

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -)
Cutter Enterprises, LLC) ASBCA Nos. 61020, 61021, 61061
61146, 61278
Under Contract No. W912TF-15-C-0500)

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OPINION BY ADMINISTRATIVE JUDGE OSTERHOUT

The appeals in this dispute concern the termination for default of a \$31.5 million construction contract, Contract No. W912TF-15-C-0500 (the contract) between Cutter Enterprises, LLC (Cutter or appellant) and the New Hampshire Air National Guard (NHANG, the Army, or the government). The contract specifications included altering two existing KC-135R aircraft hangar buildings at Pease Air National Guard (ANG) Base, NH: Fuel Cell Building 253 (Building 253) and Maintenance Hangar Building 254 (Building 254). The alterations would allow the ANG to house the new KC-46 tanker. After a series of delays and other issues, the government terminated the contract for default. Appellant appealed the decision. Over time, Cutter filed five appeals. The five appeals covered the termination for default (ASBCA Nos. 61021 and 61146) and the various claims Cutter submitted seeking time extensions and associated costs (ASBCA Nos. 61021, 61061, and 61278). We deny the appeals.

FINDINGS OF FACT

I. The Solicitation and the Contract

1. On January 28, 2015, the NHANG issued Solicitation No. W912TF-15-C-0500 to alter two existing KC-135R aircraft hangar buildings at Pease ANG Base to house the new KC-46 tanker (R4, tab 37 at 1).

2. On February 19, 2015, Cutter's Chief Executive Officer (CEO), Patrick Dwyer, attended a site visit (R4, tab 66 at 3).

3. On April 28, 2015, Cutter submitted its proposal for the project (R4, tabs 5-6).

4. On July 27, 2015, the government awarded the contract to appellant (R4, tab 7).

5. On August 18, 2015, the government issued the notice to proceed to appellant and appellant acknowledged receipt (R4, tab 10).

6. The period of performance was 900 days after notice to proceed. The date by which appellant was required to complete all work was February 3, 2018 (*id.*).

7. Cutter was to commence work within 10 days of receipt of the notice to proceed (*id.*).

8. The contract incorporated by reference Federal Acquisition Regulation (FAR) 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION (APR 1984) (R4, tab 7 at 13).

9. The contract incorporated by reference, FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984) (R4, tab 7 at 12).

10. The contract incorporated by reference FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984) (R4, tab 7 at 13).

11. The contract incorporated by reference FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996) (R4, tab 7 at 13).

12. The contract included Special Contract Requirement 27, Contractor Quality Control, which stated:

27.1. The contractor shall comply with the quality control provisions as specified herein. The Contractor shall perform all quality control inspection and/or testing required by this contract unless specifically designated to be performed by the Government. The quality control system consists of plans, workmanship, fabrication, construction, and operations that comply with contract requirements. The system shall cover construction operations, including fabrication both on-site and off-site, and shall be keyed to the proposed construction sequence. If the contractor fails to submit an acceptable quality

control plan within the time herein prescribed, the Contracting Officer may refuse to allow construction to start if an acceptable interim plan is not furnished or may withhold funds from progress payments in accordance with the contract clause titled, "Payments under Fixed Price Construction Contracts", until such time as the contractor submits an acceptable final plan.

27.2 Quality Control Plan

27.2.1. General. Upon receipt of the Notice of Contract Award, the contractor's quality control plan electronic format shall be submitted for acceptance in accordance with Part 1-General para 3.4 of specifications.

27.2.2. Acceptance. The Contracting Officer's Representative will review the quality control plan. The contractor shall make such changes and additions as necessary for clarity and completeness as requested by the Contracting Officer's Representative through the Contracting Officer. *Acceptance of the contractor's plan is predicated on satisfactory performance during construction. Acceptance is conditional and the Government reserves the right to require the contractor to make changes in quality control plans, personnel and operations to correct deficiencies and to assure contract compliance.*

27.2.3. Changes. When the contractor proposes changes in the quality control plan or implementation during construction, the Contracting Officer shall be notified in writing. The contractor shall implement no changes prior to acceptance in writing by the Contracting Officer.

(R4, tab 7 at 40-41) (emphasis added)

13. The specifications included a requirement to survey the site prior to demolition and deconstruction work. The specifications also required Cutter to, "Record existing conditions in the presence of the Contracting Officer showing the condition of structures and other facilities adjacent to the areas of alteration or removal." (R4, tab 1 at 229) Photographs were acceptable to record existing conditions and the specifications specifically referenced "conflicting electrical conduits" in paragraph 1.11. Further, the specification directed, "It is the Contractor's

responsibility to verify and document outages required during the course of work, and to note these outages on the record document.” (*Id.* at 229-30)

14. The specifications included instructions and restrictions for paving during cold weather for both buildings. Specification 3.3.4. restricted concrete from being placed between October 15 and April 15, excluding certain work from being performed during the winter months. (R4, tab 1 at 1790-91, tab 3 at 1769) Specifically, it stated:

3.3.4 Paving in Cold Weather

Concrete shall not be placed during the period of October 15 through April 15. From April 16 through October 14, comply with the following: Cold weather paving shall conform to ACI 306R. Special protection measures, as specified herein, shall be used if freezing temperatures are anticipated before the expiration of the specified curing period. Placement of concrete shall not begin unless the ambient temperature is at least 35 degrees F and rising. Thereafter, placement of concrete shall be halted whenever the ambient temperature drops below 40 degrees F. When the ambient temperature is less than 50 degrees F, the temperature of the concrete when placed shall be not less than 50 degrees F nor more than 75 degrees F. Heat the mixing water and/or aggregates to regulate the concrete placing temperature. Materials entering the mixer shall be free from ice, snow, or frozen lumps. Salt, chemicals or other materials shall not be incorporated in the concrete to prevent freezing. Covering and other means shall be provided for maintaining the concrete at a temperature of at least 50 degrees F for not less than 72 hours after placing, and at a temperature above freezing for the remainder of the curing period. Remove pavement slabs damaged by freezing or falling below freezing temperature to full depth, by full slab width, to the nearest indicated joint, and replace at the Contractor’s expense as specified in paragraph REPAIR, REMOVAL, REPLACEMENT OF NEWLY CONSTRUCTED SLABS. Record air and concrete temperatures and temperature within the sample holding container and submit to Contracting Officer in accordance with the approved monitoring plan.

(R4, tab 1 at 1790-91) This appears to be what the parties referred to as the “cold weather restriction” or “winter restriction” throughout the record and testimony.

15. The specifications provided instructions for dealing with existing underground utilities at paragraph 1.12:

A. Verify on-site utilities prior to the start of construction. Where existing piping, utilities, oil and gas lines, and underground obstructions of any type that are to remain are indicated in locations to be traversed by new piping, ducts, and other work provided herein, and such are not indicated or specified to be removed, the elevations of the existing utilities and obstructions shall be determined before the new work is laid closer than the nearest manhole or other structure at which an adjustment in grade could be made. Obtain required dig permits and notify the Contracting Officer 14 calendar days prior to any excavation.

B. If any utility line not shown on the drawings is found, notify the Contracting Officer and Base Civil Engineer’s office immediately. Avoid damaging such line. Do not alter without Contracting Officer’s approval.

C. If an active line has been inadvertently damaged or broken, take actions necessary to safeguard personnel and property from immediate harm, including but not limited to physiological, physical and environmental damages. Otherwise take no action until directed by the Contracting Officer.

D. After disposition is determined and carried out, record on the Record Set the nature of the line, original location and any changes made to the line.

(R4, tab 1 at 52)

Further, Paragraph 3.1.2 details requirements for utilities and related equipment. In particular, the general requirements state:

3.1.2.1 General Requirements

Do not interrupt existing utilities serving occupied or used facilities, except when authorized in writing by the Contracting Officer. Do not interrupt existing utilities serving facilities occupied and used by the Government except when approved in writing and then only after temporary utility services have been approved and provided. Do not begin demolition or deconstruction work until all utility disconnections have been made. Shut off and cap utilities for future use, as indicated.

3.1.2.2 Disconnecting Existing Utilities

Remove existing utilities, as indicated or if uncovered by work and terminate in a manner conforming to the nationally recognized code covering the specific utility and approved by the Contracting Officer. When utility lines are encountered but are not indicated on the drawings, notify the Contracting Officer prior to further work in that area. Remove meters and related equipment and deliver to a location in accordance with instructions of the Contracting Officer.

(R4, tab 1 at 230-31)

16. The specifications contained Section 260533 which dealt with raceways and boxes for electrical systems. The section summary included: “1. Metal conduits, tubing, and fittings[;] 2. Metal wireways and auxiliary gutters[;] 3. Surface raceways[; and] 4. Boxes, enclosures, and cabinets.” (R4, tab 1 at 1458) The section also contained a related requirement of Section 270528 which dealt with pathways for communications systems. (*Id.* at 1458, 1658)

17. The specifications contained Section 260543 which dealt with underground ducts and raceways for electrical systems. The section summary included: “1. Direct-buried conduit, ducts and duct accessories[;] 2. Concrete-encased conduit, ducts, and duct accessories[; and] 3. Handholes and boxes.” (R4, tab 1 at 1474) While portions of the section discussed electrical access outside, such as discussing earthwork (R4, tab 1 at 1478) we find that nothing in the section stated that the section solely applied outside the building.

18. The specifications required excavation for structures to within a tolerance of plus or minus 1 inch.

Excavate to indicated elevations and dimensions within a tolerance of plus or minus 1 inch. If applicable, extend excavations a sufficient distance from structures for placing and removing concrete formwork, for installing services and other construction, and for inspections.

1. Excavation for Footings and Foundations: Do not disturb bottom of excavation. Provide 6-inch thickness crushed stone working mat below foundations where indicated. Excavate by hand or excavator with smooth-edge bucket to final grade just before proof compacting and placement of crushed stone working mat.
2. Excavation for Basin and Mechanical or Electrical Utility Structures: Excavate to elevations and dimensions indicated within a tolerance of plus or minus 1 inch. Do not disturb bottom of excavations intended as bearing surfaces.

(R4, tab 1 at 1747)

19. The drawings stated that the “FAA 7460-1 ‘Notice of Proposed Construction or Alteration’ (For Building)” permit would be obtained by the government. However, the contractor was required to obtain the FAA permit “for temporary construction crane.” (R4, tab 2 at G02-00005)

20. Cutter did not plan to construct both buildings at the same time. Instead, “[t]he project sequence was that [B]uilding 253, which is the fuel cell maintenance hangar, had to be constructed and useable first. And then the Building 254 maintenance hangar would then be available for us to begin construction.” (Tr. 1/38)

21. Pursuant to the contract, appellant was required to submit its Preliminary Project Schedule 15 calendar days after acknowledgement of the notice to proceed (R4, tab 1 at 66). The Preliminary Project Schedule formed the basis for the Initial Project Schedule and was to include submissions and approvals required by the contract, to include a Quality Control Plan, Safety Plan, Environmental Protection Plan, design activities, planned submissions, permits, design reviews, and other activities required in the first 90 calendar days of performance (*id.*). The preliminary schedule was due not later than September 2, 2015 (R4, tab 35 at 7). Appellant submitted the Preliminary Project Schedule on August 28, 2015 (R4, tab 13 at 2).

II. Project Performance and Contract Administration

A. Problems with Establishing Baseline Schedule

22. Pursuant to the contract, appellant was required to submit an Initial Project Schedule 42 calendar days after acknowledgement of the notice to proceed. The Initial Project Schedule, also referred to as a baseline schedule by the parties, was required to “demonstrate a reasonable and realistic sequence of activities which represent all work through the entire contract performance period.” (R4, tab 1 at 66) The Initial Project Schedule was due no later than September 29, 2015 (R4, tab 35 at 7).

23. Appellant submitted the Initial Project Schedule, or NH-03, on November 2, 2015 (R4, tab 11 at 2, tab 12 at 2). This was more than one month later than required by the contract.

24. On November 19, 2015, the government rejected NH-03, documenting “revise and resubmit” as the final response action. The government stated that the schedule did not comply with section 01 32 01 of the contract and provided examples of nonconformance with paragraph references to the section that required each action. The government included 14 examples to demonstrate nonconformance but specifically stated the rejection was not limited to those 14 examples. These included that it was not cost-loaded, mandatory tasks were not included, third party inspections were not identified, a lack of sequencing, showing certain tasks as parallel instead of sequential, activities were not properly coded, and the critical path was not apparent. (R4, tab 60.013)

25. On December 15, 2015, appellant provided a revised baseline schedule NH-03, which the government rejected on December 30, 2015. Cutter appeared to respond to 11 of the action items from the government’s reasons for rejecting the Initial Project Schedule but failed to respond to several items and did not adequately respond to several others. This included that design and permit activities did not appear to be clearly tied to the start of work for several items, including, of note for these appeals, the structural steel connections, fire suppression sprinklers, and the fire alarm and mass notification system. It also still had problems with demonstrating a clear critical path, where the critical path was not apparent and pre-requisites, antecedents, or follow-on activities were not clear as well as issues with the critical path not being correct in several places. Sequencing also remained a problem. (R4, tab 60.014 at 3-4). The government also provided several additional comments, including concrete for Building 253 being proposed to occur during cold weather, problems with the schedule being out of sequence or redundant, and a scheduling problem with the fire pumps being demolished in March 2016 and not being reconnected until September which was too long to not have fire pumps in place (*id.* at 4).

26. Also in December 2015, the Contracting Officer's Representative (COR), Captain Daniel Trembley, filed a COR Monthly Report where he characterized Cutter's quality of work as satisfactory and wrote that issues were found and corrected through daily inspections or visits. He further wrote that the Site Superintendent had been replaced because of concerns with his expertise and knowledge. He also wrote that the government had concerns with Cutter's Quality Control Manager but that Cutter had assigned a senior Quality Control Manager to help. He calculated that Cutter was "[c]urrently estimated to be 3% behind schedule, but difficult to measure without approved schedule/baseline." (R4, tab 52.02 at 1) He noted that several discrepancies were documented and currently being addressed (*id.*).

27. On December 15, 2015, the contracting officer (CO) sent Cutter the first letter of concern. In the letter, the CO expressed his concerns with appellant's Project Superintendent, outlining the deficiencies. Deficiencies included:

“[i]nability to interpret drawings demonstrated in the understanding of how the new footings tied into the existing building foundations, and that the tie beams needed to be poured before steel and roofing was installed over the winter; scheduling a technician to perform an additional compaction test when a geotechnical engineer for soil bearing capacity analysis was needed and requested; using an unapproved set of rebar shop drawings for the rebar installation; and ordering, and placing crushed stone material on the job site prior to submittal review/approval by the government and premature to compaction testing.”

(R4, tab 11 at 1) The CO also expressed concerns with the Quality Control Manager, stating the government had wasted time reviewing incomplete submittals, which should have been corrected by the Quality Control Manager. The CO stated that the Quality Control Manager should have caught all of the problematic items for the Project Superintendent instead of their being pointed out by the government. Finally, the CO also stated, “Lack of an approved project schedule also poses a great concern as it makes it very difficult for the [g]overnment to gauge Cutter's progress on the project.” (R4, tab 11 at 1-2) The CO then outlined the submission and rejection timeline that had occurred with the project schedule. The CO directed that 1) Cutter propose a replacement for the Project Superintendent and relieve the existing one of his duties; 2) provide a corrective action plan for better quality control; and 3) expedite submission of the final project schedule. (*Id.* at 2)

28. On December 23, 2015, Cutter responded to the letter of concern. Cutter agreed to replace the Project Superintendent but believed removing him was premature. Further, Cutter agreed to integrate a part-time senior Quality Control Manager to assist the Quality Control Manager. However, Cutter only agreed to provide this senior Quality Control Manager temporarily “until such time as Cutter determines that it has complied with Section 00800 paragraph 27 of the Prime Contract, and those requirements of the contract documents that are not in conflict with said section.” (R4, tab 12 at 2) Finally, while appellant acknowledged that the government had not approved a project schedule, it protested that it was not its fault. Cutter stated, “[t]he Prime Contract clearly states that the Contractor shall utilize the invoice forms provided at the pre-construction conference. The only form provided by the Government at the pre-construction conference was AF3065 Contractor Progress Report.” (*Id.*) Appellant then stated that the government had been unsuccessful in using its own project manager software, had taken excessive time approving appellant’s Schedule of Values (SOV), incorrectly interpreted its own payment application, and caused delays in payment. All of these items “[r]endered it impossible for Cutter to issue the project schedule to the Government prior to receipt of the approved SOV.” (*Id.*) Cutter also stated that nothing in its letter waived any rights and expressly reserved its rights (*id.* at 3).

29. On January 18, 2016, appellant submitted a baseline schedule update, or NH04, which the government approved on February 3, 2016 (R4, tab 60.016).

30. In his February 2016 COR Monthly Report, Captain Trembley downgraded Cutter’s quality of work to marginal and noted, “Column line #1 footing depth out of tolerance, paid \$16K for structural analysis to determine structurally sound” and estimated Cutter was in excess of 10%, or at least 45 days, behind schedule. (R4, tab 52.03)

31. In his March 2016 COR Monthly Report, the COR noted, “Several concerns with under slab conduit resulting in having to have the AE [(Architectural Engineer)] review (out of scope) and contractor having to make several changes.” He noted that Cutter was nearly two months behind schedule and “slow to react to changing conditions.” He noted an issue with a failing column pier. (R4, tab 52.04) We find that this column pier was Column 12’D’ that is referenced throughout this Decision.

32. On June 5, 2016, Captain Trembley filed his COR Monthly Report for May 2016. Under Contractor’s Quality of Work, he maintained the marginal quality of work rating and wrote, “Continued lack of adherence to specification requirements.” (R4, tab 52.05) He noted that project completion had slipped three months. He also noted a continued lack of quality control by the Quality Control

Manager. He also wrote, “Contractor cut power to [Building] 254 paint room because they didn’t bother to review the as-built plans nor conduct site survey.” (*Id.*)

33. In his June 2016 COR Monthly Report, the COR downgraded Cutter’s quality of work to unsatisfactory and noted, “MANY issues with structural steel in addition to misalignment at C truss splices, including column flange braces incorrectly installed and misalignment of belt holes” (R4, tab 52.06). He also documented “significant honeycombing of poured concrete stem wall, incorrect vertical rebar installed in stem walls into CMU, under slab conduit not installed per drawing and specification requirements, and incorrect depth of holes drilled for epoxied rebar” (*id.*). He documented concern that a building that met drawing and specification requirements would not be delivered. He documented that Cutter was approximately 29%, or six months, behind schedule. He also documented that several quality issues were discovered by the COR and the A&E (Architectural and Engineer) representative. Under customer complaints, he noted that Cutter cut power to an occupied hangar because of its failure to review as-built drawings and conduct a site survey. (R4, tab 52.06)

34. In his July 2016 COR Monthly Report, Captain Trembley again documented Cutter as unsatisfactory for quality of work and noted issues with the way Cutter installed underslab conduit, that seal fittings were not at 18 inches as required, that vertical rebars were not installed in accordance with specifications, L-bars were not installed at all concrete wall intersections as required, 4000 PSI concrete was used instead of the required 5000 PSI, and a lintel over a door opening was installed incorrectly. He was still concerned about Cutter not delivering a building the met the requirements of the drawings and specifications. He noted that Cutter was 34% behind schedule, or more than six months behind, and getting worse each month. He still noted that the COR and A&E representative identified several issues. He also noted, “Most days everyone is gone by mid-afternoon, and by noon on Fridays, despite being months behind schedule.” (R4, tab 52.07)

B. FAA Permits and Steel Fabrication/Erection Orders

35. On October 13, 2015, Cutter submitted a Notice of Proposed Construction or Alteration for a crane, which the parties call a Crane Permit (app. supp. R4, tab 278).

36. On November 2, 2015, the FAA sent an email to Canatal Industries, Inc. (Canatal), Cutter’s subcontractor for steel fabrication and erection, requesting additional information (R4, tab 76 at 117280). The email included an internal FAA email asking for details about the crane, noted that the FAA representative did not see a filing for any permanent construction associated with the crane work, and asked if it was an alteration of an existing hanger or new construction (*id.* at 117281).

37. On November 3, 2015, Canatal responded in red to a copy of the FAA internal email (R4, tab 76 at 117279-81). Canatal responded that it would have three cranes, including two crawler cranes and one hydraulic crane (R4, tab 76 at 0117280-81). Canatal also stated that the hangar was new but tied into the existing Building 253 (*id.*). On November 9, 2015, the FAA asked Canatal to confirm there would be three cranes on site because they only saw two mentioned (*id.* at 0117278). Also on November 9, 2015, Canatal confirmed they would have three cranes: a 230 ton crawler crane, a 275 ton hydraulic crane, and an 80 ton crane (*id.*). Canatal provided a height estimate of 145-160 feet for the height of the 80 ton crane (*id.*). On November 10, 2015, Canatal sent an email to the FAA informing them that it had made a mistake and the height would be 185-200 feet for the 80 ton crane (*id.*). Also on November 10, 2015, the FAA asked Canatal what the elevation was for the existing buildings (*id.*). On December 14, 2015, Canatal asked the FAA for an updated status but it did not appear that the crane contractor had ever answered the question about the building height (*id.* at CUTTER0117277-78). There is also no evidence in the record that Canatal informed Cutter that it needed to convey these communications to the government, including the FAA's question about the Building Permit from November 2, 2015.

38. On December 15, 2015, the FAA sent Canatal an email expressing concern that using three cranes instead of one, as proposed for the project, would cause a significant impact on the function of VOR. He also asked "if the people proposing the structure ever filed a case for the building itself" and asked if Cutter ever filed for the other two cranes. (App. supp. R4, tab 133; R4, tab 76 at 117277)

39. Also on December 15, 2015, Canatal sent an email to Cutter asking about the FAA Building Permit (R4, tab 76 at 117277). From the record, this appears to be the first time Canatal asked Cutter about the Building Permit.

40. On December 18, 2015, the government requested the FAA approve what the government called a Building Permit, or what the FAA called a Construction Permit under a Notice of Proposed Construction or Alteration. (app. supp. R4, tab 134).

41. On January 13, 2016, Cutter's Quality Control Manager sent an email to Canatal asking if Canatal submitted all the steel fabrication packages that it planned to and if any more would follow for "these Spec sections" (R4, tab 77 at 142706). Canatal answered on the same day that it had submitted for the first time everything that needed to be for the first building and were working on the resubmittal of the first package; however, it needed RFIs 18, 19, and 20 to be answered (*id.* at 142705-06). On January 15, 2016, Canatal sent an email to Mr. Dwyer, Cutter's CEO, and copied three other Cutter employees and a Canatal employee, informing them that it received "approval of the shop drawings for division 1 thru 3" but received minor comments and asked for confirmation that Canatal could start fabrication (*id.* at 142705). That

same day, Mr. Dwyer asked for the comments so he could review them and respond (*id.* 142704-05). Also that same day, Cutter's Project Manager informed Canatal and Mr. Dwyer that he had no problem starting fabrication but that the submittal was not yet approved and would need to be submitted for approval (*id.* at 142704). On January 19, 2015, Mr. Dwyer directed Canatal to proceed with fabrication in accordance with the shop drawing comments and that Canatal would need to resubmit the drawings for approval (*id.* at 142703-04). On January 26, 2016, Mr. Dwyer asked Canatal to advise him about the schedule for fabrication, erection, and shop drawing resubmittals (*id.* at 142703). On January 27, 2016, Canatal responded that resubmission of batch number 1 would be that day and sequence 1 would be released in fabrication the following day (*id.* at 142703). Canatal also stated that it scheduled erection to start on March 14, 2016 (*id.*). Also on January 27, 2016, Canatal informed Cutter that the second approval for batch number 1 was posted (R4, tab 78 at 19720-21).

42. On February 1, 2016, the FAA contacted the government to ask if the cranes would be higher than 125 feet and, if so, how much higher (app. supp. R4, tab 137 at 2928-29). The contract specialist forwarded the email requesting the crane height to Cutter that same day (*id.* at 2927-28). This indicated that neither Canatal nor Cutter informed the FAA of all of the crane heights as the FAA asked in November 2015.

43. On February 3, 2016, the FAA approved the Permanent Construction Notice of Proposed Construction or Alteration for Construction, referenced by the parties as the Building Permit (app. supp. R4, tabs 134, 187).

44. On February 3, 2016, the FAA released a DETERMINATION OF HAZARD TO AIR NAVIGATION regarding the Crane Permit to erect steel at Building 253 (app. supp. R4, tab 135).

45. On February 4, 2016, Cutter's crane contractor sent an email to Cutter's Project Manager stating that he filled out the FAA form to propose closing down the VOR, projected to begin on March 14, 2016 (app. supp. R4, tab 137 at 2924-25).

46. On February 25, 2016, Cutter's Project Manager sent an email to the FAA inquiring about the status of the Crane Permit and the VOR shut-down (*id.* at 2924). On the same day and in response, the FAA personnel responded and confirmed that the requested date should not be a problem. Also on February 25, 2016, Cutter's Project Manager sent an email to the Canatal personnel, management for Cutter, and the government including a string of emails from the FAA that demonstrated that the VOR shutdown was on schedule to start on March 14, 2016. (*Id.* at 2922)

C. Submittals, Initial Letter of Delay, and Modification No. P00001

47. Between December 2015 and March 2016, appellant filed submittals 48, 58-59, 48.1, 58.1, 59.1-59.2 (these were all, or almost all, shop drawings). The government rejected all of these and required resubmissions. (Cutter Stipulated Findings of Fact Nos. 122-29)

48. On March 11, 2016, appellant submitted its first letter of delay to the government. Cutter explained 17 different categories of delay: 1) Projectmates¹ training; 2) Submittal Register/Log; 3) Preliminary 90 Day Schedule; 4) Foreign Object Damage (FOD) or Temporary fencing; 5) Free Zone Letter; 6) Schedule of Values; 7) Baseline critical path method (CPM) Schedule; 8) Stormwater Pollution Prevention Plan; 9) LEED Submittals; 10) Silt Fence and Temporary Fence related to snow removal; 11) Permanent/Temporary Structure FAA Permits; 12) Concrete Mix Designs; 13) Scattered Submittal Requirements Throughout Specifications; 14) Varying levels of reviews and approvals of submittals; 15) FOD/Temporary Fence and Control Technologies; and 17) Re-issued plans and Specifications in Amendment 007 During Solicitation (R4, tab 13 at 1-7). Additionally, Cutter complained about “the questionable actions” of the Contracting Officer’s Technical Representative (COTR) and the A&E representative (*id.* at 7-8). Cutter requested that the government remove the COTR due to safety concerns (*id.* at 8).

49. On March 25, 2016, Cutter notified the government, “The column pier at 12’ is in very bad shape” and that it needed “immediate attention.” (App. supp. R4, tab 140 at 2940)

50. On April 18, 2016, Cutter provided a response to the government’s request for proposal to provide temporary shoring for column 12’D for an amount of \$61,953 to cover six months of shoring (app. supp R4, tab 141 at 2946). The scope of the proposal included

¹ Projectmates was the project management software used in the contract and was used by the parties to communicate about the project. *See, e.g.*, tr. 1/84-85 (questioning whether reports were uploaded “to Projectmates, to the project management software”), 119 (discussing requests for information submitted in the system), 201 (referencing a discussion forum), 211 (approving a proposal in the system), 220 (discussing a change). Projectmates is “a comprehensive record of what’s occurred in the project” and contains the bulk of the project record for the subject contract, all project submittals, all requests for information, test reports, and all documents (tr. 4/155). “There’s a discussion board forum which was initially used but that later transitioned to primarily an email back and forth to resolve certain issues” (*id.*).

providing PE stamped shoring drawings, erect, dismantle, scaffold rental and trucking for four shoring towers. Two towers will be erected to support the mezzanine deck and two towers will be erected to support column. Bearing tabs will be provided and welded to the column for beam supports. Soil bearing surfaces will be prepped by the site contractor. Daily competent person inspections will be performed by ARC Safety.

