractor was required to insert compatible gear breakers that would allow electrical power to flow to the WSOC.

The dispute began when the contractor discovered that the existing 30-year old Westinghouse switchgear "required gear breakers from the same time period." As these "were no longer in production," NSA provided assistance in locating replacement breakers that were refurbished by Circuit Breaker Sales, Inc. at a cost of $45,000. (*Id.* at 1)

53. The COFD said that LWJV could not reasonably have interpreted the contract to conclude that "it must provide all work for the outside utility connection except for the switchgears that were indispensable to that connection" (R4, tab 405

at 4). Even though the work was not discussed in the specifications, CO Faykes said, it was called for in Dwg. EP 601 (*id.* at 5-6). Appellant was reminded that contract clause 252.236-7001, Contract Drawings and Specifications requires LWJV to follow contract drawings, and that the contractor was not relieved from performing "manifestly necessary" work even if it was omitted or misdescribed (*id.* at 1-2, 6). The contractor's appeal of this COFD was docketed as ASBCA No. 60507.

ASBCA No. 59740: Worch Electric's Appeal for Delay Costs Associated with Replacement Circuit Breakers and the Provision of Permanent Power

54. In correspondence dated December 3, 2013, Worch notified LWJV of its "Pass-Through Claim for Compensable Time Extension Due to Lack of Permanent Power, Design Deficiency, and/or Constructive Change" (R4, tab 309 at 4-7). The electrical subcontractor said the lack of permanent power left it unable "to make their final power connections and commence Worch's extensive testing and commissioning activities on the electrical equipment that has been installed." Worch also faulted NSA for allowing MPO "to impose various constructive changes in connection with furnishing permanent power," which adversely impacted Worch "from early May of 2013 through the first three months of 2014." (*Id.* at 4)

55. Worch elaborated on its "Delay Claim Due to Lack of Permanent Power" on December 20, 2013 as it sought $386,613 for costs "from May 6, 2013 until December 2, 2013 (211 calendar days)" (R4, tab 309 at 2). Mr. Bauer sent Worch's claim to Messrs. Boettcher and Lebolo on February 11, 2013 (*id.* at 1).

56. On February 13, 2014, Worch contacted Mr. Dave Strutt, LWJV's in-house counsel, to discuss the subcontractor's outstanding claims. Mr. Bauer, who forwarded this information within LWJV, said that Mr. Worch did

> not want to take responsibility for their part of delaying the substation. He wants us to pay him for his change orders and pay him in full and wait to see how he does on the claims to determine if he wants to fund us for our damages he caused. I told him that would not work.

(R4, tab 310; *see also* tr. 2/131)

57. As of July 31, 2014, LWJV submitted a certified claim dated July 18, 2014 for $630,472 on behalf of Worch "related to Government delay of the facility permanent electric power" (R4, tab 22 at 1, 3). Of this amount, the "Worch total claim" is for $528,157 and LWJV seeks $102,315 in extended overhead and profit (*id.* at 5).

58. Worch complained that the government's demand that the contractor provide replacement circuit breakers was unreasonable. It maintains that not only were prospective contractors not given access to the existing substation to assess the premises, the contract "did not contain proper and correct direction in the specifications or contract drawings to allow procurement of breakers for installation in the existing substation in the case that was the intention of the design." (R4, tab 22 at 7-9)

59. Worch disagreed that note 4 of Dwg. EP 601 obliged the contractor to provide the replacement circuit breakers. It says that this revised drawing was belatedly "added to the contract documents" which "indicate[s] a late determination by the designer of any requirement to provide any type of interface and compatibility with the existing electrical switchgear [t]hat would provide power to the new WSOC facility." Worch maintains that this "note falls short of [meeting] design obligations inherent in this process." (R4, tab 22 at 8)

60. Although Enterprise and not Worch was tasked by LWJV to provide the replacement circuit breakers (*see* R4, tab 412 at 2), Worch maintains that its work was delayed in large part by the government's requirement that LWJV furnish replacement circuit breakers and the lack of permanent power (R4, tab 22 at 10, 120). It seeks 300 days of compensable delay, from February 22, 2013 through December 22, 2013, the latter date being when permanent power was functioning in the building. Mr. Worch based the number of days delay upon the fragnet[12] with a run date of February 6, 2014. He said that he had given information to LWJV's Chuck Conway[13] to be used in preparing the fragnet. (R4, tab 27; tr. 3/53-58)

61. In exhibits F and G to its claim, Worch states that it incurred additional costs for labor, equipment, and other expenses as well as extended overhead. This was

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[12] "Fragnet" is short for "fragmentary network." *Hedgecock Electric, Inc.*, ASBCA No. 56307, 12-2 BCA ¶ 35,086 at 172,305. As explained in *Sunshine Constr. & Eng'g, Inc. v. United States*, 64 Fed. Cl. 346, 369 n.32 (2005), "[a] 'fragnet' is a fragment of the network analysis system" and "a scheduling tool that modifies the contract schedule so as to determine the impact of a change to a contract's completion date. As a practical matter, a scheduling change is a part of the scope of work and should be tracked for purposes of cost, delay, and future impacts, and the fragnet provides this tracking." LWJV's scheduling expert Mr. French testified that "[a] single fragnet is a group of activities that define one impact. Multiple fragnets can also be put into the schedule, which would be multiple [f]ragnets which have similar impacts. Tab 27 does not, is not, descriptive enough. I can't look at the relationships, I can't tell which it is." (Tr. 3/192)

[13] Mr. Conway was deceased by the time of the hearing (tr. 1/169).

from May through December 2013, although Worch advised that the delays were ongoing. (R4, tab 22 at 111, 118-20) Worch explained that the contract called for construction of a new substation "to support the WSOC facility" by "provid[ing] electrical power via an underground duct bank from the electrical gear in the existing substation to the new Secondary Unit Substation supporting the WSOC SATCOM building," and that it could not timely perform without permanent power (*id.* at 7). The government did not render a COFD in response to this claim; the appeal from the deemed denial was docketed as ASBCA No. 59740.

ASBCA No. 60378: Delay Claim by Warner Mechanical, Inc. for Costs Associated with Replacement Circuit Breakers and Delay in Providing Permanent Power

62. By correspondence dated September 18, 2014, LWJV requested a COFD on behalf of its mechanical subcontractor, Warner (R4, tabs 77-78). The certified claim sought $437,453[14] (which included $70,991 in overhead and profit for the joint venture) for alleged government delay in providing permanent power to the facility (R4, tab 77 at 2-5). The narrative of Warner's delay claim tracks almost verbatim with that of Worch, and makes the same arguments (*cf.*, R4, tab 22 at 6-11, tab 77 at 5-9).

63. Warner's "Monetary Calculations" for direct and indirect expenses and its supporting documents (R4, tab 78) state that "[t]he original contract schedule detailed energizing of building panels to be complete on 1/31/13. Power was not provided until 12/5/13." (*Id.* at 3) Warner calculated its "Total Compensable extended Home office overhead" of $130,658 by multiplying the sum of $596.61, its "Daily Home Office Overhead Allocable to the Contract," by 219 days of alleged government delay (excluding weekends and holidays) (*id.* at 4-5).

64. Warner did not perform its own scheduling analysis, but relied upon the fragnet prepared by LWJV and discussions with Mr. Conway (tr. 2/204-05; *see also* R4, tab 27 at 2-3, tab 77 at 10-11). According to the testimony of Warner's Rex Camden, the government never placed Warner on standby during the period of alleged delay and the company was performing other projects during this time (tr. 2/204-05). Mr. Camden faulted the lack of permanent power for Warner's inability to work (tr. 2/196). Mr. Camden's testimony did not reference Warner's bid for this

[14] Warner's pass-through claim inconsistently states the overall amount it seeks. Although the transmittal letter from LWJV seeks $461,508 (R4, tab 77 at 2), Warner states elsewhere in that volume that the claim is for an overall $437,453 (*id.* at 4). Claim volume 2 "Monetary Calculations" also states the total amount sought as $437,453 (R4, tab 78 at 2). As appellant's post-hearing brief uses the lesser amount and there is no explanation for the discrepancy (*see* app. br. at 36 (¶ 136)), we consider the claim to be for $437,453.

contract, indicate who participated in preparing the bid Warner submitted to LWJV (much less his own involvement, if any), and did not refer to any bid papers (tr. 2/178-212). We find that Mr. Camden failed to establish any knowledge of what was (or was not) included in Warner's or LWJV's bid, and appellant did not offer testimony of any other witness relevant to Warner's bid or its own for this work.

65. Prior to making a final decision, the government responded to the Warner pass-through claim on December 31, 2014. Administrative Contracting Officer (ACO) Sharon M. Garay Rodriguez, P.E., noted that "[w]hile there may be some merit to delay costs submitted in Volume 2 (Financial Exhibits), we disagree with the rationale presented in Volume 1 (Entitlement)." ACO Rodriguez said that the "reason for the delay" was given as the government's failure "to 'provide adequate and proper direction in the contract documents related to any aspect of the existing substation [LWJV] was required to be compatible with and connect to.'" She disagreed with the allegation that there was a failure of the contract drawings and specifications to "contain proper and correct direction . . . to allow procurement of breakers for installation in the existing substation." (R4, tab 79) (internal quotations omitted)

66. ACO Rodriguez pointed out that the government had responded affirmatively during performance to the contractor's inquiry over whether "the circuit breakers are part of the contract and within scope," and noted that the fragnet offered in support of the requested compensable delays "did not correspond with the narrative submitted." The government "recognize[d] there were several additional issues which led to a delay in permanent power to the facility." The parties' additional discussions "led to a compensable time extension for LWJV's extended general conditions, with the knowledge that costs negotiated did not include those of lower tier contractors." For the government to further evaluate the claim, LWJV was asked to "please submit a better rationale for the delay costs claimed and a revised fragnet" that "support[ed] this reasoning." The government asked that this information be "limit[ed to] impacts to only those activities that [Warner] was working on during this time," and "is in agreement with prior settlements made between [the government] and LWJV on the number of compensable days for such delays." (R4, tab 79)

67. The COFD issued on December 9, 2015 denied Warner's pass-through claim in its entirety. CO Faykes observed that

> while the claim is highly argumentative and difficult to understand, it appears Warner now alleges that because circuit breakers in the existing electrical substation had to be replaced before electrical power could be provided to the

> WSOC, it is somehow entitled to $366,462.00, with markups from [LWJV] bringing the total to $437,453.00.

(R4, tab 80 at 1)

68. The CO reminded LWJV that the parties had resolved this claim on August 4, 2014 at the request for equitable adjustment (REA) stage through bilateral Modification (Mod.) R00030.[15] The contractor received $262,125, and performance was extended by 212 calendar days. The CO told appellant that the adjustment had compensated the contractor in full for all costs associated with the project delays, which the contractor had said "were [for] interference with the work flow and processes by a third party (NSA), improper design and failure to address in a timely manner the existing differential relays, and the improper phasing of the electrical power coming from the existing upstream electrical source for the project." The CO also criticized the contractor for the claim's lack of clarity and support. (R4, tab 80 at 2-4) LWJV's appeal from this COFD was docketed as ASBCA No. 60378.

ASBCA No. 60459: Worch Exit Door Power & BAS Controller Power Claims

69. This appeal, another pass-through claim from Worch, also involves matters of contract interpretation. According to Mr. Worch, the "circuits were not shown on the electrical bid drawings" (tr. 2/217).[16] As stated in LWJV's November 7, 2014 request for a COFD, Worch sought a total of $37,213 for the issues of "Backbone Cabling," "Exit Door Power," and "BAS Controller Power." This amount also included indirect costs for LWJV. (R4, tab 102) The COFD, signed by CO Faykes,

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[15] This contract modification is referred to variously by the parties and witnesses. The French Report calls it Modification No. R00030 (*see, e.g.*, R4, tab 441 at 6); the Ockman Report calls it Modification No. A00021 (R4, tab 338 at 17); appellant apparently references it as Mod. P00030 (app. br. at 11 (¶ 27)) and the government's brief calls it both Modification DM and Change DM (gov't br. at 25 (¶ 102), 53). As the record contains only a single contract modification dated August 4, 2014 that extended performance by 212 days and gave LWJV $262,125 for extended field office overhead, we find all these refer to the same document, which is found at R4, tab 23.

[16] Mr. Worch provided this response after a rather convoluted question by counsel. Read in its entirety, the question seems to relate to both exit door power and BAS controllers. Broadly read, we understand it to indicate that Worch did not include these items in its bid. Mr. Worch does not opine regarding how LWJV bid on these (tr. 2/214-17) nor does appellant's proposed finding provide support for his credibility in doing so (*see* app. br. at 49 (¶ 208)). Nothing else in LWJV's briefs demonstrates how LWJV bid the contract, including its position regarding any of the issues in these appeals (*see* app. br.; app. reply br., *passim*).

found merit to the "Backbone Cabling" claim, which left the latter two issues and $29,095 in dispute (R4, tab 81 at 1-2).

Worch Claim for Exit Door Power

70. The contractor filed a series of requests for information (RFIs). LWJV's RFI-0253, dated January 30, 2013 and received by the government on February 5, 2013, stated: "The electrical drawings do not indicate any circuits for power to the doors, where power supplies are required for the electrical hardware, nor [are] any circuits shown on the panel schedules. Examples are electric lock sets and electric exit devices. Please provide direction." The government replied on February 12, 2013: "Power for Electrical Hardware per contract comes from the nearest circuit that meets the required voltage to each door with these components. There is no additional cost or time due to this response as it is part of the contract." (R4, tab 83)

71. Mr. Worch testified that he assisted with bidding the project on behalf of Worch Electric (tr. 2/213). With respect to the exit doors, he said that "the contract did not show they required power. There were no circuits shown. Nothing on the drawings or panel schedules." (Tr. 2/214) He said that "[t]he project was a design bi[d]-build project. Drawings were issued by the Corps of Engineers, a complete design. If it's not shown on the drawings. It's not bid on, is the way we looked at it." (Tr. 2/215)

72. Mr. Boettcher wrote the government on February 22, 2013 to provide "formal notice in relation to the power requirements for the missing design and engineering for the electrical hardware." LWJV said it would "not proceed until required formal written modification is received and associated impacts [were] agreed upon." It advised there would "be additional costs associated with these modifications." (R4, tab 85)

73. The government told LWJV on May 10, 2013 "to provide clarification for the power supply being provided for Exit only doors." COR Clary recounted relevant correspondence, and an email of March 20, 2013 to Mr. Sloss gave "further detail on this subject." He restated "the government's position that these power supplies are already included in [the] contract," and advised the contractor that it had "the option to submit a Request for Equitable Adjustment" under contract clause 252.243-7002 if it disagreed. (R4, tab 88)

74. Mr. Boettcher's email of May 17, 2013 forwarded the government's May 10, 2013 letter to Worch and others. He said that Worch needed "to proceed immediately with associated work," and advised the subcontractor it could file an REA. Mr. Boettcher

criticized costs previously raised by Worch:

> This pricings quantity [is] too high if you are going to submit an REA. You have 500 lf [lineal feet] of EMT and 1500 feet of THHN [thermoplastic high heat-resistant nylon-coated wire]. Each door only has at most 30' for a total of 150' of EMT and 450' of wire roughly. Again, if needed you can review with Todd on the matter because he knows the nearest box to pull from onsite; these do not have to be homerunned. Also do not be putting these random overtime hours in the price; they are not justifiable for extras.

(R4, tab 89)

75. Worch responded to LWJV on June 19, 2013. It reiterated that there were no contract drawings calling for electrical connections to the exit doors. Worch cited contract drawing series EP, "where power circuits are shown [and] there is not one circuit or designation in the panel schedules for power associated with these doors." It similarly pointed out that contract drawing series EY has "details associated with doors that show the empty conduit system and boxes for door locations" but made "no provision [] for 120v power at any of these locations." Worch explained that it could not have performed the work without the direction provided by the government's letter of May 10, 2013. It sought an "equitable adjustment" of $15,943 but cautioned that if the matter were not "settled amicably," then Worch would revise its costs and "request that you do the same." (R4, tab 91)

76. On July 17, 2013, LWJV provided information regarding RFI-0253 (R4, tab 92). It gave the government a "detailed summary cost break down in relation to the issue including cost to furnish and install power to five (5) doors . . . . Other costs included in the pricing are a paint/drywall/clean up touch up lump sum cost and Lebolo Watts' standard project cost mark ups." (*Id.* at 1) Worch sought $15,943 for this work (*id.* at 5). The change request included 500 lf of ¾″ EMT and 1500 feet of THHN wire (*id.* at 7).

77. The government replied on August 9, 2013 to LWJV's July 17, 2013 "unsolicited proposal and disagree[d] that this is an additional cost." COR Clary stated that "[t]he omission of the wiring diagrams for the door hardware power from the Electrical drawings and details does not constitute a change to your contract." He directed LWJV's attention to "contract Section 252.236-7001(d), CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000)," which obliged the contractor to perform work even if it were omitted "from the drawings or specifications or the

misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed." (R4, tab 95)

78. On August 15, 2013, Worch wrote LWJV regarding the government's August 9, 2013 letter. Worch said that its proposed Change Order #38 "ask[ed] for additional time and money as an equitable adjustment due to the 'constructive' change" called for by RFI-0253. It reiterated that the contract did not contain any "provisions for circuiting shown for any doors," nor did contract drawings in the EP and EY series. Worch again agreed to settle for "$15,943" and "an additional ten days of installation duration time" if the claim were settled amicably. (R4, tab 97) On October 14, 2013, Worch wrote LWJV to "request a final Contracting Officer's decision for Worch Change Order #38" (R4, tab 100).

Worch Claim for BAS Controller Power

79. The government received RFI-0255 regarding "BAS Control Panels Circuitry" on February 8, 2013. Even though this is Worch's claim (R4, tabs 101-02), this was submitted by Warner (R4, tab 84), and was prepared with the assistance of Mr. Worch (tr. 2/218). It stated:

> This RFI is for record purposes. The HVAC BAS control panels require 120 volts AC to operate and circuits for these panels cannot be found throughout the Division 26 specifications or drawings. Via field coordination between the mechanical controls and electrical subcontractor, power from panel EUL1 circuit #023 shall be utilized to prov[ide] power to north mechanical room BAS wiring trough and MUL1 circuit #023 shall be utilized to prov[ide] power to [the] south mechanical BAS wiring trough. The EMCS/HVAC contro[ls] Subcontractor will then run from the trough to the BAS control enclosures and transformer panels.

(R4, tab 84)

80. The government responded to RFI-0255 on February 22, 2013. While it agreed "with power utilization of EUL1 and MUL1," the government "[d]isagree[d] with [the] statement that this work was not covered in the specifications as it appears to be covered in specification 23 09 00 Energy Management and Control System, EMCS General, section 3.3 CU Quantity and Location." The government quoted from the contract:

> 3.3 CU QUANTITY AND LOCATION

> Individual Digital Control Stations (DCS) are referenced to indicate [the] location of points to each DCS and DCS location. Digital control stations shall consist of one or multiple CUs to meet requirements of this specification. Where a DCS is referenced, Contractor shall provide at least one (1) CU, and additional CUs as required, in sufficient quantity to meet the requirements of this Specification. Restrictions in applying CUs are specified in Section 230903 – EMCS Field Panels. The contractor shall extend power to the DCS from an acceptable power panel. (In many cases control panels exist with 120v power. The same power sources may be reused for the new panels and extended as necessary.) If the control contractor wishes to further distribute panels to other locations, [the] control contractor is responsible for extending power to that location. Furthermore, contractor is responsible for ensuring adequate locations for the panels that do not interfere with other requirements of the project and that maintain adequate clearance for maintenance access.

(R4, tab 84)

81. Worch's proposal of April 19, 2013 sought to increase the contract by $6,083 "to provide power to the BAS controllers" in accordance with RFI-0255. It also sought a "time extension of (5) working days in conjunction with this change." (R4, tab 86) On May 4, 2013, Mr. Boettcher wrote the government that this was an "unsolicited pricing in response to" RFI-0255 "BAS Controllers." He said that "[t]hough power is outlined in the mechanical specifications and as noted in the RFI response[,] proper design should include required power for mechanical equipment and components to be properly shown in the electrical drawings[,] i.e. circuitry and proper symbols on applicable power plans." Mr. Boettcher said the price of $7,765 to furnish and install this power did not "include[] any cost for adding these changes to the as-built drawings," as appellant understood that this would be done by the government's architect, which would provide "CADD drawings." He also said that the time impact proposal was not included.[17] (R4, tab 87)

[17] From the context of the complete sentence, Mr. Boettcher appears to have meant that this price did not include making changes to the drawings, although the word "not" does not appear.

82. Mr. Boettcher informed Worch in an email of June 3, 2013 that the government "has rejected any cost for [RFI-0255] BAS Controllers citing the power is listed in the specs in the RFI answer." He reiterated that "[a]s discussed before this work has and should be completed regardless as the spec[ifications] do state for power and Worch's contract is linked to providing power for mechanical equipment." Mr. Boettcher told Worch that "[d]ue to the power being cited in the specifications an REA seems less plausible to conduct at this time in [LWJV's] take." (R4, tab 90)

83. Worch responded to Mr. Boettcher on July 24, 2013. It again sought $6,083 plus "an additional five days of installation duration time" if "settled amicably." Worch denied any responsibility for the BAS controllers:

> Within the contract documents there are no provisions for circuiting shown for these BAS controllers. Throughout the [contract's] EP drawings, where power circuits are shown there is not one circuit or designation in the panel schedules for power associated with these BAS controllers. It cannot be assumed that we are to provide 120v power if power is not shown or designated. Worch Electric is not responsible to assume a piece of equipment is required to have 120v, 24v, or maybe be battery operated. If there is not definitive clarity on the drawings we cannot be held accountable for the [government's] omissions. This is not a design build or GMP [guaranteed maximum price] project.

(R4, tab 93)

84. Mr. Boettcher wrote the government on August 8, 2013 and asked for "formal responses" to several outstanding letters from the contractor. This included his May 4, 2013 letter regarding RFI-0255 and "BAS Controllers." (R4, tab 94) COR Clary's reply of August 9, 2013 stated that RFI-0255 was not marked by LWJV "as having a potential cost impact or schedule impact." In framing the issue, the contractor's request had stated that it was "for record purposes." COR Clary said that the government had provided direction in response to the RFI on February 22, 2013. He reiterated that contract specification 23 09 00 Energy Management and Control System, EMCS General, "section 3.3 CU Quantity and Location" obligated the contractor to do this work. COR Clary concluded this "is the COR's interpretation that as stated in [the February 22nd] RFI response that this power requirement is an existing requirement of the contract documents." (R4, tab 96)

85. Mr. Boettcher on August 20, 2013 conveyed Worch's "request for equitable adjustment" for RFI-0255 to the government. "In a show of good faith," LWJV offered

to "omit its overhead and profit on this modification if this can be resolved timely." (R4, tab 99)

86. Worch again wrote LWJV on October 14, 2013 regarding the RFI. It requested a COFD and sought the same remedy as before (R4, tab 101). On November 7, 2014, LWJV forwarded Worch's request for a COFD to the government. In a pass-through claim, Worch sought $6,146 for "Backbone Cabling"; $15,943 for "Exit Door Power"; and $6,083 for "BAS Controller Power." (R4, tab 102)

87. The government's COFD of December 21, 2015 denied the claim (R4, tab 81). CO Faykes's decision noted that the "Exit Door Power" and "BAS Controller Power" claims were grounded in "similar facts" alleged by Worch "that the drawings and specifications fail to show the electrical circuits required to provide power" to these items. CO Faykes agreed that the "drawings did not contain these circuits," but disagreed that it was a change to require the contractor to provide these. The CO said the government had "provided direction on how that power was to be provided." Because the government was "aware that in this highly technically complex project, not every detail might be shown in the drawings and specifications…the contract made the contractor responsible for providing circuits to electrical hardware, even if those circuits were not shown on the plans, if the circuits were manifestly necessary for the project." Thus, even if there were an inadvertent omission "as happened here, the electrical hardware, by itself, would place the contractor on notice that power had to be provided to the hardware." (*Id.* at 11-12) CO Faykes cited specification § 08 71 00 "Door Hardware," which said: "Provide Power supply as required, wiring done by electrical contractor." He also referenced contract clause 252.236-7001, Contract Drawings and Specifications, which "makes the contractor responsible for errors when it fails to check all drawings that were furnished, compare them before laying out the work, and promptly notify the [CO] of any discrepancies." Because LWJV did not do so and these circuits were "*manifestly necessary*," the CO found there was not a contract change and denied Worch's pass-through claim. (*Id.* at 12-13) (emphasis in original)

The Government's Assertions of Contractor-Caused Delay Relating to ASBCA Nos. 59740, 60378, and 60507

88. The government responded to appellant's claims associated with permanent power by asserting that the contract called for the contractor to provide replacement circuit breakers, and that resulting delays were the fault of LWJV. These are discussed in detail in findings 31-61 for LWJV and Worch, and in findings 62-68 for LWJV and Warner. The government also maintains that the contractor is responsible for four other "critical path delays" that adversely affected the overall schedule, including alleged concurrent delays when LWJV says it was delayed by the government. These are the late finish of masonry walls; slow progress with electrical work; late commissioning of

the substation; and slow progress with testing/late substantial completion as-built schedule. (Gov't br. at 4 (¶ 13))

89. An internal LWJV email of March 10, 2014 provided an update on the contract. It notes that appellant gave its timeline of events to the CO on February 11, 2014. Mr. Bauer wrote that LWJV was:

> asking for 300 days or the total duration of the time extension which includes the Phoenix terminal and Permanent power issues [but] knew we would not get all that because we already negotiated the Phoenix terminal and received 70 days out of 120. The remaining piece is the 174 days for the delay associated with getting permanent power.

90. Mr. Bauer indicated it was likely that LWJV would settle with Enterprise. He said LWJV had "about $48K in hard cost back charges" to Worch, and that LWJV was seeking "GC [general contractor general conditions] compensation" as Worch "was at full fault for the gear arriving late and partial fault for the substation not getting set on time." Mr. Bauer noted that Worch was "actually looking for extended GCs (ironically as [Worch] is part of the problem)." (R4, tab 317)

Late Masonry Work

91. The government contends that appellant is responsible for project delays occasioned by LWJV's subcontractor Daly Masonry, which adversely affected the project's critical path. Daly was responsible for "laying the block walls for the exterior of the building and the interior of the building." Government inspector James Neary testified regarding Daly's deficient work and lack of qualified masons ("Daley [*sic*] Masonry was under manned from day one"). He noted that Daly had projected at a preparatory meeting that it "would lay 600 block[s] a day" but that on its "best day" only managed to place 200. Mr. Neary said that Daly did not do "quality" work, was "using a bunch of inexperienced masons," had problems keeping workers because they were not paid or were underpaid, did no overtime work and worked only two weekends. (Tr. 4/22-24) Other deficiencies included Daly's improper placement of control joints, installing block from unapproved sources, and/or failing to place them at all (tr. at 4/25; *see also* R4, tab 398 at 146; Quality Assurance Report (QAR) from May 24, 2012).

92. In an internal email of April 15, 2013, Mr. Bauer acknowledged project delays, which he attributed to LWJV's aggressive bidding approach that contributed to "6 Subcontractor Defaults" including "Civil, Retaining Wall, Masonry, Roofing, Metal Panels and Electrical." He stated that "[t]he Masonry delayed the completion of the

structure (a critical activity item) by three months." Mr. Bauer advised that LWJV had defaulted Daly Masonry, which "failed to meet the project schedule." He also said that Worch "has damaged our schedule," and the government was "using the fact that we are two months late on getting power up as a concurrent delay situation." Mr. Bauer stated that LWJV was "going after Worch" for delay and "potential pass thru LD [liquidated damages] impacts." He estimated a "potential risk" of "$200K" to $320,000 for Daly, and "$500,000 (not likely, probably $200,000)" for Worch. Mr. Bauer said that LWJV had notified Worch's bonding company and that he was "working with our local counsel to get them formally on notice." (R4, tab 155)

93. A government letter to LWJV dated July 17, 2012 expressed concern "over the progress of the project," and noted that the overall schedule and critical path items had slipped "at least 3 weeks" due to masonry delays. COR Clary warned the contractor that it was unacceptably changing "the submitted progress schedule [to] show a trend of [revising the logic] that shifts critical activities late finish dates to the right thereby appearing to be on schedule" in contravention with contract specification 01 32 01.00 10 ¶ 3.6. "Furthermore, [LWJV] has not been able to meet or maintain these dates as a result of the revised logic," which "further support[ed] the government position that [LWJV] is submitting unrealistic schedule updates to show that the contract will be completed by the contract completion date." He directed the contractor to prepare a compliant schedule. (R4, tab 104) The government reiterated this direction on August 13, 2012. It warned the contractor that because the schedule was used to calculate payment, "retainage will continue to be held until a satisfactory recovery schedule is received and accepted by the government." (R4, tab 105)

94. LWJV replied on August 16, 2012. It acknowledged delay to the project, which it attributed to various reasons, and said that it was working with its "subcontractors to reduce the delay." Among other things, LWJV specifically recognized slippage in completing the masonry wall, and blamed that subcontractor: "We acknowledge our schedule to complete the masonry walls and install the [roof] joist and deck has slipped. This schedule was created with durations provided by our masonry subcontractor and their failure is their sole responsibility." LWJV said it had engaged the surety, "secured another masonry company to supplement this work," and gone to a 6-day workweek. The contractor said it was "committed to work collaboratively to resolve the current impacts and avoid any potential future delays." (R4, tab 107)[18]

95. The masonry delays adversely affected other site work and overall job progress. Warner wrote LWJV on November 28, 2012 that exterior masonry had not been completed by June as expected. After listing untimely work by other LWJV

[18] The referenced surety was for Daly, which had been LWJV's masonry contractor; *see* findings 24 (Daly's surety did not finish the work) and 91.

subcontractors (including the roofing subcontractor), Warner denied that it had delayed the project. It advised: "We have been delayed as much [as] 3 months for our work to commence. We have already spent additional time already due to the pace of the progress." (R4, tab 115 at 1-2) Similarly, Worch complained about problems caused by masonry delays (R4, tab 146 at 2).