(*Id.* at 2945) The response included a rental rate of \$28.12 per day (*id.*).

51. On April 26, 2016, Cutter submitted a second proposal for three months of shoring instead of six months. The scope of the work remained the same as the April 18, 2016 proposal. As with the proposal for six months, this proposal included a statement that schedule modification and further rental duration would “be addressed in the subsequent [change order] for the repair of the column footing and pier.” The cost proposed was \$39,556. (App. supp. R4, tab 190 at 3914-15)

52. On May 20, 2016, the CO issued bilateral Modification No. P00001, concerning Hangar 253 and adding \$39,556 “to provide *temporary shoring* and coring samples at column 12’D’ to stabilize failing column pier and add clause 252.204-7012 (dev)” (R4, tab 14 at 1 (emphasis added)). It also corrected the delivery date to reflect 900 days from the notice to proceed rather than from contract award. The corrected due date of February 3, 2018, was listed. The modification included additional descriptive language in Contract Line Item Number (CLIN) 0013AA, directing that appellant was to:

provide temporary shoring at Column 12’D’ to stabilize the current structure and provide structural support during existing column pier and footing repair/replacement for a period of three (3) months. Take two (2), 4” core samples of the pier and footing, and provide compressive strength tests of core samples. Provide alkali silica reactivity tests of the core samples per ASTM 1260, and chloride ion content test per ASTM C1543.

(*Id.* at 3) The modification also contained a release clause, which stated, “In consideration of the modification agreed to herein as complete equitable adjustments for the [c]ontractor’s proposal for shoring of column 12’D’, the [c]ontractor hereby releases the [g]overnment from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the proposal for adjustment” (*id.* at 1).

53. On May 23, 2016, Cutter signed Modification No. P00001 (R4, tab 14 at 1).

54. On June 7, 2016, Cutter noted in Progress Meeting Notes that Cutter had “approximately one month left of work that can be done around Col 12’D’ before it will result in work stoppage” (app. supp. R4, tab 193 at 3932, 3937).

55. On June 10, 2016, the CO responded to Cutter’s letter of delay. The CO responded to each of the 17 issues as well as the issues with the COTR and A&E representative. (R4, tab 15 at 1-4) In some instances, the CO requested more information if Cutter wanted to further pursue discussions (*id.* at 4). The CO concluded, “At this time, based on the facts presented in Cutter’s letter dated 11 Mar 16, the Government does not agree that any additional compensation or extension of time is owed to Cutter due to Government delay” (*id.*).

D. The Government’s Second Letter of Concern and Modification
Nos. P00002-00004

56. On July 1, 2016, the CO sent another letter of concern to Cutter. This letter detailed several issues that fell into three categories and the CO required corrective actions and a plan to rectify those three categories of: 1) the lack of quality control; 2) the lack of adherence to specifications; and 3) the lack of timeliness of administrative actions. The CO stated that quality control issues existed both in administrative reviews of submittals and the overall quality control of the project and then included examples of specific project quality control issues: electrical underslab conduit not being spaced or supported properly; underslab conduit hit in Building 254; I-beam structural steel misalignment; vertical rebar missing; L-bars missing; and interior curb wall problems. The CO stated that many of the issues listed for quality control also concerned the lack of adherence to specifications. (R4, tab 17 at 1-2)

a. The electrical under slab conduit was not spaced or supported properly in the nose dock area where heavy tugs and aircraft nose gear would pass. This was noted by the government as a deficiency item on May 17, 2016, and was still pending at the time of the letter. (*Id.* at 1)

b. The underslab conduit hit in Building 254 concerned a June 2, 2016 conduit hit which “seized all power” to the paint booth shop and disrupted the fire alarm system. This happened before coordination with the government prior to saw cutting commencement. (*Id.*)

c. The I-beam structural steel misalignment was identified on April 5, 2016, by Cutter’s third-party quality control inspector but was not uploaded into

Projectmates until May 17, 2016. It was not brought to the government's attention in a timely manner. (*Id.* at 1-2)

d. The government COR identified the missing vertical rebar at the sides of control joints. While Cutter fixed the issue in a timely manner, it was brought to appellant's attention by the government. (*Id.* at 2)

e. The L-bars were identified as missing in an already-poured stem wall. It was identified by the government COR and was not yet corrected. (*Id.*)

f. The government and A&E contractor representative discovered that 4,000 PSI concrete had been incorrectly used at all interior cub walls. This should have been 5,000 PSI per the specifications. (*Id.*)

g. The CO stated, "When discrepancies are identified, in most instances, rather than correcting and complying with the specifications, the Government and the A&E team have spent many additional hours researching and analyzing if the alternative approaches/methods of Cutter's installation or construction meet the same intent as what was written in the original specification" (R4, tab 17 at 2). The CO explained that this should only be the process if "the specification may be interpreted in two different ways" but instead the CO opined that Cutter instead used alternate approaches to avoid following the specifications, using Request for Information (RFI) 147 as an example (*id.*). Regarding the third category of concern, timeliness, the CO stated, "RFIs are not submitted timely or not submitted at all which creates the common occurrence of deviations from the plans and specifications" and provided examples (R4, tab 17 at 4).

h. The CO directed Cutter to respond "with the courses of action Cutter will take to correct the deficiencies identified" and informed Cutter that the government would retain 10% of the monthly progress payments (R4, tab 17 at 4).

57. On July 14, 2016, Cutter responded to the letter of concern. Cutter objected to the government "cast[ing] blame" on Cutter "for issues that Cutter does not bear responsibility." (R4, tab 18 at 1) Cutter responded to each of the concerns in its seven-page response. Regarding quality control, Cutter stated that many of the issues raised by the government were due to poor design documents and "the inexperience of the Contracting Officer's Technical Representative with this type and magnitude of construction, not quality control." (*Id.*) Cutter explained that the quality control examples were all fixed by summarizing what happened for each one. Cutter also stated its disagreement with the government's characterizations regarding adhering to the specifications and timelines in administrative tasks (R4, tab 18 at 4-5).

58. In its July 14, 2016 response to the letter of concern, Cutter described its proposed plan in two paragraphs.

First, Cutter discussed that it would implement the Army Corps of Engineers' Three Phases of Control in the Quality Control Program which it stated would address design coordination issues prior to construction "instead of after installation of work." Cutter suggested that any unresolved questions from any preparatory meetings would result in Cutter submitting an RFI and no work would commence until a resolution was determined. Cutter stated, "With the Government's representatives taking an active role in the preparatory meetings there should be no instances where follow-on inspections by the design team result in discoveries of apparent deviations from the contract documents." (R4, tab 18 at 6)

In its second paragraph, Cutter shifted the burden to the government, stating that it would submit change orders and RFIs as quickly as the Government could provide more clear scopes of work, "complete[] reviews for requests that need revision and provide[] required information and responses" (*id.*). Cutter closed with disagreement over an interim performance report and the 10% retainage (R4, tab 18 at 7).

59. On August 5, 2016, the CO executed unilateral Modification No. P00002 to Cutter under FAR 52.243-4, CHANGES (JUN 2007). The purpose of the modification was "for Change Orders 253.007, Removal of ACM at Fascia at A' between 8' & 9'; and 253.009, ACM Mezzanine Hangar door, Under Ground Hydronic Pipe and Window." The total amount of increase was \$17,533.79. Bond increase and consent of the surety was required. The modification added seven days to the contract period of performance, changing the delivery date from February 3, 2018, to February 10, 2018. The modification did not contain a release of claims. (R4, tab 19 at 1)

60. On August 12, 2016, the CO executed unilateral Modification No. P00003 to Cutter under FAR 52.243-4, CHANGES (JUNE 2007). This modification incorporated "Change Order 253.018, Grade Beam Additional Demolition." Bond increase and consent of the surety was required. The modification added CLIN 0013AD in the amount of \$30,605.45 and added five days to the delivery schedule, making the delivery date February 15, 2018. The modification did not contain a release of claims. (R4, tab 20 at 1)

61. On August 23, 2016, the CO issued bilateral Modification No. P00004 under FAR 52.243-4, CHANGES (JUN 2007). This modification incorporated change

orders “253.003-Water & Sewer piping, 253.008-ACM at exterior wall, 253.010-Silt fence, 253.014-Wall Packs, 253.016-Receptacles, 253.017-VFDs for Fans, 253.020-Emergency Shoring, and 254.002-Water & Sewer piping.” (R4, tab 21 at 1) The modification added CLIN 0013AE for all of the change orders for Building 253, which increased the amount of the contract by \$36,132.46. The modification also added CLIN 0014AA for the Hangar 254 item, which increased the amount of the contract by an additional \$1,504.00, for a total increase of \$37,636.46. Thus, the additional CLINs added by this modification increased the total contract price to \$31,720,031.70. The delivery date remained the same. Bond increase and consent of the surety was required. The modification included the language, “In consideration of the modification agreed to herein as complete equitable adjustments for the contractor’s proposal for adjustment for aforementioned change orders the contractor hereby releases the [g]overnment from any and all liability under this contract for further equitable adjustments.” (*Id.*)

62. On August 29, 2016, Cutter signed Modification No. P00004 (*id.*).

E. Appellant’s Schedule Status Letter

63. On August 29, 2016, Cutter’s CEO, Mr. Dwyer, sent a schedule status letter to the CO (R4, tab 22²).

64. First, Mr. Dwyer outlined the contractually-required schedule documentation and the need to use more than the method that was required in the contract to document the schedule. He used this section to explain various ways to determine amount complete as well as the difference between his estimate of project completion (16.8%) and the government’s estimates of project completion (4.08%) and why those differences existed. (R4, tab 22 at 1-3) Mr. Dwyer included documentation to demonstrate his calculations. (R4, tab 22 at 10-287) He disagreed with exclusively using the CPM schedule, as he discussed limitations with solely using the CPM schedule, ran what he called “fictitious” schedules imagining if everything had been performed without alleged government delays, and was overall critical of the contractually-required schedule (R4, tab 22 at 3). The contract should have been at least 42% complete by that point in time according to the fictitious schedule (R4, tab 22 at 2).

² This is also in appellant’s Rule 4 File at 204. For ease of reading the Decision and as discussed at the hearing, the Board will only reference the government Rule 4 File submissions rather than citing to the duplicated Rule 4 File submissions. However, the Board did not realize the duplicated Rule 4 File submissions until partway through the hearing so some of the documents were referred to in the Record of Hearing as appellant’s numbering system.

65. Second, Mr. Dwyer discussed quality control concerns. Mr. Dwyer stated that he understood the government's concern with Cutter's third-party special inspection laboratory, stating that Cutter was "addressing the clarity of their reporting as well as the attention to detail in the field related to their inspections." (R4, tab 22 at 3) The letter also stated, "Additionally, we are also addressing our internal concerns with our ready mix concrete supplier regarding the timeliness of concrete deliveries as well as batching the incorrect mix in the trucks for one of our concrete pours recently" (*id.*). Further, he stated, "we have consistently maintained that the COR personnel on the project have not adhered to the Quality Assurance aspects of their responsibilities in performance of this contract" and requested that the government's COR and A&E personnel include Cutter's Quality Control Manager when conducting inspections, in order to reduce issues between the parties (*id.* at 3-4, 7)

66. Third, Mr. Dwyer discussed RFI submissions, stating that over 270 bid phase RFIs and almost 300 RFIs during performance demonstrated that the contract requirements were not clear. He also expected more RFIs. "Considering that we are only 21% through the total contract, we can anticipate substantially more RFIs being required." (*Id.* at 4)

67. Fourth, Mr. Dwyer stated that a communication and trust issue existed between Cutter and NHANG and asserted that he would personally be more involved in the project going forward. Cutter again attempted to shift the burden to the government. Mr. Dwyer outlined the distrust with the COR's inability to make "field decisions on the numerous issues with the contract documents that plague the project . . ." (*Id.*) He further requested that experienced government personnel be present on site and that the A&E firm personnel be readily available for teleconferences when required (*id.* at 5).

68. Fifth, Mr. Dwyer listed eleven "Action Items" that were causing delays in the project and suggested resolutions, including: 1) fire protection system design; 2) simplex fire alarm/mass notification system; 3) Building 254 EPDM roof versus electrical conduits; 4) Building 253 duct bank clearance at new transformer; 5) security and vetting of contractor personnel; 6) a request for an experienced government person be assigned to the project for quicker resolution of issues; 7) a request to include the Cutter Quality Control Manager in all inspections going forward so that deficiencies can be corrected more quickly; 8) Building 253 insulated metal wall panels (requesting that the submittal Cutter submitted be reviewed quickly); 9) Building 253 existing to remain slabs; 10) a lack of revit/autocad files; and 11) failure of existing column 12'D'. Mr. Dwyer repeatedly mentioned the design deficiencies and differing site conditions, suggesting actions the government had to take to correct the designs. (*Id.* at 5-8) Mr. Dwyer closed by stating that he believed, after meeting and conversations with the government, that the design lacked clarity and the omission in the documents related to the existing concrete grade beam posed a serious impact to

the schedule. Mr. Dwyer stated he elected to move forward with completely removing this grade beam to be able to warrant that the concrete floors, trench drains, and jacking slabs would perform as they should. Mr. Dwyer stated this was an added cost to Cutter, but the only way he could warrant the work and put the project back on schedule. (*Id.* at 9)

69. On October 17, 2016, Cutter submitted a cost proposal for permanent repairs to Column 12'D' in the amount of \$653,978 with a contract extension of 194 days (app. supp. R4, tab 148 at 2999-3001).

F. The Contracting Officer's Cure Notice

70. On October 26, 2016, the CO issued a cure notice to Cutter. The CO warned, "The [g]overnment considers your firm's lack of compliance with the subject contract's requirements and adherence to plans and specifications as listed below, to be a condition that is endangering performance of the contract." (R4, tab 23 at 1) The CO stated that there had been "very few subcontractors performing work on the job site, and the [g]overnment ha[d] observed the workers, who are on the job site, leaving for the day at 1500 hours and working only half days on Fridays, despite the fact that your firm is behind schedule" (*id.* at 1-2). The items that the CO categorized as "listed below" included: CPM schedule delays (should have been 42% complete but was only 20% complete); grade beam schedule delay (referencing drawings SD-101 and SD-501); deficient installation of electrical conduit underslab Building 253; recurring deficient installation of electrical conduit underslab Building 253 required in specification section 260543; conduit severed in Building 254 which was the second underslab conduit hit and impacted the paint booth and the fire alarm system; I-Beam structural steel; vertical rebar missing; L-Bars missing; and interior curb walls using 4,000 PSI instead of 5,000 PSI concrete. The CO explained in detail why each of these areas were problematic. (*Id.* at 1-13) At the end of the cure notice, the CO stated,

The Government is entitled to work that strictly adheres to the Contract plans and specifications. Notwithstanding, while each deviation described throughout this Cure Notice Letter [may] not solely affect the structural integrity of the building, the culmination of each deviation from the contract plans and specifications creates more undue risk that will undoubtedly have substantial impact on the structure integrity and/or the useful life of the building.

(*Id.* at 13) The CO requested a plan to cure Cutter's failures and stated that Cutter must, at a minimum address three items: 1) specific remedial measures to address the issues; 2) interim milestones for curing the deficiencies and expected dates of

completion; and 3) descriptions of corrective actions taken to prevent future failures in quality control. (*Id.* at 14-15)

Specifically regarding the grade beam, the CO wrote that after receiving Cutter's December 2015 request, RFI 253.015, to modify the requirements at no cost, the government agreed that the change was "acceptable" (*id.* at 2). After receiving Cutter's January 2016 request, RFI 253.038, to further modify the requirements for the grade beam to completely remove the existing grade beam, the CO again stated the change was acceptable "and also that the acceptance be contingent upon no additional cost to the Government" (*id.* at 2). After receiving Cutter's March 2016 request, RFI 253.101, to modify the requirements for the grade beam for additional demolition, the government determined that removing the top eight inches of grade beam was appropriate and that "additional drawings and compensation would be given for demolition that was not captured in the drawing SD-101 to include greater demolition depth to accommodate trench drains and jack pads" (*id.* at 3). On July 1, 2016, Cutter submitted a cost estimate proposal for complete removal of the grade beam, 98 days after the government responded to RFI 101 (*id.* at 3). The CO issued Modification No. P00003 in August 2016 and again stated the work was "at the contractor's convenience and at no additional cost to the Government" (*id.* at 2-3). In September 2016, the government reviewed the grade beam removal with Mr. Dwyer and "from the additional review found that portions of the grade beam can effectively be removed as shown on S-SK-06 & S-SK-07 without causing cracking in the finished concrete floor and overlaying epoxy finish" (*id.* at 4-5). Thus, the CO informed Cutter that an additional modification would be forthcoming to remove the note that said complete removal of the grade beam was acceptable from CLIN 0013AB and insist Cutter comply with the contract specifications (*id.* at 5).

71. On November 4, 2016, Cutter responded to the CO's cure notice. Cutter explained that it was not in default and disagreed with the statement that Cutter had failed to comply with contract requirements or adhere to the drawings and specifications. While Cutter admitted to being behind schedule, Cutter disputed that it was the sole cause of delays (R4, tab 24 at 1). Cutter explained how the government, in its opinion, had also caused delay, including failing to provide information to Cutter, delays in government responses, and the government's failure to address problems with the specification (*id.* at 1-4). Cutter argued that the FOD fence caused delay because "The Government over-scrutinized the temporary fence system" and caused it to incur additional unnecessary costs (*id.* at 2). Cutter argued that the trench drains had a discrepancy in the requirements where the specifications called for modular trench drains and the drawings called for cast in place trench drains, so the government allowed Cutter to choose. Cutter explained that it chose the modular trench drain and the A&E contractor was requiring Cutter to install rebar around it. Cutter refused to move forward with the trench drain as a result. (*Id.* at 3) Cutter

further explained that all of its work complied with the contract plans and specifications and that any deficiencies were resolved (*id.* at 4-6).

72. Cutter further explained that the Building 253 insulated metal wall panels had a design conflict between structural and architectural drawings, where the two drawings depicted different sized openings. Cutter submitted a request for information and the government, through the A&E firm, responded with a revised design. “Cutter responded with an alternative solution. The Government agrees with Cutter’s proposed alternative solution.” Cutter added that it was in the process of pricing a construction change order request (CCOR) for submission. (*Id.* at 3)

73. Regarding grade beam schedule delays, Cutter alleged the government was responsible for the delays, not Cutter. Cutter claimed it could not install jacking pads in the hangar due to clearance conflicts and the contract requirement to remove eight inches from the top of the grade beams would impact the integrity of the slab and epoxy flooring system. While Cutter proposed removing the entire beam, Cutter included in the cure notice response that it did not agree to do so at no cost or no time. (*Id.* at 3-4) The government continued to direct Cutter to follow the specifications but Cutter “kept pressing the issue to deliver a better end product to the [g]overnment” (*id.* at 4). Cutter wrote that it “knew from years of experience in construction that the original plan to remove the top 8” of grade beam would impact the integrity of the slab and floor system” (*id.*).

74. As Cutter noted in its cure notice response, three RFIs addressed the grade beam (*id.* at 3).³ Although Cutter claimed it “never advised the [g]overnment that this work would be no cost or no time” (R4, tab 24 at 3), in RFI 15, under the “Cost Change” category, Cutter stated “Cost Increase of US \$0.00” and under the “Time Change” category, Cutter stated “Increase of 0 days” (R4, tab 73 RFI Bldg 253 SCZQ139901 – 015 at 1). In RFI 38, in the “Cost Change” category, Cutter included “Yes, may be” and in the “Time Change” category, Cutter included “Increase of 0 days” (R4, tab 73 RFI Bldg 253 SCZQ139901 – 038 at 1). Further, in response, the government directed Cutter to the specific location of requirements in the specifications but allowed Cutter to make the changes it requested (*id.* at 2). The government closed the comment with “This proposed solution is not expected to increase the construction cost” (*id.* at 2). In RFI 101, Cutter stated “Yes, may be” in both the “Cost Change” and “Time Change” categories (R4, tab 73 RFI Bldg 253 SCZQ139901 – 101 at 1).

³ While Cutter cited RFIs 15, 28, and 101, the RFIs are actually 15, 38, and 101 (R4, tab 73 RFI Bldg 253 SCZQ139901 – 015 (submitted December 2015), RFI Bldg 253 SCZQ139901 – 038 (submitted January 2016), RFI Bldg 253 SCZQ139901 – 101 (submitted March 2016)).

In its response to the CO's requirement in the cure notice for a remedial plan, Cutter stated that it has already addressed the deficiencies the government presented and that there were only two open items: the interior curb wall analysis and issues with quality control. Regarding the interior curb wall analysis, Cutter stated that it was awaiting the results of the structural engineer's review. Regarding the quality control, Cutter stated that while it believed it was already providing "more than adequate" quality control, it would supplement the site personnel with an additional quality control team member. (R4, tab 24 at 6-7) We find that Cutter failed to provide a remedial plan, the first requirement in the CO's direction and failed to address how it would prevent such failures from happening in the future, the third requirement in the CO's direction in the cure notice.

75. In its cure notice response, Cutter acknowledged the delay and stated, "Cutter believes the schedule impacts are due to design conflicts and changes, unforeseen conditions, and delayed responses by the [g]overnment" (*id.* at 7). Appellant stated, "Cutter is committed to a recovery schedule and mitigating further delays" but failed to provide such a schedule or mitigation plan (*id.*). Instead of presenting any proposed course of action, Cutter requested a meeting with the government and design team to discuss how to get back on track (*id.*). We find that Cutter failed to submit any plan to remedy the schedule delays and did not provide any interim schedules or completion dates.

76. On November 4, 2016, Cutter submitted a cost proposal for repairs to the footing and pier at Column 12'D' for \$256,460 and 74 calendar days. It also stated that Cutter reserved the right to request additional time and compensation as a result of time impacts caused by the column repair and that a Request for Equitable Adjustment was pending submission. Cutter included that the critical path of the schedule was significantly impacted by the column issues, stating that it caused work stoppage in seven areas and that additional time and costs would be submitted once Cutter could quantify those. (App. supp. R4, tab 151 at 3053-55)

77. On November 10, 2016, the CO unilaterally executed Modification No. P00005 under FAR 52.243-4, CHANGES (JUN 2007). This modification incorporated the changes in change order 253.024, Column 12'D' repair. It added CLIN 0013AF and increased the contract amount by \$77,859. It also extended the period of performance by 21 days, making the delivery date March 8, 2018. Bond increase and consent of the surety was required for the modification. The modification did not contain a release of claims. (R4, tab 25)

G. Appellant's Delay Notices to the Government

78. On November 13, 2016, Cutter submitted its first request for equitable adjustment (REA), that was effectively a certified claim,⁴ requesting a compensable extension of time of 223 days and an increase of \$1,125,266.20 in the cost of the contract. According to Cutter, the reason for this request was “Government caused issues” that included “temporary construction fencing design issues, FAA permit delays, fire pump design revisions, fire alarm sole source vendor change, existing grade beam demolition design revisions, column 12D shoring and repairs, and unforeseen site conditions encountered while performing demolition for under slab electrical conduits.” (R4, tab 26 at 14 (time impact analysis prepared by RECON International))

Concerning the fire alarm sole source vendor change, Cutter claimed 149 days of delay at the beginning of the section and 197 days of delay at the end of the section without explanation (*id.* at 9-10). This was due to the sole source manufacturer changing from Simplex to Monaco Enterprises (*id.*). The solicitation documents required “specified Simplex Fire Alarm Components” (*id.* at 9). Cutter issued a submittal on February 23, 2016, for the system (R4, tab 26 at 144-46). On March 23, 2016, the government rejected it, stating, “Submittal not reviewed by A&E per direction of contracting since it will change based on the pending design change that is not yet awarded.” (*Id.* at 9, 146) On June 10, 2016, the government changed the sole source vendor to Monaco System via CCOR 253-011 (*id.* at 9-10, 147). Cutter alleged that it repeatedly requested a point of contact for Monaco until August 23, 2016, so it was unable to secure a cost proposal for the system (*id.* at 10). On October 5, 2016, Cutter provided a cost proposal for the Fire Alarm/Mass Notification System (FAMNS) to provide and install the Monaco system which included adding an unknown number of days to the project and cost \$81,626. (*Id.* at 10, 148-50) Cutter noted this delay was concurrent with the underslab conduit delay, the column shoring delay, and the grade beam demolition delay (*id.* at 10).

79. On November 17, 2016, Cutter sent the government a second letter concerning the cure notice. In it, Cutter explained that at the time of its cure notice response, two items were still open. Regarding the I-Beam structural steel issues, Cutter stated that the five outstanding issues were resolved but not documented so

⁴ Cutter used “Request for Equitable Adjustment” in the subject of the letter but the contents of the letter, including a sum certain and certification, and a demand for a CO’s final decision (*see* R4, tab 26) support our finding this to be a certified claim. *See Hejran Hejrat Co. v. United States Army Corps of Engineers*, 930 F.3d 1354, 1357-58 (Fed. Cir. 2019). Thus, for clarity, we refer to the letter as “the November 13, 2016 certified claim” throughout this Decision.

Cutter uploaded the information to Projectmates, which fully resolved the issues. Regarding the interior curb wall concrete report, Cutter explained that it had hired Davey Associates, Inc., to evaluate the compressive strength of the wall and provide a report of findings. This report was completed on November 7, 2016 and uploaded to Projectmates on November 17, 2016. Finally, Cutter again addressed the quality control personnel and said it intended to supplement on site personnel with an additional quality control team member. (R4, tab 27 at 1-2) Specifically, Cutter stated it engaged a recruiter and “Cutter is committed to attempting to bring another team member on board by the end of the year” (*id.* at 2).

80. On November 23, 2016, Cutter sent a notice of delay and intent to request additional time and compensation to the CO. Cutter explained that more delays occurred since October 1, 2016. Specific delays included a dimension conflict concerning translucent fiberglass wall panels and contaminated settled dust on the existing structure that indicated asbestos and numerous heavy metals. Cutter included the report, dated September 22, 2016, with the letter. (R4, tab 28 at 1-2, 4, 6-8)

81. Specifically regarding the contaminated dust, Cutter recommended that the dust be removed by a licensed asbestos and lead contractor after testing demonstrated asbestos and other heavy metals. The dust impacted “install[ing] beam clamps for suspended piping and equipment, welding of modified structural elements, and various other items connected to the existing structure” as well as painting (*id.* at 2). Cutter wrote, “This remediation work cannot be completed by a non-licensed asbestos worker, and must be performed in an isolated environment with the necessary controls and air monitoring per OSHA regulations” and warned that it had the potential to negatively impact the schedule (*id.*). Cutter requested the government provide direction on how to proceed (*id.*). On November 30, 2016, Cutter requested that the CO release all retainage currently being withheld on prior Cutter invoices and cease retaining money on future invoices. Cutter stated that there was no basis to withhold the retainage because all of the cure notice items were addressed. (R4, tab 29)

82. On December 15, 2016, Cutter sent a letter to the CO requesting a suspension of work order or stop work order on “certain aspects of the [p]roject” discussed in the letter to allow the government to resolve the issues for which Cutter previously notified the government (R4, tab 30 at 1). Specifically, Cutter remained concerned about the column 12’D’ failure in Building 253, the fire alarm sole source vendor change, the fire pump delay, the dimension conflict concerning translucent fiberglass wall panels, contaminated settled dust on the existing structure, and hangar bay floor slabs and trench drains. Cutter listed the portions of the contract that it could continue working on if the government did not suspend performance of the contract. (R4, tab 30 at 1-4)

Concerning the contaminated dust, Cutter stated that it discovered the dust during the week of September 15, 2016, and directed its environmental consultant to conduct tests. Cutter also wrote that it informed the government and provided the test results on November 23, 2016. Cutter again noted that remediation work needed to be completed by an expert and wrote that the government had not responded or acknowledged the issue. (R4, tab 30 at 3) We take judicial notice that the amount of time between September 15, 2016, and November 23, 2016, was 69 days. We also find that Cutter did not do anything to mitigate the contamination issue during the over two months it took to notify the government or at any time prior to termination, other than have an environmental consultant conduct tests.

83. On December 23, 2016, Cutter sent the CO another letter concerning government delays. These delays concerned column 12'D' shoring costs and an increased rental period, fire water standpipe break, withholding of payment, fire protection coordination drawings, and grade beam work. (R4, tab 31 at 1-4)

III. The Termination For Default

84. On December 29, 2016, the CO sent Cutter a notice of termination for default, in which it also responded to Cutter's delay assertions. The CO listed three reasons for termination: 1) failure to make sufficient progress, which endangered performance of the contract; 2) failure to provide adequate assurances that it would complete the construction on time; and 3) failure to comply with various contract provisions, including FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984), FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984), FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996), and Special Contract Requirement 27, Contractor Quality Control. (R4, tab 32 at 1) In the notice of termination for default, the CO reviewed what had happened on the contract, including summarizing the cure notices. In short, the CO was not convinced that Cutter "provided adequate assurance of successful future contract performance," (R4, tab 32 at 15) Specifically, the CO found that Cutter did not adequately address deficiencies stated in the cure notice because: 1) Cutter had several schedule delays (*id.* at 16-36); 2) Cutter's workmanship was substandard and failed to abide by contract plans and specifications (*id.* at 36); 3) Cutter failed to prosecute the work with diligence that would ensure the project's completion within the period of performance specified in the contract (*id.* at 39); 4) Cutter failed to provide adequate assurances (*id.*); and 5) Cutter failed to comply with several contract provisions and clauses (*id.*(referencing FAR "52.236-5 Material and Workmanship, 52.236-3 Site Investigation and Conditions Affecting the Work, 52.246-12 Inspection of Construction, and 52.236-15 Schedules for Construction Contracts"))).

A. Failure to Make Sufficient Progress

85. The CO listed thirteen schedule delay allegations from Cutter and described the government's position on each (R4, tab 32 at 16-36, ¶¶ 1.i through 1.xiii).

86. In its general section concerning the reasons for termination, the CO stated that Cutter performed the project for 491 days, as of December 21, 2016. The CO stated that the project should have been approximately 47% complete but was only 23% complete. The CO stated that the parties appeared to agree on the percentage of completion. However, the CO believed that while Cutter assigned all of the delay to the government, the government believed the delays were "almost wholly attributable to Cutter." (*Id.* at 16, ¶ 1) The CO addressed each of Cutter's delay allegations in its termination letter and referenced the parties' various communications throughout the termination letter, demonstrating further notice of the problems and issues prior to termination.

87. The first delay allegation the CO discussed was the untimely responses by the government to RFIs submitted in Projectmates. The CO stated that the average response time to RFIs was 12 days, with approximately 122 of them (or 45%) responded to in fewer than seven days. Thus, the CO believed the response time was reasonable. (*Id.* at 16)

88. The second delay allegation the CO discussed was that Cutter attributed delay due to the untimely issuance of CCORs. The CO stated that the contract did not require the government to issue CCORs and referenced section 012663 of the contract, relevant to changes and quoted the Changes Clause and other requirements in the contract. Instead, the CO argued, Cutter did not meet its notice obligations for changes, which the CO believed was the reason for delays. Thus, the CO believed delays related to CCORs were Cutter's fault. (*Id.* at 16-17)

89. The third delay allegation the CO discussed was Cutter's allegation of schedule delays due to conflicting contract documents and design changes. The CO referenced the contract's affirmative instructions concerning defective specifications in section 012663, paragraph 1.1 of the contract. According to the CO, Cutter did not meet its obligations regarding defective specifications under the Changes clause. (*Id.* at 17-18)

90. The fourth delay allegation the CO discussed was the unforeseen site condition of the deteriorated footing/pier at column 12'D' in Hangar 253. According to the CO, Cutter discovered the problem on March 25, 2016. Then, on April 5, 2016, the government's A&E firm provided a sketch to brace the column to prevent movement. The CO stated that Cutter claimed the government was responsible for

153 days of delay for the process to obtain the shoring drawings. The CO stated that the government attributed at least 195 days of delay to Cutter, from April 5, 2016, when Cutter received the sketch design, until October 17, 2016, when Cutter provided the government with a complete cost proposal. The CO further stated that the government executed bilateral Modification No. P00001 on May 20, 2016, to include the shoring and bracing for column 12'D' and added more work in unilateral Modification No. P00005 on November 10, 2016. According to the CO, work resumed in Hangar 253 as early as April 11, 2016, and other critical path construction resumed as early as April 7, 2016. The CO included a timeline chart of the column 12'D' issues. The government believed it provided responses in a reasonable time but that Cutter excessively delayed its submissions. Further, the government was unsure which responses Cutter believed the government unreasonably delayed. Finally, the CO opined that Cutter did not follow the contractual notice requirements for a government-caused delay. (R4, tab 32 at 18-22) Specifically, the CO stated, "Cutter has failed to furnish the requisite notice that would have set the predicate for Government-caused, or excusable delay" (*id.* at 22).

91. The fifth delay allegation the CO discussed was the fire protection system design (*id.* at 22-25). The CO stated that Cutter provided "very little information" about this delay claim (*id.* at 22). The CO provided a chart outlining the various communications held concerning the fire protection system. The CO stated that "the contracting parties worked together to facilitate the work" but that Cutter stalled this work from March 11, 2016, until August 25, 2016, and the government did not receive a cost proposal until December 7, 2016. Thus, the CO attributed 271 days of delay to Cutter instead of the government. (*Id.* at 25)

92. The sixth delay allegation the CO discussed was the fire alarm and mass notification system. The CO stated that Cutter claimed 197 calendar days delay for the change in the fire alarm company. The CO believed that at least 116 calendar days were delayed by Cutter due to Cutter's delay in providing a cost proposal. The CO included a chart with the dates and various actions regarding the fire alarm and mass notification system. The CO stated that Cutter failed to include a line item in the "prepare and submit" section of the schedule and did not identify this issue on the critical path. The CO stated that Cutter's failure to adequately explain this delay rendered it impossible for the government to determine how much of a delay was possibly attributed to the government. (*Id.* at 25-26)

93. The seventh delay allegation the CO discussed was a delay based on the grade beam (R4, tab 32 at 26-29). The CO stated that the record of the project demonstrated that Cutter ineffectively prosecuted this work and the government did not cause a delay. The CO included a chart with dates and actions for this issue, complete with screenshots of the relevant RFIs. In its first RFI, submitted on December 4, 2015, appellant proposed an increase to the removal width and stated the

change was no cost and no time change to complete the work (*id.* at 26). The CO accepted the change the same day (*id.* at 26-27). In January 2016, appellant proposed via RFI the complete removal of the grade beam, stating that there “may be” a cost increase but still a time change increase of 0 days (*id.* at 27). The government concurred in February 2016 but stated the “proposed solution is not expected to increase the construction cost” (*id.*). In March 2016, appellant submitted another RFI, asking if the intent was to install a fill depth foundation and said there may be a cost change and a time change (*id.*). The government answered the following week (*id.*). On July 1, 2016, Cutter submitted a CCOR with a cost estimate for complete removal of the grade beam and requested 53 additional days (*id.*; app. supp. R4, tab 127 at 0864-66). On July 28, 2016, the government rejected the CCOR because of unreasonable costs and time extension. On August 12, 2016, the government issued Modification No. P000003 to allow the additional demolition of the grade beam, adding \$30,605.45 and five days and further allowed for complete removal at appellant’s convenience but at no additional cost to the government. (*Id.*; *see also* R4, tab 20) Further, the CO stated that Cutter never informed the government that additional time was required, other than an annotation of “Yes, may be” in answer to the “time change” category. The CO stated that this vague note was not enough to record a delay. While Cutter alleged that the government caused 148 calendar days of delay, the CO believed that Cutter’s ineffective project management caused the delay. The CO believed that Cutter was responsible for 168 days of delay for not prosecuting the work. (*Id.* at 28-29)

94. The eighth delay allegation the CO discussed was Cutter’s allegation of delay due to the FOD fence. The CO stated that the plans and specifications required a FOD fence at section 024100, Demolition. The initial fences Cutter submitted did not meet the requirements in the contract, according to the CO. The CO outlined the timeline for the FOD fence submittal and responses. When the FOD fence was approved on October 15, 2015, the government provided comments informing appellant that it retained liability because this was not an engineered submittal. Even after working with appellant to approve an acceptable fence, according to the CO, appellant still deviated from the requirement. While the fence was required to withstand 80 mph winds, weather data demonstrated that 31-45mph winds toppled portions of the fence on September 11, 2016. (R4, tab 32 at 29-32)

95. The ninth delay allegation the CO discussed was the FAA permits. Cutter alleged that the government did not secure the proper FAA permits to start construction, causing a delay. (*Id.* at 32)

- a. The CO stated that the government did not cause any delay because Cutter was required to obtain all licenses and permits to perform the work, pursuant to section 1.4 Permits, of the solicitation. The CO agreed that the

government was required to obtain a permit called the Notice of Proposed Construction/Alteration of Building from the FAA but noted that Cutter was required to obtain the permits for the temporary crane. The CO stated that it submitted the Notice on December 18, 2015, making it a timely request. The permit request the government submitted was approved on February 3, 2016. (*Id.* at 32-33; *see also* app. supp. R4, tabs 134, 187)

b. The CO further explained that Cutter applied for FAA permits between October 22, 2015, and December 15, 2015. On January 22, 2016, the FAA informed appellant that there were airspace concerns about the height of the cranes Cutter planned to use. On February 3, 2016, the FAA determined a hazard to air navigation and advised that airspace would be impacted. The temporary construction crane permit required the VOR Facility at Pease/Portsmouth of the National Air Space System navigational equipment to be shut down. Cutter submitted a request to shut down the VOR, beginning on March 14, 2016. The CO noted that the FAA only required 30 days notice for the shut down and it was unclear why Cutter opted to ask for a later date. (R4, tab 32 at 32-33)

c. The CO opined that there was no impact on the schedule because the two parties' permits were submitted at nearly the same time (*id.*)

96. The tenth delay allegation the CO discussed was the Building 253 duct bank clearance at the new transformer. The CO stated that the government was unable to understand this claim because it was too vague. However, the CO reviewed the project record to determine if delay existed. The CO quoted RFI 253.171, which was submitted on August 22, 2016, where Cutter asked the government to provide details about where to set the transformer pad. The CO stated the government provided a final response on August 30, 2016, and discussed the transformer location on-site with Cutter's Site Superintendent. The CO noted that no further RFIs related to the issue were submitted and the parties closed out the issue in project documents. The CO concluded that there was no indication of "slow decision making" as Cutter alleged. (*Id.* at 33-34)

97. The eleventh delay allegation the CO discussed involved the Building 253 insulated metal wall panels. The CO opined that this claim was not ripe for discussion

because Cutter was still in the process of pricing the CCOR. Still, the government explained:

On February 23, 2016, Cutter provided, submittals for the translucent walls panels, and the Government approved the submittal on March 3, 2016. On September 30, 2016 (after 174 days), Cutter first alerted the Government to conflicts in the design relating to this work—namely the dimensions of the openings for installation. The Government responded by October 14, 2016, and accepted the proposed detail, and also required re-verification of certain details (girt elevations and girt types). Cutter provided an incomplete response to the Government on November 15, 2016, which did not clearly address the girt re-verification requirements. The design issues were resolved by November 25, 2016, when the Government provided sketches requested by Cutter.

(R4, tab 32 at 34)

The government stated in the termination letter that it intended to consider an adjustment request from Cutter and intended “to render a determination that reasonably compensate[d] Cutter for this additional work relating to this design issue” but because Cutter was still in the process of pricing a CCOR for submission, the “issue was not ripe for consideration or action.” (*Id.*)

98. The twelfth delay allegation the CO discussed was the trench drains. The CO stated that drawings that were provided required reinforcements, but it appeared that Cutter planned to disregard the directions regarding reinforcements. Further, on at least two occasions, the government found that Cutter failed to use reinforcements in the trench drains. According to the CO, Cutter affirmed the refusal to include reinforcements in its cure notice response. The CO noted that he did not construe the actions described as repudiation but reserved all remedies for the nonconforming work. (*Id.* at 34-35)

99. The thirteenth delay allegation the CO discussed was the stored equipment claim. The CO stated that the allegation was “convoluted and vague.” The CO stated that the allegation lacked merit. (*Id.* at 35)

100. Next, the CO stated his findings on the schedule delays experienced on the project, as noted in the cure notice and identified as conditions that endangered performance on the contract. The CO stated that the conditions had not been cured and that Cutter had not furnished a plan to cure the delays. According to the CO,

Cutter instead appeared to assert excusable delay for all of the delays and assigned the blame to the government. The CO stated that even if the government caused the delays, Cutter was still required to submit a plan and schedule as required by the cure notice. (R4, tab 32 at 35-36)

101. Regarding the delay allegations, the CO found “the facts do not support the allegation that the Government is the sole and exclusive cause of delays on this construction project, as Cutter seemingly alleges; the facts also indicate that the delays experienced on this construction project arose from causes plainly within control of Cutter.” (*Id.* at 36)

B. Substandard Workmanship and Failure to Follow the Contract Plans and Specifications

102. The CO then opined that Cutter had provided substandard workmanship and failed to abide by the contract’s plans and specifications. The CO stated that the cure notice required Cutter to provide remedial measures to address the areas of concern, including describing corrective measures that would be taken to prevent such future failures. However, the government alleged that instead of providing a meaningful response, the CO stated that Cutter dismissed the section by stating that the conditions had been remedied. While the CO was aware that some of the issues were remedied, “the primary purpose to describing the nonconforming work in the Cure Notice was to describe the repeated failure in project management and contract performance.” (R4, tab 32 at 36, ¶ 2.i-vi) The repeated problems outlined in the cure notice included several issues.

103. Regarding recurring deficiencies with installation of electrical conduit underslab in Building 253, the CO stated this had been remedied but that Cutter did not provide any response to explain how it would control quality issues such as the one here, which led to delay of four months, from happening in the future. (*Id.* at 36-37)

104. Regarding the severed conduit in Building 254, the CO stated that Cutter did not appear to dispute the contract’s requirement but also failed to respond to this concern (*id.* at 37).

105. Regarding the I-beam structural steel, the CO was very concerned with the poor quality of the work and was not reassured by Cutter’s cure notice response that adequate quality control measures were in place to preclude this from happening again throughout the life of the project. The CO stated that structural steel deficiencies still remained unresolved by Cutter. The CO concluded, “Cutter’s Cure Notice Response provides no plan to prevent future occurrences of substandard work, and provides no responsive information or explanation for quality control issues.” (*Id.* at 37-38)

106. Regarding the missing vertical rebar, the CO stated that Cutter admitted to improperly installing the rebar but asserted that it was not a quality control issue and was corrected. The CO expected Cutter to provide a plan to prevent future occurrences such as this one but Cutter provided no response. (*Id.* at 38)

107. Regarding missing L-bars, the CO stated that Cutter alleged a safety issue but never submitted an RFI or request to deviate from the plans and specifications concerning the issue. The CO stated that Cutter did not believe this was an issue and provided no remedial or corrective measure for “this blatant disregard for the Contract Specifications.” (*Id.*)

108. Regarding the interior curb walls, the CO stated that Cutter did not appear to dispute the government’s description of nonconforming work. The CO stated that the nonconformance was further proof of Cutter’s lack of understanding of the requirements in the contract. The CO also stated that Cutter failed to provide any response to prevent further occurrences of substandard work. (*Id.*)

109. The CO found that the cure notice identified several substandard workmanship issues and failures to abide by the contract but that Cutter did not provide any proof or reassurances that the conditions had been cured. The CO stated that Cutter failed to provide information that responded to the government’s requests for remedial or corrective measures, as well as actions to prevent such occurrences in the future. The CO was particularly concerned with quality control issues that Cutter failed to address. The CO found that the conditions had not been cured. (*Id.* at 38-39)

C. Failure to Prosecute Work

110. As the third area of concern, the CO stated, “As the record of this project demonstrates, Cutter has not prosecuted the work with the diligence that will insure the project’s completion within the time specified in the Contract” (*id.* at 39). The CO stated that Cutter requested over 200 days for a time extension, which Cutter calculated as 233 days which was requested in the REA and 211 days which was analyzed by a time analyst. The CO stated, “By any metric, Cutter is significantly behind schedule. For the reasons stated above, I find it reasonable to believe that there is no likelihood that Cutter can perform the entire contract effort within the time remaining for contract performance.” (*Id.*)

D. Failure to Provide Adequate Assurances

111. As the fourth area of concern, the CO stated that Cutter did not provide adequate assurances. The CO stated, “If Cutter had formulated a realistic and workable plan to return the project to timely performance, or otherwise provided

convincing support that it would indeed get this project back on track and moving forward, this would weigh in favor of not terminating the contract for default.” (R4, tab 32 at 39) Instead, the CO found, “Cutter has altogether refrained from providing a plan and schedule for project recovery, as requested by the Cure Notice” (*id.* at 39).

E. Failure to Comply with Contract Provisions

112. As the fifth area of concern, the CO found that Cutter failed to comply with contract provisions. Specifically, the CO opined that Cutter failed to comply with FAR 52.236-5, Material and Workmanship; FAR 52.236-3, Site Investigation and Conditions Affecting the Work; FAR 52.246-12, Inspection of Construction; and FAR 52.236-15, Schedules for Construction Contracts. The CO further opined that failure to follow these provisions caused delays. The CO concluded, “I find that Cutter’s failure to perform in accordance with contractual obligations is a material deviance from the contractual bargain between the parties, and constitutes a separate ground for default.” (*Id.*)

F. Termination for Default Decision

113. The CO stated that he decided to terminate the contract for default for several reasons and attempted to resolve the problems at the lowest level possible, with multiple cure notices, after attempting to work with Cutter. The CO found that most of the issues in the cure notices were still uncured at the time of termination and led to the decision to terminate. The CO found that Cutter’s actual performance was 22.5% complete instead of the 47.2% scheduled to be complete. The CO stated that Cutter claimed to be 223 days behind schedule, which Cutter attributed to the government. The CO stated that Cutter did not provide a plan to recover lost time on the project and was not able to stop additional delays. Additionally, the CO decided to terminate because of substandard workmanship and quality concerns. (R4, tab 32 at 40)

114. As of the termination date on December 29, 2016, approximately 14 months remained until the March 8, 2018 completion date.

IV. After the Termination

115. On January 4, 2017, Cutter responded to the termination for default, stating that a more detailed response would be forthcoming. Cutter claimed that it was not in default and that the termination was wrongful. Cutter stated that it addressed and fixed any issues identified by the government in the October 25, 2016 cure notice. Cutter stated that the project was behind due to excusable and compensable delays. Cutter stated that it thought the parties were partnering and discussing how to deliver a successful project. Cutter closed by requesting that the government rescind the termination and requested a meeting. (R4, tab 33)

116. On January 13, 2017, the CO sent Cutter a letter stating that it would respond to Cutter's November 13, 2016 certified claim by January 31, 2017. (R4, tab 34)

117. On January 17, 2017, Cutter sent a more detailed response to the CO's termination notice. Cutter stated that it was not in default and did not commit a material breach. Regarding workmanship problems, Cutter stated that the government was rehashing already-remedied issues. Regarding schedule delays, Cutter stated that the government was the cause of the delays due to "conflicts in the Contract Documents, ongoing design changes, unforeseen site conditions and failures by the Government to provide requested information and approvals." (R4, tab 43 at 1) Cutter addressed the following areas in detail: 1) RFI impacts; 2) column 12'D'; 3) fire pump; 4) fire alarm/mass notification system; 4) Grade Beam; 5) FOD, or temporary, fence; 6) FAA permits; 7) Building 253 duct bank clearance at new transformer; 8) Building 253 insulated metal wall panel; 9) trench drains; and 10) stored equipment. Cutter also included a section entitled "Prior Workmanship Issues Have Been Resolved" but again failed to explain how it would prevent these issues from occurring in the future with any of the problems. Cutter's classification of resolved issues included: 1) installation of electrical conduit underslab Building 253; 2) conduit severed in Building 254; 3) I-beam structural steel; 4) vertical rebar missing; 5) L-bars missing; and 6) interior curb walls. (R4 tab 43)

118. On January 19, 2017, Cutter appealed the termination for default decision to the Board. The Board docketed the appeal with two ASBCA numbers: ASBCA No. 61020 concerned the termination for default; ASBCA No. 61021 concerned Cutter's claim for time extension and associated costs.

119. On January 31, 2017, the CO issued a final decision on the November 13, 2016 certified claim. The CO denied the claim. First, the CO stated that he denied the claim because Cutter misinterpreted or ignored the contract requirements to submit project schedules. Second, the CO stated that project schedule submittals were deficient. Third, the CO stated that Cutter relied upon a "Time Impact Analysis" that was fundamentally flawed because it did not cite to any portions of the contract or plans and specifications. (R4, tab 35 at 7-8) Finally, the CO reviewed each claim and provided his analysis, which was very similar to the termination for default notice. (*Id.* at 9-26)

120. On February 10, 2017, Cutter filed an appeal with the Board based on the CO's final decision for the November 13, 2016 certified claim. The Board docketed this appeal as ASBCA No. 61061.

121. Also on February 10, 2017, Cutter requested a final decision from the contracting officer on the termination for default. Cutter stated that it had “responded to the December 29, 2016 purported termination notice.” (R4, tab 45) Cutter stated that it responded to the notice on January 4, 2017, and January 17, 2017, and appealed the decision on January 19, 2017. Cutter stated that while it believed the December 29, 2016 letter was a final decision, it was asking for a final decision to avoid ambiguity and confusion. (*Id.*)

122. On April 24, 2017, Cutter filed an appeal with the Board for what it called a deemed denial of its request that the government reconsider the termination for default. The Board docketed this appeal as ASBCA No. 61146.

123. On April 7, 2017, Cutter submitted a claim to the CO seeking 76 calendar days extension (October 2, 2016 through December 29, 2016) and requested a CO’s final decision (R4, tab 47 at 1).

124. On August 7, 2017, the CO issued a final decision denying the April 7, 2017 claim (R4, tab 48 at 2).

125. On August 11, 2017, Cutter appealed the August 7, 2017 CO’s final decision for the April 7, 2017 claim. The Board docketed this appeal as ASBCA No. 61278.

V. Hearing Testimony and Expert Reports

126. During the hearing, several witnesses testified concerning the events leading to the termination. This testimony largely restated, reiterated, and further reenforced the parties’ versions of their arguments as stated in the written documentation previously discussed and summarized above. However, during the hearing, a few items were discussed that expanded upon the Rule 4 file. The largest differences in testimony were from appellant’s CEO and the expert reports which contained additional analysis. The parties stipulated to admitting the expert reports as proffered testimony so the experts did not need to explain their entire reports on the record and largely provided testimony through cross-examination and redirect during the hearing. (Tr. 3/5)

A. Relevant Testimony from Cutter’s CEO

127. Appellant’s CEO, Mr. Dwyer, testified regarding the severed conduit in Building 254, stating, “Cutter severed electrical conduits in the floor and the issue turned into an ordeal, and essentially made its way into a termination letter against me even though what was depicted in the contract documents reflected nothing that I encountered and ultimately was held accountable for, an existing differing site

condition” (tr. 1/99). Mr. Dwyer testified that underslab conduits were not identified in the contract documents (tr. 1/99-100). Mr. Dwyer testified that Cutter conducted site visits and used the as-built drawings to determine where conduit existed (tr. 1/100). Mr. Dwyer stated that the as-built drawings did not indicate anything being under the slab. Mr. Dwyer testified that the government stated that the as-built drawings might not be helpful and to proceed with caution. (Tr. 1/102) Mr. Dwyer testified that the as-built drawing contained a conflict with what they saw in that a single circuit to a duplex convenient outlet existed but there was no indication of it or its presence “being underslab, overhead, within the wall, or anything else” (tr. 1/103-04). Mr. Dwyer testified that power was disrupted for one area but that Cutter restored the power and he believed the issue was resolved (tr. 1/108-09).

During cross-examination in which he was directed to different pages of the contract, Mr. Dwyer testified that he did not know when a site survey was performed for Building 253 (tr. 2/19-20; R4, tab 1 at 229). Mr. Dwyer also admitted he did not know when his company recorded existing conditions in the presence of the contracting officer prior to demolition (tr. 2/20-21). Mr. Dwyer answered “no” in response to the government’s question:

Going back to the contract specification, I believe it’s the fourth sentence says, “Include in the record the elevation of the top of foundation walls, finished floor elevations, possible conflicting electrical conduits, plumbing lines, alarm systems, the location and extent of existing cracks and other damage and description of surface conditions that exist prior to starting work.”

Do you know whether that was done by Cutter for Building 253?

(Tr. 2/23)

Mr. Dwyer also testified about the grade beam, which he characterized as a government delay (tr. 1/212). He testified that the grade beam ran across the entire front of the building and bore the weight of the hangar doors (tr. 1/212). He testified that the drawings indicated Cutter was to “cut and remove a 14-foot-six-inch wide section of the existing grade beam” but Cutter discovered a conflict with the design (tr. 1/215). Mr. Dwyer testified that Cutter and its subcontractor needed “to remove more of that grade beam so that workmen could get into that area and install form work the full width of that” and requested approval to remove it, which was granted (tr. 1/216). Mr. Dwyer testified that Cutter submitted RFI 38, indicating “further design ambiguities related to the existing grade beam” which specifically sought direction on removing the top eight inches (tr. 1/216). He testified that the government

agreed with removing more of the grade beam and that the government indicated the proposed solution should not increase the cost of the project (tr. 1/217). He testified that on July 1, 2016, Cutter submitted its cost proposal for \$234,838 and 53 calendar days extension for the grade beam removal (tr. 1/218). Mr. Dwyer testified that Cutter did not agree with the government's Modification No. P00003, dated August 12, 2016, to increase the cost of the project by \$30,605.46 and five calendar days and notified the government of the disagreement (tr. 1/220-21). He testified that there were additional issues with the east end of the grade beam, as indicated in RFI 188 (tr. 1/221). Cutter was terminated before being able to complete the east end grade beam changes (tr. 1/223).