96. On April 2, 2013, Worch wrote LWJV that from "the beginning of the job it was delayed by the block work [by] 4 months. This has had a tremendous impact on the job as a whole." (R4, tab 146 at 2) Even though LWJV brought in a second masonry contractor after terminating Daly for default, the successor subcontractor was also terminated for failure to perform. As Mr. Bauer advised in an internal email dated April 15, 2013: "Daly Masonry - For those of you knew [*sic*] to the job, this was our original mason who failed to meet the project schedule. We defaulted them, had their surety step in, then when the surety qui[t] performing, we terminated them." (R4, tab 155 at 2)

97. Mr. Rozenblat testified that although LWJV put together a recovery schedule to show how it would take care of masonry issues and finish the job on time, the effort was not successful. The logic behind the sequencing of work was unsound, the contractor did not timely finish, and resulting masonry delays also adversely affected other subcontractors. As examples, he pointed out that roofing could not be installed until the masonry walls were in; without the roof in place, the mechanical subcontractor could not hang duct work, nor could the electrical subcontractor pull wiring. (Tr. 4/188-90)

98. Although Mr. Boettcher testified that he did not include the masonry delays in his scheduling analysis because these "didn't delay the project, and did not end up on the critical path related to the power issues and the associated claims" (tr. 2/58-59 referencing the fragnet at R4, tab 27), we find the record does not support his assertion. LWJV's contemporaneous correspondence and that of a year later support our finding that masonry delays to the schedule, including critical path items, are the responsibility of the contractor and adversely affected the project schedule. (*See, e.g.*, R4, tabs 104-05, 107, 115, 146, 155)

99. The government's scheduling expert assessed the impact of LWJV's delayed masonry work. Mr. Ockman determined that LWJV's "revised baseline schedule," which had a "data date of 10Nov11" and had been approved by the government, "was, in general, a reasonable plan for performing the scope of work." He used this "as the as-planned schedule" in preparing a "Time Impact Analysis." (R4, tab 338 at 13, 51) Mr. Ockman determined that masonry work was on the critical path. Appellant began the interior masonry work on schedule on April 25, 2012 (R4, tab 338 at 18; tr. 5/138-39). According to the QCR of August 31, 2012, excerpted in Mr. Ockman's report, LWJV actually finished the masonry work on that date. This

was 78 calendar days later than the adjusted schedule. (R4, tab 338 at 19-20) Because the follow-on subcontractor was unable to begin setting roof joists until August 28, 2012, that "resulted in the 60 calendar day push to the projected contract completion date" (tr. 5/146). Mr. Ockman noted that LWJV was able to somewhat mitigate the masonry-related delay, but reduced it only to 60 days (R4, tab 338 at 18-21).

100. We find that the record as a whole supports Mr. Ockman's analysis of contractor-caused delay to the critical path (*see, e.g.*, R4, tab 338 at 18-23) better than LWJV's subsequent assertions that it overcame the masonry problems and that these did not delay the project (*see, e.g.*, app. reply br. at 33-35[19]). We find that the contractor is responsible for 60 days of project delay due to late finish of masonry work.

Slow Progress of Electrical Work

101. The switchgear housed in the new substation in Building 8905 was necessary to step down the high voltage power coming from the NSA source to a usable level for the WSOC and other SATCOM facilities. A particular sequence of events had to be followed before the new substation could be installed, and LWJV's subcontractors relied in turn upon lower tiered subcontractors to do some of that work or furnish equipment and supplies. Worch was responsible for getting power into the building and distributing it inside, which included underground work. (Tr. 4/180-85)

102. 1st Electric initially was to provide the foundation for the new substation, which had to allow "stub-[ups]" which went "from the electrical room through the footer to go out towards the substation" (tr. 3/90). Worch, which took over from the defaulted 1st Electric, advised LWJV on November 21, 2012 that although it was "getting ready to complete the secondary conduits to the substation," some of the ductbank "work installed previously by 1st Electric" was not done in accordance with

[19] Appellant's reply brief disputes that the masonry delayed the project (app. reply br. at 33-35 (¶¶ 22-29)). LWJV supports this with the testimony of Mr. Boettcher, which has been called into doubt as proof of project delay for being at odds with contemporaneous contract correspondence (*see* discussion regarding masonry delay in Decision § 9.b, *infra*). Beyond that, where appellant cites the record at all in disputing the government's assertions of masonry delay, it gives only general references to the QCRs from January 1 through December 31, 2012 found at R4, tab 448. It points our attention to the QCR of December 31, 2012 (R4, tab 448 at 597), which states with respect to the masonry work that "Advanced Masonry worked on finishing brickwork at doorway on east side." We find this insufficient to overcome the government's better-founded contentions that masonry delays for which the contractor is responsible delayed the contract by 60 days.

the contract and had to be reworked. Mr. Worch told LWJV that 1st Electric's error in installing the duc[t]bank work "will take more time and money." (R4, tab 114; *see also* tr. 3/67-68, 4/231-32)

103. Worch's work at the new substation included running conduit from the electrical room out to the two transformers. These conduits, also referred to as stub-ups or raceways, were to run underground then emerge into the switchgear inside Building 8905. Once the stub-ups were completed, the contractor could pour the concrete pad upon which it would set the switchgear. County, Worch's subcontractor, was to install the stub-ups. (Tr. 4/47-49) After County did not timely or acceptably perform, another of Worch's subcontractors, Precision Concrete, poured the concrete pad on which the substation was to sit. This was one of the earliest activities for the new substation. (*See, e.g.*, R4, tab 121 at 2-3; tr. 4/51-52, 183-84)

104. Enterprise, LWJV's "outside" electrical subcontractor, was responsible for installing the new substation once the pad was finished. The pad had to be properly constructed to allow the necessary electrical connections. (Tr. 3/18, 4/48, 183) Enterprise obtained the substation from Eaton, and subcontracted its installation to that company (tr. 4/47-49, 58-59, 64-65, 67, 6/205-07).

105. LWJV was made aware on September 4, 2012, that Worch was having financial problems. Dennis Madden of Southern Maryland Cable wrote Mr. Sloss that Madden's company had "difficulty in our communications with Worch" despite repeated efforts and was looking for information regarding Worch's payment bond. (R4, tab 117 at 1-3)

106. On November 7, 2012, LWJV expressed to Worch its "concern with multiple submittals still outstanding which affect the project schedule." The contractor referenced contract provisions, which included "26 28 01 Coordination Study and Associated Submittals"; "26 23 00 Switchgear and Associated Submittals"; "27 51 16 Public Address System and Associated Submittals"; "28 36 00 Leak Detection System and Associated Submittals"; and "26 51 00 Light Fixture and Associated Submittals." LWJV told Worch of the government's concerns and called for the subcontractor to act promptly and to provide a better quality product. "A key example of this is the 26 28 01 Coordination Study and Associated Submittals now on its third submission," which LWJV first received on August 23, 2012. LWJV "demand[ed] Worch improve its quality of remaining submittals," and "request[ed] all outstanding submittals within forty-eight hours." Appellant asked to "receive a presentation or proposal from Worch on its mitigation of potential impacts of the outstanding submittals within seven calendar days, and see improvement in the quality of the remaining submittals." (R4, tab 112)

107. Mr. Boettcher wrote Worch on December 4, 2012 to express LWJV's concerns and asked for a response "asap." Mr. Boettcher said that "[d]ue to the

Coordination Study not being approved to date with multiple iterations rejected, it is not know[n] if elements of the Substation should be upsized based on the study." (R4, tab 116)

108. On January 22, 2013, LWJV issued a "notice to cure" to Worch that included repeated criticism of its work. Among submittals that had been promised by Worch but remained overdue and were causing project delays were "electrical gear back boxes [that] would have allowed the associated piping work to start in these areas by now" and "the coordination study complete with arc flash and other specified requirements, telecommunication racks, parts of the public address system, light fixtures and lighting controls and dimmers." LWJV said Worch had not finished the "substation underground feeder work" which "has delayed the placement of the substation." It told Worch that its "work for the substation should have been completed in December [2012] allowing the foundation and pad for the substation to be complete in early January [2013]. This equipment should have been set, no later th[a]n last week, to allow adequate time for testing prior to it being energized to provide power for the building to make our contractual completion date. The substation has been procured and is being stored offsite with associated cost implications." Worch was also faulted for failing to complete other work. (R4, tab 121 at 2-3)

109. Worch was again warned about its deficient substation work as part of LWJV's April 1, 2013 follow-up to its January 22, 2013 Notice to Cure: "The substation underground feeder work delay to the substation, which has created major delay to the project critical path, has additionally led to difficulty/rejection in negotiations on contract document modifications with the [government]." Mr. Boettcher's letter referenced a recent letter from the CO, which cited this activity. He noted that it was "shown as critical as of December 11, 2012" and was "91 days behind schedule" as of "March 12, 2013." Mr. Boettcher told Worch "This has implications to lead to a substantial dollar amount in general conditions, stipulated delay damages and/or other applicable costs." (R4, tab 144 at 2)

110. Worch's response of April 2, 2013 to LWJV's April 1st letter offered several excuses for its problems. It complained about delays by 1st Electric, which included "all the fixtures, switchgear, fire alarm, leak detection, etc." and that company's inability to provide a bond for the project. Worch said it had to complete the work and also had to "resubmit on many items that were neglected by [1st] Electric." This happened repeatedly, "[n]ot only once or twice, but many times on some items, specifically the dimming controls and coordination study (which was never submitted by [1st] Electric in the first place)." (R4, tab 146 at 1)

111. Worch also caused delays by not timely obtaining electrical equipment that was necessary for providing permanent power to the WSOC. In a series of emails from April 9-11, 2013, Mr. Boettcher pushed Worch to learn when the switchboards would

be obtained. (R4, tab 152) Mr. Worch responded that he had spoken with IEM, the manufacturer, which had promised for several days to ship the switchboards but had "just dropped the ball." He said that he told IEM that this delay exposed them to "everything from back charges to [the general contractor] holding me hostage until this equipment shows up." (*Id.* at 1)

112. Mr. Boettcher told Messrs. Sloss and Bauer on April 18, 2013 that "Worch items continue to slip and one of these main items is telecommunications activities associated with manpower." Mr. Boettcher said that he would "send communication" to Worch that LWJV "will start to supplement this work at [Worch's] cost if [it] does not provide [a] solution to this issue. Otherwise this will continue to be a 'Daly' esque [sic] type issue." (R4, tab 157)

113. The new substation had arrived in early February 2013, but "sat in an open field next to the site" until the concrete pad was finished and tested. The substation was then lifted by a crane onto the pad on April 19, 2013. Mr. Rozenblat testified that this delay "was due to impacts [the contractor] had with the concrete foundation and the grounding grid and the stub-up[s] not lining up with the entrances in the manufactured substation." (Tr. 6/205-07) Mr. Rozenblat discussed the stub-ups, which were used to allow later electrical connections. He said that both Worch and Enterprise "had conduit runs that were coming from [Building] 8905 for Enterprise and from the WSOC facility for Worch Electric. These conduits came up underneath the substation. They had to be in place prior to the substation being put on its foundation pad." (Tr. 6/206)

114. In a May 23, 2013 letter to its surety, Colonial Surety Company, Worch chronicled its serious problems with County. Worch said that its subcontractor's deficient and untimely work included its failure to have the main ductbank complete by January 18, 2012, as was necessary to have the new "substation for the project to be set in place." This work was on the "critical path of the project" and the subcontractor's failure to timely perform caused delay. As a result, "Worch had to spend upwards of 100+ man hours (which includes overtime) helping [County] to complete tasks, such as leveling conduits, installing rebar, installing forms, hand digging, installing conduit, [and] helping pour and vibrate concrete." In addition, Worch had to purchase "over $20,000 in concrete for the project since [County] didn't have accounts with concrete suppliers." Worch "had to bring in another contractor to complete all the remaining work with the ductbank area #1, in the amount of about $5,000" and had spent "approximately $10,000" to complete areas #2, 3, and 4. Worch told Colonial there was no basis for County's claim against it for $110,858.34. (R4, tab 179 at 2-3)

115. Mr. Boettcher wrote Worch on May 15, 2013 regarding multiple, outstanding "critical items." This included whether the "UPS wire being pulled today?/are we done with wire pulling from sub[station] to main gear?" (R4, tab 170 at 1) Mr. Boettcher on May 30, 2013, told Worch that he "want[ed] to see solid results

this morning" (R4, tab 181 at 1). Repeated correspondence showed that Worch's electrical work was behind schedule throughout 2013 (tr. 2/59-72). By June 2013, Worch still had not completed many critical items of work. Mr. Boettcher told Worch again on June 5, 2013 of multiple deficiencies that were of "major concern." This included the lack of UPS wire ("UPS wire getting completed is one of the most critical issues right now"). (R4, tab 183 at 1)

116. In an email of June 12, 2013 that was copied to Worch, LWJV stated that the work was "months behind schedule" and that [subcontractor] Datacom seemed to be "walking off." Mr. Bauer asked Worch about its plans to get the project completed in light of Datacom "loading up their gang box and pulling off the job." (R4, tab 190 at 1)

117. The new substation was still not ready to be energized as of June 2013. Mr. Boettcher sent an email to Worch, other subcontractors, and internally within LWJV on June 19, 2013. He wrote regarding time-sensitive items to be completed by various subcontractors. Among other things, this included having Enterprise furnish lugs ("needed these yesterday") and Worch being told that settings for "breakers of over 1,000 amps and [coordination] study [were] not based right off breaker type." (R4, tab 194 at 1)

118. In response to being told by Mr. Boettcher to furnish "UPS Lugs" (R4, tab 194 at 1), Worch responded on June 20, 2013 that these "are still not on site . . . . Once we have the lugs for the substation and make those terminations we can energize the building pending the permanent power from the [government]." (R4, tab 196) This included the lack of UPS Wire ("UPS wire getting completed is one of the most critical issues right now") (R4, tab 183). These contractor-caused problems delayed project completion by 128 days (R4, tab 338 at 25). Worch emailed LWJV on June 20, 2013 that "[t]he lugs for the substation are still not on site…. Once we have the lugs for the substation and make those termination we can energize the building pending the permanent power from the [government]." (R4, tab 196)

119. Worch's financial problems were further discussed in an email of July 11, 2014 from Mr. Bauer to Mr. Worch. The seven claimants against Worch and amounts involved were County ($110,858.34); Dominion Electric ($110,858.34); United Rentals ($35,412.56); Grade Solutions ($95,000); Datacom ($99,688.09); Communications Supply Corporation, an assignee of Datacom ($99,688.09); Graybar ($368,248.99); and IBEW Local No. 26 ($260,656.01). Of these, Dominion Electric and Graybar had filed suit against Worch. (R4, tab 331 at 1-2, 4)

120. Worch met with its surety on July 16, 2013. Among agenda items were LWJV's goals that there be "[n]o additional delays to the project"; that they have a "Back Charge Discussion"; the "$806,104 currently left on [Worch's] Subcontract"; and "County['s] Status." (R4, tab 217 at 2) In an internal email of July 18, 2013,

Mr. Boettcher acknowledged the difficulty Worch was having with the coordination study. He declined to discuss a "'combined' coordination study [as] irrelevant and plays into [Worch's] smoke and mirrors." (R4, tab 219) On July 23, 2013, LWJV prepared a "Third Notice to Cure" for Worch that discussed that subcontractor's continued deficient performance (R4, tab 226 at 2).

121. According to appellant's expert witness Mr. W. Thomas French, the replacement relays were installed on August 2, 2013 under Mod. A00016. He disagreed that the bilateral modification put all delays for the relays on the contractor. (R4, tab 441 at 13)

122. Government inspector Neary testified that, during the summer and fall of 2013, there were numerous contractor-related problems. He said that the "issues with the [current transformers] and relays" should have been discovered earlier "had a proper coordination study been done prior to" installation. When the new substation was inspected, quality control problems were found that included "dirt . . . multiple lugs on the main gear [and] nuts that were supposed to be torqued to 90 pounds that they were taking off with their fingers." In addition, inspectors found "a lot of water running into the substation" and transformers, as well as "missing gaskets, so they had to dry that out, do a test to prove that it was dry before we could have power to the substation." Mr. Neary said that Eaton's performance was "spotty," because they would show up but then "be gone for a week." Mr. Neary testified that the contractor's deficient work resulted in MPO's postponement of providing permanent power lest there be a "failure to their gear downstream which would have been catastrophic to NSA's mission." He explained that this was why the inspections took place and the outages were carefully planned. (Tr. 4/66-68)

123. Worch continued to have problems performing its work and having the substation ready for testing prior to the provision of permanent power. LWJV on October 9, 2013 brought "[m]ultiple Issues" to Worch's attention that "continue to 'plague' completion on the project so we can truly say we are done . . . . [M]any of these items have been out for months and we just need to wrap this up and be done… please step in here and get this taken care of as they are impacting the job . . . . [W]e are going to get to where there is power and these items won't be done and have even more pressure from [the government] as to why they are not." (R4, tab 273)

124. Mr. Boettcher questioned Worch on October 23, 2013 regarding its failure to timely obtain materials needed to perform its work: "We still have some breakers and ballasts missing onsite..[.] where are these materials at? . . . I really want to just get these matter[s] taken care of and not gamble and then be stuck/worch stuck holding the bag." LWJV was also concerned over Worch's failure to complete the fire alarm: "We still don't have Siemens back out completing the fire alarm." (R4, tab 281) Worch's financial problems continued. Mr. Boettcher on October 29, 2013 emailed Mr. Sloss

and Mr. Bauer and asked whether "[e]ither of you got a couple thousand on your credit card we might [be] able to use for the job on Thursday? I am to the limit right now and we need some more [W]orch components that aren't onsite and we have been asking about for months." (R4, tab 284)

125. Mr. Boettcher's email of November 5, 2013 showed he was not in favor of granting Worch's request that LWJV pay additional UPS battery charges. This was because Worch's "own systems were not complete at the time to allow any power and [Worch] delayed power directly." (R4, tab 287 at 1)

126. On November 14, 2013, Mr. Boettcher emailed Worch stating:

> Please make sure you are working to ensure all your systems are going to be ready as needed for commissioning. Have concerns specifically on some of this [sic] remaining telecommunications, the fire alarm system and that all settings per the coordination study are right (specifically have sent communication multiple times from the testing agent there were settings still missing from the study, etc.).

(R4, tab 289 at 1)

127. On December 6, 2013, Mr. Boettcher wrote Worch regarding "remaining [critical] items to get this thing finished out / we have concerns on the following." The list included "1. Planning out completing main portions of the work…. 8. Respond to HVM [High Voltage Maintenance] testing deficiencies." He asked Mr. Worch to "please take the time asap to work on these items so we can ensure we get all work done and don't get stuck again in the crosshairs… thanks." (R4, tab 298 at 1)

128. In an email exchange of August 7, 2014, Mr. Conway and Mr. Boettcher discussed a response to the government's request for a "schedule impact fragnet" from LWJV to "validate" the claim for "211 calendar days" from Worch. Mr. Bauer was copied on these emails. Mr. Conway said that "[i]ronically the 211 days requested by Worch is the same period as the 211 days [the government] just compensated [LWJV] for." He asked Mr. Boettcher whether "the fragnet you provided [the government] during delay negotiation for the JV delay [is] appropriate to this request." Mr. Boettcher replied these were not the same days but did not elaborate further. He responded that he "guess[ed]" the fragnet would work, although the government "might push back on multiple electrical items that were still being conducted but the response would be Worch has a right to mitigate its costs for other days accordingly… (in reality if the power was granted from the agency for the substation Worch would have been in trouble…)." (R4, tab 333)

129. Despite repeated correspondence from LWJV that contemporaneously indicated delay caused by Worch and its subcontractor County (*see, e.g.*, R4, tab 122 ("This is absolutely ridiculous how unprofessional a job these guys have been performing")), Mr. Worch testified that Worch Electric's work on the ductbank and its readiness for permanent power were not affected by these deficiencies. He said he refrained from pulling feeders (wires) into the ductbank until the permanent power was available. (Tr. 3/90-97)

130. However, Mr. Bauer's email update of March 10, 2014 said that LWJV had "$48K hard cost back charges" against Worch. He said "We are also seeking [redress from Worch] for GC compensation as [Worch] was at full fault for the gear arriving late and partial fault for the substation not being set on time." (R4, tab 317) Similar charges had been shown in a draft agenda for LWJV's meeting with Worch dated July 16, 2013 that included, among other things, the status of County and a "Back Charge Discussion" with Worch (R4, tab 217; tr. 2/169-70).

131. Despite repeated correspondence which he largely wrote that expressed concern over the quality and timeliness of work by Worch and Enterprise (*see, e.g.*, R4, tabs 121-22, 133, 138, 144, 162, 183, 194, 219-20, 226, 228, 246, 252-53, 260, 265, 273, 281, 287, 289, 292, 294, 298, 303, 308, 311, 317-18, 333; *see also* tr. 2/59, 64-91), Mr. Boettcher testified that LWJV's subcontractors did not delay the project (*see, e.g.*, tr. 2/58-59 (saying respectively that neither masonry nor Worch delays appear in LWJV's fragnet at R4, tab 27 "because they didn't delay the project" and "what delays?"); *id.*; *see also* tr. 2/60-91 (generally discussing contemporaneous correspondence between LWJV and Worch regarding problems and delays by Worch and its lower-tiered subcontractors); tr. 2/72 (He replied "no" to the question of whether "tab 27 identif[ied] delays caused by Enterprise Electric"); and tr. 2/90 (citing R4, tab 333, in which Mr. Boettcher commented on Worch's claim for delay that "In reality, if the power was granted from the agency for the substation, Worch would have been in trouble…")). Appellant's posthearing reply brief contends that "There were no 'delays' for Mr. Boettcher to recall," (app. reply br. at 46 (¶ 82)), but cites nothing in the record to support that contention. We find the contemporaneous documentation, including that of both LWJV and Worch, to be more probative of contractor-caused delay than appellant's unsupported denials. There is also a noted lack of contemporaneous project correspondence to support that these delays were fully overcome and had no adverse effect.

Late Commissioning of the New Substation

Bilateral Contract Modification A00016

132. The discovery of problems associated with defective relays and current transformers is shown in the QAR of June 28, 2013. Mr. Rozenblat commented that

"the Relays in both Cabinet[s] 5 and 11 were not the proper Relays originally told by MPO." (R4, tab 399 at 55)

133. The parties are in agreement that installation of the new relays was completed by August 2, 2013 (*see* app. br. at 32 (¶ 113); gov't reply br. at 20 (¶ 113); *see also* R4, tab 393 at 5, Activity PUO1650).

134. The parties subsequently entered into bilateral Contract Modification No. A00016 (Mod. A00016), which is in the undifferentiated amount of $35,613 for a "Differing Site Condition [DSC] for Change BA" and included installing and testing the relays as well as other changes (R4, tab 404 at 1-2). In relevant part to these findings, the modification read:

> E. CHANGE IN CONTRACT TIME
>
> The contract completion date shall remain unchanged by this modification.
>
> F. CLOSING STATEMENT
>
> It is understood and agreed that pursuant to the above, the contract time is not affected, and the contract price is increased as stated above, which reflects all credits due the Government and all debits due the Contractor. <u>It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.</u> You are hereby given Notice to Proceed with this change work as of the effective date of this modification as shown in block 16C.

(*Id.* at 7) (underlining added)

135. Paragraph A, which detailed the scope of work for Mod. A00016, referenced "Chg 'CM, DC, DH' MULTI." It states in relevant part:

> A. SCOPE OF WORK
>
> . . . .

DC Exist Switch Gear–Addl 3rd Party Testing

Contractor shall provide all labor, equipment and materials to conduct independent (third party) testing of the existing switchgear for:

1. Conduct a virtual outage and install the new Government purchased CO7 relays in the existing switchgear, replacing the existing relays which are not compatible for the planned usage.

2. Conduct testing of the new CO7 relays after contractor installation in the existing switchgear.

3. Conduct a current circuit check test to verify that the ground relays are connected to a current transformer (CT).

4. Conduct an outage to allow safe access of personnel to existing CT's for data plate examination/verification.

5. Conduct a breaker trip test.

(R4, tab 404 at 2)

136. Mod. A00016 became effective on April 23, 2014. It was signed on April 18, 2014 on behalf of the contractor by Mr. Boettcher. The record copy of Mod. A00016 at tab 404 of the Rule 4 file is not signed by the contractor. We accept appellant's proposed finding that this modification "was signed by Mr. Boettcher of Lebolo-Watts on April 18, 2014, after Project Completion" (app. br. at 10 (¶ 22)). The modification increased the contract price (R4, tab 404 at 2), and unlike some other as well as previous modifications, it did not increase contract time (*cf.*, Mod. P00002 and A00025 (R4, tab 15 at 2, tab 151 at 2)). However, appellant did not reserve the right to later claim for associated delays or other costs on behalf of itself or its subcontractors (R4, tab 404 at 2).

137. According to the Ockman Report, the government is responsible for 31 calendar days of delay in providing the appropriate relays (R4, tab 338 at 32). Mr. Ockman premised this determination on appellant's schedule, which reported that the new substation was complete on July 1, 2013 (R4, tab 391 at 4, referencing activity PUE 1380 depicting a finish date of July 1, 2013). He testified that this date was conservative, because other contemporaneous records indicated that the new substation was not complete as of July 24, 2013 (R4, tab 228 at 2; tr. 5/159-61).

138. Appellant cites tr. 1/158 for the proposition that "[o]nly approximately $2,000 of the Modification A000016 scope of work was for relay and other work in the existing switchgear in NSA Building 8905" (app. br. at 10 (¶ 23)). In this testimony, Mr. Boettcher was responding to a question regarding the "relay problem" in which he said that the contractor submitted only the "raw" cost of doing the work (*see also* tr. 1/155-58; app. br. at 10 (¶ 22)). Mr. Boettcher said: "When I had submitted that cost, we were already talking about - - we had started talking about project delays related to the power, and it was concurred that we were going to - - something was going to be done separate to capture that scenario" (tr. 1/158). We find appellant's reliance on this testimony to be inadequate to show that Mod. A00016 was of limited scope and that it was understood by the parties that further claims by subcontractors were excepted. This modification was entered into about four months after the parties began their discussions. It was signed by Mr. Boettcher on behalf of LWJV; the modification plainly waives LWJV's further right of recovery for time or costs by the contractor, its subcontractors and suppliers, and did not leave open the right to later seek delay.

139. We find that appellant is a seasoned contractor that had signed other contract modifications which extended time and added costs, as well as those that waived further recovery for contract price and/or time. Although appellant maintains that "[t]here were no negotiations between [LWJV] and the Government regarding [Mod.] A00016 settling any delay claims and [Mod.] A00016 was never intended by the parties to settle any such claims" (app. br. at 10 (¶ 23)), appellant does not provide a record citation in support of this portion of its proposed finding, which is echoed and adopted in the report of its expert ("the French Report"). Mr. French improperly draws what we regard as a legal conclusion on that point (*see* R4, tab 441 at 5). *See also* Decision §§ 1.a-b, *infra*.

140. Further, appellant's reference to correspondence dated December 11, 2013 (relating to what became Mod. A00016) in which it indicated that it intended to submit additional REAs (app. reply br. at 3-4), does not support its contention that it made reservations on behalf of its subcontractors when executing the modification. That correspondence was made months before the modification was signed. Appellant offered no explanation regarding its failure to reserve further claims on behalf of its subcontractors and suppliers in the modification. (*See, e.g.*, R4, tabs 15, 21, 151) We find that the plain language of Mod. A00016 (R4, tab 404), which was entered into about four months after LWJV advised the government that it intended to submit REAs relating to "existing gear at [Building] 8905 transformer relays" and "out of phase power" that also delayed commissioning the substation (R4, tab 396 at 1), states that LWJV settled in full on behalf of the joint venture as well as its subcontractors and suppliers (R4, tab 404 at 3).

The Government's Concerns About Deficient Contractor Performance

141. On August 23, 2013, the government sent LWJV a list of deficiencies found in its inspection with MPO at the new substation that was "bigger than the attached list" (R4, tab 243; tr. 5/67). The government had expected the new substation to then be ready for power, because LWJV's Mr. Sloss had said that it was clean and ready for power (tr. 4/71). The government's list of "Critical items" included "Transition Yolk from Gear to XFRM's on both sides" (missing gasket and "bottom piece of yolk"; "Not bolted together"; "Has duct tape over gaps"); "Tags inside of the gear have metal wiring used strap tag on pieces of the gear [that] are wrapped around live bus components"; and "Foam insulation was used to seal conduits to prevent rodents, not proper material to use in this situation as it will corrode the wire insulation." It said the area needed to be "[t]horoughly cleaned of all metal scrapings, sand, dirt, and misc trash"; the contractor needed to "[c]lean out Red Cable covers w[h]ere cables tie onto bus located at both south and north section of substation, dirt and sand are inside them"; "the Cad Welds of ground at north end are breaking off due to equipment driving by"; and the "[i]nside of Gear along the top is open compartments to control wiring, some of the control wiring is not mounted properly inside of some of these compartments." Numerous "Non-Critical Items" were stated, as well as "Potential Items" including the "rigid conduit mounted to housing of XFRM" which was not acceptable. (R4, tab 243 at 2)

142. Also on August 23, 2013, LWJV told Enterprise of the government's concerns. Appellant said that "Enterprise needs to ensure with Eaton coordination that this substation is fully complete and ready for power… the last is a guide/starting point but this substation needs to be run through complete/every nook and cranny to ensure it looks pristine/is ready/will function." Mr. Boettcher instructed Enterprise to speak with Eaton, as he "believe[d] they are responsible for some of these items so they need to be apart [sic] of correcting and minimizing the progress forward." (R4, tab 243; *see also* tr. 4/225-32; R4, tab 247 at 1) Mr. Boettcher told Enterprise that LWJV would be sending a formal cure notice about these issues and that it would need to have the gear "ready, complete, and [operating] properly." He warned that "[w]e don't want to get power to this thing/not be ready and make the situation worse; i.e. equipment failures, etc." (R4, tab 245 at 1; tr. 4/233-45)

143. The QARs of August 23 and 26, 2013 show that the government and MPO inspected the site on these dates and found major deficiencies in the substation and switchgear (R4, tab 399 at 111, 114). The inspection was necessary prior to a scheduled outage (tr. 4/216-17, 5/89-90), and the resulting delay was attributed to the contractor's quality control problems. The latter QAR recorded that "MPO visited the site and found major defic[i]encies in the sub station and the switch gear so [MPO] would not provide power to switchgear as [the] scheduled outage called for. This is a

contractor delay [due to] lack of quality control." This QAR also noted quality control problems with "luna concrete." (R4, tab 399 at 111, 114)

144. LWJV sent a "Notice to Cure and Notice of Delay on Completion of Substation" to Enterprise on August 26, 2013. Mr. Boettcher told Enterprise that "[b]ased on [the] actual start date of March 28, 2013, the substation installation was to be complete by Enterprise by the middle/to end of April." Because this had not happened, Enterprise was "currently causing delay to the critical path of the project." Once the substation was energized, "Enterprise would then commission the substation and [LWJV] could also start work on the SCADA system[20] and ultimately provide power to the building. This planned sequence has been delayed." LWJV "demand[ed that] Enterprise Electric complete the installation of the substation in full to be ready for permanent power immediately. Having all of these associated issues still at this point has made USACE/MPO wary of the substation status and [they have] communicated clearly they will be looking at the substation in more detail as the installation finalizes." (R4, tab 246 at 2)

145. COR Clary notified LWJV of the "multiple deficiencies [that were] discovered within and around the secondary unit substation" during recent inspections on August 23 and 28, 2013 (R4, tab 249 at 1; *see also* tr. 5/85-88). In forwarding the letter by email on August 28, 2013, COR Clary told LWJV to "continue to correct items ASAP but do not permanently close up items until [the] government has had a chance to inspect or witness the correction." He also said to not "limit [Quality Control] inspections to what we have listed as the whole substation needs to be reviewed vs the contract requirements/specifications." (R4, tab 250 at 1) The condition of the new substation made it unsafe for MPO to provide permanent power (*see, e.g.*, R4, tabs 243, 399 at 111; tr. 4/225-32).