128. Regarding missing vertical rebar (finding 46.d.), Mr. Dwyer testified from Cutter's notice of termination response letter (tr. 1/51 (citing app. supp. R4, tab 109)) and RFI 145 (tr. 1/54 (citing app. supp. R4, tab 220)). Mr. Dwyer admitted, "On those four control joints, Cutter's masonry subcontractor omitted . . . one of those two bars on each side of the control joint. It was caught during installation." (Tr. 1/53-54) The RFI included a statement that demonstrated that Jason Karlin from Oak Point discovered the error (app. supp. R4, tab 220 at 4068). Mr. Dwyer later testified that Mr. Karlin was the government inspector (tr. 1/64). Mr. Dwyer also testified that the issue was resolved in June 2016 (tr. 1/55). We find that Cutter failed to follow the specification during these concrete pours. Further, we find that it was Cutter's responsibility to follow the specification.

129. Regarding the interior curb walls section B-1 (finding 46.f.), Mr. Dwyer admitted,

In prosecuting the work of placing the concrete foundation walls, Cutter, its subcontractor, and the team on the ground in error placed 4,000 PSI concrete on several different days totaling 38 cubic yards of 4,000 PSI concrete being placed where the contract indicated 5,000 PSI concrete.

(Tr. 1/62) This mistake included approximately six pours of concrete (tr. 1/64). Mr. Dwyer testified that the government's inspector and the contracting officer's technical representative were in attendance at the pours but did not provide Cutter notice of the error until the sixth pour (*id.*). Further, Mr. Dwyer testified that Cutter hired a structural engineer, at the government's request, and that structural engineer determined that the 4,000 PSI concrete was acceptable and structurally adequate (tr. 1/65-66). It was Mr. Dwyer's opinion that the government accepted the 4,000 PSI mix (tr. 1/68).

130. Mr. Dwyer testified at length about the impacts of column 12'D' using marked up specifications to demonstrate the issues that occurred and the impacts of the problem (tr. 1/153-60). He continued discussing the schedule and submissions he

made to the CO concerning the impact (tr. 1/161). He further discussed the submittal process surrounding column 12'D' which included submittals and rejections and resubmittals through to the modification and work that occurred pertaining to the issue (tr. 1/162-82).

131. Mr. Dwyer testified concerning the general schedule and what schedule should have been used to determine the actual status of the project (tr. 1/111-13). Specifically, he testified that he believed Cutter was further along than the baseline CPM schedule indicated (tr. 1/112). He testified, "The [g]overnment didn't provide us any actual analysis at any point during the project based on the CPM schedule itself" (tr. 1/113). Instead, according to Mr. Dwyer, the government used applications for payment (*id.*). He testified that the CO requested he perform an analysis to demonstrate the status of the project and compare it to the status of the original schedule (tr. 1/113-14 (referencing app. supp. R4, tab 204)). He testified that the analysis he prepared demonstrated the differences between the initial schedule and the payment requests (tr. 1/114-15). He testified that he created a fictitious schedule per the CO's request based on the assumption that everything had gone as planned from the baseline CPM schedule (tr. 1/115 (referencing app. supp. R4, tab 420)). Further, he created a fictitious payment application per the CO's request reflecting percent complete if the project had gone as planned (tr. 1/115-16 (referencing app. supp. R4, tab 421)). He opined that these two fictitious schedules revealed "that the project ha[d] not gone as planned" and "where the project would be if it had gone as planned" (tr. 1/116). He agreed with the government attorney that under these fictitious schedules, he would have billed 33.49% and the progress would have been 42% (tr. 1/117).

Mr. Dwyer further testified that he did not provide a recovery schedule or recovery plan and explained in detail why he did not do so (tr. 1/251-53). He testified that he could not provide a recovery plan or recovery schedule without the delay items he identified being fixed (tr. 1/252-53). He testified about why he requested a suspension of work, so the "project stakeholders could regroup and, as a team, resolve those issues, create a plan to move forward, possibly even partner for the first time on the job and ultimately, God willing, build the buildings I was hired to build" (tr. 1/253).

132. In cross-examination, Mr. Dwyer agreed that he was included on a December 15, 2015 email from a Cutter subcontractor concerning the FAA permits, that included attached emails dated between November 3, 2015, and November 10, 2015. Specifically, the November emails pertained to the FAA permits and notified appellant that the FAA did not see a filing for permanent construction and requesting the height of the building being constructed. (Tr. 2/26-27; R4, tab 76 at 117278-81) The November emails demonstrated that Cutter's subcontractor was notified by the FAA about the lack of filing for permanent construction as early as November 3, 2015 (R4, tab 76 at 117280-81). There was no evidence that Cutter's subcontractor

responded to FAA questions about the height of the building and Mr. Dwyer testified that he did not know whether the question was ever answered (tr. 2/27-28; R4, tab 76). On November 10, 2015, the FAA asked for the elevation of the existing buildings again (R4, tab 76 at 117278). Further, Mr. Dwyer admitted that he knew as early as the end of January 2016 that the structural steel subcontractor had just released its steel sequence into fabrication with a scheduled steel erection start date of March 14, 2016 (tr 2/32 at 16-22; app. supp. R4, tab 133).

133. Mr. Dwyer admitted during cross-examination that for column 12'D', temporary shoring was installed the day after the deficiency was discovered and that workers continued to work in the vicinity of column 12'D' shortly after the shoring was completed (tr 2/34).

B. Relevant Testimony from the Contract Specialist, Amanda Bogue

134. Ms. Bogue was the government's contract specialist for the duration of the project and was a contracting officer at the time of the hearing (tr 3/13, 15).

135. Ms. Bogue visited the project approximately once per week in the beginning but "started having a much stronger presence on the project" once the first letter of concern was issued (tr. 3/18).

136. Ms. Bogue testified that Cutter's employee, Pat Briggs, seemed to become adversarial with some government personnel once the first letter of concern was issued (tr. 3/20). The government removed the alternate COR from the project at Cutter's insistence but the contracting officer and contract specialist maintained a good working relationship with Mr. Dwyer (tr. 3/19-21).

137. In response to a question about what issues caused problems between Cutter and the government, Ms. Bogue testified, "I think the actual issue stemmed from Cutter wanting to run forward with the project and do the project, construction projects in their terms, rather than complying with what our contract specifications stated" (tr. 3/25-26). She testified that Cutter, for example, kept referencing industry standards instead of the specifications regarding electrical conduits in Building 253 (tr. 3/26).

138. Ms. Bogue testified that Cutter's project manager was not effective because he did not appear to be authorized to make decision on Cutter's behalf (tr. 3/28). She also testified that Mr. Dwyer did not see everything happening on the project because there were times he was not on site (tr. 3/28-29). When Mr. Dwyer did visit the site, he acted like the project manager (tr 3/29).

139. Ms. Bogue testified that she believed Cutter abused the Request for Information system by submitting RFIs that were incomplete and submitting multiple RFIs for the same issue, trying to “get us to respond with an answer they had been seeking” (tr. 3/30-31). This included objecting to the specifications (tr. 3/31). Using RFIs in appellant’s supplemental Rule 4, tabs 162, 163, and 164, Ms. Bogue demonstrated that Cutter used four RFIs to disagree with the government’s specifications for the fire pump system; however, the government directed Cutter to proceed with the current specifications (tr. 3/31-35). She testified that this level of disagreement and argument that the government was wrong, was not common with other contractors, and it caused delay with every issue because the government believed it gave Cutter a final answer but Cutter kept submitting new RFIs to argue their point (tr. 3/35). The Board agrees that Cutter excessively used the RFI System and frequently disagreed with the specifications.

140. Ms. Bogue testified that the government made the decision to concede to Cutter’s work as they requested “so that we could together move the ball forward” (tr. 3/36) She did not believe Cutter would move forward with the government’s direction to use the specifications provided (*id.*).

141. Ms. Bogue testified that she and the CO initially believed that Cutter and the government suffered from personality conflicts and attempted to resolve those. They wanted to see Cutter succeed as a small business. They had many conversations with Mr. Dwyer about what needed to be done. This included during the time surrounding the government issuing the cure notice, when Ms. Bogue and the CO “personally followed up with Mr. Dwyer before we sent that email, trying to convey to him what we needed him to respond with, the plan that we needed him to respond with, so that we could get this project back on track.” (Tr. 3/37-38)

142. Ms. Bogue outlined that the project schedule was a problem because neither the initial schedule nor the full schedule were submitted on time (tr. 3/38-39).

143. Ms. Bogue stated that the government conceded to what Cutter recommended for the FOD fence because Cutter did not produce a submittal that showed it could achieve the contract specifications of withstanding winds to 80 miles per hour (tr. 3/39).

144. Ms. Bogue testified that she sent a letter to Cutter expressing concerns that they were at least 30 days behind schedule by October 30, 2015 (tr. 3/39-40).

145. Ms. Bogue testified that there were constant delays in submittal packages and submittal reviews became emergencies due to not being submitted on time (tr. 3/44).

146. She testified that she did not agree with Mr. Dwyer's testimony that the structural steel deficiencies did not delay the project because the structural steel deficiencies were still ongoing (tr. 3/45).

147. Regarding quality control, Ms. Bogue testified that government facility maintainers informed her of the conduit severing in Building 254 instead of Cutter informing the government. When she arrived at the site after notification, she discovered that Cutter's Quality Control Manager did not know that Cutter had severed the conduit. This concerned her because she would have expected Cutter's quality control person to be on site at any time Cutter was cutting concrete because of the prior conduit hit in Building 253. From her observations, the quality control person was at his desk instead of observing the work 95% of the time. (Tr. 3/45-47)

148. Ms. Bogue also testified that the quality control surrounding using 4,000 PSI instead of 5,000 PSI concerned her because the government discovered that deficiency as well. It made her, as the contract specialist, concerned that Cutter might have more deficiencies because government inspectors were not on-site 24 hours a day, seven days a week. She was very concerned that a catastrophic event might occur because the government missed finding a discrepancy. (Tr. 3/49-53)

149. Referencing meeting minutes that Cutter prepared, on June 7, 2016, Ms. Bogue testified that there was "approximately one month left of work of what can be done before the Column 12D issue [wa]s resulting in work stoppage" (tr. 3/54-55; app. supp. R4, tab 193 at 3937)

150. Ms. Bogue testified that Cutter never got to the point that they could not perform work due to Column 12'D' prior to termination (tr. 3/55).

151. Ms. Bogue testified that she believed the government made the right decision in terminating the contract because even after issuing the first letter of concern in December 2015, the project continued to worsen. The schedule kept slipping, there was poor workmanship and a lack of quality control. There was no way they could see that Cutter would be able to complete the project on time. (Tr. 3/56-57)

152. On cross examination, Ms. Bogue agreed some of the conflicts surrounded design errors (tr. 3/58-59). She agreed that the girt misalignment issue and Column 12'D' concerned specification issues; however, the underslab utilities were not (tr. 3/60-61).

153. During most of cross-examination, Ms. Bogue could not remember if she wrote particular portions of emails or other details counsel asked her about. Ms. Bogue's testimony during cross-examination was not particularly helpful and we

find that the documents are more accurate than Ms. Bogue's testimony regarding the specific phrases about which she was questioned.

154. During redirect concerning the government's July 1, 2016 Letter of Concern and Cutter's response, Ms. Bogue testified that she was concerned about Cutter not addressing the Site Superintendent disregarding the specifications of the contract (tr. 3/188-89 (citing R4, tab 17; app. supp. R4, tab 203 at 2)).

155. During redirect, Ms. Bogue testified concerning a December 7, 2016 email that stated Cutter was nearly at a standstill, which Ms. Bogue understood was because subcontractors were not on site. She testified that this was not because of a delay issue but a mismanagement issue and that it was at Cutter's choice. (Tr. 3/189-90; app. supp. R4, tab 430 at 8904)

156. During redirect examination, Ms. Bogue testified about the specifications concerning the fire suppression system where the government first told Cutter to follow the specifications and then responded on March 11, 2016, to the third RFI that Cutter could provide a cost proposal so the government could fully review the proposal. The government did not receive the proposal until August 24, 2016. (Tr. 3/194-96; app. supp. R4, tab 164 at 3244, tab 165)) Cutter included the time period between March and August 2016 in its 190-day delay claim (tr. 3/196 (citing R4, tab 26 at 10)). The government stated in answer to the third RFI that the government did not concur with Cutter's characterizations of the design, but that Cutter was proposing an alternative approach that could be considered if Cutter could demonstrate it was viable (R4, tab 164 at 3244). The government stated that a change order including a list of requirements "may be submitted for consideration" (*id.*). We take judicial notice that the time between March 11, 2016, and August 25, 2016, is 167 days. We find that the government directed Cutter to follow the specifications, the government did not require or direct a proposed redesign, that Cutter had the choice to submit this change order, and that Cutter incurred the time to create said change order at no fault to the government.

C. Relevant Testimony from Major Daniel Trembley, The Contracting Officer's Representative

157. Major Trembley testified that he approved a change to the FOD Fence because Cutter could not find anyone to provide one that could withstand 80 mph winds. This was required in the specification but the government made an exception and approved a replacement because it appeared sufficient. He expected Cutter to have initiated the paperwork for the subcontractor but that did not happen so mobilization could not proceed immediately upon approval. (Tr. 4/14-15) Major Trembley did not remember any wind damage but there was damage from sandbags decaying and creating a foreign object debris hazard (tr. 4/16).

158. Major Trembley testified that he had concerns with the qualifications of the initial Site Supervisor. He provided an example that the Site Supervisor failed to have proctor tests performed on the subgrade soils and failed to engage a geotechnical firm to perform a geotechnical analysis required by the contract. This caused a 10 working-day delay. (Tr. 4/18 (citing R4, tab 63. 4⁵)) The Site Superintendent was replaced due to concerns with the level of expertise and knowledge (tr. 4/20).

159. Using Hearing Exhibit 6,⁶ Major Trembley testified about concrete pour quality control issues (tr. 4/30-34). The specification stated the pours should have been between 37 and 41 inches (tr. 4/31-32). But the pours reflected in the exhibit included pours that were not thick enough (tr. 4/32) and pours that were thicker than Cutter stated they were (tr. 4/33). He was particularly concerned with the pours at columns D, E, and F because they were lower than the specification tolerance of 37 to 41 inches (tr. 4/33-34). There were also issues with the rebar mass location, which should have been 33 inches but was actually 31 inches (tr. 4/34).

160. Major Trembley was concerned about the grade beam because fully loaded dump trucks drove over it within five days of pouring, which is a very minimal cure time. He testified that the bonds do not form for 28 days and that if they are broken, they will never reform so the government had to present the situation to the architectural engineers to clear the activity and make sure permanent damage did not happen. (Tr. 4/36-37)

Also concerning the grade beam, Major Trembley testified that Cutter presented an RFI to remove the entire grade beam instead of the top eight inches (tr. 4/55). This was a common request he has seen throughout his career because the government frequently would not call for an entire foundation to be removed, especially if it supported something like hydraulic or electrical equipment; however, contractors frequently say they know it does not have to come out but it is easier to take the whole thing out (tr. 4/55-56). Because this is a common occurrence, when the government received Cutter's RFI to remove the grade beam, the answer was, "yes, of course you can take the entire grade beam if you'd like at your own convenience and at no

⁵ While the transcript indicates that counsel directed the witness to R4, tab 63.04, that tab does not exist. The correct tab is 63.4, which is consistent with the testimony.

⁶ Throughout the hearing, witnesses periodically discussed documents provided in the parties' Rule 4 submissions, as well as documents submitted as hearing exhibits. In those situations, we have cited to the transcript and have included a citation to the Rule 4 document and/or the hearing exhibit discussed during the testimony.

additional cost to the government.” (Tr. 4/56) Major Trembley testified that three months passed without further discussion when Cutter submitted a change proposal for approximately \$250,000 and a 60-day extension (tr. 4/56). Because Cutter was adamant that the entire grade beam needed to be removed, the government met with the designer to make certain the engineers had not missed anything (tr.4/56). He testified, “We did determine that there were four locations there were going to be trench drainage running through the grade beam at which point they would have to take out more than the 8 inch depth.” (Tr. 4/56) At that point, they modified the contract for around \$32,000 and an extension of 7 days to accommodate that change (tr. 4/56-57) When Cutter remained adamant that the entire grade beam was required to be removed, the CO directed the government personnel to take another look at the specifications so the civil engineers, contracting personnel, and design contractor again looked at the design and determined the entire grade beam was not required to be removed (tr. 4/57-58).

161. Major Trembley testified that there was a delay between January 13, 2016, and February 24, 2016, because of Cutter’s lack of planning when constructing the tie beams, that prevented Cutter from being able to work inside the building (tr. 4/38-39). We take judicial notice that the number of days between January 13, 2016, and February 24, 2016, was 43 days.

162. Major Trembley testified that Cutter did not adhere to specifications as demonstrated by the structural steel misalignment and the underslab conduit, which had already had issues that had to be reworked previously so Cutter should have fixed that process (tr. 4/42).

163. Major Trembley testified that because there had been issues in Building 253 with the electrical conduit, the government took extra precautions for Building 254 but Cutter still cut the conduit in the slab (tr. 4/42-43).

164. Major Trembley testified that as of April 30, 2016, Cutter was supposed to have been 48% complete with Building 253 but was only 21% complete, so the estimated completed date had slipped from December 22, 2016 to March 10, 2017. Further, Building 254 had slipped from February 3, 2017 to April 18, 2017. (Tr. 4/45-46)

165. Major Trembley testified that Cutter had an opportunity to work on both buildings at the same time but that the new schedule never materialized. Further, Cutter had the opportunity to work weekends but it did not do so. Additionally, everyone was gone from the construction site by midday Fridays and ended their days at 3:30 p.m. every Monday through Thursday. This caused significant frustration because Cutter did not seem to exhibit a sense of urgency on a contract that was behind schedule. (Tr. 4/46-47) He testified that other people also noticed, “We had

people from all over the wing inquiring why, if the contractor was behind schedule, was nobody there on Friday afternoon and why they were leaving mid-afternoon on many days.” (Tr. 4/51-52)

166. Major Trembley testified that in June 2016, Cutter was approximately six months behind schedule and that the issues were not minor issues but were significant enough that the designer of record stated “that it’s a major concern with misalignment at the C truss splice screening a stress concentration” (tr. 4/48) Further Cutter failed to install rebar as required in the drawing specifications. “At that point it was getting to the point where it was a daily thing where I’d go out on the job site and find[] deficiencies versus what the drawings and specifications required” (tr. 4/48-49).

167. Major Trembley testified that in July 2016, the incorrect lintel was installed over a wide door opening and he pointed it out to Cutter. He testified that Cutter submitted an RFI asking if the wrong lintel was acceptable and, before getting an answer, installed a second incorrect lintel. (Tr. 4/49-50)

168. Major Trembley testified that the schedule slipped three weeks during one month in the summer of 2016 and slipped five weeks in a four-week month. He testified it was very difficult to explain to wing leadership how a project slipped five weeks over the course of four weeks. (Tr. 4/52-53) He also testified that he discussed this issue with Cutter personnel (tr. 4/53 (referencing R4, tab 62.20 (emails demonstrating those discussions))).

169. In cross-examination, Major Trembley responded that he did not know for many questions because he was not present at the time. He also answered affirmatively that documents said what appellant read to him. (Tr. 4/61-78)

170. During redirect examination, Major Trembley testified that several issues existed regarding a third-party inspection report from John Turner Consulting (JTC), to the extent that he reported the quality concerns to the contracting office. The issues dealt with signing off on something being done within specifications when they were actually not, like not installing required rebar. (Tr. 4/83-84 (citing app. supp. R4, tab 493))

D. Relevant Testimony from Lieutenant Colonel Eugene Mozzoni, the Base Civil Engineer

171. Lieutenant Colonel (Lt Col) Eugene Mozzoni was the Base Civil Engineer during the project and was in charge of the civil engineering unit at Pease (tr. 4/92). He testified that Cutter did not manage its subcontractors (tr. 4/101 (“It was non-existent.”)). He also testified that he did not see Cutter exhibit appropriate quality control either. He stated Cutter’s Quality Control Manager was mostly in his office

doing paperwork and that even for pours, he would not be on the site but would be in his office. He testified that this was significant because it meant the government was doing the contractor's job. He expected a larger staff for the size of the job. (Tr. 4/102-03) He also did not believe Cutter prosecuted work in a timely manner because Cutter seemed to do only one thing at a time instead of having multiple jobs being completed at the same time. He questioned how Cutter could possibly get everything done if it only had "one subcontractor doing one thing at one time." (Tr. 4/103)

172. Lieutenant Colonel Mozzoni testified that to keep the project moving along, the government frequently "allow[ed] the contractor to install something less than was required." (tr. 4/103-04). He used the FOD fence and the 4000 PSI concrete installed versus 5000 PSI required as examples (tr. 4/104). He testified that the government acquiesced so Cutter could proceed (tr. 4/103).

173. Lt Col Mizzoni testified that this contract was different than other contracts he worked on because when there were arguments, with the government engineers, the engineer of record, and the representative from Oak Point all saying the same thing, while Cutter saying another thing (tr. 4/106).

E. Relevant Testimony from Major Autumn Ricker, Deputy Base Civil Engineer

174. Major Ricker testified that he was involved with the project during the design phase as well as during Cutter's contract performance until the end of January 2016. He testified he was also involved after termination. (Tr. 4/151-53) He testified that he is the COR on the follow-on contract with Vertex, the company the surety selected to complete the work post-termination (tr. 4/153-54).

175. Major Ricker testified that during the time he worked on the subject contract, he visited the project site several times a week and his presence increased to typically daily during the month of January 2016 (tr. 4/160).

176. Major Ricker testified that the contract required Cutter to design some items, like trapeze hangers for piping systems for the FOD fence, fire protection work, and vibration and seismic isolation pipe anchors (tr. 4/161-62). Structural steel connections were one of the more significant design components of this contract and Canatal, the steel fabricator, had professional engineers on staff to perform design work (tr. 4/162).

177. Major Ricker testified that the FOD fence was important because it is a temporary construction fence, but it prevents small items, like coffee cups or insulation, from getting blown away from the construction area, which was important

in this project because of the construction's proximity to an active airport (tr. 4/165-66). The government rejected the plans for first FOD fence Cutter submitted because the fence did not meet the specifications in the contract: the plans did not demonstrate it could withstand 80 mph winds and did not show back stays or blocks used to support the fence (tr. 4/168-69). In the resubmittal, Cutter addressed the block issue but not the 80 mph winds requirement and did not consider the three feet of silt fence at the bottom. Nevertheless, the government accepted the resubmittal. (Tr. 4/169) The fence failed in several locations on a weekend with high winds of about 30-40 mph (tr. 4/170). Major Ricker testified that he and Lt Col Mozzoni did a perimeter walk after receiving a call about the failed fence and noticed several other issues with improperly and dangerously stored items like an oxygen cylinder, an acetylene bottle, and a diesel tank sitting on pavement with a battery on top of it (tr. 4/170-72 (citing R4, tab 68 at 3-6)). Further, the relaxed fence the government approved did not comply with Cutter's proposed fence because back stays that were proposed were not included properly as part of the fence (tr. 4/171-72).

178. Regarding the underslab electrical conduit hit in Building 253 Major Ricker testified that even without as-built drawings, Cutter should have seen that underground service was there based on the electric room and paint in the hanger indicating electrical, which would have been discovered had Cutter performed a proper site survey (tr. 4/176-79). There were no wires above the electrical room or going to the building so everything was obviously underground (tr. 4/179-80).

179. Regarding the trench drain in relation to the conduit hit, Major Rickers testified that the top 13-inch portion of the trench drain was supposed to be demolished but the lower part was to remain, according to drawing SD501 (tr. 4/184-85 (citing R4, tab 2 at 30)). If the trench drain had been cut in that manner, the conduits would not likely have been hit (tr. 4/185).

180. Major Ricker testified that he did not recall any pre-demolition walk-through with the CO or even the COR for either Building 253 (tr. 4/187-88) or Building 254 (tr. 4/188-89). This is something that Cutter should have noted in its superintendent daily report and the Quality Control Manager daily report, but nothing was noted (tr. 4/189-90).

181. Counsel directed Major Ricker to testify concerning another area that concerned him, specifically regarding segments of the footing. Regarding the concrete pour for the footing on column line 1, Major Ricker testified that he went to the construction site because he was notified that it was ready for inspection (tr. 4/202). He explained that the column line 1 footing was the second footing being placed, and that number 7 had been completed earlier (*id.*). He explained that the purpose of a building's footing is to support the entire structure above. It is a critical element to ensuring the entire weight of the building is supported. (Tr. 4/208) He testified that he discovered

that many areas were not the required three feet, three inches thick and not within tolerance (tr. 4/202). Further, he testified that the rebar cage was too close together inside of the footing profile (tr. 4/203). On January 15, 2016, the government discovered too much stone underneath the footing on column line 1 and Cutter took action to correct the deficiency which was annotated in the superintendent daily report for January 19, 2016 (tr. 4/204). Major Ricker testified that by January 25, 2016, the deficiencies still existed but he was unable to fully inspect the area because Cutter refused to remove the thermal blankets that kept the rebar and concrete warm (tr. 4/211-14)

F. Relevant Testimony from Chief Master Sergeant Bussell Concerning Issues Discovered After Termination

182. The alternate COR, Chief Master Sergeant (CMSgt) Brett Bussell, testified about his experience with the project's termination. He became the alternate COR approximately a week after the government terminated Cutter. (Tr. 5/6-7)

183. CMSgt Bussell testified that he prepared a slideshow with some of the observations he had since being part of the project and also reports from third parties that had been given to Vertex. This slideshow was admitted into the record with no objection by Cutter as Hearing Exhibit 10 and included photographs of various portions of the project. (Tr. 5/14-16)

184. After termination, the government discovered several problems with Cutter's workmanship. These included: 1) inadequately tightened bolts; 2) gaps in the installation of the pan decking; 3) failure to properly compact soil; 4) exterior wall penetrations caused damage to insulation; 5) Lintel above door opening improperly installed; 6) underslab electrical conduit not installed according to specifications; and 7) lack of survey, or grade, control in the structural steel alignment, grade beam height, trench drain sewer line, and CMU wall footings. (Ex. 10) We find that all of these items required remedial work or correction by the follow-on contractor.

185. CMSgt Bussell testified that he worked with Tetra Tech (the design firm) to do a report of the work that remained and any deficiencies. He testified that he was involved with exploratory work, potholing, trenching, utilities, and ensuring everything was installed correctly. He also worked with Vertex once they were hired to continue the project. (Tr. 5/7-8) He testified that the exploratory work was visual inspections and running cameras through some of the lines but that the government did not damage anything (tr. 5/12-13).

186. CMSgt Bussell testified that he broke the concerns into three areas: 1) lack of quality control; 2) lack of adherence to specifications; and 3) lack of survey (grade) control (tr. 5/16, 26, 32; ex. 10 at 10).

187. CMSgt Bussell testified that over 1,000 of the bolts were hand tightened instead of torqued, which was reported to the government by Vertex and Neil White, Construction Steel Inspector. This was important because hand tightened bolts could fall out and weaken the structure. One can tell from the photographs that the bolts were not tightened with a torque wrench because the splines were showing and would have been sheared off if torqued. (Tr. 5/16-18; ex. 10 at 3) When asked how many bolts were found with the splines still on, CMSgt Bussell responded that there were over 1,000 and stated, “I witnessed probably – approximately five or six five-gallon buckets full of bolts that were taken out and replaced.” (Tr. 5/18)

CMSgt Bussell further testified that a report written by JTC, dated June 23, 2016, demonstrated that splines were still on the bolt in the photograph and that there were not visible paint marks to indicate that the turn-of-the-nut method was authorized on it (tr. 5/18-19 (citing app. supp. R4, tab 255 at 4282)). On cross-examination, CMSgt Bussell admitted that Cutter was authorized to use the turn-of-nut method when they could not use the tension control wrench (tr. 5/63). On redirect, CMSgt Bussell stated that Vertex found bolts had not even been tightened to the turn-of-nut standard (tr. 5/120).

Based on CMSgt Bussell’s testimony and the evidence in the record, we find that Vertex had to remove and replace over 1,000 bolts that Cutter had not properly torqued.

188. CMSgt Bussell testified that he and Vertex uncovered issues with pan decking, where the specification required a minimum end-bearing of an inch and a half and end joints are required to be lapped, where one sheet is supposed to be over the top of the other. Instead, you can clearly see light to the floor below, indicating that the specifications were not followed. (Tr. 5/19-20; ex. 10 at 4 (citing the requirement in R4, tab 1 at 353)). In cross-examination, CMSgt Bussell admitted that if Cutter had not been terminated, it could have fixed the issue with the pan decking (tr. 5/66-67). Further, he agreed that the shop drawings were approved and that deck ends shall be butted over supports (tr. 5/70-71, 76-77; ex. 13 at 18). He also testified that a zero lap where Cutter would butt the ends was in violation and was a variation of the contract, without any marking for the variation (tr. 5/76). In redirect, CMSgt Bussell testified that a lap of zero inches does not have a gap and that the photograph in Hearing Exhibit 10 did not meet the requirement for a lap of zero inches (tr. 5/126; ex. 10 at 4).

189. CMSgt Bussell testified that there were issues with soil compaction where Cutter supplied sporadic reports about soil compaction so Vertex and JTC did compacting testing. The testing revealed that several areas had no compaction. This was a problem because if the soil is not compact to the specified levels and later a concrete slab is placed on top of it, that slab will settle over time, possibly cracking or causing structural issues. He testified that every layer needed to be compacted

properly. Because they did not have the proper documentation to demonstrate the compacting, that had to be reworked so they knew for certain it was built correctly. (Tr. 5/20-22) JTC should have provided the test report and those were required to be uploaded into Projectmates but nothing was in Projectmates. Unless they had their own testing lab onsite, there would not be a way for Cutter to know how compact the soil was. He also testified that the requirement was for not more than a six-inch lift for hand-operated tamp equipment being used but the lift was much more than six inches. (Tr. 5/22-24 (citing hearing ex. 10))

In cross-examination, CMSgt Bussell admitted that the area had been backfilled with no test reports but also testified that some areas had insufficient compaction or compaction failed testing (tr. 5/79-80). He testified that the government did not have a report that demonstrated corrective work or recompacted work but that did not mean recompacting did not occur (tr. 5/81-82). CMSgt Bussell further admitted that he did not know what type of equipment was used for soil compaction without going back to the test reports from that day (tr. 5/90-91).

In redirect, CMSgt Bussell stated that JTC did the testing for both Cutter and Vertex. Further, JTC lacked data that demonstrated that soil compaction testing had been done in the appropriate areas. (Tr. 5/127)

190. CMSgt Bussell testified that there were exterior penetration issues based on photographs throughout the construction where you can see daylight out of holes left open to the elements and insulation on the inside of the facility was damaged. He testified that leaving the exterior penetrations open was a problem because it can cause mold, mildew, rust, and other issues inside the building. He could not say how long the penetrations were open because they were demolished but he testified about problems from the penetrations. (Tr. 5/25-26; ex. 10 at 6 (citing the requirement at R4, tab 1 at 51))

191. CMSgt Bussell testified that the lintel bearing plates still had issues that needed to be resolved even though Mr. Dwyer testified that these were no longer issues (tr. 5/26). He testified that he has been at the site and you can see a visible crack in the concrete “all the way up that wall and that goes from one joint, through the center of the next block, to the joint, through the center of the next block, to this joint, center of the next block, all the way above” in the photograph he referenced. (tr. 5/29; ex. 10 at 8). He testified that the cracking indicated that the wall settled from when it was placed because there are not enough bearing plates where the wall shifted (tr. 5/29-30). In cross-examination, CMSgt Bussell agreed that the project sat for almost one year without work, that Cutter was not permitted to return to the project, and that the government did not cover the project at all (tr. 5/47-51). Specifically, the government did not make efforts to close the penetrations (tr. 5/51).

192. CMSgt Bussell testified that there were several areas with issues regarding underslab conduit. In some areas, there was no sand bedding under the conduit as required by the contract (tr. 5/30-31; ex. 10 at 9). Further, because pipes were stacked next to each other, there was not room for sand bedding (tr. 5/31). He testified that not doing this properly will typically result in cracking in a slab when aircraft, vehicles, and materials drive over the area (tr. 5/32).

193. CMSgt Bussell testified that there was a lack of survey control in several areas at the site. There were areas that were not plumb that were outside of the American Institute of Steel Construction's Code of Standard Practices that defined tolerances. He testified that the wall panel manufacturer that Cutter used specified no more than one-eighth inch variation at ten feet but Cutter had one inch. This meant that the panels Cutter chose could not be affixed to the girts because the panels would bend or kink. (Tr. 5/32-36; ex. 10 at 10-12)

194. When asked about Column 12'D', CMSgt Bussell testified that Vertex was able to work on the project because shoring was put in place so the structure was rendered safe. He testified that it may have been more cumbersome or tedious to work in the area, but work continued. Vertex safely worked in the area with only the shoring for approximately a year as the column was not repaired until two weeks before he testified. The repair took one week to accomplish. (Tr. 5/36-38) We find that it was safe to work in the area with only a shored column, which occurred during Cutter's performance of the contract and was the subject of Modification No. P00001 (*see* finding 41).

195. Regarding grade beam removal, CMSgt Bussell testified from tab 127 of appellant's Rule 4 file (tr. 5/38-39). Appellant requested 53 days and \$234,838 for the change (app. supp. R4, tab 127 at 0866). Vertex removed the grade beam in all the locations inside the facility in three days (tr. 5/39). Vertex used the trench drain that Cutter left behind at the site, a Zurn pre-fabrication, pre-formed plastic trench drain. CMSgt Bussell testified that this was a drain meant to be cast in the concrete. They set it in place, to grade, placed reinforcing steel (or rebar) around it, placed their forms and cast the drains in concrete. (Tr. 5/39-40)

G. Appellant's Expert Report and Testimony

196. Appellant proffered, and the government did not object to, Russell Berner of Construction Claims Group (CCG) as an expert witness in the area of forensic schedule analysis (tr. 2/71-72, 75-79; app. supp. R4, tab 296; ex. 4). The Board admitted appellant's expert report per the parties' request (tr. 2/78; app. supp. R4, tab 295 (appellant's expert report)).

197. Mr. Berner's methodology in his report used the Association for the Advancement of Cost Engineers International (AACE), Recommended Practice No. 29R-03, Retrospective-Modeled-Additive-Single Base technique. "This technique consists of the insertion of activities representing delays into a critical path method ('cpm') schedule that will model and calculate the effect of the impact." (App. supp. R4, tab 295 at 4479) Mr. Berner confirmed this during cross-examination (tr. 2/87-88).

198. During his testimony, Mr. Berner stated that the schedules were problematic and not very helpful in performing the analysis. Thus, he used an impacted as-planned analysis. He opined that "the overall project was delayed through termination 393 days or so, which is about January 7, I believe, 2019. So, my analysis indicated that there is a basis for a non-compensable contract extension, for the impacts that were encountered during the project." (Tr. 2/73-74)

199. During cross-examination, Mr. Berner stated that he used an "impacted as-planned" analysis which was not listed as a matter in which he had expertise in his CV (tr. 2/84, 86).

200. In his executive summary of his report, Mr. Berner stated that the project was significantly delayed by many design changes and unforeseen differing site conditions (app. supp. R4, tab 295 at 4472). He posited that Cutter issued several letters to the government, requesting 299 days of delay, but that the government only granted 33 days of extensions, which was inadequate (*id.* at 4473). He opined that the COTR had personality conflicts with appellant's personnel and delayed the project by unreasonably denying contract extension requests (*id.*). Mr. Berner concluded that Cutter was entitled to a compensable time extension of 299 days as opposed to the 33 days awarded by the government (*id.* at 4475). He opined that the government ignored the concept of a concurrent delay (*id.*).

201. The expert report provided a timeline chart to demonstrate his opinion that appellant was not responsible for the delays (app. supp. R4, tab 295 at 4477-78).

202. In his report, Mr. Berner assumed that the baseline schedule was approved late, thus placing blame on the government although he wrote about both sides' arguments. However, at the end of that analysis, he stated, "Ultimately, the argument regarding who is culpable for the delayed schedule approval (NHANG or Cutter) is not germane to this forensic schedule analysis because the Project records show work progressed even without an approved schedule." (App. supp. R4, tab 295 at 4481)

203. In his expert report, Mr. Berner created three categories: 1) "Major Discrete Delays"; 2) "Ongoing Concurrent Delays as of Termination"; and 3) "Other Delays" (app. supp. R4, tab 295 at 4486). He defined the Major Discrete

Delays as: 1) FAA Permit Delays; 2) Column 12'D' Issues; and 3) Severing of UnderSlab Electric Conduit. He opined that the Ongoing Concurrent Delays as of Termination consisted of: 1) owner caused delay to FAMNS; 2) fire pump design delay; 3) asbestos contaminated material (ACM) dust; and 4) trench drain issues. He explained Other Delays meant “[b]y themselves, but-for the over-arching delays caused by the above ‘Major Impacts’, each of these ‘Other Impacts’ would have caused extensions to the Project’s completion date” (*id.*). Mr. Berner described the Other Delays as issues with the metal wall panel and grade beam demolition (*id.* at 4486-87)

204. In his report, Mr. Berner opined that according to his schedule analysis, appellant was entitled to 339 calendar days of delay due to the column 12'D' issues and the FAA permit issue in the Major Impacts category (app. supp. R4, tab 295 at 4477-78). Specifically, Mr. Berner opined that the FAA permit issues caused 46 days of delay and the column 12'D' issues caused 293 days of delay, both of which should be attributed to the government (*id.* at 4488-97). If Cutter was not granted an extension of time for the FAA permits and column 12'D' issues, Mr. Berner opined that Cutter would be entitled to “not less than 150 days” of delay for demolition of unmarked underslab conduits (*id.* at 4497-99).

a. Regarding the FAA permits, Mr. Berner opined that the government admitted it was responsible for submitting the building designs and admitted it was late. According to Mr. Berner, this caused the construction crane permits to be delayed. He opined that the delay impacted steel erection so it could not commence on March 14, 2016, and the government should be responsible for one and a half months of delay. (*Id.* at 4488-90)

b. Regarding column 12'D', Mr. Berner opined that on March 25, 2016, during excavation, appellant discovered deficiencies with column 12'D' in Building 253 (app. supp. R4, tab 295 at 4491). Cutter sent the government an email and immediately installed emergency shoring. Mr. Berner described in his report the actions taken to install new shoring and taking core samples. (App. supp. R4, tab 295 at 4491-93) Further, Mr. Berner summarized that the column sprang loose during foundation demolition in December 2016 and before Cutter could start any repairs, the contract was terminated (*id.* at 4493). According to the expert, column 12'D' impact “held up a portion of activity 135 ‘FRP Composite Shop Walls’” (*id.* at 4493).

c. Mr. Berner opined that the government’s position was incorrect. He characterized the government’s position as being that the government acknowledged the unforeseen site condition but then denying that Cutter was entitled to any extension because: 1) the government response was timely; 2) the repair was not contingent on shoring the column; and 3) appellant was responsible for 195 days of delay measured from April 5, 2016, when the sketch was provided to Cutter, through October 17,

2016, when a cost proposal was provided. Mr. Berner opined that the government was incorrect because the government did not provide immediate direction to make the repairs and that 195 days of delay attributable to Cutter was inaccurate. For the repairs, the government did not direct appellant to perform work according to the sketch it provided. Further, the sketch was an outline of one possible solution and was marked tentative and not for construction. (App. supp. R4, tab 295 at 4494-96)

d. Mr. Berner attributed 293 days as incremental compensable contract extension as a result of the unforeseen condition of column 12'D'. Basically, Mr. Berner calculated the time from March 25, 2016, through December 29, 2016. If the FAA permits are not acknowledged as delay, then Mr. Berner opined that Cutter is entitled to a contract extension of 339 days of delay for column 12'D'. (App. supp. R4, tab 295 at 4496-97)

e. Regarding severing the conduit in Building 253, Mr. Berner opined, "The Contract Documents did not show any existing underslab electrical conduits" (app. supp. R4, tab 295 at 4497). Cutter requested as-builts, but the government did not provide any that showed underslab conduit and appellant unintentionally cut conduits buried under the slab (app. supp. R4, tab 295 at 4497-98). On November 9, 2015, appellant started demolition of the concrete slab in Building 253. On January 12, 2016, appellant severed numerous electrical conduits that were in the 14-inch concrete slab. On March 18, 2016, appellant performed emergency repairs and procured a generator to provide temporary power. On September 30, 2016, appellant completed the slab demolition at Building 253. On November 4, 2016, appellant restored permanent power. (App. supp. R4, tab 295 at 4497-98)

f. Mr. Berner considered the conduit severing completely the fault of the government. Mr. Berner opined that the work was on the NH04 critical path with zero days float and was supposed to be performed from December 17, 2015, through December 29, 2015. However, appellant started early but was not able to finish until September 30, 2016, which Mr. Berner claimed would be a delay of 288 days as one way to measure the delay. Mr. Berner also opined that the conduit issue was concurrent to the FAA permit and column 12'D' delays, but if Cutter was not considered entitled to recovery on those issues, it would be entitled to an extension of time of at least 150 days, from June 23, 2016, through November 25, 2016, for the underslab conduit issue. (App. supp. R4, tab 295 at 44989)

205. Mr. Berner opined that further delays, in the category of Ongoing Concurrent Delays as of Termination (FAMNS, fire pump, ACM, and trench drain), were also the fault of the government but were concurrent with the column 12'D' issues and the FAA permit issue. He opined that Cutter would have been entitled to a 339-day contract extension.

a. For FAMNS, Mr. Berner opined that Cutter was entitled to at least 305 days because of what amounted to a sole source requirement for the system. According to the expert, the subcontractor was not responsive and the government failed to approve an alternate. It still had not been approved at the time of termination. (App. supp. R4, tab 295 at 4499-03)

b. For the fire pump, according to Mr. Berner, Cutter informed the government that the current system would not pass current code requirements. After some argument from the government about whether the system met the code requirements, appellant provided four options and the government selected one, but did not provide drawings for several months. On March 11, 2016, the government requested Cutter submit a cost proposal and the revised pump design. Cutter could not submit a cost proposal until it received the design drawings, which it did not receive until October 11, 2016. Cutter submitted a proposal on December 7, 2016. Mr. Berner opined that this was a critical delay, although concurrent, and would have resulted in a delay of at least 259 days, with more probable due to it not being resolved at the time of termination. (App. supp. R4, tab 295 at 4503-05)

c. For the ACM, Mr. Berner reported that Cutter notified the government about the presence of asbestos and heavy metals after its painting subcontractor mobilized and tested the area, providing the results of the testing on November 23, 2016. Mr. Berner opined that the dust impacted several other areas, including: Column 12'D'; preparation of surfaces; installation of mechanical, electrical, fire protection, and other equipment; foundation excavation, including trench drain installation; placement and finishing of the mezzanine concrete slab deck; and installation of mezzanine mounted equipment. Mr. Berner stated the government did not respond from November 23, 2016, through December 29, 2016 (termination). The government had not responded to Cutter's concerns by the time termination occurred. Mr. Berner attributed at least 143 days of critical delay to the government. (App. supp. R4, tab 295 at 4506-07)

d. Regarding the trench drain, Mr. Berner stated that there was originally a design discrepancy and the government answered an RFI that led to Cutter using a modular trench drain system instead of a cast-in-place drain. The government stopped installation because the structural engineer alleged it was noncompliant with the requirements. According to the expert, this would have caused a contract extension of 181 days. (App. supp. R4, tab 295 at 4507-09)

206. Mr. Berner included a category called “Other Delays” in which he included two items: the metal wall panel and grade beam demolition. Mr. Berner opined that the government should have extended the contract for each of these alleged delays; however, they were concurrent delays with the other delays, so no additional delays occurred to the schedule. If the government had not terminated the contract and all other delays were ignored, Mr. Berner opined that contract extensions of 256 days for the wall panel and 126 days of delay for the grade beam demolition would have been required. (App. supp. R4, tab 295 at 4509-13)

Regarding the grade beam demolition, Mr. Berner summarized the communications between the parties. Mr. Berner stated that Cutter notified the government of the cost and 53-day request for extension on July 1, 2016. Mr. Berner stated that Cutter completed the work in Modification No. P00003 on September 30, 2016, but reserved the rights to seek additional time and compensation. Mr. Berner also opined that the topping slab impacted the grade beam and that Modification No. P00003 did not address that issue. He opined that the 126-day delay was concurrent with other delays but would have increased if the contract had not been terminated and would stand alone without the other claimed delays. (App. supp. R4, tab 295 at 4511-13)

207. During his testimony, Mr. Berner stated that there were a number of procurement activities that did not have a direct nexus to the construction activities. He further stated that there were constraints within the schedule that he did not list in his report because he did not view them as important. (Tr 2/91)

208. Mr. Berner stated that neither the structural steel submittal process nor the steel fabrication time were on the driving critical path (tr. 2/100). Further, the construction of footings related to the structural steel were not reflected in the critical path because, at worst, any delay would be non-compensable and concurrent with the delay caused by “the FAA situation” (tr. 2/100-01).

209. Mr. Berner testified that one could not tell whether a particular activity was critical, and his response demonstrated the problems with appellant’s schedule and

provided insight as to why he analyzed the delay as he did. Specifically, Mr. Berner stated,

From a scheduling update perspective, it's hard to tell, which is why I chose the approach I did in impacted as-planned. Because while you use these schedule contemporaneously for project management purposes to get a gauge of where you are in the project, but to look at it forensically, in order to determine what is the critical path of the project in an after-the-fact analysis, you can't answer that question because of all of the activities that are missing from this schedule, which I believe probably would have overridden whatever was critical. But you can't tell because they're not in this schedule.

(Tr. 2/102-03)

210. Mr. Berner testified that actualized dates could not be included in the baseline because it would impact the internal logic (tr. 2/104-05).

211. When asked whether he reviewed the RECON analysis (the company who assisted with appellant's REA), Mr. Berner responded that he considered it but "went his own way" although he thought his analysis was similar to RECON's. (Tr. 2/113-14)

212. Mr. Berner had no knowledge of why there were 5-digit and 3-digit activity codes (tr. 2/115).

H. The Government's Expert Report and Testimony

213. The government proffered, and appellant did not object to, Joseph McFadden, of Capital Project Management, Inc. (CPMI), as an expert witness in the area of forensic schedule analysis (tr. 2/76-79; R4, tab 60.000; ex. 5). The parties requested to admit, and the Board so admitted, the government's expert report contained in the Rule 4 file (tr. 2/78).

214. According to the government's expert report, CPMI's methodology was a Schedule Analysis that was a retrospective methodology using the contemporaneous schedule updates:

CPMI prepared this Schedule Analysis to quantify and allocate the delay that occurred on the Project. This analysis is a retrospective methodology that utilizes the contemporaneous schedule updates to analyze the Project

in succinct time periods over the course of the entire Project. CPMI utilized this methodology to assess the causes of and the duration of delay emanating from project issues to determine the effect of delay-causing events to the contract completion date. Under this methodology, periods of time are evaluated, allowing for an assessment of the work completed during the period between updates, as well as a forecast of the balance of the work yet to complete. Specifically, the delay to the project is measured by examining the actual progress of the critical path from the update at the start of the period and changes to the critical path forecast as of the schedule update at the end of the period. By analyzing the project history at appropriate successive intervals starting with the baseline schedule and working chronologically to the schedule at termination, this process normally allows for the determination and assessment of specific delaying events in the context of the project at the time the events occurred. This is a preferred method of analyzing delay because it considers the contemporaneous schedules and attempts to measure delay against the schedule in effect at the time of delay.

CPMI utilized the contemporaneous Cutter schedule updates to derive the sequence or path of activities that controlled the completion of the project.

(R4, tab 60.000 at 10-11)

215. Mr. McFadden testified that he used the Critical Path Method to analyze the schedule. He explained

So, Critical Path Method is a type of calculation that is done on a schedule. A schedule is made up of tasks that defined the work items. Those work items are assigned a duration. They're logically tied together in a network and then the software does this process of calculating the start and finish dates for each of the activities, based on that network and it can determine the sequence of work through that network.

So there's many paths of work and then the critical path is the longest path through the schedule and that's what we focus our efforts on analyzing.

(Tr. 5/145)

Mr. McFadden was asked in cross-examination, "And you would agree with me, would you not, that the base international recommended practice number 29R-03 is the protocol that good forensic schedule analysis stems from?" (Tr. 5/173) Mr. McFadden answered, "So the RP 29 is just what it states. It's a recommended practice. It's not a standard. It's not something that would be followed without exception, there is judgment in doing this type of work . . ." (*id.*). When asked if he followed AACE in performing his schedule analysis, Mr. McFadden answered that he did not.

In redirect, Mr. McFadden testified about the recommended practice further, acknowledging that the AACE International Recommended Practice No. 29R-03 even states at the beginning of it that it is a recommended practice not intended to establish a standard of practice (tr. 5/201 (referencing app. supp. R4, tab 359 at 8685)).

The AACE International Recommended Practice No. 29R-03 contained in its introduction, "This RP is not intended to establish a standard of practice, nor is it intended to be a prescriptive document applied without exception. Therefore, *a departure from the recommended protocols should not be automatically treated as an error or a deficiency as long as such departure is based on a conscious and sound application of schedule analysis principles.* As with any other recommended practice, the RP should be used in conjunction with professional judgement and knowledge of the subject matter. While the recommended protocols contained herein are intended to aid the practitioner in creating a competent work product it may, in some cases, require additional or fewer steps." (App. supp. R4, tab 359 at 8685 (emphasis added))

Mr. McFadden agreed that adopting use of 29R-03 did not assure the soundness of substantive content (tr. 5/201-02 (citing app. supp. R4, tab 359 at 8714)). He further testified that the recommended procedure did not endorse any one methodology over another (tr. 5/202).

Mr. McFadden further testified that the American Society of Civil Engineers, of which he was also a member, had publications concerning schedule-delay analysis and that it was similar to the recommended procedures for AACE (tr. 5/202).

216. Mr. McFadden used P6 software by Primavera, then bought out by Oracle, to conduct the analysis. Mr. McFadden testified that Mr. Berner used P3, an earlier version of the software, which has been phased out of being used. (Tr. 5/145-46)

217. Mr. McFadden testified that his approach was “to use the contemporaneous schedules to the fullest extent possible . . .” (tr. 5/151). He also called this a time-impact analysis (*id.*). He testified that his approach was “to utilize the schedules as they existed and walk through those schedules to assess delay” (tr. 5/152). We find that this time-impact analysis was an appropriate way to approach the analysis, given the circumstances with missing or incomplete schedules.

218. Mr. McFadden’s report stated, “To analyze delays to the overall project completion, I have evaluated nine (9) distinct periods from the contemporaneous schedule updates, which cover the performance period from August 18, 2015 (Award) through December 29, 2016 (termination)” (R4, tab 60.000 at 13) The 9 periods were: 1) Baseline Schedule Update NH04 through Schedule Update NH06 (*id.* at 13-29); 2) Schedule Update NH06 through Schedule Update NH07 (*id.* at 29-35); 3) Schedule Update NH07 through Schedule Update NH08 (*id.* at 35-41); 4) Schedule Update NH08 through Schedule Update NH09 (*id.* at 41-48); 5) Schedule Update NH09 through Schedule Update NH10 (*id.* at 49-53); 6) Schedule Update NH10 through Schedule Update NH11 (*id.* at 53-57); 7) Schedule Update NH11 through Schedule Update NH13 (*id.* at 58-66); 8) Schedule Update NH13 through Schedule Update NH14 (*id.* at 66-75); and 9) Schedule Update NH14 through termination (*id.* at 75-90). We find this breakdown of the timeline useful in our analysis of the case.

219. Mr. McFadden testified that he reviewed how the actual work aligned against the delay allocations that Cutter presented in its REA (tr. 5/156-57). He stated

That there were many things that impacted the progress of the work that were not mentioned within the REAs, particularly material conformance issues, subcontractor availability issues. There were things with fixing deficiencies with installed work. There were temperature-sensitive items that were slipping into winter-restricted periods and all those things impacted the ability to assess delay as you walked through the scheduling.

(Tr. 5/157) Mr. McFadden testified that the flaws in the schedule affected the critical path, making it difficult to assign any specific delay to those issues (tr. 5/157-58). He also testified that he “noted that the concrete paving items were one of those significant tasks that was affected by a winter restriction within the contract” and he re-ran the schedules with the dates of the provided schedule (tr. 5/158). We agree with Mr. McFadden that Cutter failed to consider the winter restriction when determining the schedule.

220. When asked whether consequential issues⁷ created problems in the schedule, as Mr. Berner testified, Mr. McFadden testified that he would not agree with that statement

Because flaws within the schedule were already there before the consequential issues that Mr. Berner is referencing arose on the project. So, the duplicative activities, the fact that procurement activities were not tied to install activities, that third-party inspection activities were not logically tied to run parallel to construction tasks, that weather calendars were not in place for weather-sensitive work, you know, such as the concrete paving, but also for things like landscaping and painting, which were also affected by weather-time constraints.

(Tr. 5/203)

Mr. McFadden testified that the structural-steel submittal process started late and required a second submittal, which pushed release of fabrication out from mid-December to February (tr. 5/204).

221. CPMT's analysis yielded the following expert opinions as outlined in the executive summary of Mr. McFadden's report:

- Subcontractor performance issues related to: (sic) slow progress, availability, nonconforming materials and installations contributed to impacting various portions of the work;
- By July 2016, the Cutter delays to the tail dock hangar addition had already pushed the hangar bay and apron slabs into the winter exclusionary period, which meant the start of floor slabs and finishes would not commence until spring of 2017;
- After July 2016, the Cutter-alleged delay issues that arose were not on the critical path because months

⁷ Mr. Berner testified that the schedules were “missing certain activities, the most of which happen to deal with what I call the consequential activities, the consequential events that would occur as a result of design issues or unforeseen conditions that impacted the work.” (Tr. 2/73-74)

of float were available before the restart of floor slab and finish work in the spring of 2017;

- Regarding the Cutter REAs, the alleged delays are duplicative and overstated. The delay compilations ignored the contemporaneous schedules and disregarded any contribution that Cutter or its subcontractors had in completion of the alleged delayed work;
- Finally, CPPI finds that no entitlement to additional time is due Cutter for performance of the work under the contract.