146. The government wrote LWJV on August 28, 2013, regarding "multiple deficiencies being discovered" during inspections that were "described in the contract and FAR Clause 52.246-12, Inspection of Construction." Deficiencies included "missing components of the gear, debris within the gear, damaged grounding connections broken and bolts not tightened correctly." The government told LWJV these problems were regarded as contractor-caused delay. It reminded appellant of its contractual responsibility for quality control to "ensure there are no safety issues" and "that the substation itself meets contract requirements and that it has been built in accordance with contract requirements including applicable codes." COR Clary advised that "the government will not pay for deficient work." (R4, tab 249)

[20] The SCADA system "is a monitoring system [used] to verify that the substation was functioning as designed and as manufactured per Eaton" (tr. 5/29).

147. LWJV on August 29, 2013 communicated the government's concerns over "associated substation incompletion delay" to Enterprise. Mr. Boettcher reminded the subcontractor that they had "discussed multiple times [that] it is imperative this work be completed thoroughly/with quality and timely to ensure we have a function[ing] critical piece of equipment and to minimize associated impacts." (R4, tab 250 at 1)

148. Mr. Boettcher faulted Enterprise and Eaton for the substation's problems. His email of September 4, 2013 warned that if these were not taken care of,

> then we won't get the commissioning outage for Monday and we have another two weeks of delay lead time for an outage. Note stipulated damages for the job are [$]1,800 a day and our [general contractor damages are] around $3,000 a day and this is not a threat. This is actually happening and impactful.

(R4, tab 260 at 2)

149. In this email, sent six days after Mr. Boettcher warned Enterprise of the government's concerns (finding 147), he told Enterprise and Eaton that

> [I]t is completely unacceptable to date [that] we do not have a proper and complete substation and do not have commitment from Eaton on some of these main issues left to be resolved today/tomorrow. We had multiple communications a few weeks back after the pre startup checklist was conducted [that] this station was ready to be powered up. Obviously the list of deficiency items disproves this.

(R4, tab 260 at 4)

150. The contractor was required to give a minimum of two weeks advance notice when requesting a power outage to ensure that it could be safely done and did not impact other contractors or NSA. The government's inspection found repeated problems that had to be corrected before the outage would be allowed, such as poor alignment of the conductors and conduit, issues related to moisture intrusion, and improperly cleaned areas. (Tr. 5/10-18) Mr. Boettcher's email of September 4, 2013 to subcontractors including Worch and Enterprise reiterated the urgency of correcting these issues, which included deficiencies remaining from the August 28, 2013 inspection (R4, tab 258). Mr. Boettcher indicated that the contractor was not yet ready to receive permanent power in an email of September 17, 2013. He asked the government to "let us know if Enterprise could meet onsite with NSA tomorrow to

continue on the process of getting power to the substation and moving forward." (R4, tab 338 at 39) In an email of September 26, 2013, Mr. Boettcher asked the government whether an inspection by MPO could be scheduled for the next day (*id.* at 40). We find that these emails confirm that LWJV was not ready for a power outage prior to at least September 26, 2013 and was responsible for these delays.

151. On September 27, 2013, Mr. Boettcher gave Enterprise 48 hours to complete several items. This included "internal substation quality control and specifically address and complete all items brought up during previous substation walks with [the government]. If this is not done [LWJV] may exercise all options as allowed it under the agreement including supplementation with associated costs being back charged for the work." Problems including "compiling the grounding of grid work and associated retesting as per USACE letter" and "conducting the ohm testing at ductbanks" "are affecting our progress and each day of delay has associated costs/impacts." (R4, tab 268 at 2-3) Mr. Boettcher emailed Enterprise again on October 10, 2013 regarding new deficiencies such as "water [] running of[f] the transformer roof and running in back doors" (R4, tab 275).

152. According to the QAR of October 9, 2013, "Underfloor inspections were started again but found to still be unacceptable [due] to dirt and trash." Mr. Neary spoke to Mr. Boettcher about this, as "this is the third time and they are still extremely dirty." (R4, tab 399 at 158)

153. The government wrote LWJV on October 11, 2013 regarding water "leaking into the low voltage compartment due to poor seals" that was "infiltrating the transformer housing as well . . . two of the five ground connections shown on the contract were not properly grounded . . . . This recent discovery has prompted additional safety concerns from the utility provider that must be verified and addressed prior to power being supplied." LWJV was directed to "address the issues . . . to minimize further delays." The government regarded these as the contractor's responsibility and told it that another safety inspection was necessary. (R4, tab 276 at 1)

154. According to the QCR of November 12, 2013, LWJV and its subcontractors (including Worch, Enterprise, Eaton, and HVM) were still correcting punch-list items and performing testing (R4, tab 402 at 300), so the new substation was not available for power (tr. 6/176; R4, tab 338 at 27-28). The new substation's lack of readiness before that date is attributable to the contractor. This is further supported by the QAR of August 26, 2013, which states that "MPO visited the site and found major [deficiencies] in the sub station and the switch gear so they would not provide power to switchgear as [our] scheduled outage called for. This is a contractor delay [due to] lack of quality control." (R4, tab 399 at 114)

155. Mr. Boettcher's stringent email of November 26, 2013 blamed Enterprise for delays in commissioning the substation. He insisted that the subcontractor "be able to start the commissioning beginning of next week and not lose an additional week on the schedule of this project." He wrote: "As communicated previously there have been a myriad of issues with the substation being incomplete (un-torqued bolts, leaking, fuses missing….) which have caused significant delays to the project where there is great exposure to [LDs] (roughly $1,800 a day), general contractor general conditions (roughly $3,000 a day)." (R4, tab 294)

156. A crackling sound was heard when permanent power was initially applied to the new substation in November 2013 (tr. 2/46-47). The power was then turned off; the problem was determined to be MPO's mislabeling of feeders connected to Building 8905, which was readily corrected (tr. 2/48-52, 5/27). The QAR of December 4, 2013 shows that Enterprise was onsite to switch cables to correct the phasing problem (R4, tab 399 at 214). The issue was resolved when power coming from Building 8905 was turned on to feed the substation before December 6, 2013 (R4, tab 399 at 216; tr. 6/66). We accept Mr. Ockman's determination that the government was responsible for "any impact from the critical path from switching the cables," and that the government was responsible for 17 calendar days of delay as the result of this problem (*see* R4, tab 338 at 29, 41-42).

157. The QAR of December 4, 2013, shows that "Enterprise . . . was on site to switch cables to correct [the] phasing iss[u]e from [Building] 8905 to[] substation" and "Eaton [was] on site commissioning the sub station" (R4, tab 399 at 214). According to the QAR of December 18, 2013, commissioning of the new substation was complete. Worch was still "cleaning building panels getting ready to turn power on to the building TODAY." (*Id.* at 228-29) We find permanent power was first available on December 19, 2013. This was 129 calendar days beyond the contractually - adjusted schedule. Delays associated with permanent power moved the anticipated contract completion date from November 1, 2013, to March 21, 2014, and put the project 140 days behind schedule. (R4, tab 338 at 31)

158. During commissioning of the project, Worch's subcontractors were not always on site due to payment issues. Emails from December 26, 2013 that included Mr. Bauer as well as Worch's subcontractors Ewing and Surepower said that "there are still finance issues outstanding" that "need to be cleared up before we can enter the site." Even if monies "were released today," the subcontractors would not be "ready for start-up till the week of January 13th" or ready to train government personnel "till the end of the month at the earliest." (R4, tab 300)

159. Substation deficiencies and resulting delays caused by Enterprise were detailed in an April 21, 2014 letter from LWJV to that subcontractor (R4, tab 322). Among reasons "that clearly illustrate that the substation while physically installed was not ready for operation and failed numerous inspections delaying the commissioning

process" were "[p]unch [list] items" found on August 23 and 28, 2013 and September 6, 2013; "Fuse and Feeder issues on 9/16/2013"; "Sheared Cable discovered and water intrusion issues not resolved until 10/22/2013"; and "Various other issues including the current transformer fan issues." LWJV told Enterprise that "[t]he current total delay is 344 days with $3,743 per day for general contractor general conditions and $1,782 per day for [government LDs] totaling $1,900,600 in direct costs not including any other subcontractor impacts." LWJV concluded the letter by rejecting a settlement offer from Enterprise. (*Id.* at 2)

Slow Progress with Testing/Later Substantial Completion As-Built Schedule

160. The parties are in agreement that, after permanent power was made available to the project in December 2013, critical path items included follow-on, startup, testing, and commissioning the new substation (*see* app. br. at 22 (¶ 76); gov't reply br. at 14 (¶ 76)). Mr. Boettcher, who testified that the project was substantially completed by mid-March 2014, agreed that the government placed substantial completion on April 14, 2014 due to the "punch list of items that needed to be completed, including some things with some of the systems" (tr. 1/119). According to its records, the government determined that "Actual Construction Completion" and the actual beneficial occupancy date (BOD) was April 15, 2014. This was a "25 calendar day delay due to slower than planned progress" due to punch list items the contractor needed to finish. (Tr. 5/157; *see also* R4, tab 338 at 33-34; tr. 5/144, 157-58, 6/159-61)

161. We find that April 15, 2014 was the date of project completion and the BOD, and that the testing and punch list work had delayed substantial completion by four weeks. We accept Mr. Ockman's determination that even if the project had been substantially complete in March 2014 as urged by the contractor (*see, e.g.*, app. br. at 48 (¶ 201); tr. 6/55-56), this does not affect his conclusions on other time impacts (R4, tab 338 at 34; tr. 6/159-60).

ASBCA No. 60508: Control of Air Conditioning Units by the EMCS

162. This appeal, which involves the "'ACU Control By EMCS Claim,' is a pass-through claim [from Warner] for providing additional controls for the isolated battery and electrical room stand-alone air-conditioning units ('ACUs'), which [the government] constructively directed to be controlled by the Energy Management Control System ('EMCS') and related mechanical work by Warner, submitted on October 24, 2014 in the amount of $35,851.00." Appellant cites R4, tab 425, as the subject claim. (App. br. at 52 (¶ 225))

163. Appellant alleges that "no such integration [between the ACUs and EMCS] was shown on the contract drawings and/or required by the Specification" (app. br. at 52 (¶ 226)). Rather, LWJV asserts that the ACUs "were designed to provide cooling to the

spaces identified with the Sequence of Operation to be provided by[] ' … package controls supplied by [the] unit manufacturer'" (*id.* at 52 (¶ 227)). Despite what appears to be a quote from the contract and reliance on other provisions that affirmatively state how the ACUs are to be handled, appellant's brief does not cite a portion of the record that substantiates its contentions. The same is true for the contractor's additional proposed findings of fact that mention Contract Dwg. No. M601, which again do not furnish a record citation (*see*, *id.* at 54-55 (¶¶ 238, 242)).

164. The record citations that are given by LWJV include RFI-0240, which was submitted by the contractor to the government on this issue (app. br. at 53 (¶ 230)), for which appellant gives an erroneous reference. It also cites further correspondence between the parties regarding the ACUs and EMCS (*id.* at 53-54, 55 (¶¶ 229-30, 233-38, 240, 243)) that describe the parties' interactions. However, we find that these do not establish that the contractor correctly interpreted the contract.

165. In refuting Warner's claim, the government points our attention to Dwg. Nos. M706 ("Mechanical Controls") (R4, tab 415) and M700 ("Mechanical Controls Points Schedule Instructions") (R4, tab 416); (gov't br. at 32 (¶ 135); gov't reply br. at 34 (¶ 240)). In the upper right portion of Dwg. M706 under the heading "PACKAGED TERMINAL AIR CONDITIONING UNITS," the contract describes ACU requirements and contains a chart entitled "ACU Points Schedule." The first four rows contain an "X" in the column labeled "alarm," which indicates that an EMCS graphical display is required for those four points.[21] (R4, tab 416) By connecting the ACUs to the EMCS, an alarm would be set off in the event the ACUs malfunctioned (tr. 5/37-38). The right lower portion of Dwg. M700 contains instructions entitled "Point Schedule Instructions for EMCS Contractor." In items 3 and 4, it requires an "M & C . . . graphical display" where an "X" is indicated. (R4, tab 416)

166. On December 13, 2012, and again on April 19, 2013, the government responded to RFI-0240 by directing appellant's attention to particular drawings and requiring the contractor to tie the ACUs into the EMCS (R4, tabs 418, 420). After Warner informed LWJV on February 6, 2013 and LWJV told the government on August 20, 2013 that it disagreed with the government's position of August 9, 2013 (R4, tabs 422-24), LWJV submitted Warner's pass-through claim of October 24, 2014 to the government (R4, tab 425).

[21] The first four items in the "ACU Points Schedule," each of which is to be alarmed, are listed with the following "point name" and "point descriptor": EV-F-S, "evaporator fan status"; CD-F-S, "condenser fan status"; CM-P-HL, "comp[resser] press high limit"; and CM-P-LL, "compressor press low limit" (R4, tab 415).

The Parties Execute Key Bilateral Modifications Including P00002, CX, and DM

167. Over time, the parties entered into a number of bilateral contract modifications. Some, but not all, extended the performance date and/or further compensated the contractor. Among these was Contract Modification No. P00002 (Mod. P00002), effective May 30, 2013, which dealt with "BA Phoenix Terminal." (R4, tab 15 at 2) This work was concurrent with but unrelated to permanent power and was not on the critical path (*see, e.g.*, tr. 1/167, 2/56-57, 4/56, 207-12, 5/98-99). This modification increased the contract price by $673,343 and the completion date was extended by 127 calendar days to September 15, 2013 (R4, tab 15 at 2).

168. The "Closing Statement" of Mod. P00002 stated plainly that the agreement was made without the reservation of rights by the contractor:

> It is understood and agreed that pursuant to the above, the contract price is increased as stated above, which reflects credits due the Government and debits due the Contractor. <u>It is further understood and agreed that this adjustment constitutes compensation for direct costs on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, and for performance of the change within the time frame stated</u>.

(R4, tab 15 at 3) (underlining added)

169. Also related to the Phoenix Terminal changes was bilateral Contract Modification CX (Mod. CX), which referenced Modification No. R00029 and was signed by the CO on July 30, 2014. It increased the contract price by $222,104 for "extended overhead for compensable days due to delay as a result" of this change, but did not alter the contract completion date. The contractor acknowledged that "this adjustment constitutes compensation in full on behalf of the Contractor for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated." (R4, tab 21)

170. On January 13, 2015, the parties entered into bilateral Modification No. A00025 ("CHG 'BJ' TIME EXTENSION") (Mod. A00025). It was made effective on April 11, 2013, and extended the contract by 13 non-compensable days due to the slowness of the government's review of contractor submittals. (R4, tab 151 at 1-2)

171. Bilateral Contract Modification Change DM (Mod. DM), which referenced Mod. R00030, was signed on August 4, 2014 by the CO and by Mr. Lebolo on behalf of

LWJV. The contract price was increased by $262,125, and the time was extended "212 calendar days (CDs) for delays caused by power delays and substation changes. Of these, 84 CDs will be compensable time with extended field office overhead (FOOH)." According to ¶ D, the "closing statement" of the modification:

> It is understood and agreed that pursuant to the above, the contract time is extended 212 CDs, and the contract price is increased as stated above, which reflects all credits due the Government and all debits due the Contractor. It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

(R4, tab 23) (underlining added)

172. LWJV asserts that it "specifically excluded the delay and impact effect on all subcontractors, including Worch and Warner from the settlement of changes: Modifications P00002 [Change CX] and P00030 [Mod. DM], including reserving potential subcontractor claims from any language suggesting a full 'release' and/or 'accord and satisfaction' included therein." This assertion relies upon the testimony of Mr. Bauer. (App. br. at 11 (¶ 27) (citing tr. 2/148)) Appellant does not cite any language in the modifications that supports this assertion; in fact, the modifications specifically contradict this contention. Among other limiting language, Mod. P00002 ("Change BA") states that "this adjustment constitutes compensation for direct costs on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, and for performance of the change within the time frame stated" (R4, tab 15 at 3; *see also* findings 167-71). Mod. DM similarly states that "this adjustment constitutes compensation in full on behalf of the Contractor for all costs" (R4, tab 23 at 2; *see also* finding 171). We find that appellant waived its right to further recovery.

Scheduling Approaches by the Parties' Expert Witnesses

Mr. W. Thomas French, LWJV's Expert Witness

173. LWJV prepared a fragnet[22] (R4, tab 27) as a "tracking mechanism" for events that appellant alleges affected the project schedule. Mr. Sloss, Mr. Boettcher, and Mr. Bauer began this effort in mid-August 2013 (tr. 1/101), and updated it in either January or February 2014, after permanent power was provided (tr. 1/120). Mr. Conway also collaborated in preparing the fragnet (tr. 1/169). The preparers "pulled up the emails [and] hard documentation [about] the whole situation" (tr. 1/120, 169).

174. According to LWJV's legend on the fragnet, it has a "run date" of February 6, 2014; the "data date" indicates only activities that began on or about January 1, 2013 and took place through August 23, 2013 (R4, tab 27 at 2-3). Later events are shown with projected dates, even where completed by February 2014 (*id.*). Although the fragnet assigns delays to the Phoenix Terminal (*id.* at 2), it does not identify masonry delays or those attributable to Worch (*id.*, *passim*). It shows minimal delays by Enterprise, with the earliest of those occurring on August 23, 2013 (*id.*, "Multiple MPO punch list and Enterprise remedial"). This stands in sharp contrast to contemporaneous correspondence, such as LWJV's email to Enterprise of November 26, 2013 regarding the latter's "exposure . . . from the last approved completion date on May 13, 2013 for the project till roughly when this project gets turned over." LWJV told Enterprise that it "intends to recoup associated impacts to the fullest extent." (R4, tab 294, *see also* finding 155)

175. There is also correspondence from April 21, 2014 in which LWJV advised Enterprise of its

> potential financial risk related to [delays between August and October 2013 that] can range from the original project completion date of 5/12/2013 to the current date of this letter and beyond as the substation transformer fans are still not properly operational and functioning in full. The current total delay is 344 days with $3,743 per day for general contractor general conditions and $1,782 per day

[22] The government says that Mr. French refers variously to R4, tabs 27 (the fragnet) and tab 395 "as an as-built schedule," but that "[n]either document should be treated as such" (gov't reply br. at 37). We agree that appellant failed to establish this.

> for [government] stipulated damages totaling $1,900,600 in direct costs not including any other subcontractor impacts.

(R4, tab 322 at 2)

176. The delay analysis prepared by Mr. French, appellant's scheduling expert, considered (among other things) the project's approved baseline schedule dated December 2, 2011 (R4, tab 441 at 6-7). He also spoke with Messrs. Lebolo, Bauer, Worch, and Sloss (tr. 3/147). The baseline schedule, which was periodically updated, is found at R4, tab 339 (tr. 3/128). Mr. Sloss agreed that he was the one who "primarily put this together," which he described as "our initial revised baseline schedule that [was] accepted by the Corps, I believe" (tr. 1/78). Mr. French said that he compared the approved initial baseline schedule to what he characterized as the "as-built schedule" (the "fragnet"), which is found at R4, tab 27. That chart is also attached to the French Report as "exhibit B" (R4, tab 441 at 17-18[23]; tr. 3/146-47). Mr. French also appended exhibit A to his report, which he identified as "the critical path baseline schedule" that was prepared by Mr. Ockman (R4, tab 441 at 7, 15; tr. 3/187).

177. The fragnet is summarized in the report of the government's scheduling expert Stuart Ockman (R4, tab 338 at 33; tr. 5/122-23). According to Mr. French, "[t]he last As-Built Schedule [was used] to accurately determine the actual As-Built critical path" (tr. 3/143). Mr. Ockman used a different as-built schedule, which he developed "us[ing] the information from the contemporaneous schedule updates together with the daily reports in preparing the as-built schedule," which was appended to the Ockman Report as Exhibit 1, "Time Impact Analysis" (R4, tab 338 at 13, 51).

178. According to the French Report, "The critical items delaying the submission of the substation were . . . (1) the unavailability of spare breakers at the existing substation; (2) the defective existing relays that the Government had to replace; (3) the issues of the compatibility of the current transformers with the existing switchgear; (4) the failure of MPO to provide the power outage; and finally (5) the discovery after crackling that the original feeders were reversed causing phasing problems, which were not resolved until November and December of 2013." (R4, tab 441 at 5) Mr. French also testified that the contractor may "pace his work" in the face of government-caused delay (tr. 3/163-64).[24]

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[23] As those pages of the document were unnumbered, we have added this pagination.

[24] Mr. French also denied that the "MC cable matter impact[ed] the critical path of the project" (tr. 3/186-87), but we do not analyze that issue here. This claim was denied in *Lebolo-Watts Constructors 01 JV, LLC*, ASBCA Nos. 59738, 59909, 19-1 BCA ¶ 37,301, *aff'd* 801 Fed. Appx. 777 (Fed. Cir. 2020).

179. Mr. French opined on behalf of LWJV, Worch, and Warner "regarding (1) the Government's responsibility for the delay in providing permanent high voltage power from the existing substation in Building 8905 on NSA property, which delayed completing the remaining critical activities of [LWJV], Worch Electric, and Warner Mechanical, necessary for completing [their] critical path activities . . . and (2) for the cost of providing two refurbished circuit breakers compatible with the existing substation switchgear located in Building 8905." Mr. French found that the government was responsible "for the following reasons":

> (a) Contrary to the representation on Drawing EP-601, there were no spare existing breakers for cubicles 5 and 10;
>
> (b) There were no operational existing relays that could be utilized for the high-voltage power required for the project, and the Government had to procure replacement relays;
>
> (c) The Government was late in providing the outage required for the installation of the replacement breakers and relays, which didn't take place until June and July of 2013;
>
> (d) The Government was responsible for re-testing and setting of the new relays by issuing a "no time extension" change order;
>
> (e) The Government was responsible for resolving and verifying the adequacy of the existing current transformers at the existing switchgear, which did not take place until an outage was provided in mid-August 2013; and
>
> (f) The Government was responsible for the issues that the existing gear had defective differential relays and phasing, which was not corrected until December of 2013, allowing for the substation to be commenced in mid-December 2013 and the permanent power distributed to the panel boards in the new building on December 22, 2013, a delay of approximately ten months.

(R4, tab 441 at 2-3)

Mr. Stuart Ockman, The Government's Expert Witness

180. In preparing his report and to ascertain relevant facts, Mr. Ockman reviewed among other things a lengthy list of contract-related documents. He determined that LWJV's "revised baseline schedule" carrying "a data date of 10Nov11[] was, in general, a reasonable plan" and used it "as the as-planned schedule." Mr. Ockman "used the information from the contemporaneous schedule updates together with the daily reports" to prepare an "as-built schedule." The purpose of an "as-built schedule [is to] illustrate[] the contractor's actual sequence and performance of design and construction." This as-built schedule was also reflected in Exhibit 1 of the Ockman Report. (R4, tab 338 at 13, 51)

181. Mr. Ockman used information from both LWJV's "as planned schedule" and the "as-built schedule" to prepare his "Time Impact Analysis." This was done "[t]o demonstrate the events that account for the extended duration of construction." He "prepared a series of four adjusted schedules that graphically illustrate the impact of controlling delays on achieving project completion," and analyzed these in his report. (R4, tab 333 at 13-14, 51)

182. The Ockman Report explained how his Time Impact Analysis was prepared:

> To demonstrate the events that account for the extended duration of construction, [Mr. Ockman] prepared a summary as-planned schedule and a series of adjusted schedules that graphically illustrate the impact of controlling delays on achieving substantial completion. The adjusted schedules were prepared by starting with the as-planned schedule and chronologically incorporating the time impacts, as they occurred during the project, into this schedule. Once a time impact was identified, the original schedule dates were revised to create an adjusted schedule incorporating the time impact, thereby reflecting the contractor's schedule and the projected completion date at the time each particular impact was resolved. This adjusted schedule was then revised to incorporate the next chronological time impact. In this way, each of the time impacts was incorporated into the schedule as it occurred.

(R4, tab 338 at 18)

183. Mr. Ockman focused upon four situations that adversely impacted timely contract performance. The first was the contractor's late finish of masonry walls, a critical activity which Mr. Ockman said was started on time:

> The revised baseline schedule shows interior masonry [work] on the critical path with a planned finish of June 14, 2012, plus a five-workday or 11-calendar day lag before the start of setting roof joists on June 26, 2012, its immediate successor activity. However, the contemporaneous schedule updates show an actual finish of August 31, 2012, 78 calendar days or 2½ months later than the adjusted plan. This was confirmed by the [QCR] of the same date[.]

(R4, tab 338 at 19)

184. Mr. Ockman concluded that LWJV "was able to mitigate two weeks of this delay by starting to set steel roof joists on August 28, 2012, three calendar days before the completion of interior masonry, instead of starting 11 days after the completion of interior masonry as originally planned." He adjusted the "revised baseline schedule to reflect the impact of the late finish of interior masonry . . . [to] a projected completion date of June 26, 2013." This was 60 calendar days "beyond the original contract completion date of April 27, 2013." The masonry walls were chosen for analysis because these "were the first activity on the critical path" on the contractor's contemporaneous April, June, and July 2012 schedule, and were also "on the most critical parallel path in the May 2012 schedule update with just seven days of float." Mr. Ockman says that the masonry delays are shown in the contractor's "monthly *Schedule Narrative* accompanying the June 30, 2012 schedule update notes." (R4, tab 338 at 20-21) He referred to LWJV's correspondence of August 16, 2012, which acknowledged the contractor's late finish of masonry walls. Mr. Ockman plotted these dates on Exhibit 1 of his report. (*Id.* at 22-23, 51)

185. The second time impact analyzed by Mr. Ockman was "Slow Progress with Electrical Work." He referenced the Schedule Narrative for the "2Oct12 schedule update" for the proposition that, "shortly after completing interior masonry work, '[t]he critical path runs thru installation and energizing of the new electrical substation as it must be on line for the start up, testing and commissioning of equipment." Mr. Ockman posited that with the "start of roof framing" on August 28, 2012, "substation equipment delivery and the start of equipment setting occurred on schedule." Although the contractor's "30Apr13 update shows a critical path that includes activities such as loading dock awning and paving basecourse which were unlikely to have any impact on substantial completion, [LWJV's] June 14, 2013[] *Schedule Narrative* notes that the near critical path runs through electrical finish work." The Ockman Report says that although appellant "alleges that this work is being delayed by electrical design issues,

[]the daily reports show that Worch . . . is working on base contract work throughout the project during this period." (R4, tab 338 at 23-24) Mr. Ockman concluded that the contractor's late finish of masonry walls delayed performance by 60 days (*id.* at 34).

186. Mr. Ockman said that "Worch began electrical work inside the building on September 26, 2012." Although the contractor's "contemporaneous schedule updates show that setting transformers and switchgear started on December 28, 2012, in accordance with the adjusted schedule, [LWJV] did not begin setting the substation until April 9, 2013." He points to LWJV's contemporaneous correspondence, which shows that "Worch beg[an] pulling feeder cables from the substation to the main switchgear on May 28, 2013" but did not finish this work until June 24, 2013. Mr. Ockman stated further that the contractor's "contemporaneous . . . schedule updates report an actual finish date for Activity PUE1380, *Substation Transformers / Switchgear*, of July 1, 2013," which is "140 calendar days later than the adjusted plan." He concludes that the contractor's "slow progress with critical electrical work involving setting the transformers and switchgear pushed the projected completion date from June 26, 2013, to November 1, 2013, 128 calendar days . . . beyond the adjusted plan." Mr. Ockman attributes this delay to LWJV's "account due to its inability to perform this critical work at the rate originally planned. The impact of the slow progress with electrical work is shown graphically [in the report] and on Exhibit 1." (R4, tab 338 at 24-25, 51)

187. The third time impact analyzed by Mr. Ockman is "Late Substation Commissioning." He quotes the QAR of June 28, 2013, which says: "With out the proper Relays in the existing Switchgear, power cannot be provided to the new Substation, [and] this is a critical issue" (R4, tab 388 at 26 (citing tab 399 at 55)). Mr. Ockman also states, however, that "[j]ust as importantly, point-to-point electrical testing, a predecessor to energizing the substation and electrical panels, did not begin until July 16, 2013" while "the final [LWJV] schedule update shows an actual start date of July 30, 2013." There were also contractor-caused delays due to "'major deficiencies in the installation of the substation and switchgear that will not allow permanent power to the site [un]til corrected.'" Mr. Ockman quoted the QAR of August 26, 2013, stating:

> This is a contractor delay [due to] lack of quality control. Problems include (1) trash found in the switchgear compartments needing to be removed prior to energizing and (2) bolts on the transformers needing to be properly torqued. In addition, the transformer housings leaked due to improper or damaged gaskets, and additional grounding was needed, both requiring a fix.

There were additional contractor-caused delays, which included "Building 8905 relays [being] tested by [HVM] on November 1, 2013, and HVM was repairing the

substation together with Enterprise Electric and Eaton . . . on November 12, 2013." (*Id.*, tab 338 at 26-27)

188. Mr. Ockman said that, "[a]ccording to the QARs, substation commissioning began on November 25, 2013, though the QCRs do not show substation commissioning starting until December 4, 2013." He stated that delays resulting from the "phasing issue" were the government's responsibility, and that "Enterprise resolved the improper phasing problem by December 6, 2013." (R4, tab 338 at 28-29)

189. The Ockman Report says that the QAR shows that "Worch was cleaning the electrical panels in the building on December 19, 2013" and that "permanent power was first available" on that date. This contractor-caused delay was "beyond the adjusted plan [which] pushed the projected completion date from November 1, 2013, to March 21, 2014" and extended the project "140 calendar days . . . further behind schedule." (R4, tab 338 at 31)

190. Also part of the Ockman Report's "Time Impact No. 3" or "Late Substation Commissioning" analysis is the delay caused by obtaining and "installing relays in Cubicles No. 5 and 11 (along with the "responsibility for verifying the correct existing current transformers)." Mr. Ockman believed this "was shifted to [LWJV]" in accordance with Mod. A00016. He said that "[r]eplacing the relays delayed the project for 31 calendar days . . . from July 2, 2013, to August 2, 2013," and that "verifying the current transformers [also] delayed the project another three weeks from August 2, 2013 to sometime during the week of August 19, 2013." Mr. Ockman stated that although "replacing the relays was initially the Government's responsibility[,] it was always [LWJV's] responsibility to verify the current transformers, and this should have been accomplished earlier with no impact to the critical path." (R4, tab 338 at 32)

191. Mr. Ockman maintained that although the government

> was initially responsible for 18 calendar days of delay damages due to an issue with the existing differential relays (one workday) and out-of-phase conductors (10 workdays) . . . as with the relays and current transformer above, these delay damages were included in Mod. A00021 which resolved all delay damages encountered throughout the project and extended the contract completion date to the date [LWJV] completed construction.

(R4, tab 338 at 32)

192. The Ockman Report concluded that:

> [T]he entire 140 calendar day delay to the contract completion date experienced [during late substation commissioning] has been resolved through bilateral Mods. A00016 and A00021 with [LWJV] receiving (1) 84 calendar days of delay damages for the 49 calendar days of Government delay and (2) a no cost time extension relieving [LWJV] of 128 calendar delays of [LDs] caused by [LWJV's] own failure to perform critical work in a timely manner exacerbated by quality and coordination problems it experienced during construction.

(R4, tab 338 at 32) The overall impact of delays related to "Late Substation Commissioning" is depicted in the charts shown at R4, tab 338 at 33 and 51.

193. The fourth time impact analysis performed by Mr. Ockman dealt with "Slow Progress with Testing/Late Substantial Completion[/]As-Built Schedule." His report states that after the contractor "completed commissioning the substation on December 18, 2013, [the] testing/punch list work took four weeks longer than planned." According to an excerpted June 2014 Status Sheet from the job, this delay pushed out "substantial completion/beneficial occupancy . . . to April 15, 2014, the adjusted contract completion date" per Mod. A00021. Mr. Ockman says that due to these contract extensions, "[t]hus, [LWJV] completed the project on schedule." (R4, tab 338 at 33)

194. Mr. Ockman prepared a summary table that showed the contractor's time impacts that "were critical to achieving the contract completion date":

Impact No.	Description	Calendar Day Impact	Time Extensions	Calendar Days Late
--	Base Contract	--	--	(1)
1	Late Finish of Masonry Walls	60	--	59
2	Slow Progress with Electrical Work	128	140	47
3	Late Substation Commissioning	140	--	187
4	Slow Progress with Testing/Late Substantial Completion As-Built Schedule	25	212	--
	Totals:	**353**	**352**	--

(R4, tab 338 at 34)

195. The Ockman Report also addressed the delays alleged in the Worch and Warner claims (R4, tab 338 at 35-43). Mr. Ockman notes that LWJV's QCR of June 11, 2013 shows that the breakers were delivered to Building 8905 on that date. Because the contractor's QCR of June 28, 2013 states that Enterprise was "[t]erminat[ing] high-voltage cable ends [on] NSA and Ft. Meade sides," (R4, tab 402 at 88), it is his expert opinion that "delivery of the breakers was timely" (R4, tab 338 at 35). He opines that

> [i]t was not the new breakers that kept permanent power from the WSOC until December 2013, but the myriad problems centered around the new substation. . . . [HVM] was repairing the substation as late as November 12, 2013 . . . and all work involving the new breakers/relays and the current transformers was completed by August 26, 2013.

(*Id.* at 36)

196 The government's QAR of that date records that the "MPO visited the site and found major [deficiencies] in the sub station and the switch gear so they would not provide power to [the] switchgear as our scheduled outage called for. This is a contractor delay [due to] lack of quality control." (*Id.* at 35, R4, tab 399 at 114) Mr. Ockman concluded that "Worch has failed to demonstrate entitlement for any delay damages sought from the Government" (R4 tab 338 at 36).

197. Mr. Ockman's report also examines Warner's claim in ASBCA No. 60378, which tracks Worch's delay claim almost verbatim. He provides essentially the same analysis, and comes to the same conclusion that the claim is without merit. (R4, tab 338 at 37-49) Mr. Ockman notes that Warner's claim "identifies the three Government impacts: Government procurement of new relays, the improperly connected existing relay and the out-of-phase conductors" (*id.* at 49).

198. The Ockman Report concludes that although LWJV "completed the project 352 calendar days beyond the original contract completion date, its performance was timely due to its receipt of time extensions totaling 352 days through contract modifications." He asserted that the contractor was responsible for four "controlling delays to achieving project completion," which were the late finish of masonry walls; its slow progress with electrical work; the late substation commissioning; and the contractor's slow progress with testing/late substantial completion. (R4, tab 338 at 48)

199. For reasons discussed in the Decision section below, we find the Ockman Report to be far more persuasive than the French Report. The primary bases for this are that the government's expert report is consonant with the Board's Findings and legal conclusions. We further find that the Ockman Report is better grounded in the record (including contemporaneous project correspondence) than is the French Report. This lends greater credibility to Mr. Ockman's analysis and expert opinion.

DECISION

1. Preliminary Matters: Board Direction Regarding Advocacy and the Parties' Motions in Limine Regarding Proffered Scheduling Experts

Before considering the merits of these appeals, we discuss two preliminary matters that are germane to this decision. The first is "Board Direction Regarding Advocacy," which focuses on the parties' relative burdens of proof and briefing obligations. The second is a ruling on the parties' motions *in limine* as they pertain to expert witness testimony.

1.a Board Direction Regarding Advocacy

The Board's May 8, 2017 Hearing Order provided the parties with clear direction regarding advocacy on behalf of their respective clients. Particulars were given regarding submission of evidence and preparation of the Rule 4 file (Hearing Order at 2-3). Further requirements for "Post-Hearing Briefs" detailed the manner in which briefs were to be prepared (*id.* at 4-5). This guidance, basic to any professional legal practice, was restated to reinforce the parties' understanding that it is essential for

their briefs to predicate proposed findings of fact upon the record and to support their legal arguments with specific and well-grounded facts. The parties were told:

> a. Proposed findings of fact will be set forth with pertinent citations to the record relied upon to support each finding. Sequentially numbered findings should be arranged in a chronological or other logical order under separate claim or event heading.
>
> b. Argument (*i.e*., the legal basis, as applied to the facts, for sustaining or denying each claim or claim event) will be presented in the same sequence as the proposed findings of fact.

(*Id.* at 4)

The parties were also reminded that it is the duty of counsel, not the Board, to advocate for their respective clients. It is not incumbent upon the ASBCA to make the case for them, or to dig through a voluminous record in search of support for an unsubstantiated argument or uncorroborated assertion: "The Board, at its option, may not examine evidence in the record not cited in a brief." (*Id.* at 5) Although these instructions should have been unnecessary, they were not always followed.

In each of these appeals, LWJV bears the burden of proving its claims by a preponderance of evidence. "Clearly, the evidence offered must be sufficiently persuasive to discharge the contractor's burden of proof." *American Transp. Line, Ltd*., ASBCA No. 44510, 93-3 BCA ¶ 26,156 at 130,036 (citing *Maintenance Eng'rs Inc. v. United States*, 21 Cl. Ct. 553 (1990)). Integral to this duty is providing credible proof of probative value to support the contentions appellant makes in furthering its position or rebutting that of the government. We repeatedly have held that mere assertions and/or conclusory statements, which do not cite reliable evidence, are insufficient to meet that burden. *See, e.g., Lebolo-Watts Constructors 01 JV, LLC,* ASBCA No. 59738 *et al.*, 19-1 BCA ¶ 37,301[25] at 181,457 ("As LWJV bears the burden of proving its claim by a preponderance of the evidence, it is appellant's duty to respond to credible government challenges to key assertions and it has not adequately done so."); *Black Tiger, Co.*, ASBCA No. 59819, 18-1 BCA ¶ 37,046 at 180,336 (Lacking credible evidence, "in the face of probative government documents to the contrary, appellant has not met its burden of proof, and relief will not be granted."); *Atherton Constr., Inc*., ASBCA Nos. 44293, 46053, 51178, 02-2 BCA ¶ 31,918 at 157,711 ("The mere assertion of a claim or contention is not a sufficient basis on which to determine that appellant is entitled to relief. Generalized conclusory, unsupported opinion type

[25] *Aff'd* 801 Fed. App'x 777 (Fed. Cir. 2020)

statements do not demand weight when such statements are little more than self-serving conclusions.") (First citing *L.B. Samford, Inc*., ASBCA No. 32645, 93-1 BCA ¶ 25,228 at 125,660; and then citing *Newell Clothing Co*., ASBCA No. 28306, 86-3 BCA ¶ 19,093, *aff'd*, 818 F. 2d 876 (Fed. Cir. 1987) (table)).

Unsupported statements purporting to be facts are not evidence, and are accorded no weight where made in a posthearing brief. Assertions of fact or attempts to rebut contrary evidence must rest on actual proof that satisfies the party's burden of proof. *See, e.g., Mason's, Inc*., ASBCA Nos. 27326, 28183, 86-3 BCA ¶ 19,250 at 97,359 ("The facts do not bear out counsel's contentions, nor can we accept mere assertions appearing in a brief, without supporting evidence"). "The contractor's burden must be supported by probative evidence, not by bare allegations that the contractor disagrees with the Government." *Gov't Contractors, Inc*., GSBCA No. 6776, 84-1 BCA ¶ 16,934 at 84,243 cited by *Space Age Eng'g, Inc*., ASBCA Nos. 25761 *et al*., 86-1 BCA ¶ 18,611 at 93,472. This is particularly true where it is incumbent upon a contractor to demonstrate prebid reliance. Our appellate court memorably made this point: "As Mr. Jaggers said, 'Take nothing on its looks; take everything on evidence. There's no better rule.' C. Dickens, Great Expectations ch. 40 (1861)." *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1432 (Fed. Cir. 1990).

As discussed herein, it is for these reasons that certain proposed findings of fact and conclusions of law offered by a particular party are given little or no weight.

1.b The Parties' Motions in Limine Regarding the Proffered Scheduling Experts

Before turning to the merits of these appeals, we rule on the "Government's Motion *in Limine* to Exclude Appellant's Expert Report and Testimony by W. Thomas French" (gov't mot.) and "Appellant's Motion *in Limine* to Exclude Legal Opinion Contained in the Government's Expert Report and Testimony of Stuart Ockman" (app. mot). Prior to the hearing, the government raised concerns over Mr. French's lack of experience and expertise. The Board provisionally allowed Mr. French to testify and present his report at the hearing. We instructed the parties to more fully brief the issue afterward (tr. 3/121), which they did (*see* gov't br. at 27-28; gov't mot., *passim*; app. reply br. at 19-21; and app. mot. at 1-6).

1.b.1 The Determination of a Witness as an "Expert" and the Weight to be Afforded His or Her Testimony

Before ruling on the parties' respective motions *in limine*, we discuss the criteria for accepting a witness as an expert and evaluating the weight of his or her testimony. The question of whether to admit, and what extent to reply upon, expert testimony is an evidentiary determination left to the sound discretion of the Board. Although ASBCA Rule 10(c) provides that "[t]he Federal Rules of Evidence [Fed. R. Evid.] are not

binding on the Board but guide the Board's rulings," we look to those rules in evaluating whether a witness qualifies as an expert. *See, e.g.*, *Pyrotechnic Specialties, Inc*., ASBCA No. 57890, 19-1 BCA ¶ 37, n.2 at 181,472-73 citing ASBCA Rule 10(c); *Laguna Constr. Co*., ASBCA No. 58324, 14-1 BCA ¶ 174,947-80; *KBJ, Inc*., ASBCA No. 58512, 16-1 BCA ¶ 36,289 at 176,983 ("In addition to appropriate evidence admissible under the Federal Rules, 'the Board will consider evidence admissible in the sound discretion of the presiding judge'"; and, *Northrop Grumman Corp*., ASBCA No. 52178 *et al*., 05-2 BCA ¶ 32,992 at 163,523-24 ("At its discretion, the Board may accept evidence for its probative value. The ultimate weight afforded such evidence may be influenced by such factors as the reliability and credibility of the witness. That analysis need not be articulated on the transcript or in the decisions, as 'to do so would result in interminable and unreadable decisions' and transcripts.")

Fed. R. Evid. 702 Testimony by Expert Witness provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

The Board adheres to this guidance and that of our appellate court in determining whether to accept a proffered witness as an "expert." We assess that person's "knowledge, skill, experience, training, or education" by considering, among other things, the level and type of schooling and employment although "experience can be gained in many venues and that knowledge can be demonstrated by mastery displayed in an expert's analysis and responses to questioning about it." *Carnegie Mellon University v. Marvell Technology Group*, 607 F.3d 1283, 1302-03 (Fed. Cir. 2015).

But, it is the duty of the proponent of the purported expert (and not the Board) to establish the witness's qualifications:

> It is the Board's duty as factfinder to ensure that its findings of fact have a sound evidentiary foundation, which the [proponent of the proffered expert] failed to provide as is its burden. *See, e.g., Parsons-UXB Joint Venture,* ASBCA No. 56481, 12-1 BCA ¶ 34,919 at 171,694-95 discussing the tribunal's obligations according to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 586-87 (1993); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999); *see also Ashland Oil, Inc. v. Delta Resins & Refractories*, 776 F.2d 281, 294 (Fed. Cir. 1985), comparing the utility of evidence offered under FED. R. EVID. 701, Opinion Testimony by Lay Witnesses and FED. R. EVID. 702, Testimony by Expert Witnesses, and the necessity of a tribunal's reliance upon testimony that is "sufficiently convincing."

Ensign-Bickford Aerospace & Defense Co., ASBCA No. 57890, 16-1 36,533 at 177,074-75.

We follow the guidance of the Fed. R. Evid. and applicable precedent in (1) assessing the qualifications of Messrs. French and Ockman to serve respectively as expert witnesses for appellant and the government and (2) determining the weight (if any) to be afforded their evidence.

1.b.2 Rulings Upon the Parties' Respective Motions

The government hired Mr. Stuart Ockman, whose extensive resume shows that he is a registered professional engineer (PE) and president of Ockman & Borden Associates. He earned a B.S. in civil engineering from Cornell University, an M.S. in construction management from Stanford University, and an M.B.A. from the University of Pennsylvania, Wharton School. Mr. Ockman has over 25 years of experience serving as an expert witness in the areas of scheduling, estimating, cost control, and financial analysis. He has published widely and served as an expert witness in over 50 matters in litigation. (Tr. 5/108-09; R4, tab 338 at 52-54, tab 444 at 2-6) Appellant accepted Mr. Ockman as a scheduling expert (tr. 5/110). For purposes of these appeals, the Board accepts Mr. Ockman as an expert witness in scheduling analysis whose professional depth and experience signal a high level of knowledge and understanding.

LWJV hired Mr. W. Thomas French "as a rebuttal expert in construction contract scheduling and implementation" and to "testify regarding delays to the Project and

related matters" (gov't mot., tab 1, letter of July 31, 2017 from Mr. Braude to the Board). Mr. French's qualifications include a B.S. in electrical engineering from SUNY Maritime College as well as classes in construction and scheduling (tr. 3/114-16).[26]

We deny the government's motion to exclude Mr. French as an expert. Although Mr. French has never before served as an expert in scheduling,[27] he has sufficient education and work-related experience to allow him to qualify as an expert witness in this area. Although the government asserts serious concerns over the lack of depth and reliable foundation for Mr. French's opinions (*see*, *e.g.*, gov't mot. at 2-3), this goes to the weight we afford his opinion.

We do, however, question the depth of Mr. French's further expertise as described by appellant. LWJV's counsel stated at hearing that he was "proffer[ing] Mr. French as both a scheduler expert and an electrical engineering design expert with regard to electrical and mechanical design concepts" (tr. 3/120-21; *see also* R4, tab 39 at 17[28]). Having examined the record provided by LWJV as well as Mr. French's testimony and report, we do not view his purported wider expertise (beyond scheduling) as adequately established. We find that Mr. French, although he has a degree in electrical engineering and experience in "electrical and mechanical design" (tr. 3/114, 120-21), did not present sufficient in-depth knowledge, credentials, or expertise to qualify in our view as an expert in electrical engineering. We note that, although the French Report concludes that "The procurement and cost for finding existing spare breakers to be modified and tested to be installed in cubicles 5 and 11 … [was] the Government' responsibility" (R4, tab 441 at 14), appellant's posthearing briefs do not

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[26] Mr. French's expert report is primarily a rebuttal of Mr. Ockman's report (*see* R4, tab 441 at 3: "I was asked to review and prepare a rebuttal report to the government's expert report, originally dated July 26, 2017, and revised August 3, 2017, by Ockman & Borden and Associates signed by Stuart Ockman"). This is consistent with other statements by appellant; *see*, *e.g.*, app. mot. at 2. Appellant's counsel stated at hearing that he was "proffer[ing] Mr. French as both a scheduler expert and an electrical engineering design expert with regard to electrical and mechanical design concepts" (tr. 3/120-21).

[27] The two matters in which Mr. French said that he previously served as an expert witness dealt with workers compensation claims in the 1990s; neither involved scheduling or engineering issues (tr. 3/175-76; *see also* app. mot., ex. 4).

[28] Mr. French's *curriculum vita* states that he has an undergraduate degree in electrical engineering and has "over 25 years of experience on government and commercial projects." Although his resume lists a number of construction projects and dates his work in scheduling back to 1993, none of the showcased projects (R4, tab 439 at 17) or his testimony at hearing (tr. 3/114-21) describe his work as an electrical engineer that rises to the level of a recognized expert.

rely upon Mr. French's purported expertise as an electrical engineer in bolstering its contract interpretation argument that the breakers were to be provided by the government. *See, e.g.*, app. br. at 50-51 (¶¶ 108-16); app. reply br. at 23-25, 51-53 (particularly ¶ 119, which relies primarily on the testimony of Messrs. Boettcher, Sloss, and Worch, and do not mention Mr. French).

We have also reviewed LWJV's contentions that the government's expert sometimes attempted to express a legal opinion (app. mot. at 7). Although we do not regard the controverted material as offering legal advice or expertise, we disregard any such effort by either of the proffered scheduling experts. "To the extent the experts provide opinions as to which party is responsible for delays or other questions of law, such opinions exceed the scope of expert evidence and are inadmissible." *Parsons-UXB Joint Venture*, ASBCA No. 56481, 12-1 BCA ¶ 34,919 at 171,695 ("Expert testimony pertaining to issues of law is inadmissible," and we do not allow an expert "to usurp the role of the judge in determining the law, or the trier of fact in applying the law to the facts.") *See also Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137 at 180,787.

2. Overview of ASBCA Nos. 59740, 60378, 60459, 60507, and 60508

This decision concerns appeals by prime contractor LWJV and pass-through claims of two of its subcontractors, Worch and Warner, as well as costs sought by lower tier subcontractors and suppliers that are part of the overall claims. Underlying three of these appeals, Nos. 59740, 60378, and 60507, are the issues of whether the contract required LWJV to provide replacement circuit breakers and, if so, whether it unambiguously described the characteristics these must possess. ASBCA No. 59740 is a $630,472 pass-through claim by Worch, which asserts that it is owed for the impact of 300 calendar days of alleged government-caused delay concerning the provision of permanent power. ASBCA No. 60378, in the amount of $437,453, is a pass-through claim from Warner. That subcontractor claims it suffered the same delay as Worch in No. 59740 and for the same reasons. In ASBCA No. 60507, LWJV seeks $75,569 for "providing reconditioned circuit breakers for the existing switchgears in NSA Building 8905." (App. br. at 1-4)

In ASBCA No. 60459, Worch seeks $37,213 for costs associated with "providing electrical power to exit doors and the 'Building Automation System' ('BAS') Controller," which it maintains is outside contract requirements. ASBCA No. 60508 is Warner's pass-through claim in which it seeks $35,851 for having to provide "additional controls for the isolated battery and electrical room stand-alone air conditioning units ('ACUs')" along with associated mechanical work. LWJV contends that the government constructively required the ACUs to be controlled by the EMCS. (App. br. at 3)

3. The Merits of Appellant's Claims in ASBCA Nos. 597940, 60378, and 60507 Regarding Replacement Circuit Breakers and Contract Interpretation

LWJV contends in ASBCA Nos. 59740, 60378, and 60507 that the government was required to provide replacement circuit breakers for cubicles 5 and 10[29]; the government disagrees.[30] We discuss the parties' contentions in §§3.a-b, and apply the familiar principles of contract interpretation stated in §3.c in analyzing these appeals in §3.d.

3.a The Appellant's Arguments Regarding Contract Interpretation

In this section, we begin our analysis with the threshold issue of whether the contract required LWJV to furnish replacement circuit breakers in cubicles 5 and 10. Later in this decision, we evaluate other arguments offered by appellant in support of its recovering costs and impacts associated with providing the circuit breakers. These include allegations that there was a Type 1 DSC and government misrepresentation (§ 4); the government withheld superior knowledge (§ 5); and the government breached its duty to act in good faith and deal fairly (*see* §§ 6-7). We turn in §§ 8-9 to assertions of government-caused delay made by LWJV and its subcontractors Worch and Warner, which are also part of these appeals.[31] These matters go beyond interpreting the contract

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[29] Although LWJV does not use the phrase "government furnished equipment" or its acronym "GFE," we do so in this decision as a recognized term of art and a shorthand reference to items provided by the government that are not the obligation of the contractor. *C.f.*, FAR 45.102 regarding government furnished property and *ASFA Constr. Industry and Trade*, ASBCA No. 57269, 11-2 BCA ¶ 34,791 discussing the different treatment of government furnished property or equipment and that provided by the contractor.

[30] LWJV does not seek delay costs *per se* in No. 60507, but asks for markups on Worch and Warner claims in ASBCA Nos. 59740 and 60378 (findings 47, 57, 62).

[31] The government asserts that LWJV's "original request was for compensable delays due to permanent power and the Phoenix Terminal, not solely for permanent power as Appellant here alleges." The government cites testimony and correspondence from Mr. Bauer to support its position. He is quoted as having testified that LWJV "was not concerned, necessarily, if we got X amount of days from one and another amount of days from the other. It really did not matter to us. We were looking for roughly 300 initially," and having written that LWJV was "**asking for 300 days** or the total duration of the time extension **which includes the Phoenix terminal and Permanent power issues. We knew we would not get all that because we already negotiated the Phoenix terminal and received 70 days out of 120**." (Gov't reply br. at 6 (¶ 28) citing tr. 2/162 and R4, tab 317 at 1) (emphasis in original)

specifications and drawings and consider additional contract events, modifications entered into by the parties, and the proffered expert opinions.

3.a.i Appellant's Argument That the Contract Calls for the Government to Provide Circuit Breakers in Cubicles 5 and 10

As proof that the contract unambiguously required the government to provide the controverted circuit breakers, LWJV argues that Dwg. EP 601 "represents that in the existing switchgear, Cubicles 5 and 10 are spare cubicles with existing breakers installed in each cubicle." It contrasts information in note 4, which reads: "CIRCUIT BREAKER INSTALLED IN THE EXISTING SWITCHGEAR SHALL BE COMPATIBLE WITH THE EXISTING SWITCHGEAR. INCLUDE THIS WORK IN THE COORDINATION STUDY" with other notes on that drawing. For example, drawing note 3 states "UTILIZE EXISTING SPARE CUBICLE." Note 2 reads "FURNISH AND INSTALL 1 SET OF 3 #2/0-AWG-C AND 1 #6-AWG-G," which "instructs the contractor to furnish and install wires that will activate the existing breakers in cubicles 5 and 10." (App. br. at 14-15 (¶¶ 43-46))

Appellant also cites the testimony of Messrs. Bauer, Boettcher, Sloss, and Worch[32] to support its interpretation that note 4 "does not require LWJV to provide new or reconditioned breakers for the existing switchgear spare compartments" because these were already in place as GFE (app. reply br. at 51-63 (¶ 118)). LWJV points to the contract's lack of information about circuit breakers for cubicles 5 and 10 as compared to detailed descriptions for other features (*id.* at 81). This includes those items found "in the Specifications and on the Panel Schedules on the Electrical Drawings" at "R4, tab 452 at 397-401" and "Specification Section 26 11 16" (*id.* at 5-6, 9-10). For example, there is considerable information elsewhere about other circuit breakers the contractor agrees that it had to provide (*id.* at 5-6, 15 referencing, *inter alia*, R4, tab 452 at 361 (which provides in ¶ 1.4 of § 26 00 00.00 20 that "Electrical characteristics for the project shall be 13.8 kV primary, three phase, four wire, 60Hz, and 480 volts secondary, three phase, four wire. Final connections to the power distribution system at the existing Bldg. 8905 shall be made by the Contractor as

[32] Mr. Boettcher's degree is in construction engineering; he is not an electrical engineer. He began work on this contract in June or July 2012 (tr. 1/118), approximately one year after contract award (finding 36). Although Mr. Worch is an experienced electrical subcontractor (finding 25), we review his testimony in the light of an individual with a vested interest in the outcome of this litigation. Appellant does not allege that either Mr. Boettcher or Mr. Worch helped formulate LWJV's bid. We have previously noted that, like these witnesses, Mr. Bauer and Mr. Sloss were not involved with the making of LWJV's bid nor did they testify as to any particular insight into technical or pricing assumptions made by those who formulated appellant's submission (findings 34-37).

directed by the Contracting Officer)" (R4, tab 452 at 397-401; Dwgs. E0000 and EP701-EP711).

3.a.ii Appellant Disagrees That the Trade Practice of Using Heavy or Bold Lines Calls for the Contractor to Provide the Circuit Breakers in Cubicles 5 and 10

LWJV takes exception to the government's assertion that "anytime lines on a Contract Drawing are highlighted by making them darker, then the contractor must automatically provide 'new equipment' for whatever the Government has chosen to place in bold." Appellant alleges that the "actual practice is that areas being worked on are highlighted on Contract Drawings." Here, it says, "the existing breakers are [depicted in bold ink because these are] being connected to new furnished and installed feeder lines and are the subject of a coordination study." Appellant contrasts the "feeder lines [which] were to be furnished and installed." These are "described in Note 2, and also described in the Specifications, while the breakers were never described in either, nor was the existing switchgear itself described in any fashion." (App. reply br. at 54 (¶ 119))

3.a.iii. Appellant Argues That the Doctrine of Contra Proferentem Compels the Contract To Be Construed Against the Government as Drafter

The contractor addresses the possibility that there is more than one reasonable interpretation of Dwg. EP 601. It asserts that because it reasonably interpreted Dwg. EP 601 as "showing existing breakers in Cubicles 5 and 10 . . . even if there are two reasonable interpretations, the document will be interpreted against the drafter" under the doctrine of *contra proferentem*. LWJV supports this argument by alleging that its prospective subcontractors adopted its interpretation of the contract. It says that LWJV, "Worch, Enterprise Electric, as well as two other bidders all determined that Drawing EP601 showed existing breakers in Cubicles 5 and 10." (App. br. at 59-60)

Although LWJV maintains that it "relied on the Contract Drawings at the time of bid" and "was not under any duty to seek clarification of Note 4 on [Dwg. EP 601]" (app. br. at 60), it provides no record support for this assertion. LWJV does, however, say that neither it nor Enterprise nor Worch included replacement circuit breakers in their bids (*id.*, ¶ 11; *see also* ¶ 14, which relies upon the testimony of Mr. Sloss from tr. 1/114, but that testimony pertains only to Mr. Sloss's post-award understanding regarding what LWJV bid.)

LWJV contends that it "demonstrated that its initial interpretation of note 4 was reflected by the Government-approved December 2011 'Baseline Schedule,' where replacement new circuit breakers were never shown to be submitted for approval" (app. reply br. at 10-11). If it is appellant's argument that by this the government somehow

also approved LWJV's present interpretation of Dwg. EP 601, we find this insufficient evidence to warrant considering this argument further.