(R4, tab 60.0000 at 6-7)

222. In his report, Mr. McFadden stated that he analyzed appellant's REA, which included a schedule analysis prepared by RECON International, Inc. (RECON). The expert pointed out a major issue with the RECON report in that RECON initiated its analysis by developing a "Summarized Baseline Schedule" using two baseline schedules submitted by appellant, NH02 and NH04. (*Id.* at 8) Mr. McFadden stated, "NH04 was the baseline schedule that was approved by NHANG, it is unclear why the earlier unapproved NH02 was considered in RECON's modelled baseline, and RECON provided no explanation for its inclusion" (*id.*). Then RECON inserted the as-built information to create an "Impacted As Built Schedule to Oct 1st" to demonstrate the issue of delay periods with as-built tasks. RECON derived the delay periods with each issue and ultimately determined which issues introduced project delay and then considered with issues were concurrent. "RECON determined that Cutter experienced 223 calendar days of excusable delay, while two (2) modifications had previously addressed 12 calendar days, leaving a balance of 211 excusable calendar days." (*Id.*) In the REA, Cutter determined that the delays were fully compensable (as opposed to RECON's determination that the delays were excusable) and applied a daily general conditions rate and an unabsorbed home office overhead rate. However, while the two alleged delay cost components totaled \$1,061,071.38, Cutter alleged the two components were \$1,125,266.20, which left \$64,198.82 unexplained. (*Id.*)

223. Mr. McFadden explained that Cutter's second certified claim sought an extension of 76 calendar days for performance from October to December 2016, also using RECON to analyze the situation. Of those 76 days, RECON admitted that a modification addressed 21 days, leaving an alleged 55 excusable calendar days, now totaling 299 calendar days of excusable time; however, 33 calendar days were

addressed by Modifications Nos. P00002, -03, and -05 which resulted in 266 calendar days and the above compensation request of \$1,125,266.20. (*Id.* at 9-10)

224. In his expert report, Mr. McFadden listed several problems with the schedule.

These problems included:

- Duplicative Tasks;
- Monitoring tasks became part of the critical sequence of installation work;
- Material payment tasks became part of the critical sequence of installation work;
- Lack of a weather calendar for temperature sensitive work;
- Preferential logic restraining out of sequence work;
- Failing to correct repeated out of sequence work;
- Missing schedule narratives reflecting schedule changes, progress achieved, and an accurate status of the remaining work;
- Procurement Tasks (Submittal Prepare & Submit, Review & Approve, Fabricate & Deliver) not logically tied to installation tasks, but rather to a single finish constraint.

(*Id.* at 11-12) (footnote omitted)

225. Mr. McFadden testified that appellant's REA delay allegations were overstated, in part because appellant failed to incorporate the requirements from the specifications to avoid the winter period for concrete paving. Thus, Cutter had not proven entitlement to those delays. (Tr. 5/165-66)

226. Mr. McFadden admitted that his expert report was limited to analysis of appellant's two REAs. It did not rebut appellant's expert report by CCG. (Tr. 5/171)

227. Mr. McFadden admitted that Cutter could not move forward to complete the column 12'D' work until it received responses to the two RFIs pertaining to it.

Until the 12'D' repair was done, the mezzanine work could not commence. The support area could commence but the mezzanine work could not. The new area deck that was being poured above the support area was proceeding. (Tr. 5/197-99)

228. Mr. McFadden broke the schedule down into nine periods from the contemporaneous schedule updates, covering the period from contract award to termination (R4, tab 60.000 at 13). This breakdown assisted us in finding that Cutter was unable to recover from early delays and demonstrated the cumulative effect of the early delays, including those due to the issues surrounding creating a viable schedule.

229. In the first period, which was baseline schedule update NH04 through NH06, Mr. McFadden explained that NH04 forecasted a contract completion date of February 2, 2018. “[T]he primary critical path ran through securing permits, preconstruction preparation, and set up and mobilization prior to diverging what are, effectively, interior and exterior construction paths.” (*Id.* at 13)

230. By schedule update NH06, the Building 253 schedule had already slipped 69 calendar days and project completion had slipped 66 calendar days. “Activity 12268, Demolition of Existing Slab on Grade-Bldg 253, was the activity that commenced the most critical path float, followed by support area footings, composite shop footings, gutter/downspout foundations, backfilling of foundations, dampproofing, and start of structural steel. . . .” (*Id.* at 14) Structural steel erection relied upon several predecessor activities including “demolition of existing slab on grade, support area footings, composite shop footings, gutter/downspout and FRP concrete shop” (*id.*). However, structural steel erection did not rely upon “the existing hangar bay demolition, foundations within the existing hangar bay, miscellaneous concrete structures or dampproofing” (*id.*). The remaining critical path remained as reported in NH04 (*id.* at 15).

231. Appellant alleged 26 calendar days delay because of the foreign object damage (FOD) fencing. The delay was actually nine calendar days. Cutter stated the delay was October 26, 2015, through November 21, 2015, when completion actually occurred. However, enough FOD fencing was in place by November 4, 2015, which resulted in the nine days of delay “until the critical successor activity could proceed.” (*Id.* at 15) Further, Mr. McFadden’s report stated that, according to the COFD, it was ultimately Cutter’s responsibility to provide an acceptable design for the FOD fencing and the government approved the revised submittal on October 15, 2015, also allowing a relaxed specification to allow for the revised submittal in a timely manner (*id.*).

232. Mr. McFadden also reviewed the FAA permits, agreeing that the government was responsible to provide the FAA permit associated with the new hangar building and Cutter was responsible to obtain the construction crane permit. The expert reiterated what was stated in the drawings and largely matched what the

CO stated in the COFD regarding the dates the permits were requested and granted. (R4, tabs 35 at 11-13, 60.000 at 15-16).

233. The FAA permits and structural steel procurement are tied together. For the structural steel procurement, Mr. McFadden explained, “The structural steel had to commence delivery by January 29, 2016 to support the start of steel erection, however, the structural steel procurement process (submittal preparation, approval, fabrication and delivery) was not logically tied to the start of steel erection within schedule update NH04.” (*Id.* at 22) His report opined that if the structural steel had been properly tied to the start of the structural steel erection, the criticality of the submittal would have been clear in schedule NH04 but, as it stood, steel was not delivered until mid-March 2016, far after the January 29, 2016 critical start of steel erection (*id.*).

234. Mr. McFadden opined that the FAA Building permits (the government’s responsibility) were complete by January 22, 2016, which would have allowed critical steel erection starting January 29, 2016. However, all of the other predecessor work was not completed timely, including the VOR System shutdown required with the FAA crane permit (which was appellant’s responsibility). Thus, Mr. McFadden found no merit with Cutter’s 45 calendar days of delay for the FAA building permits. (*Id.* at 25) Further, Mr. McFadden noted that the RECON analysis concluded that the FAA building permit caused zero calendar days of delay (*id.* at 25 n.6).

The RECON analysis Mr. McFadden referenced stated that the activity delay (measured from the planned start of steel erection, January 29, 2016, until the FAA permit was received with authorization, March 14, 2016) was 45 calendar days (R4, tab 26 at 25). In contrast, “[t]he project delay account[ed] for concurrent and prior delays, re-sequenced logic and activity production” (*id.* at 25). The RECON analysis continued, “The project delay is *0 calendar days* because of the late FAA permit” (*id.* (emphasis in original)). Further, in its breakdown of delays chart, RECON reiterated that the FAA Permit was 0 days of delay, 0 days of concurrency, and 0 days of non-concurrent project delay (*id.* at 37).

235. Mr. McFadden’s report explained that Cutter alleged 44 calendar days of delay on the critical path slab on grade demolition because of a power outage (R4, tab 60.000 at 25). On January 12, 2016, Cutter caused an electric outage within the hangar, which appellant reported was severed. However, the saw cutting subcontractor was not present on site that day, according to the government’s expert. “Additionally, the live electric conduit in question resided beneath the existing floor slab that [appellant’s subcontractor] had previously saw cut directly over in this area.” (*Id.* at 25) Thus, Mr. McFadden calls this issue “Hangar Power Outage – Under Slab Electric Break” instead of underslab severing (*id.*) He opined Cutter was actually responsible for the power outage because Cutter and its subcontractors failed to remove the underlying conduit during the slab demolition and failed to protect,

disconnect, and avoid the interruption of service. Further, during subsequent slab removal by appellant's subcontractor, "the wire terminal was pulled off the transformer a distance away from the removed conduit causing fluid to leak from the transformer, and . . . the underlying conduit was ripped up from beneath the adjacent hangar slab during slab removal." (*Id.*) According to Mr. McFadden, it was also unclear why the main electrical service remained energized during slab removal when the electrical subcontractor was onsite in October and November for other demolition work (*id.* at 27). This is especially problematic because specification 0241000 Demolition, subsection 3.1.2.1 indicated that demolition would not commence until all utility disconnections had been made (*id.*).

236. Mr. McFadden opined that Cutter overstated the 66-day NH04 to NH06 delay and that it should have been attributed "to the equipment and materials necessary to commence steel erection which was the responsibility of Cutter and its subcontractors" (*id.*).

237. In Mr. McFadden's second delay period, NH06 to NH07 schedule update, he opined that the Phase I completion and project completion had slipped nine calendar days (*id.*). He explained that no progress was made on the critical path item, Demolition of Existing Slab on Grade (*id.* at 27-28). "Following completion of slab on grade activities, the critical path transitioned into interior finishes" (*id.* at 30). The interior finishes time was reduced by overlapping with other activities that had previously been sequential (*id.* at 28). The steel erection began earlier than projected and overlapped with the sequential interior finishes, in reality (*id.*). Cutter adjusted some schedule issues, reducing ready-mix concrete materials from 100 days to five days, which Mr. McFadden classified as Cutter performing "normal schedule maintenance necessary in the schedule updating process" (*id.* at 29-30).

238. Mr. McFadden reviewed the column 12'D' impact in this NH06 to NH07 section, opining that protracted demolition of the existing slab delayed the start to excavation and backfill activities, rather than column 12'D' being the problem. He specifically stated

A comparison between schedule updates NH06 and NH07 indicates that the overall delay during this period was nine (9) calendar days. While about a week was initially lost during the excavation around column 12'D' for an emergency repair and investigation, work quickly resumed on the Composite Shop. The schedules indicated that the protracted demolition of the existing slab on grade delayed the start to the excavation and backfill activities for the composite shop foundation, downspout support foundation, damproofing and through retained logic the completion of

structural steel erection at the tail dock addition. Within NH07, the retained logic was effectively suspending the remaining steel erection work until May 6, 2016. The reality was that steel erection was not restrained by any interior predecessor work and steel erection on the new hangar bay addition (tail dock) progressed through this time period and eliminate any project delay in NH07.

(*Id.* at 35)

239. In Mr. McFadden's third time period, schedule update NH07 through NH08, the government's expert explained that Phase I completion slipped 24 calendar days and, in total, project completion slipped 22 calendar days due to excavation and backfill activities for the downspout support foundations (*id.* at 36-37). Additionally, work was being performed out of sequence without prior CO approval, which was required by the contract specifications (*id.* at 37).

240. In Mr. McFadden's fourth time period, by schedule update NH09, he calculated that Phase I completion slipped two days, project completion had slipped another four days, and that multiple activities had become critical. Now, the Tail Dock Structure—Install Metal Decking activity was driving the critical path but it was not shown in appellant's critical activities schedule. (R4, tab 60.000 at 41) This activity was tied into other activities which also became critical (R4, tab 60.000 at 42-43).

241. Mr. McFadden's report also again addressed the Column 12'D' repair in this section. The report explained that Modification No. P000001 was issued on May 20, 2016, to provide the temporary shoring and on May 31, 2016, the government provided planning designs for permanent repair because the final design was dependent upon the outcome of the core sample tests. Mr. McFadden explained that despite the unresolved issues with column 12'D', foundation work continued around the compositive shop area. (*Id.* at 46-47)

242. In Mr. McFadden's fifth timeframe, NH09 through NH10 schedule update, Phase I completion slipped 28 calendar days and project completion slipped 29 calendar days. Within the NH10 schedule update, activities driving the critical path were concrete, asphalt testing and inspection.

While schedules indicated that inspection/testing and material supply activities became the drivers to the critical path work, other performance issues arose with construction tasks that included ongoing correction of structural steel deficiencies, concrete mix submittals,

material conformance issues with installed foundation walls and under slab conduit, and subcontractor availability. These performance issues were detrimental to the ongoing construction of both the new tail dock addition, as well as construction within the existing hangar bay. While non-construction activities improperly drove the critical path within the schedules and misrepresented the delay during this period, CPMI considers the time lost during this period the responsibility of Cutter for the performance issues of its subcontractors.

(*Id.* at 52-53)

243. In Mr. McFadden's sixth time period, Schedule Update NH10 through NH11, the government's expert opined that Phase I and project completion slipped another 29 days because no significant progress was made on the critical path activities in that time. "The entirety of the 29 calendar day delay to Project Completion during this period is the result of erroneous and protracted paving inspection and testing activities and ready mix concrete foundation activities." (*Id.* at 53) Mr. McFadden opined that the tasks were not properly tied to installation tasks or were "not properly statused so as to avoid becoming critical path activities" (*id.*). He further opined that, "[w]hile non-construction activities improperly drove the critical path within the schedules and misrepresented the delay during the period, CPMI considers the time lost during this period the responsibility of Cutter for the continued performance issues of its subcontractors" (R4, tab 60.000 at 57).

Specifically concerning the fire protection subcontractor for the fire pump, Mr. McFadden summarized that Cutter submitted CCOR 253-021 on August 25, 2016, requesting to downsize the fire pump after raising concerns in earlier RFIs. Appellant submitted a value engineering cost proposal with provided a net credit of \$26,315. However, the government could not approve the cost savings until electrical work was addressed, and informed appellant of that fact on September 16, 2016. On October 11, 2016, the government provided a design to address the electrical work. Mr. McFadden opined that Cutter and RECON measured the fire pump delay issue from October 1, 2016, and assumed that the fire pump issue caused the entire delay but disregarded that the fire pump was not on the critical path and "ignored the installed work deficiencies, slow progress and material conformance issues of Cutter and its subcontractors that had impacted critical path work during the project." (*Id.* at 65)

244. In its seventh time frame, Schedule Update NH11 through NH13, the Phase I completion and project completion slipped another 62 days. Asphalt and concrete testing and inspection activities slipped 68 days but Cutter mitigated that by reducing the overall duration of the interior finish activities. Mr. McFadden explained

that “[t]he entire 62 calendar day delay to Project Completion during this period is the result of the erroneous logic that forced the paving inspection and testing activities onto the critical path.” (*Id.* at 58) Because the tasks were not properly tied to installation tasks or properly stashed to avoid becoming part of the critical path, the critical path was corrupted by the secondary support tasks (*id.*). Mr. McFadden considered the delays to be appellant’s responsibility (*id.* at 64). We agree and determine that the delays were Cutter’s responsibility.

Regarding the column 12’D’ issue, appellant submitted in its November REA that it “measured the delay for the column 12’D’ issue as the difference between the amount of schedule slippage prior to the discovery of the issue and the schedule slippage as of October 1, 2016 within schedule update NH13” (*id.* at 61). Mr. McFadden stated that appellant measured this at 153 calendar days of delay and appellant “assumed that the column 12’D’ issue caused the entire delay to the project, which disregarded the work completed in the Support Area and ignored the installed work deficiencies, slow progress and material conformance issues of Cutter and its subcontractors that had impacted critical path work during the project” (*id.*). We agree with Mr. McFadden and find that Cutter ignored multiple causes of delay attributable to Cutter.

Regarding the FAMNS, Mr. McFadden noted that on October 5, 2016, Cutter submitted a proposal to use Monaco instead of the originally specified Simplex System. The location and control panel remained unchanged. The Monaco panel required an additional eave-mounted antenna. Cutter’s subcontractor had already begun the rough-in of the system based on the contract documents. Neither the system nor installation of the panel were on the critical path at the time of the Cutter’s October 5, 2016 proposal. (*Id.* at 64) We agree, and find that neither the system nor installation of the panel were on the critical path at the time of Cutter’s proposal.

Mr. McFadden noted that Cutter and RECON measured the delay for the FAMNS as 197 days, with an assumption that this delayed the entire project. However, Cutter disregarded that the rough-in of the fire alarm system or the fire alarm panel were not on the critical path and ignored work deficiencies, slow progress, and nonconformance with the specifications that impacted the critical path. (*Id.* at 65) We agree and find that Cutter ignored other delay factors.

245. For its eighth time period, Schedule Update NH13 through NH14, Phase I and project completion both slipped additional calendar days because “asphalt and concrete testing and inspection activities were still driving the critical path with a total float value of -170 workdays” by NH14 (*id.* at 66). While the completion date of asphalt and concrete testing and inspection activities slipped 29 calendar days, the slabs on grade complete milestone slipped just 23 calendar days, which suggested that the “electrical under slab activities that were driving the slabs on grade activity path

were progressing independently of the Support Area Slabs activity that was impacted by the delays to the asphalt and concrete testing activities” (*id.* at 66-67). “The 23 calendar day delay to Project Completion during this period within schedule update NH14 [wa]s the result of the erroneous logic that forced the paving inspection and testing activities onto the critical path” (*id.* at 67). This caused the critical path for NH14 to be corrupted by the secondary support tasks (*id.*).

246. Further, the painting structural steel task was not properly placed in the schedule. The recorded start of structural steel painting appeared to be October 3, 2016, and was included within “the interior construction/finishes portion of the schedule” which caused the painting work to be out of sequence. (*Id.* at 67-68) In reality, the building enclosure was dependent upon the completion of field painting and was also mischaracterized in the schedule. The mischaracterized painting tasks had no winter weather restrictions where the specification stated the exterior paint of the structural steel had a temperature range restriction of 50 to 95 degrees. (*Id.* at 68)

247. Mr. McFadden also reviewed the impact of column 12’D’ Repair, Under Slab Electrical Conduit, Grade Beam, and Trench Drains (*id.* at 68-75).

Regarding the grade beam, Mr. McFadden stated that Cutter submitted an inquiry on October 13, 2016, via “RFI #188 which inquired about the grade beam elevation east of column line 15’ and the elevation of the asphalt paving in the same area” (*id.* at 70). The government responded on October 31, 2016, informing appellant that it “could cut down or remove the grade beam at that location to accommodate the new paving” (*id.*). According to Mr. McFadden, it appeared that Cutter’s subcontractor “had already opted to vertically cut the grade beam just east of column line 15’ and not remove the top 8” as indicated by the contract drawings” and he provided a photograph, dated October 13, 2016, to demonstrate this (*id.* at 70-71). According to Mr. McFadden, the subcontractor demobilized from the project on October 18, 2016 (*id.* at 71).

248. For the trench drains, in particular, Cutter requested an extension to continue placing concrete throughout the winter season within a heated hangar, from October 15, 2016 to November 18, 2016 (R4, tab 60.000 at 72-73). The COR, Tetra Tech, and Cutter discussed the requirement for rebar and the width of the trench drains (*id.* at 73-74). However, Cutter did not comply with the rebar requirements, even though the discussion included that rebar was required for either cast-in-place or modular trench drains, which caused a work stoppage (*id.* at 74)

249. Mr. McFadden’s report considered the time lost for problems with the trench drains to be Cutter’s responsibility (*id.* at 74-75). “While the schedules continued to indicate that inspection/testing activities were the drivers to the critical path work, other performance issues continued with the slow progress of foundation

work, non-conforming work with the trench drain installation and the painting of the structural steel prior to enclosure [none of which were] addressed within the contemporaneous schedules” (*id.* at 74). We agree with Mr. McFadden and find the lost time for the trench drains were Cutter’s responsibility.

250. For the ninth timeframe, Schedule Update NH14 through termination, Mr. McFadden opined that Phase I completion had slipped another 56 calendar days and project completion had slipped 57 calendar days (*id.* at 75). Mr. McFadden opined that the fire alarm panel was unresolved in November and December 2016 prior to termination but was not on the critical path during schedule update NH13 and remained off the critical path schedule update NH 16 (*id.* at 85). Erroneous logic in the schedule update pushed construction administration and paving inspection and testing activities onto the critical path, as previously noted (*id.* at 75). Further, the critical path for NH16 was corrupted by the secondary tasks (*id.* at 75-88).

251. Regarding ACM dust, according to Mr. McFadden, Cutter notified the government of the results of a dust sampling test on November 23, 2016. The sampling test was performed on September 8, 2016, and a laboratory analysis was completed on September 22, 2016, indicating the presence of asbestos and heavy metals in the dust at four locations within the roof support beams. Work had continued through November after the laboratory analysis was complete. Still, appellant asserted that the slippage was from October 1 through December 29, 2016. Appellant’s alleged delay disregarded other work being completed during this period due to shutdowns due to temperature restrictions of weather sensitive work. (*Id.* at 86-88)

252. Regarding appellant’s contention that the insulated wall panels also caused delay, Mr. McFadden’s report explained that on September 16, 2016, Cutter’s metal panel subcontractor notified appellant about a problem with the drawings that impacted the attachment and size of the translucent wall panels. On September 22, 2016, Cutter coordinated with its translucent panel supplier to determine if the size could change, and the subcontractor responded that it could but it would require a cost increase. On September 30, 2016, Cutter notified the government about the dimension issue. The government and the A&E contractor considered a solution that would resolve the issue without the additional cost. (*Id.* at 88-89)

“On an October 6, 2016 conference call, the architect presented the simplified solution with angles attached to the existing girts to extend the bearing surface inward at the translucent panels, without making modifications to the existing girt steel” (*id.* at 89) The design was also sent to appellant on the same date. Cutter acknowledged the design. On October 7, 2016, Cutter’s metal panel subcontractor confirmed that it had completed the revised cut list for the adjacent metal wall and the panels were ready to be fabricated. (*Id.*)

On October 12, 2016, Cutter discussed changes with the translucent panel subcontractor, exchanging communication that jamb details were never installed, detailed, or fabricated. That same day, the subcontractor informed Cutter that all of the details concerning drawing S-516 were excluded from the subcontract. “Those details included the translucent panel jambs, door frames (2 each) and louver frames (10 each) that attached to the structural steel at the tail dock addition.” (*Id.* at 89-90) During October and November, more communication occurred between appellant and the government to discuss the girt elevations and spacings. On December 15, 2016, appellant executed a change order to install the missing jambs at the translucent wall panels. Cutter did not provide the government with any cost proposals about this prior to the termination. (*Id.* at 90)

Mr. McFadden pointed out that Cutter waited two weeks to formally notify the government of the problem. Cutter chose a more complicated design. “Then, after weeks of discussion, the resolution ultimately reverted back to the simplified design that the architect had conceived the same day of the notification. The alleged delay also disregards the progress of other work during this period and the status of the project at termination, as the building enclosure and airfield paving work had been shut down due to temperature restrictions on weather sensitive work.” (*Id.* at 90)

253. More broadly, in the conclusion of his report, Mr. McFadden opined, “Within the REAs, Cutter has formulated its claimed costs around compensable delay and its complaint allegations around an improper termination for default” (*id.* at 91). He further stated that Cutter did not incur the extended general conditions costs associate with the delays and that Cutter’s delay methodology was faulty. Specifically, “Cutter and RECON’s delay methodology ignores critical path method schedule analysis by attributing the entire alleged delay for each issue as the difference between the project completion date before the issue arose and after the issue was complete (or at termination).” (*Id.* at 91) He argued that Cutter did not make any effort to determine if or when an issue became critical and that RECON explained the delays as concurrent. He further opined that the reality may have been that the activity delay had no correlation with the project delay because other items were controlling the critical path. (*Id.* at 91)

We agree with Mr. McFadden’s analysis about Cutter ignoring the critical path and find that Cutter failed to demonstrate that the delays they claimed were on the critical path.

254. One of the major flaws in Cutter’s delay analysis was associated with concrete pavement, where specification section 32 13 11, subsection 3.3.4 addressed restrictions on cold weather (*id.*) Cutter’s lack of establishing a winter calendar to exclude airfield paving between October 15 and April 15 was detrimental to its

performance because it pushed paving into the Spring of 2017 (*id.* at 91-92). The work moved into the exclusionary winter period as the schedule began to slip and caused 71 calendar days of delay for five activities: 139 Place & Finish Slab on Grade – Tail Dock; 145 Place & Finish Slab on Grade – Exist Hangar Bay; 10169 Pour Slabs on Grade; 154 FRP Aircraft Apron Pavement; and 70121 Site Concrete/New Apron. (*Id.*) We find that Cutter failed to account for the cold weather restricted period and caused the delay in these areas.

255. Mr. McFadden also opined that “the schedule projection for the corrected NH10 schedule pushed the start of finishes for the hangar into the spring of 2017 and introduced another 169 calendar days of delay for the performance of work through July 1, 2016, over the flawed NH10 schedule” (*id.* at 93). This is significant because Cutter’s schedules should have indicated by July 1, 2016, that the finish work for Hangar 253 was already being pushed into the spring of 2017. Based on this, “the issues that arose between July and December 2016 would not have impacted the completion date, as finish work would not commence until spring of 2017 and months of float were available to resolve the alleged delay issues within the Cutter REAs that arose in the second half of 2016.” (*Id.* at 93)

256. Overall, Mr. McFadden opined that appellant caused 301 days of delay according to the baseline schedule between when Phase 1 of the contract should have been completed and what would have been completion of the contract, which included the 71 days of delay from schedule update NH08 and 169 days of delay from schedule update NH10. (R4, tab 60.000 at 143) As discussed above, we find Mr. McFadden’s analysis to be more persuasive than Cutter’s and hereby adopt his findings on delay as ours.

THE PARTIES’ BRIEFED POSITIONS

A. The Government’s Post-Hearing Brief

The government essentially followed the termination notice in its position. It outlined five reasons for the termination for default: 1) appellant failed to adequately investigate the site conditions which led to what appellant classified as design deficiencies; 2) appellant failed to conduct adequate inspections of its own construction, leading to deficiencies that required repair; 3) appellant conducted shoddy workmanship; 4) appellant provided worthless schedules which both experts recognized and addressed; and 5) the CO lost confidence that appellant could complete the contract in the time provided (gov’t br. at 99-100).

The government reviewed the burdens for both parties. The government also summarized testimony provided by the various witnesses. (*Id.* at 101-06) The government heavily relied upon *ECC CENTCOM Constructors, LLC*, ASBCA

No. 60647, 18-1 BCA ¶ 37,133 to demonstrate that it met the burden of proving appellant did not perform in a timely manner so the burden shifted to appellant to demonstrate that non-performance was excusable (*id.* at 101-02). The government argued that Cutter is similar to the appellant in *ECC CENTCOM* because the Board noted that it believed it was “unlikely that a time extension request covering only a fraction of the time needed to complete would have any effect on the outcome” (*id.* at 102 (quoting *ECC CENTCOM*, 18-1 BCA ¶37,133 at 180,715). The government also noted that in *ECC CENTCOM*, the Board found that the contracting officer performed the evaluation factors in FAR 49.402-3(f) but that those factors were not a prerequisite to accomplish a valid termination for default (*id.*). The government also relied upon *MOQA-AQYOL JV, LTD.*, ASBCA Nos. 57963, 60456, 17-1 BCA ¶ 36,909 at 179,826 and *Donald L. Mooney Enters., LLC*, ASBCA No. 60574, 18-1 BCA ¶ 36,941 at 179,969. The government argued it had several reasons to terminate the contract. (*Id.* at 102-04)

The government contended that it had met the prima facie case for a termination for default because “appellant failed to complete work on time; failed to proceed with work after the government rejected appellant’s proposed changes to the project; and failed to furnish some submittals and failed to gain approval over other submittals” (*id.* at 106).