3.a.iv Appellant's Explanation for Its Contract Interpretation at the Time of the Dispute

LWJV disagrees that it agreed with or spoke in favor of the government's interpretation regarding the replacement circuit breakers at the time the dispute arose. Appellant maintains that by informing its subcontractor that these were a contract requirement, it was only "telling Enterprise that the Government was taking the position that the contractor was required to install new breakers in the existing 30-year old switchgear in Building 8905." The contractor reiterates the same argument for the Cure Notice it issued to Enterprise. It also maintains that Mr. Worch's comments on the same issue were "not discussing who was responsible for providing the two new circuit breakers." (App. reply br. at 54-55 (¶¶ 124-26))

3.b The Government's Position Regarding Contract Interpretation

The government defends against LWJV's assertions that the contractor was not required to furnish replacement circuit breakers in cubicles 5 and 10. While the government asserts that the contract placed this burden on the contractor, it alternatively argues that the contract was patently ambiguous. (Gov't br. at 52-58)

3.b.i The Government Contends That the Contract Unambiguously Requires Appellant to Provide Replacement Circuit Breakers for Cubicles 5 and 10

The government counters each of the contract interpretation arguments raised by appellant, and relies upon Dwg. EP 601 in support of its contention that LWJV was required to provide replacement circuit breakers in cubicles 5 and 10. It maintains that this drawing contains plain and unambiguous language that obligated LWJV to provide these. The government contends that the drawing "informed bidders that they would need to provide breakers in Note 4," which "states [that] 'circuit breaker [sic] installed in the existing switchgear shall be compatible with the existing switchgear. Include this work in the coordination study.'" It asserts that the note's use of the "future tense 'shall be' would alert a reasonable bidder that the work of providing a breaker that was compatible with the existing switchgear was not yet performed." The government argues that note 4's additional use of the "imperative 'include' would alert a reasonable bidder that this work needs to be performed in order for the new WSOC building to receive power and be a complete and useable facility." It also points to the drawing's use of "dark [heavy] lines to show that the breakers constituted new work," which was done "in contrast to the [drawing's] 'greyed out' [light] lines, which showed existing features." The government alleges that this was done in accordance with trade practice,

because the "shading is a design convention . . . consistent with [the] designation of certain features as 'existing.'" (Gov't br. at 52-54)

The government disagrees with LWJV that it was necessary to include additional information about the replacement circuit breakers in the specifications. It relies on contract FAR clause 52.236-21, Specifications and Drawings for Construction, which states that "[a]nything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both." (Gov't br. at 2-3 (¶¶ 7-8)) The government also cites contract DFARS clause 252.236-7001, Contract Drawings and Specifications, which states that a contractor is required "to perform work that is manifestly necessary to carry out the intent of the specifications or drawings, or which are *customarily* performed" (gov't br. at 54-55) (citing *P.R. Contractors, Inc*., ASBCA No. 52937, 02-2 BCA ¶ 31,941). It reasons that "it was manifestly necessary [for the contractor] to provide gear breakers that were compatible with the existing switchgear" (*id*.).

3.b.ii The Government Argues That If the Contract Is Ambiguous Regarding Which Party Was to Provide Circuit Breakers, There Is a Patent Ambiguity That Obligated Appellant to Inquire Prior to Bid

The government maintains, in the alternative, that if the Board finds the contract to be ambiguous regarding whether the circuit breakers were GFE, then the ambiguity was patent and the dispute should still be resolved in the government's favor. It says that LWJV was made aware of the interpretation requiring appellant to furnish and install replacement circuit breakers in cubicles 5 and 10 by the bid it received from then-potential subcontractor 1st Electric. The government asserts that, because appellant failed to make inquiry of the government prior to submitting its bid despite being made aware of other possible interpretations, it cannot prevail. (Gov't br. at 56-58)

The government further alleges that, "[a]ssuming *arguendo* that the Contract was ambiguous [regarding whether appellant was to provide the circuit breakers], trade practice in interpreting electrical drawings resolves the ambiguities . . . in the government's favor." The government points out that "[t]wo experienced electrical companies, First Electric and Worch, interpreted Drawing EP 601 to require Appellant to provide breakers." The former reference is to 1st Electric's bid to appellant for the subcontract. The latter is to correspondence from Worch at the time of the dispute discussing the coordination study, in which the electrical subcontractor stated "[a]ll that means on note #4 is that when they are buying that breaker for that existing switchgear, it must be of that type of board that is existing." It is the government's position that "[t]o the extent the Drawing EP 601 is ambiguous to a layman, these interpretations by experienced electricians of the shading and language in Drawing EP 601 resolve the ambiguity in favor of the Government." (Gov't br. at 56-57)

3.b.iii The Government Asserts That Appellant Contemporaneously Espoused the Government's Interpretation at the Time the Dispute Arose

According to the government, appellant's position that it did not bid the replacement circuit breakers is further weakened because LWJV did not contemporaneously adopt the interpretation it urges in this litigation at the time the dispute arose. The government says that LWJV informed Enterprise during performance that Enterprise was responsible for providing the circuit breakers. When the subcontractor did not comply, LWJV followed up with a Cure Notice that relied in part upon that failure. The government argues that the Board has given great weight to the interpretation contemporaneously espoused by a party that differs from its position during litigation. (Gov't br. at 55-56)

3.b.iv The Government Contends That Appellant Failed to Prove It Relied on Its Current Interpretation in Making Its Bid

The government also asserts that LWJV has not proven that it relied upon its current interpretation when it submitted its bid. It alleges that LWJV has not furnished its bid documents, and offered only testimony "from a witness [Mr. Sloss] who reviewed the bids from prospective subcontractors and mistakenly believed none of the bids contemplated providing" the subject circuit breakers. The government argues that this is insufficient to meet LWJV's "burden to show that it relied on its current interpretation when bidding the Contract." (Gov't br. at 58)

3.c The General Rules of Contract Interpretation

When interpreting a contract, we begin with the plain language of the agreement. *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). We endeavor to construe the document in such a manner as "'to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract'" *LAI Servs., Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009), (quoting *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002) ("*Hercules II*")). "An interpretation that gives meaning to all parts of the contract is to be preferred, over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Tech., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (citing *Gould*, 935 F.2d at 1274).

3.c.i Determining Whether the Contract Has a Latent or Patent Ambiguity

Contract language is unambiguous where there is only one reasonable interpretation consistent with the plain meaning of the words, as derived by a "reasonably intelligent person acquainted with the contemporaneous circumstances." *TEG-Paradigm Envtl, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006)

(quoting *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999). "It is a settled legal principle that a contract or its terms are considered ambiguous only when susceptible to two different reasonable interpretations, each of which is consistent with the contract language.'" *M.A. Mortenson Co.*, ASBCA No. 50383, 00-2 BCA ¶ 30,936 at 152,705 (further citations omitted). "[I]t is not enough that the parties differ in their respective interpretations of a contract term. Rather, both interpretations must fall within a 'zone of reasonableness.'" *NVT Tech.*, 370 F.3d at 1159 (citing *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999)).

Before the Board "can conclusively declare a contract ambiguous or unambiguous, [we] must consult the context in which the parties exchanged promises." *Metric Constructors*, 169 F.3d at 752. If a contract is determined to be ambiguous, the next step is to ascertain whether that ambiguity is latent or patent. A determination that the ambiguity is latent or non-obvious reinforces the tenets of the general rule that such an error must be construed against the drafter under the doctrine of *contra proferentem*. *Id.* at 751. Because a latent ambiguity is not readily apparent, it does not trigger a duty on the part of the contractor to seek clarification prior to bid, as it must for a patent ambiguity. However, to recover for losses attributed to that latent ambiguity, the contractor must prove that it relied at bid upon the interpretation it urges in litigation. *Optimization Consulting, Inc.*, ASBCA No. 58752, 19-1 BCA ¶ 37,426 at 181,904 (citing *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004) and *Fruin-Colnon Corp. v. United States*, 912 F. 2d 1426, 1430 (Fed. Cir. 1990)). "An ambiguity will only be construed against the government if it was not obvious on the face of the solicitation and reliance is shown." *NVT Tech.*, 370 F.3d at 1162.

Once a contractor proves that its interpretation of a latently ambiguous provision was reasonable (even if not the most correct or best one), and that it relied upon that interpretation at bid (*States Roofing Corp. v. Winter*, 587 F.3d 1364, 1368-69 (Fed. Cir. 2009)), it is then afforded the remedy of having the contract construed against the government as the drafter. This is the doctrine of *contract proferentem*. *See, e.g., NVT Tech.*, 370 F.3d at 1162.

The requirements are different for a contractor to recover for an obvious ambiguity. In contrast to a latent ambiguity, "[a] patent ambiguity is one that is 'obvious, gross, [or] glaring, so that plaintiff contractor had a duty to inquire about it at the start.'" Thus, "[i]f an ambiguity is obvious and a bidder fails to inquire with regard to the provision, his interpretation will fail." *KiewitPhelps*, 19-1 BCA at 181,526, citing *NVT Tech.*, 370 F.3d at 1162.

The premise behind the relative burdens of proof for latent and patent ambiguities is one of fundamental fairness. As to a patent ambiguity, the Federal

Circuit has emphasized the principles of fairness not only to the parties involved in a particular dispute but to the overall federal procurement process:

> The patent ambiguity doctrine is a court-made rule that is designed to ensure, to the greatest extent possible, that all parties bidding on a contract share a common understanding of the scope of the project. That objective is particularly important in government contracts, in which significant post-award modifications are limited by the government's obligation to use competitive bidding procedures and by the risk of prejudice to other potential contractors.

Triax Pacific, Inc. v. West, 130 F.3d at 1475 (citations omitted).

The "patent-ambiguity principle advances the goal of informed bidding and works toward putting all the bidders on an equal plane of understanding so that the bids are more likely to be truly comparable." The idea is that an obvious or patent ambiguity places the contractor on notice of a defect and imposes upon it a duty to inquire of the government. This "tends to deter a bidder, who knows (or should know) of a serious problem in interpretation, from consciously taking the award with a lower bid (based on the less costly reading) with the expectation that he will then be able to cry 'change' or 'extra' if the procuring officials take the other view after the contract is made." *S.O.G. of Ark. v. United States*, 546 F.2d 367, 371 (Ct. Cl. 1976).

3.c.ii The Use of Extrinsic or Parol Evidence in Contract Interpretation

There are two circumstances in these appeals where the use of extrinsic or parol evidence is important. The first deals with interpretation of the contract, particularly with respect to the use of trade practice and the manner in which information is presented regarding the circuit breakers in cubicles 5 and 10 in Dwg. EP 601.

Although extrinsic or parol evidence is not generally employed to interpret an unambiguous contract provision (*McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)), on appropriate occasions "we have looked to [extrinsic evidence] to confirm that the parties intended for the term to have its plain and ordinary meaning." *TEG-Paradigm*, 465 F.3d at 1338 citing *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003).

Trade practice[33] is an exception to the usual bar to considering extrinsic evidence in interpreting contract language. "Even when a contract is unambiguous, it may be appropriate to turn to one common form of extrinsic evidence – evidence of trade practice and custom." *TEG-Paradigm*, 465 F.3d at 1338 citing *Hunt Constr. Grp., Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). As "'evidence of trade practice and custom does not trump other canons of contract interpretation, but rather cooperates with them;' we must interpret contract language in a manner that gives meaning to all its provisions." *James G. Davis Constr. Corp*., ASBCA Nos. 58000, 58002, 15-1 BCA ¶ 35,818 at 175,156 citing *Metric Constructors*, 169 F.3d at 752. "A contracting party cannot, for example, invoke trade practice and custom to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting. Trade practice evidence is not an avenue for a party to avoid its contractual obligations by later invoking a conflicting trade practice." *Metric Constructors*, 169 F.3d at 752.

The second circumstance concerning extrinsic evidence that arises in these appeals is the interpretation of certain bilateral contract modifications, and whether appellant reserved rights on its own behalf and/or that of its subcontractors for further recovery. In interpreting these, we consider the question of whether these modifications are final, or were intended at the time of execution to be limited in scope. Appellant has urged that in certain modifications it did not waive the right of further recovery for either itself or its subcontractors. This means we must examine the specific terms of the writing, and consider carefully whether to allow LWJV to introduce evidence that would contradict the seeming finality of the modification.

In either the use of trade practice, or consideration of evidence of the parties' intent beyond what is on the face of an integrated agreement, the use of extrinsic or parol evidence is limited where the contract is unambiguous on its face:

> The parol evidence rule is a rule of substantive law that prohibits consideration of extrinsic evidence to alter the terms of a written agreement that "has been adopted by the parties as an expression of their final understanding." *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004) (citing *David Nassif Assocs. v. United States*, 557 F.2d 249, 256 (Ct. Cl. 1977)). Therefore, a writing that is final and complete is an integrated agreement, and the effect of integration is the inadmissibility of prior or contemporaneous agreements to

[33] *See, e.g.*, J. Clarke's helpful analysis of select decisions dealing with proper uses of trade practice and custom in *Atlantic Dry Dock Corp*., ASBCA No. 54936, 13 BCA ¶ 35,344 at 173,470-71.

> modify or contradict the terms of the agreement. *See David Nassif Assocs.*, 557 F.2d at 256; RESTATEMENT (SECOND) OF CONTRACTS §§ 213, 215 (Am. Law Inst. 1981). Where a fully or completely integrated agreement exists, the writing cannot be supplemented with evidence of consistent or inconsistent additional terms or prior agreements that cover the same subject matter. *Rumsfeld v. Freedom NY, Inc*., 329 F.3d 1320, 1328 (Fed. Cir. 2003); RESTATEMENT (SECOND) OF CONTRACTS §§ 214, 216.

U.S. Coating Specialties & Supplies, LLC, ASBCA No. 58245, 17-1 BCA ¶ 36,710 at 178,759-60.

We take this guidance into account when interpreting the contract, and in examining appellant's evidence to support its contentions.

3.c.iii Appellant's Burden of Proof for Contract Interpretation of Dwg. EP 601

Because LWJV maintains that it was not contractually required to furnish the two replacement circuit breakers, it bears the burden of proving by a preponderance of evidence that there was either a constructive change to the contract or that the specifications were defective. *CDM Constructors, Inc*., ASBCA No. 60454 *et al.*, 18-1 BCA ¶ 37,190 at 181,011 (citing *Amos & Andrews Plumbing, Inc*., ASBCA No. 29142, 86-2 BCA ¶ 18,960 at 95,738).

3.d Analysis of Appellant's Contract Interpretation Arguments

We have found that Dwg. EP 601 specifically calls out the work in cubicles 5 and 10 in a different manner than work in other cubicles. That drawing, as it appears in R4, tab 453 at 208 and duplicated in finding 22, above, was issued as part of Amendment No. 0003 to the solicitation; this was acknowledged at the time by LWJV and was made part of the contract. The drawing itself is marked to indicate that it was a change to an earlier version. Cautionary triangles placed adjacent to cubicles 5 and 10 call attention to the revisions in the updated drawing. (Findings 5, 15-22) As the parties acknowledge, there are four aspects of the drawing that are of particular controversy in interpreting the contract relevant to this appeal. One deals with the manner in which the drawing was made, and the others with specific language in note 4 (app. br. at 13-17 (¶¶ 41-55); gov't br. at 38-31 (¶¶ 117-27)).

3.d.i The Government's Use of Heavy or Bold Lines to Indicate New Work on Dwg. EP 601

We begin with the government's use of heavy and light lines on the sketch itself to differentiate work in cubicles 5 and 10 from features in other cubicles on that drawing. We accept the government's assertion that Dwg. EP 601 distinguishes new work from other features by showing the former with darker, heavy ink, and the latter with lighter, grey shading (tr. 4/198-200; R4, tab 453 at 208; *see also* R4, tab 411 (Mr. Clary writing to appellant on October 31, 2013 that Dwg. EP 601 "shows two breakers, in darkened state (new work)"). This includes the symbol labeled "52" found in the drawing for cubicles 5 and 10 that is identified on Dwg. E000 as a circuit breaker (finding 17).

This is an instance where the use of extrinsic evidence is warranted as an aid in interpreting the contract, notably Dwg. EP 601. We are persuaded that the government's contrasting use of heavy and light lines was a "traditional design convention" (*see also* findings 15-22), which is also referred to as "trade practice" and "custom." For example, drawing note 1 identifies "existing feed[s] to building 8905." These feeds are shown as greyed-out lines with a reference to that note next to them (R4, tab 453 at 208), which reinforces the government's argument that this approach was used to identify existing features. We also find credible the explanation of Mr. Rozenblat, an electrical engineer, that "[t]ypically new work is bolded to stand out so that a contractor is aware that it is a part of his scope of work" (tr. 4/173, 198-200). This would include the portion of the Dwg. EP 601 referring to cubicles 5 and 10, which shows the symbol for circuit breakers in bold thus indicating to bidders that it is new work (*see* findings 18-22)[34] We reject LWJV's argument that this is not the case [35] We cannot ignore the contract's inclusion of distinctive, heavy lines on certain areas

[34] While it is not determinative of the outcome of this appeal, particularly where appellant failed to rebut the government's assertion that bold lines were used to denote new work, we note that this practice was uncontroverted and acknowledged in another ASBCA decision. *See North American Constr. Corp*., ASBCA No. 47853, 95-1 BCA ¶ 27,471 at 136,857 ("Although both parties agree that heavy, bold lines on drawings depict new work . . . .").

[35] We decline to accept appellant's rebuttal assertion that, under this rubric, conduits and cables should also have been shown in bold because these were also new work, as it is unsupported except by argument (*see* app. reply br. at 23-24, also 54 at ¶ 54). LWJV did not directly reply to the government's assertions regarding use of heavy or bold lines; *see* app. reply br. at 51-53 (¶¶ 117-19). For example, support for its assertion that "Circuit Breaker Installed Is Plain Language" cites testimony by Messrs. Boettcher and Worch, but neither witness addressed the issue of these lines or trade practice (*id.* at 52 (¶ 118)).

of Dwg. EP 601, as to do so would impermissibly "leave[] a portion of [the contract] useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous" (*Hol-Gar Mfg. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965)) (citations omitted). We find that the government's use of heavy lines on Dwg. EP 601 does not render the contract ambiguous,[36] and indicates that the circuit breakers in cubicles 5 and 10 – not just the feeder lines as suggested by LWJV – are new work for the contractor.

3.d.ii The Language of Note 4 in Dwg. EP 601 Regarding Which Party Is to Provide the Circuit Breakers in Cubicles 5 and 10

The next three controverted aspects of Dwg. EP 601 are in note 4. These concern how to properly interpret the government's use of the terms "circuit breaker installed"; "shall be"; and "compatible with existing switchgears." We begin with "circuit breaker installed," with emphasis on the last word. As we understand the parties' arguments from a grammatical perspective, the government is asserting that note 4 should be read to regard the word "installed" as a future tense verb (*i.e.*, the circuit breakers in cubicles 5 and 10 are "to be" provided and "to be" installed by the contractor) (gov't br. at 53-54). Appellant treats "installed" as if it were an adjective or a verb in the past tense, in that it refers to circuit breakers that "were" furnished or "have been" installed by the government as GFE (app. br. at 15 (¶ 47); app. reply br. at 83).

Considered alone, there is weight for each side's interpretation of the note's use of "install." LWJV is correct that the government could have placed language for the circuit breakers in note 4 similar to that found in note 2 of Dwg. EP 601, which instructed the contractor to "furnish and install" wires that were needed to activate the circuit breakers in cubicles 5 and 10 (app. reply br. at 52 (¶ 118)). Appellant also correctly observes that there was no information elsewhere in the contract regarding the salient characteristics of the circuit breakers in cubicles 5 and 10 that would describe what the contractor was required to procure (*id.* at 53 (¶ 118)).

The government also raises valid points to support its perspective that appellant had to provide the circuit breakers in cubicles 5 and 10. Its interpretation puts all of the language of note 4, including "installed," "shall be," and "compatible with existing switchgear," into context. Mr. Rozenblat testified that the circuit breakers that had to be provided must work with the existing switchgear in cubicles 5 and 10 were 30-year old Westinghouse models. He said that "if this breaker was existing and already installed inside the cubicle, then it should have and would have already been compatible. Because the installer of that existing switch gear in [Building] 8905 would have had to provide usable breakers at that time." Mr. Rozenblat explained that "the coordination study identifies what settings the relays would need to be put to that are on

[36] As discussed below, we find Dwg. EP 601 is ambiguous for other reasons.

attached [sic] to the breaker. And would identify the settings of the breaker to trip at a certain amperage spike so that it would protect the [Building] 8905 switch gear and anything else up stream." (Tr. 4/200-01)

We regard the government's interpretation to be reasonable that, taken as a whole, Dwg. EP 601 obligated appellant to furnish replacement circuit breakers as new work; *see, e.g.*, the use of heavy lines to call out new work in cubicles 5 and 10 (findings 18-22). We agree that "installed" in note 4 can reasonably be interpreted as a directive that the circuit breakers are to be furnished and installed as part of the contract. This is especially the case when the term is placed in context with the future imperative in the same sentence, that the circuit breakers "shall be compatible with existing switchgear." We note too that the switchgears are identified as "existing," whereas the circuit breakers are not.

3.d.iii Appellant's Alternative Argument of an Ambiguity as to the Provider of Circuit Breakers for Cubicles 5 and 10

While we determine that the contractor was required to provide the circuit breakers in cubicles 5 and 10 because these are depicted in Dwg. EP 601 as new work and this interpretation is supported by reading the entirety of note 4 as a harmonious whole, LWJV raises an alternative argument of ambiguity that warrants consideration. It notes that, unlike note 2 of the same drawing which tells prospective bidders to "furnish and install" certain wiring to these circuit breakers, note 4 omits "furnish" and uses only the word "install" (app. reply br. at 52 (¶ 118)). Appellant regards this lack of additional direction as giving credence to its interpretation of the contract. It asserts that "[u]nder the doctrine of *contra proferentum* [*sic*], even if there are two reasonable interpretations, the document will be interpreted against [the government as] the drafter." *WPC Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963).[37] (App. reply br. at 83-84)

LWJV relies upon the following assertions to substantiate its argument that it is entitled to recover under the doctrine of *contra proferentem* for providing the replacement circuit breakers. These are that its bid was predicated upon the

[37] Although we omit LWJV's long quote from *WPC Enterprises*, the facts in that case are distinguishable and the decision is inapposite. The Court there construed the contract against the government where the contractor reasonably interpreted the contract, raised inquiry prior to award, and made the government aware of its view but the government did not provide clarification or inform the contractor that it disagreed (*see WPC Enterprises*, 323 F.2d at 879). As discussed in *Fruin-Colnon*, 912 F.2d 1426, 1431 (Fed. Cir. 1990), *WPC*'s fact-specific ruling about the doctrine of *contra proferentem* does not apply where the contractor failed to prove reliance at bid.

replacement circuit breakers as GFE; appellant's subcontractors bid the requirement the same way, thus showing its interpretation was reasonable; and, under the rubric of *Mountain Home Contractors v. United States*, 425 F.2d 1260 (Ct. Cl. 1970) and related decisions, LWJV was not obliged to inquire about an item of such small relative cost (*see, e.g*., app. reply br. at 80-84).

As discussed below, even assuming *arguendo* that LWJV were correct that it, too, reasonably interpreted the contract regarding the party responsible for the circuit breakers, it could not prevail. For even if it were correct, appellant would fail to meet its burden of proof for this legal theory, which pertains only to contracts that are latently ambiguous and requires the contractor to prove reasonable reliance at bid upon the interpretation espoused in litigation.

3.d.iii.a Interpretations of Dwg. EP 601 by Other Bidders

Appellant attempts to establish the reasonableness of its interpretation of Dwg. EP 601, and applicability of the doctrine of *contra proferentem*, by "showing [that] other bidders adopted the same interpretation. *See Eagle Paving*, A[G]BCA No. 75-156, 78-1 [BCA ¶] 13,107, *Watson Elec. Constr. Co*., GSBCA [No.] 4260, 76-1 BCA [¶] 11,912. Here, [LWJV], Worch, Enterprise Electric, as well as two other bidders all determined that Drawing EP601 showed existing breakers in Cubicles 5 and 10." (App. br. at 60)

While we do not take issue with the decisions the contractor relies upon, we regard these as fact-specific rulings on procurements in which there was consistency amongst bidders in correctly interpreting the contract in the same manner as the appellant. As raised by the dissent in *Watson*, unless these interpretations are right, this may mean nothing more than that the same mistake was repeatedly made; *see Watson*, 76-1 BCA ¶ 11,912 at 57,112 (Williams, J., dissenting). In addition, assuming *arguendo* that other bidders for the instant contract interpreted Dwg. EP 601 in the manner now urged by appellant, this does not establish that the subcontractors properly bid the work (*see* findings 32-37).

Although appellant cites the Worch bid, among others, as seeming proof that both it and Worch did not believe they had to furnish and install replacement circuit breakers (*see* app. br. at 8 (¶ 13)), LWJV failed to connect any of the subcontractors' bids with its own (*see* findings 32-37). We understand the allegation to be offered for the proposition that the subcontractors who made proposals to LWJV for this work held the view that the circuit breakers were GFE. This is insufficient evidence of what appellant bid, and does not connect any purported subcontractor bids with what LWJV bid. We give no weight to the testimony of LWJV personnel who were not involved in the bidding and opined after the fact regarding what might have taken place; hold that even if we accept *arguendo* Mr. Worch's testimony regarding his company's bid that

this does not prove LWJV relied on Worch's interpretation in making its own bid; and find insufficient proof that all of these bids from potential subcontractors adopted the same interpretation that the circuit breakers were GFE. Further, as we discuss in § 3.d.iii.c (*infra*), potential subcontractor 1st Electric's bid included replacement circuit breakers for cubicles 5 and 10 and did not regard these as GFE.

§ 3.d.iii.b LWJV's Argument That It Prevails Under Mountain Home and Related Decisions

For LWJV to succeed in its alternate argument, that the contract was ambiguous and that *contra proferentem* dictates a result in its favor, it must prove that the ambiguity was latent, not patent. As we understand appellant's argument supporting a finding of latent ambiguity, it relies upon *Mountain Home* and related decisions to preclude a finding of patent ambiguity with respect to the circuit breakers in cubicles 5 and 10. This is because the cost of these was "less than one-half of one percent of the total contract price," and "Boards have held that there is no duty to inquire regarding such a small item relative to the overall value of the contract." (App. reply br. at 83) (citing *NAB-Lord Assocs*., PSBCA No. 190 *et al.*, 78-1 BCA ¶ 12,976 and *Mountain Home Contractors v. United States*, 425 F.2d 1260 (Ct. Cl. 1970))

Distinguishing between types of ambiguity is important, as proponents' burdens of proof differ. Once an appellant establishes there is an ambiguity, it must then prove that it inquired prior to bid about the discrepancy if the ambiguity is obvious or glaring ("patent") but need not do so where it is not ("latent") (*see, e.g.*, *Metric Constructors*, 169 F.3d at 751) although it must also meet other standards. These include that its interpretation was reasonable (*id.*) and that it relied thereon at bid (*Fruin-Colnon*, 912 F.2d at 1430) (*see also* § 3.d.iii.c, *infra*).

We disagree that *Mountain Home* and consistent cases necessarily stand for the proposition that the relatively minor cost of the circuit breakers is determinative of whether any ambiguity is latent or patent. Cost can be a consideration in assessing whether the ambiguity is glaring or obvious, but is not the sole criterion. The court made clear that "this is certainly not the sole determinative factor in leading us to our conclusion." *Mountain Home*, 425 F.2d at 1264. Singling out cost can be an unreliable measure, as it fails to take into account the significance of a contested item to the overall contract purpose.

Although the relatively low price of the circuit breakers is a small fraction of the amount of LWJV's contract, it is clear from the contractor's claims of over a million dollars due to the delay occasioned by and cost in providing these, that these breakers are established as an important or significant aspect of completing the project purpose.

The circuit breakers were, as described in contract provision 252.236-7001(d) "manifestly necessary" to performance of the work and achieving contract objectives (finding 14). Appellant confirms this: "[t]he critical delay that dominated and controlled the critical milestone for Project substantial completion was procuring replacement breakers and relays for the existing thirty-year-old switchgear" (app. reply br. at 17). The question of whether the circuit breakers in cubicles 5 and 10 were previously or yet to be installed is not a negligible detail a contractor might take for granted. The importance of the issue is evident from LWJV's demand in No. 60507 for $75,569 on the cost of replacement circuit breakers, as well as claims from Worch (No. 59740) and Warner (No. 60378) that seek $603,472 and $437,453 respectively where delays associated with these circuit breakers are a significant part.

This is an instance where the *value* ("significance") of a critical item that is "manifestly necessary to carry out the intent of the drawings" may vastly exceed the *purchase price*, an important distinction to bear in mind. We do not mechanically apply the rationale in *Mountain Home* as it is characterized by LWJV or automatically equate a small expense with the significance of an item. Doing so would render 252.236-7001(d) "meaningless or superfluous," and would excuse a contractor's omission of contract provisions that call for crucial but relatively inexpensive contract items. For example, the kitchen exhaust fans that were at issue in *Mountain Home*, while a useful feature, were not "manifestly necessary" to the contract's purpose of providing 300 new housing units at a military base. Without the circuit breakers, the new WSOC could not obtain power and could not function as a satellite and telecommunications operations center that was the purpose of the instant contract (finding 1).

3.d.iii.c LWJV's Argument That It Relied at Bid Upon the Interpretation It Now Espouses

We turn now to reliance at bid,[38] which is raised by the government as a defense to LWJV's alternative argument that the contract must be construed against the government under the doctrine of *contra proferentem* because the contract allegedly is ambiguous (gov't br. at 58; *see also* §§ 3.b.ii & iv, *supra*).

Critical to assessing whether LWJV met its legal burden to recover for a latent ambiguity is whether appellant has substantiated that it relied on the interpretation it

[38] This is related to, but not the same, as LWJV's argument discussed earlier, that its subcontractors came to the same conclusion as it now urges, with respect to the interpretation of the contract. In its earlier incarnation, we discussed whether their alleged contract interpretation supported a finding that LWJV's current interpretation was correct or at least reasonable. Here, we examine their interpretation to determine what was relied upon by LWJV when it tendered its bid.

now champions when it made its bid. One of the "essential ingredients" for obtaining relief under the doctrine of *contra proferentem* is proof "that the contractor *actually and reasonably construed the specifications* in accordance with one of the meanings of which the language was susceptible." *HPI/GSA 3C, LLC*, 364 F.3d at 1334-35 (Fed. Cir. 2004) (citing *W. Contracting Corp. v. United States*, 144 Ct. Cl. 318, 326 (1958)) (emphasis in original). "[W]here a contractor seeks recovery based on his interpretation of an ambiguous contract, he must show that he relied on this interpretation in submitting his bid." *LAI Servs.*, 573 F.3d 1306, 1317-18, citing *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). The Board has specifically recognized this burden for allegedly latent ambiguities, in that "[i]t is not enough to prove latent ambiguity, the contractor must also prove reliance on the latent defect to prevail" (*KiewitPhelps*, 19-1 BCA at 181,526). To the extent LWJV is asserting that it relied at bid upon a consistent interpretation by its potential subcontractors, it must prove that particular subcontractor's reliance before claiming it as its own. "Moreover, where a contractor shows it used a subcontractor's bid and hence the subcontractor's interpretation in preparing its bid to the Government, the subcontractor's reliance can be imputed to the contractor. *Froeschle Sons, Inc., v. United States*, 891 F.2d 270, 272 (Fed. Cir. 1989)." *M.A. Mortenson Co.*, ASBCA No. 54111, 06-2 BCA ¶ 33,400 at 165,581.

We are mindful that we are not to view a contractor's reliance at bid in an overly-restrictive manner, as under proper circumstances the bid of its subcontractor may be imputed to it. In *Froeschle*, the court deemed it sufficient where there was evidence the prime contractor (which was unaware of inconsistency in the drawings) relied upon the subcontractor's bid in making its own, and showed that the subcontractor had relied upon the interpretation urged in litigation. *Id.*, 891 F.2d at 272. That is not the situation here. *See, e.g.*, findings 32-37; n.10.

Since we do not have LWJV's bid papers nor does appellant cite these as proof, we look at the evidence that it did offer to support its argument of *contra proferentem* (*see, e.g.*, app. br. at 8, §§ 13-15). It is unclear on the face of its agreement with Enterprise whether that subcontractor did (or did not) include costs for replacement circuit breakers because their agreement lacks that level of detail and no person contemporaneously knowledgeable of the making of either Enterprise's or LWJV's bid testified regarding their contents. Appellant's reliance on Mr. Sloss (*see, e.g.*, app. br. at 8 (¶¶ 14-15), 60) is inadequate evidence of what it bid.[39] Mr. Sloss testified that he

[39] Although appellant also cites the Worch bid as seeming proof that it did not believe it had to furnish and install replacement circuit breakers (*see* app. br. at 8 (¶ 13)), LWJV failed to connect these two or to show that it relied on Worch's bid when it made its own, except to perhaps support its position that the contractor did not have to provide the circuit breakers for cubicles 5 and 10 (*see* findings 36-37).

came to the project months after the contract was awarded. LWJV made no representation that Mr. Sloss participated in making LWJV's bid or that he was a first-hand witness as to what took place then.[40] Whether Mr. Sloss was mistaken, did not remember, or otherwise erred with respect to whether any of LWJV's potential electrical subcontractors included replacement circuit breakers in their bids (*see, e.g.*, findings 32-37, which also reference the credibility of Messrs. Bauer and Worch on this issue), we do not find this testimony probative of what was (or was not) in Enterprise's or LWJV's bid.

Even if we assume *arguendo* that appellant's interpretation regarding the circuit breakers is either the only correct version or is a reasonable alternative because the contract contains a latent ambiguity (and we do neither), there are additional facts that undermine LWJV's case. Among other things, LWJV's attempt to show reliance at bid upon its current position is made less tenable because it knew or should have known of an alternative interpretation when 1st Electric, one of its prospective electrical subcontractors, bid in accordance with the government's interpretation (findings 32-37). Even if LWJV disagreed with 1st Electric and believed the circuit breakers were already-installed GFE, it was made aware that more than one reasonable interpretation was possible; this calls into question whether the ambiguity was indeed "latent" or actually and reasonably unknown to appellant. When it reviewed 1st Electric's bid at the time it made its own, LWJV could easily have raised an inquiry over the issue with the government but did not do so. *See Phoenix Mgmt., Inc.*, ASBCA No. 57234, 11-1 BCA ¶ 34,734 at 171,005 for examples of circumstances where *contra proferentem* did not apply because it was "unreasonable for the contractor not to discover" the ambiguity or the contractor affirmatively knew of the ambiguity.

We find that LWJV established neither that it relied on the interpretation now urged when it bid the work to the government nor that it relied upon the bid of a subcontractor that did so (*see* findings 32-37). In addition, appellant's litigation stance is called into question because at the time the dispute arose, LWJV espoused the government's interpretation in directing the work of Enterprise, its electrical subcontractor for this part of the work (findings 39-40, 42). This further undermines appellant's assertion that it believed at bid that the government would furnish circuit breakers in cubicles 5 and 10.

Absent that linkage, the contents of Worch's bid proves nothing with respect to LWJV's.

[40] As stated in finding 37, Mr. Sloss said he met with Messrs. Lebolo, Horniday, and Charleston, who were involved in making LWJV's bid. Appellant did not offer evidence from any of these regarding the making of the initial bid, or anyone else involved in that effort nor did it offer justification for not doing so.

3.d.iv Appellant's Burden of Proof to Recover for a Patent Ambiguity with Respect to Salient Characteristics of the Circuit Breakers in Cubicles 5 and 10

Notwithstanding our finding that the contract requires provision and installation of the circuit breakers in cubicles 5 and 10, we do, however, find one area of (patent) ambiguity in the contract with respect to the circuit breakers. Although the government identified these breakers as new work by depicting them using bold or heavy ink on the drawing, it failed to inform bidders of the salient characteristics of the circuit breakers or the switchgear these had to be compatible with (*see, e.g.*, findings 15-22, 37, 47-53, 65). Thus, applying the reasoning and precedent discussed in § 3.c, this glaring and obvious inconsistency rendered the contract patently ambiguous as discussed in more detail below. Because appellant might still recover under the theory of a patent ambiguity (and to answer the government's argument that LWJV cannot do so), we discuss appellant's burden to recover under that premise.

The contract is patently ambiguous because the government did not adequately describe its requirements for replacement circuit breakers despite clearly depicting these on Dwg. EP 601 as new work. This triggered LWJV's duty to inquire about this issue before bidding, and it offers no proof that it did so (*see* finding 37). LWJV's failure to seek clarification thus relieves the government of responsibility for the patent ambiguity. *Blake Constr. Co.*, ASBCA No. 24619, 81-2 BCA ¶ 15,188 at 75,153 (citing *Beacon Constr. Co. v. United States*, 314 F.2d 501 (Ct. Cl. 1963) and *William F. Wilke, Inc.*, ASBCA No. 22372, 78-1 BCA ¶ 13,153).

4. The Merits of LWJV's Type I Differing Site Condition and Misrepresentation Arguments in ASBCA Nos. 59740, 60378, and 60507[41]

We move next to additional legal theories put forth by LWJV to support its recovery for providing replacement circuit breakers in cubicles 5 and 10 and for associated delay. LWJV argues that "[t]he Government's failure to provide two spare circuit breakers as represented in Drawings [sic] EP601 is both a Type I Differing Site Condition as well as a misrepresentation by the Government." Although LWJV does not cite any portion of the record to support the contention that there was a Type I DSC (app. br. at 59), we note that among appellant's proposed findings is that Dwg. EP 601 "represents that in the existing switchgear, Cubicles 5 and 10 are spare cubicles with

[41] We include the contractor's assertions of misrepresentation as part of its Type I DSC argument, as LWJV combines these in its briefs (*see, e.g.*, app. br. at 56, app. reply br. at 64, 81) and misrepresentation is an element of proof for a Type I DSC (*see, e.g., Zafer Constr. Co.*, ASBCA No. 56769, 17-1 BCA ¶ 36,776 at 179,234-35 (quoting *Tetra Tech Facilities Constr.*, ASBCA Nos. 58568, 58845, 16-1 BCA ¶ 36,562 at 178,085)).

existing breakers installed in each cubicle. *See* Tr. Day 2, Bauer at pp. 139-140." (*Id.* (¶ 43)) It reiterates its contention that Dwg. EP 601 shows the circuit breakers in cubicles 5 and 10 as "installed" in additional findings (*id.*, app. br. at 15 (¶¶ 46-47); *see also* summary, app. reply br. at 52-53 (¶ 118)). LWJV's reply brief reiterates its assertion that there was "a 'Type I Differing Site Condition,' as well as a material misrepresentation from what was indicated on Drawing EP601" (app. reply br. at 64).

To prevail, a contractor must prove the following to establish that there was a compensable Type I DSC:

> The elements of a Type I differing site condition, which FAR 52.236-2(a)(1)[42] defines as "subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, " are (1) the condition indicated in the contract differs materially from those encountered during performance; (2) the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; (3) the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and (4) the contractor was damaged as a result of the material variation between expected and encountered conditions. *Optimum Services, Inc*., ASBCA No. 58755, 15-1 BCA ¶ 35,939 at 175,653-54 (citing *Stuyvesant Dredging Co. v. United States*, 834 F. 2d 1576, 1581 (Fed. Cir. 1987); and *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. (2002)). A contractor must prove these elements by a preponderance of the evidence, *id.*

Zafer Constr. Co., 17-1 BCA at 179,234-35 (citing *Tetra Tech Facilities Constr., LLC*, ASBCA Nos. 58568, 58845, 16-1 BCA ¶ 36,562 at 178,085).

Several of these elements of proof overlap with those related to contract interpretation, and are discussed above in § 3. Reflecting on our findings and analysis there, we assess LWJV's argument that this was a Type I DSC. We understand appellant to attempt to satisfy the first element of proof, that conditions actually encountered differed from those indicated in the contract, by asserting that there was an absence of available government-furnished circuit breakers in cubicles 5 and 10 (app.

[42] FAR 52.236-2 is part of the instant contract (finding 8).

reply br. at 81).[43] We have rejected the contractor's assertions that the contract affirmatively depicted the circuit breakers in cubicles 5 and 10 as existing equipment (GFE) and that LWJV was not responsible for providing these. We have found Dwg. EP 601 to be patently ambiguous with respect to the salient characteristics of the circuit breakers in cubicles 5 and 10 (*see* § 3.d.iv, *supra*). LWJV has not shown that it encountered conditions at the site that differed materially from contract provisions, nor has it shown that the contract indicated that the "spare" breakers were available for its use.

Similarly, LWJV is unable to satisfy the second element of proof required for a Type I DSC, which is that "the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding." We have found that note 4 of Dwg. EP 601 might be susceptible to more than one interpretation if we consider only the word "installed" (although the government, in overall context, has the reasonable interpretation), and was patently ambiguous with respect to how the circuit breakers were to be compatible with existing switchgear (*see* §§ 3.d.ii & iv, *supra*). But, this drawing was unambiguous in its depiction of the circuit breakers in cubicles 5 and 10 in bold ink to indicate these were new work. Further, had LWJV given heed to the bid it received from 1st Electric, it knew or should have known that the solicitation was reasonably understood by an experienced electrical contractor as calling for the contractor to provide replacement circuit breakers. *See* § 3, *supra*.

Finally, the third element of proof for a Type I DSC requires that the contractor establish that it relied upon the interpretation urged during litigation at the time it bid the work. This element is also a common burden in demonstrating an ambiguity. *See, e.g., Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 citing *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998); *see also* § 3.d.iii.c, *supra*. As we have determined that LWJV failed to prove by a preponderance of the evidence that it relied on the current interpretation and did not meet this evidentiary requirement (*see* § 3.d.iii.c), we do not discuss all of the elements required to meet the burden of proof

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[43] Appellant maintains that "[i]n sum, Drawing EP601 showed two spare circuit breakers, one in Cubicle No. 5 and one in Cubicle No. 10. The actual conditions were a spare breaker in Cubicle No. 10 that was used for other purposes, and the other spare circuit breaker was on the floor and was dedicated for other purposes. (R4, Tab 5)." (App. reply br. at 81) As LWJV's brief does not use the term "misrepresentation" in this portion of the text, we decline to speculate as to whether this is the alleged misrepresentation it had in mind. If it is, LWJV still cannot prevail as it failed to demonstrate that it reasonably anticipated at bid that these two pieces of equipment were to be available for its use. *See* § 3.d.iii.c, *supra*.

for a Type I DSC. It is unnecessary to evaluate the contractor's damages as set forth in element 4 as none (much less all) of the other elements of proof are met. In sum, LWJV has failed to meet its burden of proof that it encountered a Type I DSC with respect to the circuit breakers in cubicles 5 and 10.

5. The Merits of LWJV's Superior Knowledge Argument in ASBCA Nos. 59740, 60378, and 60507

Appellant argues that the government "had superior knowledge about the conditions of the NSA Building 8905 switchgear concerning the omission of available breakers and relays[44] that would affect performance of Appellant's subcontract, but failed to provide this vital information. *Helene Curtis Industries v. United States*, 312 F.2d 774 (Ct. Cl. 1963)." (App. reply br. at 17) (emphasis in original)

LWJV takes issue with the government's failure to furnish more complete information regarding the circuit breakers in cubicles 5 and 10. It contends:

> There is a consistent line of decisions by Boards and Courts in Government construction contracts that descriptions of existing physical conditions can be ascertained from silence or omissions, which amounts to an affirmative indication or representation. *E.g.*, *Rottau Elec. Co*., ASBCA No. 20283, 76-2 BCA ¶ 12,001; *Shank-Artukovich v. United States*, 13 Ct. Cl. [sic] 346 (1987); [and] *CCM Corp. v. United States*, 20 Cl. Ct. 649 (1990). Here, the fact that the Government's Plans and Specifications did not furnish any descriptions of the disputed circuit breakers "installed in the existing switchgear" establishes that a reasonable contractor may determine that replacement breakers will ***not*** be required for the existing switchgear. All [the government] had to do was state in plain simple terms "furnish, test and install replacement breakers for the spare compartments" and then describe the breakers required, like the Specifications did for the new secondary substation. (R4, Tab 453, Section 26 11 16, 13.8kV-480Y/277-Volt Outdoor Secondary Unit Substation, at 397-402). The "Superior Knowledge" Doctrine requires that the Government disclose and provide

[44] In this section, we address only the merits of appellant's superior knowledge argument with respect to the circuit breakers in cubicles 5 and 10. The relays are discussed in findings 132-40 and are addressed in § 8.c.iii, *infra*.

> the relevant information that the Government is aware that the prime contractor has no knowledge of that [which] would affect its contract performance. *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991).

(App. reply br. at 21)[45] (emphasis in original)

The Board has explained the doctrine of superior knowledge, and articulated the evidentiary burden imposed upon a contractor seeking to recover under this theory:

> The doctrine of superior knowledge is premised upon the notion that where "the government has knowledge of vital information that will affect a contractor's performance, the government is obligated to share that information." *Am. Ordnance LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,787 (citing *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963)); *see also Hercules, Inc. v. United States*, 24 F.3d 188, 196-97 (Fed. Cir. 1994) ["*Hercules I*"]. The elements of the cause of action, as set forth in *Hercules [I]*, are that (1) the contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware that the contractor lacked the knowledge and would not have reason to obtain it; (3) any contract specification provided either misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information. 24 F.3d at 196; *see also Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000).

Relyant, LLC, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,538.

Our appellate court has similarly held that the doctrine of superior knowledge "only applies if 'the government was aware the contractor had no knowledge of and had no reason to obtain such information' and 'any contract specification supplied misled the contractor or did not put it on notice to inquire.'" *Scott Timber Co. v. United States*, 692 F.3d 1365, 1373 (Fed. Cir. 2012) (citing *Hercules*, 24 F.3d at 196) (*Hercules II*).

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[45] Appellant criticizes Dwg. EP 601 as it is printed in R4, tab 5 because that exhibit does not show the lighter-shaded gray areas and lines (app. reply br. at 22). However, we have determined that the controlling version from the solicitation and contract is R4, tab 453 at 208, which distinguishes between features depicted in bold and light lines (findings 21-22).

LWJV's argument that it may recover because the government withheld superior knowledge fails because it has not met its burden of proof as articulated above in *Relyant* and *Scott Timber*. The third element is particularly problematic for appellant, as it has not shown that it did not have the duty to inquire. As discussed in § 3 *supra*, we find Dwg. EP 601 is patently ambiguous because the bold lines used to depict cubicles 5 and 10 are a trade practice that signaled new work yet the contract did not furnish sufficient information on the replacement circuit breakers for the contractor to accurately formulate its bid for these. Patent ambiguity is a legal theory that regards the contractor as on notice of the flaw, and places upon it the duty to prove it inquired prior to bid before it can recover (*see* discussion of this burden of proof in § 3.d.iv, *supra*). As demonstrated by the cases cited above, the same rubric is echoed in an appellant's burden to recover for wrongly-withheld government superior knowledge. Because only the government knew what was necessary for compliant replacement circuit breakers but did not disclose this prior to bid, LWJV was also compelled under that theory to make inquiry of the government but it did not (*see* finding 37). This failure forecloses the contractor's recovery under the doctrine of superior knowledge, especially where LWJV also cannot meet the requirement that it lacked vital knowledge: LWJV knew or should have known of the ambiguity regarding the circuit breakers from the face of the contract and because the bid of potential subcontractor 1st Electric reflected the obligation to furnish replacement circuit breakers (*see also* findings 32-33; § 3, *supra*).

6. The Merits of LWJV's Argument of Breach of Duty of Good Faith and Fair Dealing in ASBCA Nos. 59740, 60378, and 60507

LWJV also argues that "[t]he Government breached the covenant of good faith and fair dealing by requiring [the contractor] to procure new replacement breakers despite the fact that Contract Drawing EP601 clearly states that circuit breakers are installed in Cubicles 5 and 10 in NSA Building 8905." It alleges that the government further breached this duty "by requiring Appellant to go on a worldwide search for replacement breakers," and "most egregiously" did not allow appellant to use "two existing breakers in NSA Building 8905, one in Cubicle 10 and one on the floor." (App. br. at 62)

The "covenant of good faith and fair dealing contained in every contract imposes a 'duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.'" *Watts Constructors, LLC*, ASBCA Nos. 61518, 61961, 19-1 BCA ¶ 37,382 at 181,729 (citing *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019)). *See also Relyant*, 18-1 BCA at 180,539 (citing *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014)); *see also Kelly-Ryan, Inc.*, ASBCA No. 57168, 18-1

BCA ¶ 36,944 at 180,030 (quoting *Military Aircraft Parts*, 16-1 BCA ¶ 36,388 at 177,411).

These decisions emphasize the duty of one party to not impinge upon the *reasonable expectations* of the other. We ask first, was it LWJV's "reasonable expectation" that the government would provide circuit breakers in cubicles 5 and 10? As we have found that the contract did not indicate that it would do so (*see* § 3.d *supra*), we further find that it was not a reasonable expectation of the contractor for the circuit breakers to be GFE.

We query next whether it was LWJV's "reasonable expectation" to use other circuit breakers in the government's possession. As appellant notes, there were other circuit breakers in Building 8905 that the government controlled. Yet, LWJV points us to nothing other than the proximity of these "spares" and that it took effort for appellant to locate replacements for cubicles 5 and 10 to suggest that the government was somehow obligated to give these to appellant. Even the designation in Dwg. EP 601 that some circuit breakers were "spare" does not establish that the contractor had the right or reasonable expectation of being able to make use of them. The "[f]ailure to fulfill [the duty of good faith and fair dealing] constitutes a breach of contract, as does failure to fulfill a duty 'imposed by a promise stated in the agreement'" (*Metcalf*, 742 F.3d at 990 (citing RESTATEMENT (SECOND) OF CONTRACTS § 235)). LWJV has not proven that it is entitled to recover on the theory that the government breached its duty of good faith and fair dealing or that it breached an obligation owed under the contract.

7. Conclusion Regarding Appellant's Arguments for Recovery for Replacement Circuit Breakers in ASBCA Nos. 59740, 60378, and 60507 Under Legal Theories of Contract Interpretation, Type I DSC, Superior Knowledge, and Breach of the Duty of Good Faith and Fair Dealing

Having carefully examined all of LWJV's assertions regarding entitlement to recovery for providing replacement circuit breakers, which included the legal theories of contract interpretation, Type I DSC, misrepresentation, superior knowledge, and breach of the duty of good faith and fair dealing, we find that none of these has merit. The contract was patently ambiguous because it failed to provide salient characteristics of the circuit breakers in cubicles 5 and 10 that the contractor was to provide, and appellant failed to meet its burden of proof under each of the theories advanced.

Even assuming *arguendo* (but not deciding) that Dwg. EP 601 contained a latent ambiguity regarding whether the circuit breakers were GFE, LWJV failed to prove its reasonable reliance at bid (or that of a subcontractor upon whom appellant then relied) upon the position it now advocates. This failure to prove reliance at bid also defeats the above-listed arguments, as it is an essential item of proof for each.

8. Appellant's Claims for Delay in ASBCA Nos. 59740, 60378, and 60507

We turn next to appellant's alleged government-caused delay in ASBCA Nos. 59740, 60378, and 60507,[46] and to the government's denials and assertions of contractor-caused delay offered in its defense.[47]

8.a The Appellant's Position Regarding Alleged Government-Caused Delay

LWJV maintains that "[t]he first 200 calendar days of delay for which the Government is the predominate proximate cause, stems from: (i) the failure to provide two spare circuit breakers for compartments Nos. [sic] 5 and 10 in the existing switchgear located in NSA Building 8905, and (ii) defective Government-supplied existing relays in those compartments, as well as the need to verify that the current transformers in the existing switchgear were compatible with the replacement breakers and relays." The contractor contends that these shortcomings delayed provision of permanent power and kept its subcontractors from timely performing. Appellant maintains that "[t]he Project was essentially on schedule at the end of 2012 in accordance with the approved schedule and Update No. 10." It says that "[t]he combination of the circuit breakers, relays and CT cabinets that impacted the performance of Lebolo-Watts' subcontractors, was stated in the Schedule Narrative dated August 8, 2013 (R4, Tab 392), as being the major delaying factors on Project completion as well as not being able to energize the secondary substation." (App. reply br. at 1-2)

LWJV asserts that it is the opinion of Mr. French, its scheduling expert, that "there was a 300 calendar day delay to the performance of Worch Electric's and Warner's work due to the delay in the Project receiving permanent power, from February 22, 2013 to December 22, 2013" (app. br. at 41 (¶ 163)). Appellant characterizes the various alleged government-caused delays listed above as a delay in receiving permanent power, but does not allocate specific days of delay within that period to the various causes (*i.e.*, replacement circuit breakers, relays, CTs, etc.) (*see* app. br. and app. reply br., *passim*).

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[46] We note that LWJV does not make a separate delay claim, but adds its costs to those of Worch and Warner in Nos. 59740 and 60378 (finding 29).

[47] LWJV does not consistently state the number of days of alleged government-caused delay for which it seeks compensation nor the period of time covered by each. Its certified claim on behalf of Worch seeks damages for 211 days, from May 6, 2013 until December 2013, which it attributes to the contractor's having to provide replacement circuit breakers in cubicles 5 and 10 (R4, tab 22 at 1, 6-10, 119-20). LWJV also seeks 219 days of alleged government-caused delay from January 31 through December 5, 2013 for Warner, whose claim has the same basis as the Worch claim (R4, tab 77 at 2, 5-9, tab 78 at 3, 5).

Appellant also maintains that the government is responsible for an additional 122-day delay that occurred from August 23, 2013 through December 23, 2013. LWJV contends that this delay was:

> [d]ue to: (i) Government defective phasing issues in the existing switchgear caused by improperly labelled existing power feeders; (ii) later power outages of the existing switchgear by the MPO, the NSA utility power provider, which were necessary to install the replacement breakers, replacement relays, check CT cabinets, and correct the feeder phasing issue, all of which further delayed the ultimate tie-in of permanent power to the new Project on December 23, 2013; and (iii) improper and unauthorized inspections of the new secondary substation conducted by the MPO.

(App. reply br. at 4)

Mr. French, the contractor's scheduling expert, determined that "[a]ppellant was responsible for 22 calendar days of concurrent delay for cleaning the new substation, tightening torque bolts, and sealing a portion of the substation joints to prevent water leaks, all of which were the responsibility of Enterprise Electric, Appellant's medium-voltage subcontractor. These concurrent delays took place in September and October 2013." (App. reply br. at 4-5 (referring to R4, tab 441))

8.b The Government's Position Regarding Alleged Government-Caused Delay

The government resists appellant's assertions of government-caused delay on several bases. These include that there is no merit to LWJV's claims underlying these assertions, including (among other things) the requirement that the contractor provide replacement circuit breakers in cubicles 5 and 10 (gov't. br. at 41-42). The government contends that LWJV bilaterally executed contract modifications in which it was compensated for the alleged delay and/or released claims for government-provided relays and current transformer testing, and Contract Modifications CX and DM do not entitle appellant to additional delay damages (*id.* at 46-49). The government maintains that LWJV and its subcontractors are responsible for significant delays to the contract during the same periods (*id.* at 43-46).

8.c Discussion of Appellant's Claims of Government-Caused Delay in ASBCA Nos. 59740, 60378, and 60507

Our analysis is unaided by LWJV's failure to consistently associate the number of days of alleged government delay with reasons therefor.[48] As a result, we follow appellant's certified claim on behalf of Worch, which seeks damages for 211 days, from May 6, 2013 until December 2013. LWJV and Worch primarily attribute this period of delay to the contractor's having to provide replacement circuit breakers in cubicles 5 and 10 (R4, tab 22 at 1, 6-10, 119-20; *see also* findings 29-61), although they also attribute delays to "defective Government supplied existing relays"; "defective Government supplied current transformers"; "Government defective phasing issues caused by improperly labeled feeders"; "late power outages of the existing switchgear by the NSA Operations Manager"; and "improper and unauthorized inspections conducted by the MPO" (app. br. at 59). LWJV similarly seeks 219 days of alleged government-caused delay from January 31 through December 5, 2013 for Warner, which relies upon the same basis as the Worch claim (R4, tab 77 at 2, 5-9, tab 78 at 3, 5; *see also* app. br. at 3).

8.c.i LWJV's Assertion of Government-Caused Delay Associated with the Circuit Breakers in Cubicles 5 and 10

To the extent appellant and its subcontractors base a major portion of their delay claims from May 6, 2013 until December 2013 upon the government requiring LWJV to furnish circuit breakers in cubicles 5 and 10 (*see* R4, tab 22 at 6-10, tab 77 at 5-9; app. br. at 58-61), we disagree that such delays were the government's responsibility. Because the contractor failed to establish government liability for these (*see* §§ 3-7, *supra*), LWJV cannot recover alleged delay costs associated with the circuit breakers.

8.c.ii Delay Claims by Worch and Warner Related to Provision of Permanent Power

According to appellant, because the government issued a 212-day time extension to LWJV "but not [to] Worch and Warner . . . [t]his is evidence that Worch and Warner

[48] For purposes of the decision, we have attempted to determine the boundaries of delay periods. Although not couched in terms of discrete delay, appellant alleges that "various issues [arose] as a result of Government supplied current transformers" in "September, October and November 2013." It says that "settings for the Government supplied relays were readjusted and the relays were tested" on "November 1, 2013." (App. br. at 34 (¶¶ 120, 122)) As to the phasing issue, LWJV mentions that "crackling" was heard on November 4, 2013 and that the problem was resolved "[f]rom December 6-9, 2013), (*id.* at 34-35 (¶¶ 124, 127)).

are also entitled to a time extension and the Government is the cause of delays to the Project" (app. br. at 56-57, repeated at app. reply br. at 75). As we understand LWJV's argument, its subcontractors Worch and Warner are entitled to delay damages because LWJV was compensated with an additional $262,125 and granted an additional 212 days[49] to perform by bilateral Mod. DM. That modification was "for delays caused by power delays and substation changes" (R4, tab 23 at 2). LWJV attempts to buttress its position by citing, among other cases, *Cable and Computer Tech., Inc*., ASBCA Nos. 47420, 48846, 03-1 BCA ¶ 32,237. That decision relied upon the so-called "*McMullan* presumption" that the government's issuance of a modification extending time for performance "constitutes an administrative determination that the delay was not due to the fault or negligence of the contractor" (app. br. at 57) (quoting *Cable and Computer Tech.*, 03-1 BCA at 159,411). LWJV's legal argument, which is captioned "The Government's Issuance of a 212 Calendar Day Time Extension To [LWJV] Creates A Presumption of Government Caused Delay; Contemporaneous Conduct of the Parties," also makes the point that "the contemporaneous conduct of the parties before the dispute ripens is entitled to great weight in interpreting an agreement" (app. br. at 56-57). This assertion requires proof of that conduct.

There are multiple flaws fatal to appellant's argument that Worch and Warner should recover these delay damages. To begin with, LWJV is on unsound legal ground, as the *McMullan* presumption was overturned 16 years ago in *England v. Sherman R. Smoot Corp*., 388 F.3d 844, 857 (Fed. Cir 2004) ("In short, the *McMullan* presumption is at odds with the [Contract Disputes Act]."). *See also Lebolo-Watts*, 19-1 BCA ¶ 37,301 at 37,301 n.16. To the extent that appellant is arguing that, because the government granted an extension to LWJV in Mod. DM, this shows that the government is similarly liable to Worch and Warner, it errs. That presumption, even when a viable legal argument, was rebuttable (*see Computer Tech.*, 03-1 BCA ¶ 32,237 at 159,411), and the government has successfully done so here. Worch and Warner cannot recover because LWJV waived additional claims in Mod. DM, which we understand to be the basis for this portion of the contractor's delay claim.

[49] LWJV's legal argument does not make clear what contract modification(s) it relies upon in its claim that subcontractors Worch and Warner should be compensated. It is most likely to have been bilateral Mod. DM, which granted LWJV (but not its subcontractors) a time extension of 212 calendar days. However, this modification provides that only 84 of these days "will be compensable time with extended field office overhead" (R4, tab 23 at 2). Although appellant's findings cite Mod. DM as well as Mod. CX, the latter increased the contract price for "Phoenix Terminal" but did not change the contract completion date (*see* app. br. at 10-11 (¶¶ 24-27)) and so it is unlikely that is what LWJV had in mind.