The government then summarized how appellant failed to follow terms and conditions of the contract (*id.* at 107-09). This essentially followed the contracting officer’s termination for default notification.

The government argued that Mr. Berner selectively analyzed delay without analyzing delays caused by appellant (*id.* at 111-13). Additionally, the government urged us to give no weight to Mt. Berner’s analysis because he utilized impacted methods to justify the critical path when “[i]t is well established that this method is of little value” (*id.* at 113-14 (citing *Titan Pacific Cons. Corp. v. United States*, 17 Cl. Ct. 630, 637-38 (1989), *aff’d* 899 F.2d 1297 (Fed. Cir. 1990) (Table)). The government continued to criticize the expert report and schedule (gov’t br. at 114-17).

Regarding the specific amount of time required to complete the project, the government argued, “The record in this case shows that by the summer of 2016, completion of this project was already pushed from February into the Spring of 2017, and the issues that arose between July and December 2016 would not have impacted the completion date” (gov’t br. at 119).

The government argued that Cutter’s expert used an “as-planned” analysis and “cherry-picked two issues and inserted them back into the schedule to argue that they altered the critical path” (*id.*). The government argued that expertise was not needed to see the flaws in appellant’s expert. The government further argued that Cutter’s

expert reports by RECON included in the REAs were also not compelling because RECON based its report on a schedule that was not approved by the government. (*Id.*)

In contrast, the government argued that its expert fully explored the critical path and then tracked it through each of the schedules that Cutter submitted. The government argued that by summer 2016, completion was already pushed from February to the spring of 2017. The government argued it was justified in its decision “because it had justifiably lost faith in both appellant’s ability to timely complete the project and appellant’s ability to complete the project in accordance with the Contract requirements.” (*Id.*)

The government requested the Board deny ASBCA Nos. 61020 and 61146 related to the termination for default; dismiss as moot the delay claims in ASBCA Nos. 61021, 61061, and 61278, and deny the breach claims in ASBCA Nos. 61021, 61061, and 61278 (*id.* at 120).

B. Cutter’s Post-Hearing Brief

Cutter argued that it “demonstrated entitlement to an excusable time extension of at least 299 days.” (App. br. at 1) Appellant argued that the government failed to respond to its concerns and ignored design errors (*id.*). Cutter argued that it resolved every alleged issue concerning workmanship (*id.*).

Appellant’s first main argument was that there was an inherent unfairness in the way Cutter was treated during the contract, including that Civil Engineering and the COR seemed to be overly critical of Cutter and design issues on the part of the government or design contractor. Citing an unpublished Court of Appeals for the Federal Circuit case, appellant argued that the Board “must draw an adverse inference” because the contracting officer did not testify even though he attended the entire hearing. (*Id.* at 2-3 (citing *White Buffalo Const., Inc. v. United States*, 546 F. App’x 952, 956) (Fed. Cir. 2013))⁸

Appellant reviewed the burdens for each party and concluded the government did not meet its burden to demonstrate that the termination was appropriate because the government failed to determine whether appellant could complete its work within the time remaining in contract performance and that the government used the default termination to rid itself of having to deal with appellant. Appellant further contended that even if the Board determined that the government’s actions were appropriate, Cutter had demonstrated that the delays were excusable and thus the termination

⁸ *White Buffalo* does not, in fact, say this. Rather, it makes the exact opposite point, which is that the adverse inference is permitted, but not required. See 546 F. App’x at 956.

should be converted to a termination for convenience. (App. br. at 3-9) Specifically, while summarizing the reasons it believed Cutter was terminated, appellant opined, “The [g]overnment found the scapegoat for defective design in Cutter” (*id.* at 7).

Appellant pointed out that Cutter resolved alleged problems with workmanship prior to the government’s termination for default and should not be held accountable for those items. Appellant detailed those issues essentially as Cutter did in its communication with the government as outlined in the Facts section, above. (*Id.* at 9-11)

Appellant argued that it was entitled to a 299-day excusable delay and listed the following bases for that contention: 1) FAA permit delays (46 days); 2) column 12’D’ unforeseen conditions delays (at least 293 days); 3) unforeseen Building 253 conduit severing caused delay (at least 150 days); 4) fire suppression system design conflict delays (at least 295 days); 5) FAMNS vendor change (at least 305 days); 6) grade beam design conflicts and changes (at least 126 days); 7) insulated metal wall panel design conflict delays (at least 256 days); 8) trench drain design conflict (at least 181 days); and 9) discovery of contaminated settled dust (at least 143 days) (app. br. at 12-19).

Appellant also explained why it believed it was entitled to an excusable delay based on an analysis of its own expert and criticisms of the government’s expert. Specifically, appellant criticized the government’s expert because he “did not follow the AACE Recommended Practice No. 29R-03 Forensic Schedule Analysis in preparing the CPMI Report (A397)” and detailed what it found as problematic (*id.* at 20-21).

Appellant closed by requesting the Board not consider any post-termination issues in deciding the appeals (*id.* at 22-27).

C. The Government’s Response

The government responded to appellant’s opening brief, acknowledging it had the initial burden of proving the termination was appropriate and pointed to the termination notice the contracting officer sent, the government’s pleadings, the pre-hearing brief, and the opening post-hearing brief as documentation for why it believed it had met that burden. The government stated, “Simply put, the most straightforward reason for termination was appellant’s inability to complete the contract within the time remaining.” (Gov’t resp. at 2)

The government reviewed again the five reasons for the termination for default (*id.* at 3). The government then argued that post-termination issues were appropriate to consider and discussed why it believed appellant’s cited caselaw was insufficient to overcome such consideration (*id.* at 3-6).

The government then largely followed its opening brief to address appellant's arguments (*id.* at 6-37). The government conceded that many workmanship issues were resolved prior to termination but explained that the issue was not that they were resolved eventually. Instead, the issue was that the government had to point them out and argue about how to resolve the situation before the issues would eventually be resolved. (*Id.* at 7) The government again provided detailed explanations of each of those situations (*id.* at 8-12).

Next the government reviewed again why the delays to which Cutter thought it was entitled were not excusable (*id.* at 12-28). The government responded to allegations appellant raised such as the B253 Conduit Severing where appellant sought a 137-day excusable delay. The government stated that if appellant had simply followed the specifications, it would not have had the issue. "Instead, appellant over-excavated the area leading to the severing of the conduit . . ." (*Id.* at 18) Further, the government responded to allegations that the government did not help appellant get pricing from a subcontractor for the fire alarm vendor change; however, the government pointed out that there was no evidence that appellant ever requested such assistance and only requested contact information (*id.* at 22). The government also pointed out that in several instances, the amount of delay appellant requested was far greater than the amount of excusable delay initially requested (*id.* at 20- 24, 27-28).

The government addressed appellant's assertion that its expert did not rebut appellant's expert. The government responded, "There was no reason to attack his testimony at hearing because it should be afforded no weight, as borne out by the facts." (*Id.* at 29) The government pointed out that Mr. Berner had never testified before the Board. Further, the government criticized, again, Mr. Berner's impacted as-planned methodology as being of limited value. (*Id.*)

In contrast, the government summarized why its expert was more reliable. The government explained why the Board should not be swayed by appellant's argument that Mr. McFadden did not follow AACE Recommended Practice No.29R-03. Specifically, the government argued that Mr. McFadden explained at the hearing that this recommended practice is simply a recommendation, not a requirement. The government pointed out that its expert was a member of AACE and the American Society of Civil Engineers. The government also pointed out that both expert reports had limitations because of the problematic schedules. (*Id.* at 30) The government then argued that its expert's analysis precluded a finding that appellant was entitled to an extension, especially because neither the schedule nor Mr. Berner took into consideration work precluded by the winter moratorium, which ran from October 15, 2016 through April 15, 2017. Thus, regardless of any delay issues with column 12'D' or other issues, appellant caused or contributed to many of the delays based on the winter moratorium. (*Id.* at 31) The government contended that if it had allowed

appellant to continue working during the remaining time in the winter moratorium, 105 days, it likely would have reduced its amount of delays but not eliminated them; however, the entire argument was speculative and subjective because appellant simply failed to properly maintain its schedules.

The government closed by addressing issues the Board should consider that it found post-termination (*id.* at 32-37). The government contended the following: First, Cutter failed to tighten bolts in accordance with government direction to only use turn of nut method in places where the Torsion Control wrench could not be used. The government discovered that the next contractor was able to use a Torsion Control wrench to tighten some bolts and some were not tightened sufficiently (*id.* at 33-34);

Second, Cutter improperly installed metal decking, leaving gaps when the specification called for butted ends or end laps with minimum overlap (*id.* at 34);

Third, Cutter did not achieve proper soil compaction. The follow-on contractor had to excavate, bring in new material, and compact the soil again (*id.*);

Fourth, the government was required to secure Building 253, even though appellant's own third party inspection identified rusted bolts as early as June 23, 2016 (*id.* at 35);

Fifth, there were issues with the lintel bearing plates in Building 254 because there were visible cracks in the walls (*id.*);

Sixth, the underslab conduit was improperly installed (*id.*);

Seventh, the steel girt was misaligned, which a licensed surveyor verified after termination (*id.* at 36);

Eighth, Cutter did not properly demolish the grade beam, concerning the thickness and levelness of the grade beam removal. The follow-on contractor had to perform remedial work to correct the issue. (*Id.*); and

Ninth, the government argued that the trench drain sewer line and the footing alignment were two more examples of appellant's poor workmanship (*id.* at 36-37).

D. Appellant's Post-Hearing Reply

Appellant remained firm in its opinion that it was entitled to an excusable time extension of at least 299 days. It argued that bad faith by the government was the problem. Appellant reiterated its argument that the government failed to meet its burden to demonstrate that the termination for default was appropriate, arguing that the

government's case relied upon three CORs and again stated that an adverse inference "must" be drawn because the contracting officer and members of the design team did not testify. Appellant's reasoning for this was the internal disputes between government agencies and the design contractor. (App. reply at 2-3)

Appellant stated that Cutter complied with FAR 52.236-03, Site Investigation and Conditions Affecting the Work, and argued that the Government is expecting the Board to overturn *Spearin's* 100-year legacy which "provides that if a government contract contains detailed design specifications, as opposed to performance specifications, the government gives an implied warranty that if the specifications are followed an acceptable result will be produced" (app. reply at 3-4 (quoting *Rick's Mushroom Serv., Inc., v. United States*, 521 F.3d 1338, 1344 (Fed. Cir. 2008))). Appellant stated Cutter did conduct reasonable investigations and discovered several issues but not all of them (app. reply at 4).

Appellant also argued that it followed FAR 52.246-12, Inspection of Construction, because it corrected all six workmanship issues prior to termination. Appellant complained that the government relied upon post-termination work the government completed to fix items that Cutter could have easily fixed if it had not been terminated. (*Id.* at 6-7)

Appellant also asserted that it complied with FAR 52.236-5, Material and Workmanship by stating that the CORs were unreliable as witnesses to testify about these issues (*id.* at 7-8).

Appellant also opined that it complied with FAR 52.236-15, Schedule for Construction Contracts, because Cutter submitted and the government approved the schedule, which was then updated monthly. Appellant stated that it is disingenuous for the government "to blame Cutter for not tracking each and every individual impact." (*Id.* at 8)

Next, appellant stated the government's caselaw was not applicable and was distinguishable from these appeals. Appellant stated the government's reliance on *EccCentcom Constructors, LLC*, 18-1 BCA ¶ 37,133 had at least three material distinctions from these appeals: 1) the contractor had completely missed the delivery date (not anticipatory); 2) the government in these appeals admitted it did not retain a scheduler to perform a schedule analysis for Claim 1 or analyze time extension requests; and 3) the government interpreted Cutter's time extension requests as admissions that work could not be completed on time. (App. reply at 10)

Appellant instead suggested the Board follow *Lisbon Contractors, Inc. v. United States.*, 828 F.2d 759 (Fed. Cir. 1987) where the Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims decision that the government

wrongfully terminated the contractor for default. Appellant opined that the government was required to, but did not, “undertake a study to determine whether the contractor could complete the work within the required time or determine how long it would take a follow-on contractor to do the work.” (App. reply at 10-11 (quoting *Lisbon*, 828 F.2d at 766) Further, appellant argued that the government did not present any evidence showing the amount of time the government thought it would take for Cutter to complete the work.

Appellant also reviewed other caselaw the government cited and argued why it was distinguishable from these appeals (app. reply at 11-14).

Appellant argued that it demonstrated that it was entitled to excusable delay because “the [g]overnment failed to proffer credible evidence demonstrating that Cutter delays impacted the critical path” and that any delays for which Cutter was responsible were either not on the critical path or were concurrent with government delay (*id.* at 14). Appellant argued the FAA permit delays, hazardous dust abatement delay, metal wall panel design conflict delay, grade beam delay, trench drain delay, painting delays, column 12’D’ unforeseen conditions delay, and Building 235 underslab conduit delay were instances of the concurrent or government-caused delays. (*Id.* at 14-20)

Appellant contended that it provided the government with timely written notice of the excusable delays. Appellant alleged that instead of addressing the timely communication, the government terminated without responding to the first claim or providing reasonable extensions for unforeseen conditions and for design deficiencies that impacted the critical path. Again, appellant explained several areas that it believed adequate notice was provided, including FAA permit delay, column 12’D’ delay, Building 253 underslab conduit sever, fire suppression system delay, fire alarm mass notification system delay, grade beam delay, metal wall panel delay, trench drain delay, and contaminated settled dust delay. (*Id.* at 20-23)

Finally, appellant reviewed why the Board should consider its expert with substantial weight. Appellant stated the Board has accepted the impacted as-planned analysis in other appeals and was an appropriate methodology. (*Id.* at 23-27) Appellant again criticized the government’s expert, stating his analysis was “fatally flawed” (*id.* at 27).

DECISION

The legal standards are well-established in termination for default appeals. The termination for default clause, incorporated by reference into the contract (*see* finding ¶ 8) states in relevant part that:

If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work . . . that has been delayed.

FAR 52.249-10(a). The clause further states that a contractor's right to proceed shall not be terminated: 1) if the delay arose "from unforeseeable causes beyond the control and without the fault or negligence of the Contractor," such as acts of God, acts of the government, unusually severe weather, etc.; and 2) the contractor notified the contracting officer of the delay and the causes of the delay *within 10 days of the beginning of a delay, in writing*. FAR 52.249-10(a)-(b). (emphasis added). "The government bears the burden to prove that its termination was justified." *ECC CENTCOM Constructors, LLC*, 18-1 BCA ¶ 37,133 at 180,711 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987)); *New Era Contract Sales, Inc.*, ASBCA No. 56661 *et al.*, 11-1 BCA ¶ 34,738 at 171,022. If the government meets its burden of demonstrating that the contractor has not performed in a timely manner, the burden shifts to appellant to demonstrate that the nonperformance was excusable. *ECC CENTCOM Constructors, LLC*, 18-1 BCA ¶37,133 at 180,711 (citing *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996)).

"In default cases involving a contractor's failure to make sufficient progress, the government may justify the termination by demonstrating that there was no reasonable likelihood that the contractor could complete the entire contract in the time remaining for performance." *MOQA-AQYOL JV, LTD.*, 17-1 BCA ¶ 36,909 at 179,826. If the government meets its burden to prove the termination was justified and the burden shifts to appellant, appellant must demonstrate that it would have finished the project in the time allocated to any excusable delays. *See id.*

In addition to timeliness issues, other material breaches of the contract may also support a termination for default. *Quality Trust Inc.*, ASBCA No. 59983, 16-1 BCA ¶ 36,368 at 177,276 (citation omitted). Thus, in *MOQA-AQYOL*, in which we were presented with evidence of "an across the board failure of [the contractor] to meet its contractual obligations", we reviewed multiple cases from the Board and other venues where poor performance manifested in such things as failure to provide a specified roof and to correct deficiencies, poor performance and inadequate quality control and other chronic problems justified default determinations. 17-1 BCA ¶ 36,909 at 179,826 (citations omitted). Moreover, "[t]he government need only prove one sufficient basis for the termination for default." *Id.* (citing *Quality Trust Inc.*, ASBCA No. 59983, 16-1 BCA ¶ 36,368).

For the reasons set forth below, we have determined that the government demonstrated that the termination was justified. Further, we have determined that Cutter did not demonstrate that the delays were excusable or attributable to the government once the burden shifted.

I. The Termination Was Proper

Here, the government met its burden to prove the termination was justified for multiple reasons: 1) Cutter failed to provide the appropriate level of project management and quality control, leading to delays; 2) Cutter did not follow specifications on multiple occasions; 3) Cutter did not maintain adequate schedules which led to a failure to maintain, or even identify, a critical path; and 4) Cutter failed to provide assurances or any explanations for the delays to allow the contracting officer to understand why they happened or how they would be prevented in the future. These reasons largely echo those which we saw *MOQA-AQYOL* and justified the default there. *See* 17-1 BCA ¶ 36,909 at 179,828 (citations omitted). As demonstrated below, Cutter was approximately 8 months, or approximately 240 days, behind schedule by the time of the termination. Further, even if we had not found Cutter responsible for the substantial delays here, its repeated failure to follow the specifications would have provided an independent basis for us to rule for the government, that the termination was justified. *See Quality Trust*, 16-1 BCA ¶ 36,368 at 177,277 (“[T]he government need only prove one sufficient basis to justify its termination for default.”).

A. Cutter Failed to Provide the Appropriate Level of Project Management

Similar to the situation in *MOQA-AQYOL*, the record here indicates that Cutter did not have the project level management necessary to successfully perform this contract in the time allotted. *MOQA-AQYOL JV, LTD.*, 17-1 BCA ¶ 36,909 at 179,829. As early as December 2015, the COR expressed concerns with Cutter’s Quality Control Manager and that the Site Superintendent had been replaced (finding 26). The COR estimated that Cutter was already three percent behind schedule at this early date but could not provide a definite estimate without an approved schedule (*id.*). As late as November 17, 2016, Cutter noncommittally agreed it would be “attempting to bring another team member on board by the end of the year” to assist with quality control (finding 79).

The government expressed concerns about mismanagement several times throughout the performance of the contract (*see, e.g.*, findings 26-27, 70). Further, government witnesses testified about the mismanagement (*see, e.g.*, findings 138, 165, 171). While the government conveyed concerns about the project manager to Cutter and Mr. Dwyer, the project manager was partially ineffective because he was not

allowed to make decisions. When Mr. Dwyer was on site, he acted as the project manager instead of as the CEO. (Finding 138)

Some of the problems with Cutter's management were reflected in its handling of the submittal packages. Submittal packages were frequently late which caused government reviews to become emergencies. (Finding 145) Further, Cutter used the RFI system to argue with the government and object to specifications frequently (finding 139).

Management problems were also evident when the government discovered that Cutter caused a 10-day delay by failing to execute a geotechnical firm and perform tests on the subgrade soils. Cutter ultimately replaced its site supervisor responsible for this failure due to concerns about his experience and knowledge. (Finding 158) His experience and knowledge should have been known by Cutter before it placed him in his position of responsibility.

Additionally, management problems were evident in that appellant relied upon the government inspections to discover discrepancies rather than finding them itself. This was a significant problem because government personnel and inspectors were not on the site at all times (finding 148). For example, it was the government, not Cutter, which found the problem with the conduit hit in Building 254 (finding 147). It was also the government, not Cutter, which discovered the discrepancy of Cutter using 4,000 PSI concrete instead of the 5,000 PSI concrete that was required by the contract (finding 148).

We credit the testimony of the Base Civil Engineer who stated that Cutter did not manage its subcontractors appropriately and that its practice of only hiring one subcontractor at a time instead of working on multiple portions of the contract with multiple subcontractors negatively affected its ability to get work done in a timely manner. (Finding 171)

Finally, other evidence of mismanagement occurred because Cutter personnel across the board were not at the job site when they were expected to be present. One example, previously mentioned, was that Cutter's Quality Control Manager did not know that the conduit was cut in Building 254, indicating that he was not on site at the time (finding 147). In fact, the government officials complained that they most frequently saw the Quality Control Manager sitting in his office instead of being on the site to discover any inconsistencies (findings 147, 171). Further, as found above, work was "at a standstill" in December 2016 due to the absence of subcontractors on site that month (finding 155); and Cutter demonstrated a significant lack of urgency in this behind-schedule construction contract in that workers left at 3:30 p.m. every Monday through Thursday and at noon on Fridays, and declined to work weekends though it had the option to do so. (Finding 165)

This mismanagement thus played a large part in causing delays and limiting Cutter's ability to take action to remediate them. Hence, as early as October 30, 2015, Ms Bogue wrote a letter to Cutter informing the company that it was 30 days behind schedule (finding 144). Major Trembley annotated in COR Monthly Reports the continuously slipping schedule (findings 30 (10% or 45 days behind by February 2016); 31 (two months behind by March 2016); 32 (three months behind by May 2016)). By April 2016, Major Trembley stated that Cutter was 78 days behind schedule for Building 253 and 74 days behind schedule for Building 254 (finding 164). By June 2016, Cutter was approximately six months behind schedule (findings 33, 166). In July 2016, Major Trembley documented in his COR Monthly Report that Cutter was 34%, or more than six months, behind schedule (finding 34). By the summer of 2016, the schedule slipped another three weeks in one month and somehow five weeks in a four-week month (finding 168). By the end of summer 2016, after considering all of the delays the government testified about, Cutter was approximately eight months, or approximately 240 days, behind schedule (findings 30-34, 144, 164, 166, 168).

B. Cutter Did Not Follow Specifications on Multiple Occasions

Cutter failed to follow contractual requirements and specifications on multiple occasions and the government addressed this early in contract performance, informing Cutter of the problem, in writing, as early as November 2015 (finding 24). The CO again addressed the issue of Cutter not following the specifications in December 2015 (finding 27). In his February 2016 COR Monthly Report, the COR downgraded Cutter's quality of work to "marginal" and noted that the column line 1 footing depth was out of tolerance (finding 30). In his March 2016 COR Monthly Report, the COR noted that the government was concerned about the underslab conduit (finding 31). In his May 2016 COR Monthly Report, the COR continued to annotate his concerns with Cutter's lack of adherence to the specifications (finding 32). In his June 2016 COR Monthly Report, the COR again downgraded his rating of Cutter's performance to unsatisfactory because of failure to follow the specifications (finding 33). In his July 2016 COR Monthly Report, the COR continued to document Cutter's failure to follow specifications (finding 34).

Further, the contracting officer sent another letter of concern to Cutter on July 1, 2016, addressing lack of adherence to specifications (finding 55). On October 26, 2016, the CO sent a cure notice to Cutter, warning that its failure to adhere to plans and specifications endangered performance of the contract (finding 70).

While the government attempted to work with Cutter on complaints it had with the specifications, Cutter excessively used the Request for Information system and frequently asked for changes to the specifications (finding 139). The Base Civil

Engineer testified that this contract was different than any he ever worked on because there were arguments about the specifications and government engineers, the engineer of record, and the design contractor would all be saying the same thing, but Cutter would argue for something different (finding 173). On occasion, the government felt compelled to waive compliance with the contract specifications because did not believe Cutter would be able to move forward if it insisted on compliance with them⁹ (findings 140, 172). By June 2016, the COR was at the job site daily, commonly finding that work performed by Cutter was not compliant with the requirements of the drawings and specifications (finding 166). By the July 1, 2016 Letter of Concern, the government expressed in writing that it had to spend hours researching alternate methods that Cutter requested (finding 55.g.).

One of the issues that demonstrated that Cutter was not following specifications was the concrete pours. Per the specification, the concrete pours were supposed to be between 37 and 41 inches but there were several instances of the pours being out of compliance. Additionally, there were issues with rebar locations. (Finding 159)

Further, there were issues with the use of 4000 PSI concrete poured by Cutter instead of 5000 PSI concrete required by the contract and the government acquiescing to the improper type of concrete so Cutter could proceed (finding 172). Notably, Mr. Dwyer admitted that Cutter failed to prosecute the pours properly. Specifically, he admitted that Cutter placed 4,000 PSI concrete totaling 38 cubic yards of 4,000 PSI where the contract required 5,000 PSI. (Finding 129) Contrary to Mr. Dwyer's testimony where he criticized the government for not notifying Cutter of the problem until the sixth pour (*id.*), the government was not at fault for Cutter not following the specifications set forth in the contract. Instead, Cutter's own quality assurance personnel should have discovered the problem before the sixth pour. Further, even though Cutter eventually worked with a structural engineer to argue that 4,000 PSI mix was structurally acceptable (*id.*), Cutter still did not actually meet the specifications required by the contract.

⁹ This is not a reflection that the waived specifications were somehow inappropriate; rather, that the government felt compelled to make compromises in its efforts to bring the project to a successful conclusion. To be very clear: we do not find the termination justified by virtue of Cutter's noncompliance with specifications that were waived. The point of our discussion here is that there was a gross noncompliance with the contract's specifications which put the government in the position of needing to waive many of them in hopes that the contract could be completed, but the government did not waive anywhere near all of the specifications with which Cutter failed to comply.

The structural steel was another area that did not meet specifications because of misalignment (finding 162). Problems with the underslab conduit were also examples of Cutter not following the specifications, particularly in Building 254 (finding 163).

Ms. Bogue testified that she believed Cutter abused the request for information system and regularly objected to specifications (finding 139). One of the earliest issues was the FOD fence, which the government conceded to use what Cutter recommended (finding 143). According to Major Trembley, the government conceded to Cutter's proposed fence because Cutter could not find anyone to provide one that met the specifications. Because the fence was already behind schedule, he had expected Cutter would have initiated paperwork for the subcontractor so mobilization would occur immediately but Cutter did not and this caused a further delay. (Finding 157) Unfortunately, Cutter's recommended fence that did not meet the specifications caused problems with foreign object debris due to sand bags decaying (*id.*; finding 177).

Major Trembley testified that he pointed out an incorrect lintel installed over a wide door opening and that Cutter submitted an RFI asking to use the wrong lintel. Before getting an answer, Cutter installed a second incorrect lintel. (Finding 167)

One of the other issues that involved the specifications was the fire suppression system. The government first told Cutter to follow the specifications regarding the fire suppression system. After Cutter requested three times to propose a different alternative, the government conceded that Cutter could choose to submit a cost proposal. The government did not agree with Cutter that the design needed to be changed and stated so in the response to the RFI; however, it permitted Cutter to provide the alternative approach so it could review its viability. The government provided this response on March 11, 2016, but Cutter did not submit the cost proposal until August 24, 2016. While Cutter asserted the fire suppression system was one of the areas for which the government should be responsible for delay, Cutter was the party that repeatedly asked to provide something different and then filed the cost proposal 167 days after the government relented. (Finding 156) This was not delay that should be attributed to the government but instead delay attributed to Cutter.

After termination, the government discovered other areas Cutter failed to comply with the specifications. Specifically, Cutter failed to adequately tighten bolts, had gaps in the installation of the pan decking, failed to compact soil, and had exterior wall penetrations (finding 182). Additionally, over 1,000 bolts were hand tightened instead of tightened with a torque wrench (finding 187). While Cutter was permitted to hand tighten bolts that could not be reached with a wrench, Vertex reported issues with the bolts to the government and CMSgt Bussell personally witnessed approximately five or six five-gallon buckets full of bolts that were removed and replaced (finding 187). Pan decking was also an issue because the specifications directed installation that clearly did not happen correctly because light could be seen between the sheets (finding 188).