Bilateral Mod. DM unequivocally states that this modification "reflects all credits due the Government and all debits due the Contractor." This waiver is reinforced by the additional statement that: "[i]t is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated." (Finding 171) This language is clear and unambiguous, and we interpret it to foreclose additional claims on the part of LWJV as well as any sponsored claims on behalf of its subcontractors on matters addressed by the modification.[50]

LWJV is a sufficiently practiced contractor that it either knew or should know that it should have specifically reserved the rights of its subcontractors when it entered into the modification it relies upon; it previously had addressed the rights of subcontractors and/or suppliers in other modifications (*see, e.g.*, findings 134-36, 138-40, 167-72). Appellant fails to offer a credible explanation for why it would execute Mod. DM as it did, if in fact it intended to reserve the rights of its subcontractors. We do not find Mr. Bauer's testimony, which is relied upon by LWJV as proof in its proposed findings of fact (although it does not reference these in its legal argument (*cf.*, app. br. at 10-11 (¶¶ 26-27, 56-58))), persuasive. Appellant argues that LWJV "specifically excluded the delay and impact effects on all [Mods.] P00002 and P00030, including reserving potential subcontractor claims from any language suggesting a full 'release' and/or 'accord and satisfaction' included therein. *See* Tr. Day 2, Bauer at p. 148." (App. br. at 11 (¶ 27) (citing tr. 2/148)). We find this unconvincing. For one thing, it was Mr. Lebolo and not Mr. Bauer who signed Mod. DM, and we are uninformed as to any unexpressed intention of Mr. Lebolo's that would suffice to contradict the unambiguous language of the modification he executed. Nor do we find appellant's reference to Mod. P00030 to be persuasive, as it does not elaborate on its importance here, and in any event LWJV does not point to any language of reservation in the bilateral modifications upon which it relies.

[50] We note that Mr. Lebolo signed Mod. DM on behalf of LWJV on July 28, 2014 (R4, tab 23 at 1); the contractor then submitted Worch's delay claim to the government three days later on July 31, 2014 (R4, tab 22 at 1). LWJV submitted Warner's delay claim to the government on September 18, 2014 (R4, tab 77 at 2), almost two months after the prime signed Mod. DM and made a deal with the government that foreclosed further claims on behalf of itself and its subcontractors. Subcontractors lack privity of contract with the government and can sue only through the prime (*see, e.g.*, *B3 Solutions LLC*, ASBCA No. 60654, 16-1 BCA ¶ 36,578 at 178,138). If LWJV intended to reserve its right to subsequently claim on this matter on behalf of its subcontractors, it should have put language in the modification to authorize that.

In summary, by relying upon the *McMullan* presumption, LWJV's argument rests on a legal doctrine that was overturned 16 years ago. Further, because the parties bilaterally extended the contract completion date for LWJV and not Worch or Warner, the government successfully rebutted any presumption that it is obligated to do so for these subcontractors. LWJV's assertions that the government's acceptance for delay in Mod. DM, and that appellant "specifically" reserved its subcontractors' rights associated with the subject delay, are unsupported by the record (*see* findings 171-72). Even though LWJV itself benefitted from Mod. DM (finding 172), it failed to prove that Worch and Warner are entitled to recover for delays resulting from associated issues.

8.c.iii Alleged Government Delays Caused by Relays and Current Transformers

LWJV devoted a section of its reply brief to a legal argument which it captions "Appellant Did Not Settle or Release Its Subcontractors' Claims Due to the Government's Failure to Provide Breakers, Relays, and Appropriate Feeders for the Switchgear in Building 8905." Appellant argues that the government's assertion that it did so in bilateral contract Mod. A00016 lacks merit because "'[a]ccord and satisfaction' typically arises when the Government asserts that a contract modification resolved a claim for delay compensation." It says that LWJV "merely negotiated and settled the direct costs of installing the Government-furnished relays and testing the existing current transformers that occurred in one day in the latter part of August 2013." LWJV says that if that modification had "settled the delays in the procurement of the relays, the [government] should have so stated in the Modification." (App. reply br. at 70-71 referencing gov't br. at 46-48)

The government disagrees, and regards Mod. A00016 as including the controverted delay costs. It points to unqualified release language that specifically states that the modification constituted "compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs" and that this was "for all delays related thereto." (Finding 135; gov't reply br. at 20 (¶ 113), 39; *see* gov't br. at 12 (¶ 50), 47)

We agree with the government. LWJV failed to provide credible proof that the modification language is ambiguous or incomplete (*see* findings 134-40). To the contrary: Mod. A00016 states clearly and unequivocally that "this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated" (R4, tab 404 at 3; *see also* finding 134). Had the language been equivocal as to finality or completeness or contained any indicia that LWJV intended to reserve the rights of its subcontractors, then "we may examine the writing itself as well as the circumstances surrounding its

execution, including the negotiations that produced it"; *U.S. Coating Specialties & Supplies*, LLC, ASBCA No. 58245, 17-1 BCA ¶ 36,710 at 178,760 (citing, *inter alia*, RESTATEMENT (SECOND) OF CONTRACTS §210).

Nothing cited by appellant adequately justifies that we look beyond the four corners of the modification for other motivation or unexpressed thoughts. LWJV does not credibly explain why it signed a modification with the specific language contained in Mod. A00016 if it intended all along to protect the rights of its subcontractors and suppliers. Again, if that was its intention, it should have included that in the modification or at least better supported its argument with facts grounded in the record.

Appellant's initial brief alleges, without support, that "[t]here were no negotiations between [LWJV] and the Government regarding A00016 settling any delay claims and A00016 was never intended by the parties to settle any such claims" (app. br. at 10 (¶ 23)). Appellant reiterates this point in its reply brief, and adds that "[b]oth [LWJV] and the Government agreed that no time was involved in this change to the contract" (app. reply br. at 41 (¶ 50); *see also* 70-74). LWJV cites nothing other than testimony by Mr. Boettcher to support its contention that the government agreed with the view appellant now urges. That testimony includes his statement that this modification "[h]ad nothing else in it but that raw [labor] cost [of $2,000]. When I had submitted that cost, we were already talking about -- we had started talking about project delays related to the power, and it was concurred that we were going to -- something was going to be done separate to capture that scenario." (Tr. 1/158)

We give no weight to appellant's reliance on Mr. Boettcher's testimony. For one thing, it does not indicate who in the government shared this alleged understanding or when, or how he knows this to be true. LWJV gives us no basis to accept other evidence that appellant did not intend for the modification to state what it plainly did. The parol evidence rule prohibits a party "from introducing extrinsic evidence of an alleged prior oral agreement to contradict the terms of the parties' agreement" (*U.S. Coating Specialties & Supplies*, 17-1 BCA at 178,759). Mod. A00016 appears on its face to be complete in terms of the parties' understanding that there was no reservation for related delay or subcontractor claims (findings 134-36) and that the overall price was $35,613. The Board has reviewed the high bar for the proper use of parol evidence:

> The parol evidence rule is a rule of substantive law that prohibits consideration of extrinsic evidence to alter the terms of a written agreement that "has been adopted by the parties as an expression of their final understanding." *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004) (citing *David Nassif Assocs. v. United States*, 557 F.2d 249, 256 (Ct. Cl. 1977)). Therefore, a

> writing that is final and complete is an integrated agreement, and the effect of integration is the inadmissibility of prior or contemporaneous agreements to modify or contradict the terms of the agreement. *See David Nassif Assocs*., 557 F.2d at 256; RESTATEMENT (SECOND) OF CONTRACTS §§ 213, 215 (Am. Law Inst. 1981). Where a fully or completely integrated agreement exists, the writing cannot be supplemented with evidence of consistent or inconsistent additional terms or prior agreements that cover the same subject matter. *Rumsfeld v. Freedom NY, Inc*., 329 F.3d 1320, 1328 (Fed. Cir. 2003); RESTATEMENT (SECOND) OF CONTRACTS §§ 214, 216.

U.S. Coating Specialties & Supplies, LLC, ASBCA No. 58245, 17-1 BCA ¶ 36,710 at 178,759-60.

LWJV has not met this standard. If LWJV entered into this agreement to the detriment of Worch and Warner, then that is a matter to be resolved between appellant and its subcontractors for which the government is not liable.

8.c.iv Alleged Delays Providing Permanent Power Attributed to MPO

LWJV asserts that it is entitled to compensable delay due to "Unauthorized MPO Over [I]nspection and MPO Refusal To Provide Permanent Power Due To The Anniversary of the September 11 Terror Attacks Delays Permanent Power" (app. br. at 33). Appellant posits that the contract does not give "MPO authority to inspect [LWJV's] work"; on "August 23, 2013, there was an 'unannounced MPO walk' of the new substation"; "MPO told [LWJV] that it was going to scrub the job from top to bottom due to the fires in the Utah data center"; MPO's over-inspection of the job "was triggered by problems at another MPO facility" in Utah that "were reported in the press"; MPO "refus[ed] to provide permanent power for a two week period" surrounding "the anniversary of the September 11, 2001 terrorist attacks"; and, the "outage was required to apply permanent power to cubicles 5 and 1[0]" (*id.*). LWJV's legal argument is short, and contends that it is entitled to recover "300 calendar days of compensable delay due" that it attributes, in unidentified part, to "improper and unauthorized inspections conducted by the MPO" (*id.* at 59; *see also* app. reply br. at 67-68).

The government denies that LWJV is entitled to recover for these delays, some of which it attributes to appellant's subcontractors. It takes exception to LWJV's allegations, and points out that MPO is not a party to the contract. (Gov't reply br. at 20-22 (¶¶ 114-19); *see also* finding 6; tr. 2/28). The government objects to information relating to the Utah Data Center fires that was introduced by appellant

during the hearing. Although the Board agreed to allow this on a provisional basis (*see* R4, tabs 454-55), the parties were required to brief the issues of admissibility of the documents and whether the Board should take judicial notice of the fires (tr. 2/40-42). (Gov't br. at 40 (¶¶ 169-72))

The government points out that while LWJV "makes much of the fact that the upstream utility provider, MPO, attended the inspections," appellant "fails to identify any deficiencies identified by the Government [during the inspections] that went beyond the terms of the Contract." The government asserts that the deficiency lists were prepared by Mr. Rozenblat, an electrical engineer, and that the deficiencies at the new substation were also noted by HVM, "Appellant's own third party tester." (Gov't br. at 46 referencing GPFOF 60) The government also disputes LWJV's assertions that "MPO refused to provide power for a two week period around the anniversary of September 11." It notes that not even appellant's fragnet (R4, tab 27) "supports this assertion [which] shows only a four day period in which MPO would not provide power." (Gov't reply br. at 21 (¶119))

We agree with the government. LWJV failed to prove that it was wrongly delayed by MPO's alleged "over-inspection," or that MPO was a party to the contract.[51] We have reviewed the evidence relied upon by appellant, and do not find it persuasive that the inspections were over-zealous or improper (*see, e.g.*, app. br., at 33 (¶¶ 114-19) (citing tr. 1/148-55, 95-96, 2/29-33)) (testimony by Messrs. Boettcher and Sloss cited in app. br., APFOF 114-19). We note that the contract allowed the government to

[51] This portion of the transcript shows that the government objected to Mr. Boettcher's statements regarding MPO as hearsay, and the Board sustained that objection although it gave appellant the opportunity to show that the questioning fell under an exception to Fed. R. Evid. 803 (*see* tr. 1/148-55). Counsel for appellant stated that "[a]gain, we're saying that these are statements made by the defendant. Now who is the defendant in this case. It certainly is the US Government." (Tr. 1/150) Counsel reiterated, "it's not hearsay when there's statements made by the adverse party. That's an exception to the hearsay rule." (Tr. 1/151) This exchange was complicated by understandable limits on appellant's ability to provide the names and titles of the persons from MPO due to security concerns (tr. at 1/152-54). But the identity of these individuals is not at issue. Even if we accept *arguendo* that they made statements to Mr. Boettcher of LWJV that they were going to "scrub" the job (tr. 1/149), this does not address counsel's assertions that these were made by a party to the contract. It is insufficient to merely allege that MPO, as a governmental organization, is the "defendant" here, which we understand to mean that it was a party to the contract. As appellant's briefs do not support or elaborate upon this point, we find that LWJV failed to prove that MPO was a party or the "defendant" in these appeals.

designate MPO as the "third party" authorized to "elect performance acceptance testing" (finding 13), but that does not make it a "party" to the contract.

We are unpersuaded by appellant's documents and testimony that the Utah Data Center fires resulted in the mistreatment of LWJV. Appellant has not shown that it was required to do more than perform in accordance with contract requirements, and offers no credible proof that it was improperly delayed. While overzealous "inspections leading to additional 'work not required by the contract'" have been established as a "basis for contractual recovery under a constructive change theory" (*Watts Constructors, LLC*, ASBCA Nos. 61518, 61961, 19-1 BCA ¶ 37,382 at 181,729) (quoting *W.F. Kilbride Constr., Inc.*, ASBCA No. 19484, 76-1 BCA ¶ 11,726 at 55,884), LWJV has not proven that occurred here.

8.d Conclusion Regarding Appellant's Assertions of Compensable Government Delay

We have considered all arguments by appellant of government-caused delay, and find them without merit. In summary, because we found the contract was patently ambiguous because it did not provide salient characteristics of the replacement circuit breakers in cubicles 5 and 10 and appellant did not make inquiry prior to bid (nor did it demonstrate what it relied upon at bid), LWJV cannot recover for delays or the expense attributable for having to provide these. We reject the contractor's *McMullan* argument with respect to the government's grant of a 212-day extension to LWJV but not its subcontractors. That legal theory is not only out of date but unsupported by the record here, and in any event the prime contractor by executing bilateral Mod. DM obtained a benefit that it did not extend to its subcontractors. Similarly, bilateral Mod. A00016 compensated LWJV (if not its subcontractors) and appellant failed to support that it reserved its rights there on their behalf. LWJV failed to prove that it is entitled to compensation for delays occasioned by MPO, especially where appellant did not show that it was required to perform in excess of contract requirements. Finally, the contractor did not support its assertion that MPO is a party to the contract or a defendant in these appeals.

9. Government Assertions of Alleged Delays by the Contractor

In addition to defending against LWJV's assertions that it is entitled to compensable delay (such as for the replacement circuit breakers for cubicles 5 and 10 among other things), the government contends that appellant is responsible for significant delays that affected the critical path. The government maintains that, "with only limited exceptions," LWJV has alleged matters that "either were not delays at all or were concurrent with other contractor-caused delays." It says that LWJV "failed to establish the entitlement of any subcontractor to delay damages for that period" for

instances where the government was liable, and that it "has already more than adequately compensated Appellant." (Gov't br. at 41)

The government's analysis of the project schedule examines bilateral modifications in which it maintains the contractor either waived further recovery of costs or time or received an adjustment for these. It says that the contractor is responsible for delays that pushed the contract completion date out by a total of 353 calendar days, and that the contract has already been extended by 352 days. (*See, e.g.*, gov't br. at 4 (¶ 13); R4, tab 338 at 34). Government expert Mr. Ockman parses these days of contractor-caused delay into four major categories. These include: (1) 60 calendar days for late masonry walls (R4, tab 338 at 21); (2) 128 days for slow progress with electrical work by Worch and Enterprise that involved (among other things) setting the transformers and switchgear in the substation (*id.* at 25); (3) 140 days for late substation commissioning (*id.* at 31); and, (4) 28 days for "Slow Progress with Testing/Late Substantial Completion[/]As-Built Schedule (*id.* at 33-34). Appellant's project schedules show that the new substation was fabricated and delivered "on or about 28 December" 2012 (gov't br. at 7-8 (¶ 30)) (citing R4, tab 378 at 3, tab 382 at 3, both regarding Activity 1550), gov't br. at 8-11).

Mr. Ockman also identified three government-caused delays, which he concluded warranted extending contract completion time by 49 days. These were identifying "lack of relays in the existing switch gear," "out-of-phase conductors," and "feeders into existing substation not being wired as expected" (tr. 5/39-40). He said that the government "has already provided [LWJV] a more than equitable adjustment [for these] through bilateral Mods. A00016, A00021 [Mod. DM], P00002 and A00020" (R4, tab 338 at 49).

We have examined the evidence in these appeals, and made thorough findings. Looking at the bases for the alleged 300 days of government-caused delay relied upon by LWJV (R4, tab 441 at 2-3), we have found no merit to these claims and that, in any event, appellant has been fully compensated by means of bilateral modifications which waived claims by subcontractors and suppliers that related to relays, current transformers, phasing, and other aspects of the delayed provision of permanent power (*see* findings 134-40 (Mod. A00016) and 164-69 (Mods. P00002, CX, and DM)). But, according to the government, even if we erred in any or all of these determinations (and we do not believe we have), LWJV is still not entitled to recover because it also has responsibility for delays to completion that preclude its entitlement. As much of the parties' analyses drew from the opinions of their expert witnesses, we provide an overview of those efforts first (§ 9.a). We then discuss each of the government's allegations of contractor-caused delay (§§ 9.b-9.e). As the alleged contractor-caused delays were for successive intervals that involved interrelated or sequential work, we give our decision and conclusion on these in § 9.f.

9.a Analytical Approaches of the Scheduling Experts

We compared the approaches used by the parties' experts in formulating their opinions regarding periods of project delay and the effects (if any) of key events on the schedule. We scrutinized their testimony, reports, evidence relied upon, and logic in assessing the utility of these opinions and carefully review the opinion of each in weighing its value and each witness's credibility. As each expert adopted its party's position with respect to legal responsibility for the alleged delays, and it is the province of the Board and not a scheduling expert to ascertain liability, we find their reports most useful as they align with our findings of fact, the record as a whole, and our legal conclusions.

9.a.i Appellant's Expert, Mr. French

According to Mr. French, his remit from appellant was "to make an independent expert analysis based upon the approved baseline schedule versus the as-built schedules." He focused primarily upon appellant's being made by the government to furnish replacement circuit breakers in cubicles 5 and 10 and on "the delay in providing permanent power for distribution to the new Project that caused a significant critical path delay in the completion of" work by Worch and Warner. (R4, tab 441 at 4) Mr. French concluded that the government was responsible for "300 days of delay of providing and distributing permanent power to the new project from February 22, 2013 to December 22, 2013" (*id.* at 5). While he agreed that the as-built schedule indicated some delay on the part of Enterprise, he attributed that as completing minor "punchlist items" which were performed in "a couple of days" (tr. 3/153-54). Although Mr. French opined that LWJV was wrongly made to furnish the replacement circuit breakers and said that various contract modifications such as Mod. A00016 did not foreclose further recovery (especially for the subcontractors) (*see* R4, tab 441 at 5), we regard these positions as impermissible legal determinations that are the province of the Board and not a scheduler.

9.a.ii Government Criticism of the French Report

An important criticism by Mr. Ockman of the French Report is that it hinges on alleged delays associated with "permanent power" (R4, tab 338 at 44). Mr. French testified to the relevance of this "milestone activity" which he said had a "total float of zero," which "means that it is on the critical path. Every day of delay for this particular activity will delay the end of the project an equal amount." (Tr. 3/129) Mr. French said that the December 31, 2012 update showed the project was on schedule despite "the masonry delays, the other ancillary delays, with the exception of" permanent power (tr. 3/139).

Mr. Ockman took exception to Mr. French's conclusions:

> While *Permanent Power* [Activity MS1150] was always on the critical path [1][52] energizing the substation (a prerequisite to permanent power) was not. In fact, energizing the substation had more than three months of float in the as-planned schedule [see Exhibit 1[53]]. What was originally critical to permanent power was construction of the WSOC building, itself, to be ready to receive power. This was initially delayed by the poor performance of the [LWJV] masonry subcontractor [see Time Impact No. 1 above]. Energizing the substation did not appear on the critical path until the October 2, 2012, contemporaneous schedule update, after erecting the masonry walls had been completed.
>
> The permanent power milestone had nothing to do with "commissioning permanent power at the existing substation" [5]. It marked having permanent power available at the new substation, switchgear and electrical panels. Predecessor activities included *Electrical Fixtures/Accessories/Finishes* and *Point-to-Point Electrical Testing* at the WSOC.

(R4, tab 338 at 44)

The usefulness of the French Report rests on not only the expertise of Mr. French as a scheduler, but upon the factual groundings of his opinion. In addition to speaking with contractor personnel and looking at the claims, pleadings, and Rule 4 file, he reviewed the contract and its modifications as well as Mr. Ockman's report (R4, tab 441 at 6). Mr. French attached as "exhibit A" to his report "[a] copy of the critical path baseline schedule" (*id.* at 7, 15). He also attached "exhibit B," which he described as "the as-built schedule dated February 6, 2014" (*id.* at 9, 17-18). Exhibit B is the same document found at R4, tab 27 (tr. 3/146-47). The government impugns appellant's reliance on this fragnet, which it says is "filled with errors and omissions." It notes that

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[52] The bracketed cites are original to Mr. Ockman's Report. He notes that these "refer to page numbers in the French [Report] *Appellant's Expert Claims Analysis and Rebuttal Report for the Delay in Providing Permanent Power to the Wide Band Satellite Communications Operations Center* dated August 22, 2017." (R4, tab 338 at 44 n.1)

[53] As Mr. French labels his exhibits alphabetically and Mr. Ockman numerically, we understand this references exhibit 1 of the Ockman Report.

Mr. French "could not fully explain the number of delays that Tab 27 attributes to Appellant," and that "[w]ith few exceptions, almost all of the critical delays on the Project were documented by Appellant to be the fault of Appellant's own subcontractors." (Gov't br. at 43)

Mr. French testified that "the masonry walls and so forth that Mr. Ockman speaks about in his report is not relevant because it did not affect completion or providing permanent power. . . . But, in short, nothing else affected providing permanent power from January until December of 2012." (Tr. 3/124-25) Mr. Ockman disagrees, and points to instances in which there were contractor-caused delays to the critical path. These included late finish of masonry walls, slow progress with electrical work, late substation commissioning, and slow progress with testing/later substation completion as-built schedule (R4, tab 338 at 18-34, 44-49). He says that LWJV "did not perform critical activities according to plan" (*id.* at 15).

Mr. Ockman says that he "prepared a summary as-planned schedule and a series of adjusted schedules that graphically illustrate the impact of controlling delays on achieving substantial completion." As time impacts occurred, these were incorporated into the schedule and original dates "were revised to create an adjusted schedule." (R4, tab 338 at 18) The government alleges that a maximum of:

> 18 days [delay] are attributable to the Government for delays during this period [of slow new substation commissioning from July through December 2012]. While [Mr. Ockman] concluded the Government delayed the Project by 49 days, for the 31 days when the Government was procuring relays, Appellant was concurrently delaying the Project by its failure to complete the New Substation installation. ([gov't br. at 11, 13, 16 (¶¶] 47, 51, 62, 63[)]; *see infra* Part II.B.4.) Even if this Board were to find that the delays were not concurrent, Appellant has already released its claims relating to the relay delays. *See infra* Part II.B.3.

(Gov't br. at 45-46)

9.b Alleged Contractor-Caused Delay: Late Finish of Masonry Work

We understand Mr. French to make two basic arguments in support of appellant's contention that the late finish of masonry walls was not a contractor-caused delay. The first is LWJV's overarching position that, from a scheduling perspective, the project was on schedule at the end of 2012 so there were no delays to the critical path prior to that point (*see, e.g.*, tr. 3/124-25; app. br. at 41 (¶ 163), 58-62). The

second is that, on a factual basis, there were no delays due to late masonry work, because the contractor was able to mitigate these (R4, tab 441 at 8).

As to its first premise, LWJV's expert testified that "the controlling factor in the project was permanent power. There was no permanent power. Nothing of the other ancillary activities were affecting, preventing that from happening. And, furthermore, the masonry walls and so forth that Mr. Ockman speaks about in his report is not relevant because it did not affect completion or providing permanent power" (tr. 3/124-25). Mr. French says that Mr. Ockman "fails to note" that by bringing in "an additional masonry subcontractor," LWJV was able to "maintain[] the original completion date of April 27, 2013" (R4, tab 441 at 8). Appellant's initial brief proposes findings of fact that this was the case (*see* app. br. at 18 (¶¶ 8-9), 26-27 (¶¶ 83-86); *see also* app. reply br. at 25-26, 32-33 (¶ 18)). As the government notes, LWJV cites nothing in the record to support that hiring an additional subcontractor overcame the masonry delays (gov't reply br. at 11 (¶¶ 58-59)), nor does Mr. French do so (R4, tab 441 at 8). In his testimony, Mr. French said that because permanent power was delivered in December 2013, there was no way the "masonry walls impact[ed] providing breakers, providing additional testing, providing relays, et cetera" (tr. 3/162).

Having considered appellant's arguments and its expert's opinion, and being far more persuaded by the government and Mr. Ockman, we find that, consistent with our findings 99-100, LWJV delayed the project by 60 days between June 14 and August 31, 2013 due to the late finishing of masonry work. Contemporaneous correspondence establishes that LWJV and its masonry subcontractors had difficulties that pushed out completion of this task, which was essential to building a functional WSOC that was to house the sensitive equipment. Mr. Ockman's time impact analysis took into account the progress of this work on a step-wise basis, and showed how the contractor's deficiencies protracted performance (*see, e.g.*, R4, tab 338 at 18-26, 34, 51). The government correctly observes that LWJV submitted a recovery schedule reflecting the problems but was unable to overcome problems due to poor performance by the replacement masonry contractor, and the masonry difficulties adversely affected the work of subcontractors Worch and Warner (gov't br. at 44; *see also id.* at 6 (¶ 27)) (citing tr. 4/188).

We find that Mr. French's comparison of the "as-planned" versus the "as-built" schedules is not sufficiently nuanced or supported to convince us that this work did not result in contractor-caused delay. While Mr. Ockman agrees that the masonry delays were mitigated by about two weeks (R4, tab 338 at 20), neither appellant nor Mr. French cite evidence that the masonry delays were fully overcome (findings 91-100).

9.c Alleged Contractor Delays Due to Slow Progress with Electrical Work

Following completion of the masonry work, the contractor had to install the new electrical substation, which then had to be energized before the equipment could be started up, tested, and commissioned. Mr. Ockman contends that, during this period, LWJV and its subcontractors caused these delays to the project's critical path: (1) 128 days for the slow progress of LWJV's electrical subcontractors; (2) 140 days due to appellant's late commissioning of the new substation; and, (3) 25 days for the contractor's "Slow Progress with Testing/Late Substantial Completion As-Built Schedule." (R4, tab 338 at 34) The government asserts that even if the Board finds that providing the replacement circuit breakers was the duty of the government and not appellant, LWJV "is not entitled to delay damages because of Worch's and Enterprise's own concurrent delays which Appellant amply documented during performance. (¶¶ 30-44)." (Gov't br. at 45)

Appellant denies that it was responsible for these delays, and attributes the delay in large part to the government for making it furnish replacement circuit breakers in cubicles 5 and 10. LWJV asserts that it was entitled to "pace" its work and proceed at a slower rate because the government supposedly caused the delay. (App. reply br. at 31-46 (¶¶ 13-82)) We examine each of the government's three periods of alleged contractor delay below.

The government asserts that LWJV, Worch, Enterprise, and other subcontractors delayed the project by 128 days during installation of the new substation (gov't br. at 7-11 (¶¶ 30-44), 17-20 (¶¶ 71-82); *see also* gov't br. at 44-46; R4, tab 338 at 23-26, 34). Government expert Mr. Ockman maintains that, for this period, the contractor's "slow progress with critical electrical work involving setting the transformers and switchgear" delayed the new substation. This "pushed the projected completion date from June 26, 2013, to November 1, 2013." (R4, tab 338 at 25)

The government points to numerous problems relating to electrical work that began before this period of delay and continued thereafter (gov't br. at 44-46). Worch's electrical work remained behind schedule and it had continued performance issues throughout 2013. On July 16, 2013, LWJV met with Worch's surety to discuss delays and ongoing problems with, among other things, Worch's subcontractor County. (*Id.* at 18 (¶ 76)) Appellant was concerned about Worch's ability to perform, and repeatedly wrote Worch in the fall of 2013 regarding its untimely work (*id.* at 18-19 (¶¶ 76-79)). In commenting upon the fragnet upon which LWJV bases its delay claim, Mr. Boettcher said that "in reality if the power was granted from the agency for the substation Worch would have been in trouble" (*id.* at 19 (¶ 78)).