There were not records to indicate the soil had been properly compacted and the government found some areas that did not have compaction so that task had to be re-accomplished (finding 189). The exterior penetration issues were problematic because you could see daylight through the holes and any holes could damage the inside of the facility (finding 190).

Although Cutter has argued that the termination cannot be justified by the late discovery of shoddy workmanship, that argument does not help it as much as it might like. First, of course, this evidence adds further credence to our findings that Cutter was not performing its job as expected. Moreover, it is well settled that a contract termination may be justified for reasons not set forth (or even known) by the contracting officer at the time of termination. *See Empire Energy Mgmt. Sys. Inc. v. Roche*, 362 F.3d 1343, 1347 (Fed. Cir. 2004) (citing multiple cases).

C. Cutter Did Not Maintain Adequate Schedules Which Led to an Inability to Track the Critical Path

Cutter failed to maintain adequate schedules which led to an inability to track the critical path. Ms. Bogue testified that neither the initial schedule nor the full schedule were submitted on time. (Finding 142)

The contract included FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984) (finding 10). That clause requires that the contractor submit schedules and update them as work progresses, as directed by the contracting officer. FAR 52.236-15(a)-(b). Part of the issue with the schedule from the beginning was a failure to address the cold weather restriction required by the contract (findings 14, 25).

The lack of an appropriate schedule, as required by the contract, was one of Cutter's most damaging failures in this case. It caused problems for both the government and Cutter because it was impossible for either party to track the critical path without an appropriate schedule. Many of the issues involved in these appeals were caused by inadequate schedules, starting with the Initial Project Schedule or baseline schedule, as the parties referred to it throughout the record. (Findings 21-29) The initial schedule was due not later than September 29, 2015, but was not submitted until November 2, 2015, more than a full month later than required. (Findings 22-23) Approval occurred February 3, 2016 (finding 29), after several baseline schedule rejections (findings 21-29).

The delayed schedule caused, in part, the contracting officer to send the first letter of concern, dated December 15, 2015. The contracting officer expressed concerns with both the Project Superintendent and the Quality Control Manager and warned Cutter of the problems with not having an approved project schedule in place.

(Finding 27) Contrary to appellant's argument that the government appeared to want to terminate the contract at every turn, the contracting officer expressed these concerns very early during contract performance and attempted to work with the contractor to put the project back on a viable schedule that would be completed on time.

Inexplicably, appellant refused to acknowledge the warnings expressed by the contracting officer. Instead, appellant argued, in its response to the letter of concern, that the schedule issues were not its fault although it did agree to address issues with the Quality Control Manager and the Superintendent. (Finding 28) However, Cutter did not submit the next schedule until January 18, 2016 (two months after its receipt of the letter of concern), which the government ultimately approved on February 3, 2016 (finding 29).

Further, appellant relied upon other scheduling documentation instead of the contractually-mandated schedule. In August 2016, Mr. Dwyer, Cutter's CEO, outlined schedule documentation that was needed beyond the schedule required in the contract, arguing that determining the amount of work complete could not be accomplished by the contractually-mandated schedules alone. (Finding 63) This caused confusion and problems with tracking the critical path. It also caused confusion with determining the amount of work completed.

Mr. Dwyer also testified that he believed Cutter was further in contract performance than the baseline schedule demonstrated. He testified that the government did not provide an actual analysis based on the schedule but only used Cutter's applications for payment. (Finding 131) However, the government recorded Cutter getting further and further behind throughout contract documentation in COR Monthly Reports (findings 30-34).

Both the government and appellant's experts addressed the fact that the schedules were problematic (findings 198, 209). Appellant's expert chose to use an "impacted as-planned analysis" as a result of the schedule issues (finding 198). The government's expert testified about the problems with the initial schedule (findings 219-20), and his report included the problems with the baseline schedule in its first of nine periods it analyzed (findings 228-55).

We agree with the government expert's opinion that the flaws in the schedule affected the critical path and also made it difficult to assign specific delay (finding 219). In particular, the aspects of the project that were restricted by the winter period (finding 14) were impacted by the problematic schedule, adding 71 days of delay attributable to Cutter (finding 254). We agree with the government's expert that "the schedule projection for the corrected NH10 schedule pushed the start of finishes for the hangar into the spring of 2017 and introduced another 169 calendar days of delay for the performance of work through July 1, 2016, over the flawed NH10

schedule” (finding 255). Cutter’s schedules should have indicated by July 1, 2016, that the finish work for Hangar 253 was already being pushed into the spring of 2017 (*id.*). The flaws in the schedule affected the critical path and were not updated so appellant did not realize what work was required at certain times, forcing multiple submittals for the same items (findings 219-20). We also agree with the government expert’s opinion that the schedule flaws existed prior to the consequential issues, which caused appellant’s argument regarding consequential damages to be unpersuasive and fail (finding 220).

Further, schedule concerns continued throughout the contract which appellant acknowledged as well, although arguably as justification for what it deemed government delays. On August 29, 2016, Mr. Dwyer sent a letter to the contracting officer analyzing the contractually-required CPM schedule document. (Findings 62-63) Mr. Dwyer informed the government that the contractually-required schedule did not provide sufficient information to analyze the health of the project. He appeared to disagree with using the CPM schedule throughout the letter. For example, he ran what he called “fictitious” schedules to show what would happen if everything had been performed, and criticized what comprised the CPM schedule, making the percentages of completion vastly different, with his estimate being over 16% complete and the government’s being around 4% complete, as opposed to the 42% that should have been completed by that time. (Finding 63)

Another area the schedule was clearly problematic was the winter-restricted period. The contract included restrictions for construction during winter months. (Finding 14) Appellant did not address how any of its actions impacted the winter-restricted period. As early as December 2015, while discussing the project superintendent’s deficient performance, the contracting officer pointed out concerns about the winter restrictions and their impact on the schedule (finding 27). As the government expert opined, and we agree, the winter restriction impacted the schedule (findings 219, 221). He also convincingly demonstrated that appellant failed to incorporate the restricted period, which impacted appellant’s ability to demonstrate delays (finding 225). A major scheduling flaw related to the winter restriction was the concrete pavement. The winter restriction pushed paving into Spring 2017 but was not reflected in Cutter’s schedules. The government expert’s report demonstrated that this caused 71 calendar days of delay. (Finding 254) We find the report persuasive and agree with this conclusion.

From the beginning, the schedule itself demonstrated problems with appellant’s ability to complete the project on time. These impacted concrete paving, landscaping, painting, the structural steel submittal and installation, and generally being able to determine if consequential delays existed. (*See* findings 219-20)

The government met its burden of proof for terminating the contract for default based on the problematic schedules because schedules were required by the contract, not submitted on time, not updated, and had a significant negative impact on project management. Further, the schedule demonstrated that appellant was significantly behind schedule, approximately 240 days, which caused the contracting officer to conclude that there was no reasonable likelihood that Cutter could complete the work in the time remaining in the contract. *See MOQA-AQYOL JV, LTD.*, 17-1 BCA ¶ 36,909 at 179,826.

D. Cutter Failed to Provide Assurances or Any Explanations For Delays

Contrary to appellant's argument that the government seemed to want to terminate from an early point in the contract, even after all of the delays, the record demonstrates that the government attempted to have appellant rectify the situation by asking Cutter to explain how it would keep further delays from happening. The government asked for explanations about past delays and assurances through descriptions of how similar situations would be avoided in the future. This encompassed CPM schedule delays, grade beam schedule delay, deficient installation of electrical conduit under Building 253, recurring deficient installation of electrical conduction underslab in Building 253 required in specification section 260543, conduit severed in Building 254 which was the second underslab conduit hit and impacted the paint booth and fire alarm system, I-Beam structural steel, vertical rebar missing, L-Bars missing, and interior curb walls using 4,000 PSI instead of 5,000 PSI concrete. (Finding 70) However, in its less than fulsome response, appellant glossed over any answers about past problems, simply stating that those issues were resolved (findings 73-74). In short, although Cutter acknowledged delay, it blatantly failed to provide a remedial plan or even an explanation of how it would keep similar failures from happening in the future, which was sought by the first and third requests from the contracting officer in the cure notice (findings 74-75). Appellant also failed to provide an interim schedule or projected completion dates (finding 75).

In a second letter concerning the cure notice, Cutter alleged that it had corrected deficiencies regarding the I-Beam structural steel, though admitted that it had not uploaded those corrections to Projectmates, which it claimed to have remedied. Additionally, Cutter explained it had hired a company to evaluate the strength of the interior curb wall. Again, Cutter stated it would supplement quality control with an additional team member. (Finding 79) Appellant missed the opportunity for possible further extensions and negotiations by stubbornly refusing to address the areas it already admitted were problematic because of its own actions and admitted delays.

Further, this failure to explain how it would keep problems from happening again demonstrated that Cutter was unsure of how to fix the delay issues. Indeed, even though the government asked appellant to explain how it would keep similar issues

that caused delays from recurring, appellant failed to provide any explanations. (Findings 74-75, 113). While appellant failed to provide adequate quality control (findings 26-27) and continued to get further behind schedule, it also failed to explain how that process would stop for the remainder of the contract (finding 113). This constitutes further evidence refuting appellant's assertion that it could have completed the project on time -- an assertion for which it carries the burden of proof.

Appellant's failure to provide assurances supports the contracting officer's conclusion that there was no reasonable likelihood that Cutter could complete the work in the time remaining in the contract and supports termination on that basis. *See MOQA-AQYOL JV, LTD.*, 17-1 BCA ¶ 36,909 at 179,826.

II. Cutter Failed to Demonstrate That Its Delays Were Excusable

We have determined that the government met the prima facie case for default termination; thus, we must analyze whether appellant's delays were excusable. *See ECC CENTCOM Constructors, LLC*, 18-1 BCA ¶ 37,133 at 180,711 (citing *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996)). Appellant argued that the government's expert should be disregarded, that its own should be the only one the Board relies upon, and that many delays were excusable or concurrent so it should have been granted additional time to complete the contract. We are not persuaded by these arguments.

We cannot agree that Cutter demonstrated that delays were excusable or attributable to the government when the burden shifted to appellant. Cutter failed to demonstrate that the government caused 46 days of delay for FAA permits, 293 days of delay for column 12'D' issues, 150 days of delay for Building 253 conduit severing, 295 days of delay for fire protection or suppression system design conflicts, 305 days of delay for fire alarm mass notification system vendor change, 126 days of delay for grade beam design conflicts, 256 days of insulated metal wall panel design conflicts, 181 days of delay for trench drain design conflicts, and 143 days of delay for contaminated settled dust.

A. FAA Permits

Appellant claimed an excusable delay of 46 days for the government failing to obtain the Construction Permit under a Notice of Proposed Construction or Alteration, otherwise referenced by the parties as the Building Permit (finding 204). Two permits were required for the project: 1) the Building Permit; and 2) the Notice of Proposed Construction or Alteration for a crane, otherwise referenced by the parties as the Temporary Construction Crane Permit or Crane Permit. The government was responsible for the Building Permit and Cutter was responsible for the Temporary

Construction Crane Permit. (Finding 19) According to Cutter, failure to obtain the Building Permit caused construction delay for the steel fabrication (finding 204.a.).

On October 13, 2015, Cutter submitted a request for the Crane Permit (finding 35). On November 2, 2015, the FAA sent an email to Cutter's steel fabrication subcontractor, Canatal Industries, Inc. (Canatal), requesting additional information. The email included a question about whether a permanent construction permit was requested. (Finding 36) Canatal and the FAA corresponded back and forth from November 2, 2015 to December 15, 2015, concerning how many cranes would be used due to a discrepancy between 1 and 3 cranes as well as what the building height was. Canatal did not answer the building height question. (Findings 36-37)

On December 15, 2015, the FAA sent Canatal an email expressing concerns about the cranes and the significant impact on VOR. The FAA again inquired about whether the owners of the building ever filed the Building Permit. (Finding 37) Canatal then notified and asked Cutter about the FAA's question concerning the Building Permit (finding 38). On December 18, 2015, the government requested the FAA approve the Building Permit (finding 39).

On January 15, 2016, Cutter's Quality Control Manager sent an email to Canatal asking if it had submitted all the packages it planned and if more would follow. Canatal answered that it had submitted for the first time everything but some requests for information would need to be answered. Canatal and Cutter corresponded via email about what needed to be done. (Finding 39)

On January 19, 2016, Mr. Dwyer directed Canatal to proceed with fabrication. On January 27, 2016, Canatal informed Cutter that resubmission of batch no.1 would be that day and that it was scheduled to start erection on March 14, 2016. (Finding 40)

On February 1, 2016, the FAA contacted the government to ask the height of the cranes. The contract specialist forwarded the email to Cutter that day. (Finding 41)

On February 3, 2016, the FAA approved the Building Permit (finding 42). Also on February 3, 2016, the FAA released a Determination of Hazard to Air Navigation regarding the Crane Permit (finding 43). On February 4, 2016, Cutter's crane contractor sent an email to Cutter's Project Manager stating that he filled out the FAA form to propose closing down the VOR on March 14, 2016 (finding 44).

On February 25, 2016, Cutter's Project Manager sent an email to the FAA inquiring about the Crane Permit and the VOR shut-down. The FAA responded the same day, stating the requested date should not be a problem. On the same day,

Cutter's Project Manager sent the government an email informing it that the VOR shutdown was on schedule to start March 14, 2016. (Finding 45)

Even RECON, Cutter's own expert for its REA, opined that the FAA delays caused zero days of delay. Specifically, the RECON analysis reiterated that the FAA permit was zero days of delay, zero days of concurrent delay, and zero days of non-concurrent delay. (Finding 234)

During testimony, Mr. Dwyer, Cutter's CEO, admitted he was included in emails that demonstrated possible issues with a permanent construction permit and did not know if the FAA questions were ever answered by his subcontractor. Further, he admitted that he knew as early as the end of January that the steel erection start date would be March 14, 2016. (Finding 132)

While Cutter alleges that the government's failing to obtain the Building Permit prior to the start of the contract caused it to have delay, it is clear from the emails between the FAA and Cutter (or its subcontractors) that Cutter was still working on getting the Crane Permit after the approval of the Building Permit. Cutter did not submit the request to propose closing down the VOR until February 4, 2016, the day after the FAA released the Building Permit (finding 44). As late as February 1, 2016, the FAA was still seeking information from Cutter about the height of the cranes for the Crane Permit (finding 41). The FAA appeared to be processing both permits at the same time and there is no indication that the Building Permit delayed the Crane Permit. If anything, based on the communications, Cutter and Canatal failing to provide the number of cranes and height of the cranes was the biggest determining factor in obtaining the Crane Permit. The FAA repeatedly asked for the height of the cranes and expressed concerns about the impact on VOR as early as December 15, 2015 (finding 37). The Building Permit did not appear to have a time impact on the Crane Permit as the FAA was awaiting Cutter to inform it of the height and number of cranes it planned to use in the project. Thus, Cutter failed to demonstrate that the 46 days of delay was excusable or attributable to the government.

B. Column 12'D'

Cutter placed a significant amount of emphasis on Column 12'D' causing a work stoppage, arguing that 293 days of delay occurred that should have been attributed to the government (finding 204). However, Cutter failed to demonstrate that it was entitled to delay for Column 12'D'.

By its own admission, Cutter was not nearly as impacted by Column 12'D' as it alleged at the hearing. First, Cutter's CEO, Mr. Dwyer, admitted that temporary shoring was installed the day after the deficiency was discovered and workers continued to work in the vicinity shortly after shoring was completed (finding 133).

Second, in Cutter's own meeting minutes, a contemporaneous document at the time the Column 12'D' issues occurred, Cutter stated there was approximately one month of work left that could be done before it caused an issue (findings 53, 149). However, Cutter did not reach the end of that period because of the termination for default (finding 150).

Further, regarding Colum 12'D', the follow-on contractor was able to work in the area with shoring for approximately a year until the repair was complete. The work for the repair took one week to accomplish. (Finding 194)

Cutter overemphasized the safety issues regarding Column 12'D' which did not delay Cutter from continuing to work by its own admission and was further supported by the follow-on contractor safely working in the area for approximately one year. As a result, Cutter failed to demonstrate that column 12'D caused delay attributable to the government.

C. Cutting Conduit in Building 253

Cutter also claimed 150 days of delay for cutting the conduit in Building 253. However, Cutter did not adequately demonstrate that this was a delay that should be attributed to the government. While Cutter did not have drawings that indicated underground conduit, there were no wires above the electrical room or going to the building so the electrical conduit was obviously underground. If Cutter had conducted an appropriate site survey, it would likely have discovered that the conduit was underground. (Finding 178) Further, the contract required Cutter to record existing conditions in the presence of a contracting officer prior to any deconstruction work (finding 13) but this did not appear to happen (finding 180).

D. Fire Suppression System

One of Cutter's largest claimed delays is the fire suppression system, for which it claims 295 days of delay (app. br. at 16). However, Cutter itself requested to not follow the specifications for this issue (findings 139,156). Cutter disagreed with the government four times using RFIs concerning the fire pump system (finding 139). The government initially told Cutter to follow the specification but eventually told Cutter it could provide a cost proposal. This happened on March 11, 2016, but Cutter did not provide the proposal until August 24, 2016. (Finding 156) It would be nonsensical to apply the 167-day portion against the government when Cutter chose to submit a cost proposal instead of following the specification as written and as the government directed it to do. And the 167 days does not include the time Cutter kept refiling requests for information prior to the government finally conceding that it could submit a proposal. The entirety of the problems with the fire suppression system design are attributable to

Cutter because it chose to attempt an alternative method rather than follow the specification and design.

E. Fire Alarm Mass Notification System Vendor Change

Cutter contended that the FAMNS was delayed due to the contract-directed sole source subcontractor not being responsive and the government not providing an alternate (finding 205.a). Cutter inexplicably initially claimed both 149 and 197 days (finding 78) for the FAMNS delay rather than 305 days, which Cutter's expert and counsel claimed by the time of the hearing (finding 205.a; app. br. at 16-17). It is unclear why there is such a vast difference between the original claim of 149 or 197 days and 305 days by the time of the hearing or how this item was on the critical path to impact the schedule. Even Cutter cannot seem to determine how long a delay it alleged.

The contracting officer addressed this issue in the termination for default letter, informing Cutter that she believed 116 calendar days were delayed by Cutter's failure to provide a proposal (finding 92). At the time of termination, this was still an open item, and neither party advanced particularly well-developed arguments regarding responsibility for any delays. Nevertheless, we rule for the government on this subject because Cutter has not met its burden to prove delay. We agree with the government expert's analysis of the FAMNS delay claims and determination that any such delays were not on the critical path because Cutter failed to account for several issues that actually impacted the critical path, such as not following the specifications, slow progress, and correcting poor workmanship (findings 244, 250).

F. Grade Beam Design Conflicts

Cutter alleged 126 days of delay for grade beam design conflicts (finding 206). However, by its own admission, over the government's protest, Cutter insisted on completely removing the grade beams instead of what was required in the contract. Put simply, this dispute pits the government's position that removing the grade beams instead of cutting them was for Cutter's convenience and not what was stated in the specifications as opposed to Cutter's position that this was a defective specification. Cutter failed to demonstrate that the specification was defective and that the delay was excusable or attributable to the government.

First, Cutter admitted in its response to the cure notice that it "kept pressing the issue to deliver a better end product to the [g]overnment" instead of following the specifications (finding 73). This is quite different than asserting that the specifications were defective. The parties' actions, as demonstrated by the contemporaneous documentation available during performance, support the interpretation that Cutter was

asking to modify the specifications for its own convenience to deliver a “better” end product rather than to correct a deficiency (*see* findings 73, 127).

While Cutter claimed in response to the cure notice that Cutter never stated the change would be at no cost, the RFIs told a different story. In RFI 15, the initial RFI concerning removing the grade beam, Cutter wrote “Cost Increase of US \$0.00” and “Increase of 0 days” on the form. Further, in RFI 38, Cutter confirmed “Increase of 0 days” but had changed the cost to “Yes, may be” instead. (Finding 74) Cutter gradually added costs and time delays after the first request and by the time of Cutter’s cure notice response, was convinced it never said Cutter would do the work at no cost to Cutter (finding 74).

Further, the testimony of one of the government’s engineers matches the RFI contemporaneous documentation. Major Trembley testified that he approved the change because it was a typical request and, in his experience, it was for the convenience of the contractor. Major Trembley testified that his answer was “yes, of course you can take the entire grade beam if you’d like at your own convenience and at no additional cost to the government” and that Cutter did not raise any issue with costs for another three months. He testified that Cutter was adamant the entire grade beam needed to be removed and the government reviewed the request several times but ultimately determined that the entire grade beam did not need to be removed. (Finding 160)

This version of events was also documented in the contracting officer’s cure notice (finding 70) and termination for default notice (finding 93). The contracting officer wrote that the government agreed to the changes Cutter requested, finding them “acceptable” and that the change was contingent upon being no cost. This included the no-cost notation in Modification No. P00003. (Finding 70) The government agreeing to accept Cutter’s proposed change as “acceptable” is not the same as the government stating a problem existed with the specifications.

Appellant’s expert opined that the government should have added 126 days of delay for the grade beam demolition if the contract had continued but the government did not extend the contract completion date (finding 206). He placed this delay in his “Other Delays” category (findings 203, 206). Appellant’s expert was unconvincing because, rather than analyzing why a delay existed, he basically outlined the communications and simply stated the government was wrong.

Thus, based on the contemporaneous documentation in the record and testimony at the hearing, we find that Cutter requested to change the grade beam design for its own convenience and has failed to demonstrate that the grade beam design conflicts were attributable to the government or that Cutter should receive additional time. Further, even if Cutter had been able to demonstrate that any of the

time was compensable, 126 days was not sufficient to overcome the delay the government demonstrated.

G. Insulated Metal Wall Panel Design Conflicts

Cutter alleged 256 days of delay stemming from insulated metal wall panel design conflicts (findings 72, 206). In its response to the cure notice, Cutter explained that the Building 253 insulated metal wall panels had a design conflict between the structural and architectural drawings depicted different sized openings. (Finding 72) In the termination letter, the CO opined that the issue was not ripe for discussion because Cutter was still in the process of pricing the CCOR (finding 97). Appellant's expert included the insulated metal wall panel design conflict in its "Other Delays" category, opining that if other delays were not attributable to the government, this would be a government delay and a contract extension would be necessary (findings 203, 206).

However, the government's expert opined that Cutter did not notify the government for two weeks after discovering the problem with the drawings. Further, on October 6, 2016, one week after appellant notified the government, the government provided a simplified solution via its architect. Cutter acknowledged receiving the design but opted to use a more complicated design before reverting to the simplified design provided by the government's architect. Further, appellant disregarded the progress of other work during this period when it failed to consider weather sensitive work being shut down due to temperature restrictions. (Finding 252)

We agree with the government and the government's expert that this delay was not attributable to the government because the government provided a simplified solution one week after Cutter notified it and Cutter failed to consider the weather restricted period. Thus, there is no evidence this delay impacted the critical path, especially because the solution was ultimately used and, especially, because of the weather.

H. Trench Drain Design Conflicts

Cutter alleged 181 days of delay for trench drain design conflicts (finding 205.d.). Drawings provided in the contract required reinforcements in the trench drains but Cutter refused to include them, which it confirmed in its cure notice response (finding 98). CMSgt Bussell testified that the follow-on contractor used the trench drain that Cutter left at the site, that it was meant to be cast in concrete, and the follow-on contractor reinforced it (finding 195). It is unclear what delay Cutter alleges should be a government delay when it blatantly refused to follow the specifications to reinforce the trench drain. Thus, Cutter has not demonstrated that it is entitled to the 181 days of delay for the trench drain design conflicts.

I. Contaminated Settled Dust

Cutter alleged 143 days of delay for contaminated settled dust (finding 205.c.; app. br. at 19). Based on how close to termination this issue arose, as well as Cutter's failure to timely inform the government of the issue, Cutter is not entitled to the 143 days of delay it seeks.

On November 23, 2016, Cutter informed the government in writing about the contaminated settled dust. Cutter included a report, dated September 22, 2016, that indicated asbestos and other heavy metals. In the November 23, 2016 letter, Cutter informed the government that it would require a certified specialist to remove the dust and that it could negatively impact the schedule. (Finding 80)

In Cutter's December 15, 2016 letter, Cutter noted that it discovered the dust the week of September 15, 2016. Cutter also admitted it provided the government with the test results on November 23, 2016. (Finding 82)

Based on the record and Cutter's own letters, Cutter waited two months to inform the government after receiving the report demonstrating the existence of asbestos (*see* findings 80, 82). Cutter did nothing to mitigate the asbestos or contaminated dust while it held onto the report, failing to notify the government of the problem for over two months after discovery (finding 82). It is unclear how Cutter arrives at its claim that it is entitled to 147 days of delay when the amount of time between the date of the report (September 22, 2016) and the termination of the contract (December 29, 2016) was 98 days. Further, the amount of time between when Cutter notified the government (November 23, 2016) and termination was a mere 36 days. At a minimum, Cutter's delay in informing the government that an issue even existed would cause Cutter to be responsible for at least 69 days of delay rather than the government. The government had no way of even knowing a problem existed prior to being notified on November 23, 2016 whereas Cutter knew beginning the week of September 15, 2016, but did nothing to mitigate the issue. Further, the government could not have responded immediately and needed some amount of time to investigate and answer the notification. While the government seemed to reasonably respond to RFIs throughout contract performance, the termination occurred so closely in time to Cutter's notification about the contaminated dust that the government did not have sufficient time to respond. This is especially true based on Cutter's failure to notify the government about the issue at all for two months after receiving the report from the testing. Given the relatively short period of time that the government was aware of the dust issue, which was one issue of many addressed while the parties addressed the cure notice and over the holiday season, we do not find that Cutter has proven entitlement to any government-caused delay on this issue. Moreover, even if we conservatively did make such a finding, the government day

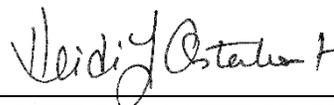
would be, at most, the 36 days between Cutter’s first informing the government of the dust and the termination of the contract.

CONCLUSION

The government demonstrated through the record and its expert that Cutter repeatedly failed to follow the specifications and failed to provide any description of how it would fix that issue in future contract performance. Additionally, the government demonstrated that Cutter was increasingly behind schedule, starting very early in contract performance through termination. Conservatively, the government demonstrated that Cutter was approximately 8 months behind schedule and that Cutter contributed approximately 240 days of delay to the schedule, from both lay witnesses and the government’s expert. In contrast, Cutter failed to demonstrate that it experienced excusable delays that would have compensated for the delay in contract performance. Even if we conservatively agreed that Cutter proved it was delayed by up to 36 days for the contaminated dust, this possible 36 days was not sufficient to overcome the 240 days of delay attributable to Cutter, which along with its manifold performance problems amply justified the contracting officer’s decision to terminate the contract for default.

We deny the appeals.

Dated: February 17, 2026



HEIDI L. OSTERHOUT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



OWEN WILSON
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. 61020, 61021, 61061, 61146, 61278, Appeals of Cutter Enterprises, LLC, rendered in conformance with the Board's Charter.

Dated: February 18, 2026



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