Mr. Ockman attributes LWJV's "inability to perform this critical work at the rate originally planned" to the contractor's recurring difficulties with Worch, its

subcontractors, Enterprise, and 1st Electric (R4, tab 338 at 25; *see also id.* at 23-26, 36, 51). These include delays caused by Worch and its subcontractor County (gov't br. at 8-9 (¶¶ 32-36)). Worch also had problems resulting from 1st Electric's failure to perform the coordination study, which in turn delayed the timely completion of electrical work and ordering equipment necessary to finish the project. Worch's financial issues, especially in 2013, resulted in its delay completing telecommunications, electrical, and fire alarm work. Although LWJV repeatedly contacted Worch about these problems and issued several cure notices about its untimely and deficient performance, Mr. Boettcher testified at the hearing that he did not remember these difficulties. (Gov't br. at 17-20 (¶¶ 71-82))

Mr. Ockman says that "Worch began electrical work inside the [new WSOC] building on September 26, 2012." Although LWJV's "contemporaneous schedule updates show that setting transformers and switchgear started on December 28, 2012, in accordance with the adjusted schedule, [Enterprise] did not begin setting the [new] substation until April 9, 2013." Mr. Ockman cites the May 10, 2013 QCR, which states that on that date, Worch was "'pulling mandrel[54] thru [sic] power conduits from substation to switchgear & UPS.'" Worch then began "pulling feeder cables from the substation to the main switchgear on May 28, 2013, and does not complete pulling feeder cables from the switchgear to the UPS until June 14, 2013. . . . Megger testing and cleaning the switchgear continue[d] until June 27, 2013." (R4, tab 338 at 24-25)

Among the contractor's shortcomings the government believes delayed the commissioning process was Enterprise's failure to timely finish installing the new substation, which it obtained from Eaton. The new substation arrived in early February 2013, but sat in a field until it was installed on April 9, 2013 because the site had not been made ready for it. Impediments included that the concrete pad the substation was to sit upon was untimely provided and improperly sized by County, one of Worch's subcontractors; Worch and Enterprise had not placed the new substation's stub ups in the location called for in Eaton's design; Worch had to redo part of the duct work that had been performed by 1st Electric; and, Enterprise failed to timely have on hand all of the parts needed for the new substation. (Gov't br. at 8-11 (¶¶ 32-43))

This resulted in a critical path delay from mid-April to the end of July 2013. LWJV issued a Cure Notice to Enterprise on July 24, 2013 over its failure to timely perform this work. (Gov't br. at 13 (¶ 51)) (citing R4, tab 228). The government says that LWJV issued two cure notices to Worch and one to Enterprise for failing to properly prosecute the work (gov't br. at 8-10 (¶¶ 30-44), 44-46). The government faults LWJV's failure to perform quality control in accordance with the contract as

[54] A mandrel is a device that is "pulled through the conduit to make sure you have a clear pathway and that it is clean, and that the wires have the ability to go through it with no problems" (tr. 4/85).

contributing to Enterprise's poor performance (*id.* at 13 ¶ 52) (citing R4, tab 246 at 2, tab 249 at 1, tab 399 at 114). (*See also* tr. 4/72, 106-07; R4, tab 338 at 26-34)

According to the government, LWJV was still not ready to energize the new substation in June 2013, as evidenced by Worch's email of June 20, 2013 to Mr. Boettcher that the lugs were "still not on site" (gov't br. at 41 (citing R4, tab 196)). Among the contractor's outstanding tasks was to provide UPS lugs and pull UPS wire. As of then, Worch still had numerous, incomplete features of work that caused major concern. Although Mr. Boettcher later said he had no recollection of these delays and these were not included in the fragnet, upon which appellant and its expert base appellant's delay claims, these shortcomings were repeatedly memorialized in contemporaneous correspondence by both Mr. Sloss and Mr. Boettcher. (*See* gov't br. at 10-11 (¶¶ 41-44); *also* R4, tab 338 at 25)

9.d Alleged Contractor-Caused Delay Due to Late Commissioning of the New Substation)

The government asserts that, once delays caused by installation of the new substation were resolved, commissioning the new substation was on the critical path. It attributes problems in doing this work to LWJV and its subcontractors, which it says caused another 140 days of delay to project completion, from November 1, 2013 until March 21, 2014. (Gov't br. at 11 (¶ 45); R4, tab 338 at 26-34) In addition, the government asserts that Enterprise continued to delay the project due to its slow progress in completing the new substation, and that Enterprise's poor work delayed commissioning between August and December 2013 (gov't br. at 13 (¶ 52)).

The government alleges that, leading up to and during the protracted commissioning period, it sent LWJV deficiency lists regarding problems at the new substation that had to be corrected. The government, MPO, and appellant attended inspections at the new substation on August 23 and 28, 2013. Although the government expected the new substation to be ready, multiple deficiencies made it unsafe for MPO to provide power. (Gov't br. at 14-16 (¶¶ 54-60)) Problems encountered included "trash found in the switchgear compartments needing to be removed prior to energizing" the new substation; "bolts on the transformers needing to be properly torqued"; "transformer housings [that] leaked due to improper or damaged gaskets"; and places where "additional grounding was needed." These deficiencies were noted in QARs from August 26, 2013 ("This is a contractor delay due to lack of quality control" by LWJV) and August 28, 2013 (There were "major deficiencies in the installation of the substation and switchgear that will not allow permanent power to the site [un]til corrected"). (R4, tab 338 at 27)

As of September 4, 2013, LWJV forwarded an email from Mr. Rozenblat to advise Worch and Enterprise of punch list items that had to be finalized before a

walkthrough with the government on Friday (R4, tab 258). Two days later, LWJV cautioned its subcontractors that it would not "get the commissioning outage for Monday." Mr. Boettcher warned that this could lead to "another two weeks of delay lead time for an outage," which could cost the contractor $1,800 a day in liquidated damages and that LWJV's general costs were even higher at $3,000. (R4, tab 260 at 2) He reminded Enterprise that it had been repeatedly warned and would be held accountable for delay damages (R4, tab 268 at 2).

On October 31, 2013, HVM, appellant's third-party electrical testing agent, found remaining deficiencies in the new substation that kept it from receiving power until November 13, 2013. LWJV was delayed by one day on November 21, 2013 by an issue with the differential relays, for which the government accepted responsibility. On November 22, 2013, appellant discovered that the conductors in Building 8905 were out of phase. This delayed the project by 17 days, for which the government again accepted responsibility. Commissioning of the new substation was completed on December 18, 2013. (Gov't br. at 16 (¶¶ 60-64))

The government cites contemporaneous correspondence in which LWJV's Michael Boettcher acknowledged that these problems had made "USACE/MPO wary of the substation status," and notes that the government had requested that the contractor not permanently close up the work until it had the opportunity to verify that the deficiencies had been remedied (gov't br. at 14 (¶¶ 54-57)). Although Mr. Boettcher testified at hearing that these contractor-driven problems were not critical and took only about two days to complete (tr. 2/120-22), LWJV was sufficiently concerned at the time that it issued a Cure Notice to Enterprise on August 26, 2013. Mr. Boettcher had also informed Enterprise and Eaton that it was "completely unacceptable to date we do not have a proper and complete substation and do not have commitment from Eaton on some of these main issues left to be resolved today/tomorrow." (Gov't br. at 13 (¶ 53))

The government's expert agrees that the government was responsible for some days of delay that affected the commissioning process. According to Mr. Ockman, and based upon appellant's schedules that showed the new substation installation was complete on July 1, 2013, the government delayed the project by 31 calendar days during commissioning of the new substation in order to provide relays to the existing substation. (R4, tab 338 at 32-33) Mr. Ockman felt that this finish date was conservative, because contemporaneous records indicate that the new substation was still not complete as of July 24, 2013 and was not commissioned until December 18, 2013 (gov't br. at 16 (¶¶ 64-65); R4, tab 228; *see also* tr. 5/159-61).

Mr. Ockman says the parties have resolved costs and delay times associated with the relays and current transformers, which affected commissioning of the new substation. The government and LWJV entered into bilateral Mod. A00016, which was effective April 23, 2014, in which LWJV accepted responsibility for installing

government-furnished relays in cubicles 5 and 10, testing the relays, and ensuring these were connected to a current transformer. The government says these efforts delayed the project by three weeks from August 2, 2013 until the week of August 19, 2013, and Mr. Ockman points out that the contractor could have chosen to verify the current transformers earlier to avoid adversely impacting project completion but failed to do so. (R4, tab 338 at 32; finding 138) The government draws our attention to the closing statement of Mod. A00016, which states that "the contract time is not affected"; the increased contract price "reflects all credits due the Government and all debits due the Contractor," and "constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers" for specified costs and delays (gov't br. 11-12 (¶¶ 46-50, 62-66)) (citing R4, tab 338 at 32, tab 404).

Appellant disagrees that its actions in setting the new substation on April 9, 2013 delayed the critical path to commissioning the substation. Without any citation to the record or evidentiary support, LWJV says this was "because the critical path now had six months of float as the substation could not be powered up and commissioned until the breakers were installed, which would be in June 2013 at the earliest, along with the defective relays, which delays were the controlling dominant factors or proximate cause of six months of delay in the first half of 2013 and was not solved until late August 2013." (App. reply br. at 37 (¶ 33))

9.e Alleged Contractor-Caused Delay Due to Slow Progress with Testing/Late Substantial Completion/As Built Schedule

Mr. Ockman asserts that, after LWJV finished commissioning the new "substation on December 18, 2013, testing/punch list work took four weeks longer than planned, pushing substantial completion/beneficial occupancy." Mr. Ockman opines that this 25-day delay period began on March 18, 2014, the projected completion date for late substation commissioning, and lasted until April 15, 2014, which is the "adjusted contract completion date" in accordance with Mod. A00021. (R4, tab 338 at 33) Citing an excerpt from a government status sheet of June 14, 2014, which shows the beneficial occupancy date of April 15, 2014, he concludes that, because LWJV completed the project within the extended time established by this bilateral modification, the project was completed on schedule (*id.* at 33-34; *see also* gov't br. at 46) (citing ¶¶ 67-70, 101, 105, 115; R4, tab 338 at 51).

With the exception of the 22 days of delay in September and October 2013 that Mr. French attributes to Enterprise, LWJV disputes the government's assertions of contractor-caused delay. These impacted the scheduled testing and substantial completion, which appellant says took place earlier than the government alleges. Appellant cites five bases for the overall conclusions urged by its expert, Mr. French, that the government and not LWJV was responsible for the contract delays. These are: "(1) the unavailability of spare breakers in the existing substation; (2) the defective

Government-supplied relays that had to be re-procured by the Government; (3) issues with the current transformers in the existing switchgear; (4) the failure of MPO to provide power outages; and (5) the phasing problems with the existing feeders in Building 8905." LWJV says that it substantially completed the project on March 15, 2014 and that Mr. Ockman errs by stating this took place on April 14, 2015." (App. reply br. at 31 (¶ 13))

The government rebuts appellant's argument that delays were primarily caused by the government's failure to obtain the replacement circuit breakers for cubicles 5 and 10. The government contends that these were the contractor's responsibility. And, even if the Board should find that the government (and not LWJV) was responsible for these, LWJV still "is not entitled to delay damages because of Worch's and Enterprise's own concurrent delays which Appellant amply documented during performance." (Gov't br. at 44-45) (citing ¶¶ 30-44, 101, 105, 115) The government also maintains that Mr. Ockman has established that there were non-compensable, concurrent delays to the critical path for which the contractor is responsible (gov't reply br. at 41) (citing R4, tab 338 at 23-26, 35-36, 38) (gov't br. at 41-42, 44-45).

9.f Conclusion Regarding Government Assertions of Contractor-Caused Delay

Much of Mr. French's report focuses upon reasons he believes that the government, not LWJV, is responsible for 300 days of contract delays. As discussed in § 9.a.i (*supra*), his position is chiefly based upon the view that the government is responsible for "the delay of 300 calendar days in completing the mechanical and electrical work . . . pursuant to the 'Changes' and/or 'Differing Site Conditions' clauses of the prime contract" (R4, tab 441 at 1) that are part of the delay claims of ASBCA Nos. 57940, 60378, and 60507. Mr. French disagrees with the government's position that appellant has waived further recovery based upon bilateral modifications such as Mod. A00016, which was for a relatively small amount (*id.* at 5, 11-13). He also states that the 212 days sought by Worch and Warner are "attributable to the permanent power delay and the existing substation changes," which he opines are subcontractor claims that "were reserved by the contemporaneous correspondence from executed change orders by the prime contractor" (*id.* at 8). Appellant's briefs reflect the views of the French Report (*see, e.g.*, app. br. at 58-61). We concluded in § 1.b (*supra*) that to the extent Mr. French offered what is tantamount to a legal opinion, he is not qualified to do so. Any such assertions carry no weight, but we carefully consider Mr. French's scheduling opinions and the bases for these.

Reflecting upon the reasons offered by Mr. French to support his contention that the government was responsible for delaying provision of permanent power from existing Building 8905 to the new WSOC and is responsible for furnishing the replacement circuit breakers in cubicles 5 and 10 (*see* R4, tab 441 at 2-3), we are unconvinced. We have determined that the contractor failed to timely raise a patent

ambiguity to the government regarding these circuit breakers and so is culpable for damages flowing therefrom; appellant failed to prove reliance on its current theory at bid, thereby foreclosing recovery for a latent ambiguity, misrepresentation, superior knowledge, and/or breach of the duty of good faith and fair dealing; the parties bilaterally settled issues arising from the existing relays, current transformers, and phasing and the prime did not reserve further rights on behalf of itself or its subcontractors; and, the government was justified in postponing the power outage needed to install the replacement circuit breakers and relays due to poor performance by the contractor and its subcontractors. Implicit in our determination is that the *McMullan* presumption does not apply.

As we have noted, we hold (*see* § 3 *supra*) that the contractor was responsible for delays to this project with the exception of those delays identified by Mr. Ockman and/or the government and for which LWJV has been compensated (*see* R4, tab 338 at 32-33, 40-42, 48-49). But, even if we erred and the government is responsible in whole or in part for the delay periods asserted by LWJV, we are persuaded by the government's facts and logic that actions of the contractor, nevertheless, preclude its recovery. The record is replete with correspondence, warnings, cure notices, terminations for default, cautions about overcharging the government, and admonitions by LWJV to its subcontractors that their untimely and/or unacceptable performance is adversely affecting the project schedule and costs (*see, e.g.*, findings 26-28, 39-40, 42, 56, 74, 82, 89-100, 102-12, 114-32, 142-45, 148, 151, 154-55).

We give these contemporaneous criticisms by the prime contractor considerable weight in evaluating its current litigation posture, the conclusions of its expert witness, and the probative value of the fragnet at R4, tab 27 in which it places great stock but which we find too-often unsupported by the record. We find the record frequently contradicts appellant's current position, and is not counterbalanced by other contemporaneous correspondence to support its assertions that these serious shortcomings by its own subcontractors did not adversely affect the project. We hold that appellant is responsible for concurrent and non-concurrent delay during these periods identified by Mr. Ockman (*see* summary table, R4, tab 338 at 34). Additionally, by entering into bilateral modifications (*see* § 8, *supra*), appellant waived further compensation on its own behalf and that of its subcontractors. Neither LWJV nor its subcontractors can recover further for government-caused delay.

We accept Mr. Ockman's expert assessment that the contractor is responsible for 60 calendar days of delay to appellant's late finish of masonry walls between June 14, 2012 and August 31, 2012 (R4, tab 338 at 18-23, 34); 128 days delay between June 26 and November 1, 2013 due for its slow progress of electrical work (*id.* at 23-25, 34); 140 days delay for late commissioning of the new substation (*id.* at 26-34); and 25 days delay between March 18 to April 15, 2014 that are attributable to the contractor's slow

progress with testing/punch list work that pushed out substantial completion. This totals 353 days of delay that are attributed to the contractor. (*Id.* at 33-39).

10. The Merits of ASBCA No. 60459, BAS Controller Power and Exit Door Power and ASBCA No. 60508, ACU Controls

Because appellant makes the same legal arguments to justify recovery for alleged constructive changes to the contract in ASBCA Nos. 60459 and 60508, we discuss these appeals together (*see* app. br. at 63).

10.a Appellant's Position

In ASBCA No. 60459, the pass-through claim it filed on behalf of its electrical subcontractor Worch, LWJV contends that it is entitled to recover $15,943 for "Exit Door Power," along with LWJV's "markups (overhead at 18.03%, profit at 10%, and bond and insurance at 1.74%)" (R4, tab 102; app. br. at 49 (¶ 205)). Mr. Worch testified that Worch's bid to LWJV did not include exit door power or BAS controllers, although he did not opine regarding LWJV's bid on these to the government (finding 69; *see also* n.16). LWJV contends that the government's "constructive change" for making it provide exit door power also required an additional "ten days of installation duration time" (app br. at 50 (¶¶ 215-16)). LWJV also says that the government-directed change of having to furnish power to the BAS Controllers "increased Worch's costs by approximately $6,083 and required an additional five days of installation" (*id.* at 52 (¶ 224)). The contractor faults the government for its "failure to show on the Contract Drawings the electrical circuits require to provide power to the Exit Doors and BAS Controllers" (*id.* at 49 (¶ 207)). It maintains that the government improperly required the contractor "to cross check the electrical drawings with the mechanical drawings for the Project" for this work, which appellant alleges is "inconsistent with the requirements of the FAR, and the DFAR" (*id.* (¶ 210)).

In ASBCA No. 60508, the pass-through claim LWJV filed on behalf of its mechanical subcontractor Warner, the contractor seeks $35,851. This is "for providing additional controls for the isolated battery and electrical room stand-alone air-conditioning units ('ACUs'), which ACUs [the government] constructively directed to be controlled by the Energy Management Control System ('EMCS') and related mechanical work by Warner" (app. br. at 52 (¶ 225)). Appellant also complains that the government did not adequately explain why the item the contractor submitted was unacceptable (*id.* at 54-55 (¶¶ 238-40)). It says that "[o]ther than the ACU Equipment Schedule on Drawing M601 [the government] provided no other technical information related to any aspect of the ACU equipment in the contract documents. Division 23 – Heating, Ventilation, and Air Conditioning is silent [as] to any ACU requirements" (*id.* at 55 (¶ 242)).

LWJV's legal argument in support of ASBCA Nos. 60459 and 60508 is this:

> [LWJV] is entitled to its direct costs on the Exit Door Power, BAS Controller Power and ACU Control by EMCS Claims. Each of these claims are based on work that [LWJV] had to provide that was not shown on the contract drawings. Providing specific requirements desired by the Government, counsel [sic] not be reasonably discerned by reasonable bidders as these requirements would not be patently obvious during the bidding process. Rather the alleged omitted work would require multiple cross checking [sic] between various specialty trades.
>
> Furthermore, the value of these claims are less than 1% of the total contract value of approximately $18 million. *See Mountain Home Contractors v. U.S.*, 425 F.2d 1260 (Ct. Cl. 1970) (holding no duty to inquire where the claim is less than ½ percent of total contract price).

(App. br. at 63)

10.b The Government's Position

The government asserts that, "[w]hile the drawings did not contain [circuits for Exit Door Power and BAS Controller Power], in each case the Government provided direction on how that power was to be provided in accordance with the Specifications." (Gov't br. at 61) As to the BAS controllers, the government says that this requirement is found in Specification 23 09 00 Energy Management and Control System, EMCS General, § 3.3 CU Quantity and Location (gov't br. at 38 (¶ 158)). With respect to the exit doors, it asserts that power is required in accordance with Specification § 08 71 00 Door Hardware, and the contract's reference to "Hardware Sets (01, 05, & 27)" (*id.* at 36 (¶ 150)). The government also relies upon contract provision 252.236-7001 to support its position that "the Government will not be held to have changed the contract by requiring the contractor to perform work that is manifestly necessary to carry out the intent of the specifications or drawings, or which are customarily performed. *See P.R. Contractors, Inc*., ASBCA No. 52937, 02-2 BCA ¶ 31,941" (*id.* at 61).

In response to ASBCA No. 60508, the "Warner Controls Claim," the government contends that this information is found on Dwg. M706, which contains a chart entitled "ACU Points Schedule." It argues that, when this drawing is read in conjunction with Dwg. M700 "Point Schedule Instructions for EMCS Contractor," the contract shows that the connections in controversy are required. (Gov't br. at 32-35 (¶¶ 133-43))

10.c Analysis and Conclusion in ASBCA Nos. 60459 and 60508

Appellant relies upon these basic arguments in these appeals: first, that the contested work is not stated in the contract and that the government constructively changed the contract by requiring LWJV to perform the work. Second, it cites, *inter alia*, *Mountain Home* to support its argument that when the very large amount of the contract is compared to the relatively low price of the items in question, a contractor should be excused for overlooking these at bid. (App. br. at 49-55 (¶¶ 205-44), 63; app. reply br. at 57-59 (¶¶ 144-68, 84-85))

As to the exit door power and BAS controls in No. 60459, appellant's proposed findings cite testimony by Mr. Worch to substantiate that "Lebolo-Watts and Worch reasonably interpreted the contract drawings at bid time," and that "[t]he only way to find the error was to cross check the drawings between the trades, not something that is done on a $36,000 item on a $18,000,000 job." LWJV maintains that "Worch's reliance on the contract damages [*sic*] was reasonable." (App. br. at 49 (¶ 208))

LWJV argues that its mechanical subcontractor Warner reasonably interpreted the contract on No. 60508 and that the challenged ACU controls were not required (app. br. at 53, ¶ 225[55]).

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[55] Although LWJV's proposed findings of fact go further regarding Worch's claim in No. 60458, appellant does not furnish a cite to the record for a number of these. *See*, *e.g.*, app. br. at 49-52, ¶¶ 206, 209-11, 216, 223. This is in contravention of the Board's repeated instructions regarding the parties' duty to cite to the record for each proposed finding of fact for which it is a proponent or it is taking exception to an opponent's proposed finding; *see* § 1.a, *supra*. We give no weight to unsupported allegations.

[55] As appellant relies upon *Mountain Home* and that decision is based upon determining whether the ambiguity was patent or latent, we focus our decision on LWJV's argument. Although proof of a patent ambiguity carries the additional duty on the part of the contractor of making inquiry prior to bid, proof of both types of ambiguity have the common requirement of demonstrating reliance at bid upon the interpretation adopted in litigation. To recover, the contractor must show that it reasonably relied at bid upon the interpretation now urged, or that it similarly relied upon the bid of a subcontractor that did so. *See* § 3.c.i, *supra* and decisions cited therein.

10.c.1 Constructive Change

LWJV's claims require that it prove that the government constructively changed the contract, and made it perform work not called for in that agreement. The basic rules of contract interpretation are discussed in § 3.c, *supra*. "A 'constructive change' occurs 'when a contractor performs work beyond the contract requirements, without a formal change order under the [contract's] Changes clause[,] due either to an informal order from, or through the fault of, the government." *GSC Constr., Inc*., ASBCA Nos. 59046, 59957, 19-1 BCA ¶ 37,393 at 181,795 (quoting, *Lebolo-Watts Constructors*, ASBCA Nos. 59738, 59909, 19-1 BCA ¶ 37,301 at 181,453). To recover for a constructive change, a contractor must prove that it suffered damages for performing in excess of contract requirements (*GSC*, 19-1 BCA ¶ 37,393 at 181,795; *see also Charles F. Day & Assoc. LLC,* ASBCA No. 60211 *et al.*, 19-1 BCA ¶ 37,215 at 181,175).

10.c.2 Contract Ambiguity

As the government agrees that the contract required LWJV to perform work associated with the exit door power, BAS controllers, and the ACU controls in either the specifications or the drawings (if not in both) (*see, e.g.*, gov't br. at 36 (¶ 10), 38 (¶ 158), 61; *see also* findings 77, 80, 87), the next question is whether the contract was ambiguous in the manner in which it required these. Assuming (but not deciding) *arguendo* that this is the case, this leads to our consideration of appellant's reliance upon *Mountain Home* and related decisions. Although not clearly framed as such by LWJV, the gravamen of that decision is whether the contract contained a latent ambiguity. The court in *Mountain Home* used cost as a measure of an ambiguity (*i.e*., whether it was obvious and patent or nonobvious and latent) by looking at the disparity between the overall contract amount and the price of the disputed item. 425 F.2d at 1263-64. The court found that the contract in question was ambiguous regarding the low-priced kitchen exhaust fans due to a "discrepancy . . . between the specifications [and] the drawings." *Id.* at 1264. It concluded this incongruity was neither "glaring" nor "obvious," and that the contractor had successfully proved that its interpretation of the contract at bid was within the zone of reasonableness. *Mountain Home*, 425 F.2d at 1263-64.

We have discussed at length the elements of contract interpretation, and of the proof necessary to show whether a contract contains a patent or a latent ambiguity; *see* § 3.c as well as further examination of the holding in *Mountain Home* (§ 3.d.iii.b) and the importance of a contractor's proving reliance at bid (§ 3.d.iii.c). The guiding principle is that of reasonableness, which is a key ingredient of the contractor's burden of proof. To begin with, in interpreting a contract, we must give reasonable meaning to all parts without rendering any portion meaningless or superfluous (*Bell/Heery*, 739 F.3d at 1331). An ambiguity will be found if a contract can reasonably be read more

than one way (*Metric Constructors*, 169 F.3d at 751 (Fed. Cir. 1999)). In the case of a latent or nonobvious ambiguity, a contractor need only show that its interpretation is reasonable (even if not the most correct or preferred), and that it relied upon that interpretation at the time of bid. The contract will then be construed against the government as the drafter under the doctrine of *contra proferentem*. *LAI Servs.*, 573 F.3d at 1314 (citing *Metric Constructors*, 169 F.3d at 751). We reach the issue of whether a contractor's interpretation of the contract is reasonable "only if the ambiguity is not patent." *PBS&J Constructors, Inc*., ASBCA Nos. 57814, 57964, 14-1 BCA ¶ 35,680 at 174,661 (citing *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997)) (further citations omitted).

10.d The Merits of ASBCA No. 60459, Exit Door Power and BAS Controllers

We find that the contractor has not met its burden of proof in ASBCA No. 60459 with respect to either exit door power or BAS Controllers. This is for two reasons. The requirement for exit door power is found in Specification § 08 71 Door Hardware, *see* particularly Hardware Sets 01, 05, and 27. The requirement for BAS controllers is found in Specification 23 09 00 Energy Management and Control System, EMCS General, § 3.3 CU Quantity and Location (gov't br. at 38 (¶ 158); *see also* findings 77, 80, and 87). Thus, it is plain that the contract required these, especially since the contract included FAR 52.236-21, which provides that requirements included in the specifications and not in the drawings shall be considered to be included in the drawings and that the specifications have priority over the drawings in any event (finding 9).

We accept at face value Worch's assertion that it relied on the drawings alone in formulating its bid (finding 71; n.16), which we do not regard as a reasonable bidding approach given the primacy of the contract's specifications. Moreover, as with the replacement circuit breakers, LWJV failed to prove that it bid the contract in accordance with any of its subcontractors' interpretations or even provide credible proof of what it contemplated in its own bid (*see* findings 34-37; n.16, n.38, n.39; *see also* app. br., *passim*, app. reply br., *passim*). The contractor's proposed finding that "Lebolo-Watts and Worch reasonably relied upon the contract drawings at bid time" is grounded only upon the testimony of Mr. Worch (app. br. at 49, ¶ 208 citing tr. 2/214-17). Mr. Worch made no representation regarding LWJV's bid (finding 69 , *see also* n.16), and appellant offers nothing else to support its contention as to what was in the prime contractor's bid or even that it then relied upon Worch (app. br., *passim*, app. reply br., *passim*; *see also* findings 34, 69, 77, 80, 87 and n.16). When these issues were initially disputed, LWJV took the government's part, and criticized Worch for failing to perform and overcharging the government (*see* findings 74, 82), which again does not support that LWJV previously believed in the position now asserted.

Applying the holding in *Mountain Home*, and accepting for purposes of this analysis from appellant's claim that the price of exit door power was $6,083 and BAS controllers was $15,943 (*see* R4, tab 102; findings 75, 81) even if we determine *arguendo* that the government's failure to depict the work in both the specifications and the drawings was a latent ambiguity in each instance, LWJV cannot prevail. Appellant failed to prove it reasonably interpreted the contract in formulating its bid for this work or that it reasonably relied upon the bid of a subcontractor that did so (*see* findings 34-37, 64, 69; n.16). LWJV has not satisfied its evidentiary burden, and so cannot recover for any latent ambiguity (*see, e.g.*, *LAI Servs.*, 573 F.3d at 1314). Even if Mr. Worch's testimony about looking only at the drawings (and not the specifications) at the time of bid was meant to apply only to the exit door power (*see* finding 69, n.16; finding 71), appellant failed to prove that it (or Worch) relied then upon the interpretation it now urges.

10.e The Merits of ASBCA No. 60508, ACU Control by EMCS

Appellant's argument to recover for ACU controls is predicated upon the position that these were not mentioned in the contract drawings or specifications (*see, e.g.*, app. br. at 52-55 (¶¶ 225-44)).[56] LWJV does reference Dwg. "M601" (*id.* at 55 (¶ 242)), for the proposition that these controls are not shown there, but does not squarely address the government's argument that the information is provided when drawings M700 and M706 are read together. Rather, referring in No. 60459 to exit door power, BAS controls, and in No. 60508 to ACU control by the EMCS, appellant says that the "requirements would not be patently obvious[57] during the bidding process," as detecting "the alleged omitted work would require multiple cross checking [*sic*] between various specialty trades" (app. reply br. at 84).

We agree with the government that the work for the ACU control by the EMCS is depicted by reading together Dwgs. M700 and M706 (even if it was not shown on a solo drawing or in the specifications). Even if we accepted *arguendo* LWJV's legal argument that any omission was "not patently obvious" (app. br. at 84) (*i.e.*, it is a latent ambiguity), appellant cannot prevail. As discussed above, a contractor must prove that it reasonably interpreted the contract at bid to recover for a latent ambiguity (*see, e.g.*, *LAI Servs.*, 573 F.3d at 1314). Unlike LWJV's subcontractor Worch, which

[56] As discussed in n.55, we disregard appellant's proposed findings of fact that do not provide a citation to the record. With respect to ASBCA No. 60508, LWJV fails to cite to the record in proposed findings 226-29, 231-32, and 238-244 (app. br. at 52-55).

[57] If LWJV is arguing that the contract is made ambiguous by the sole flaw that its meaning is not obvious without giving close scrutiny to the contract documents, it is not well developed. If LWJV is arguing that the ambiguity is not patently obvious, we address that matter further in the opinion in considering whether appellant met its burden to establish reliance at bid.

appellant's brief alleges in No. 60459 as having "reasonably interpreted the contract drawings at bid time" (app. br. at 49 (¶ 208)), appellant makes no such affirmative representation for itself or its subcontractor Warner, on whose behalf it makes this pass-through claim (*cf.*, *id.* at 52-55 (¶¶ 225-44)). Nor does it show that it relied on the bid of Warner or any other subcontractor (*see* finding 64), much less that it then adopted the interpretation relied upon in these appeals. Lacking that essential element of proof, the contractor cannot recover for the alleged ambiguity, whether latent or patent (*see* § 3.c, *supra*).

CONCLUSION

We have considered all arguments advanced by appellant, and find that each of these appeals is without merit. For the reasons discussed, we deny ASBCA Nos. 59740, 60378, 60459, 60507, and 60508.

Dated: November 17, 2020

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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. 59740, 60378, 60459, 60507, 60508, Appeals of Lebolo-Watts Constructors 01 JV, LLC, rendered in conformance with the Board's Charter.

Dated: November 17, 2020

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