ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Carousel Development, Inc.	)	ASBCA No. 50719
	)	
Under Contract No. F08651-94-C-0104	)	

APPEARANCE FOR THE APPELLANT: Jeffrey A. Lovitky, Esq.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Diana S. Dickinson, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

Appellant appealed a deemed denial of its claims for delay costs stemming from alleged actions and failure(s) to act by the Government and remission of liquidated damages. Both entitlement and quantum are before us for decision (tr. 1/15).

FINDINGS OF FACT

1. Contract No. F08651-94-C-0104, a firm fixed-price construction contract for improvements and repairs to 24 military family housing units located at Eglin Air Force Base (AFB), Florida, was awarded by the U.S. Air Force to appellant, a small business concern, on 20 September 1994 in the amount of $1,177,581.90 (R4, tabs 1 through 3).

2. The contract contained the following standard construction contract clauses: FAR 52.212-5 LIQUIDATED DAMAGES—CONSTRUCTION (APR 1984); FAR 52.212-12 SUSPENSION OF WORK (APR 1984); FAR 52.214-29 ORDER OF PRECEDENCE – SEALED BIDDING (JAN 1986); FAR 52.233-1 DISPUTES (MAR 1994), ALTERNATE I (DEC 1991); FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984); FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991); FAR 52.236-15 SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); FAR 52.243-4 CHANGES (AUG 1987) and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1).

3. Paragraph F-20 of the contract provided: "For the purposes of this [Liquidated Damages—Construction] clause the blank(s) are completed as follows: (a) the sum of

$86.74 for each day of delay PER HOUSING UNIT FOR EACH HOUSING UNIT WHICH IS LATE, AND NOT COMPLETED WITHIN THE SPECIFIED TIME PER INCREMENT AS STATED IN SECTION H, PARAGRAPH H-807, 'PERFORMANCE'" (R4, tab 1 at 000009). The contract also contained the standard construction contract clause entitled COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (FAR 52.212-3 (APR 1984)) with a cross-reference to Paragraph H-807, Performance. Paragraph I-100 filled in the blanks in the standard clause to provide that the contractor was "required to (a) commence work under this contract within 5 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work for use not later than 262 [sic]. The time stated for completion shall include final cleanup of the premises." Based on the instructions for filing in the blanks, the 262 calendar days, like the 5 calendar days, ran from receipt of notice to proceed. (*Id.* at 000021)

4. Paragraph H-807 of the contract provided, in pertinent part:

> (a) Work on this project shall be accomplished during a normal workweek 7:00 AM to 3:30 PM, Monday through Friday except legal holidays. Any work desired to be accomplished during other than the normal workweek will require prior approval of the Contracting Officer.
>
> . . . .
>
> (c) Performance period is based on the following schedule:
>
> a. Work at the jobsite shall not commence until 75 calendar days after notice to proceed to provide time for submittals, approval and delivery of materials, and to allow time for accumulation of vacant housing units. These housing units will be turned over to the Contractor according to the following schedule:
>
> (1) Provide eight apartments (housing units) to Contractor at time work commences in these areas (75 calendar days after notice to proceed).
>
> (2) Provide four additional apartments 49 calendar days after work commences in these areas.
>
> (3) Thereafter, provide four additional apartments every 21 calendar days.

(4) First eight apartments shall be completed within 89 calendar days after work begins on these apartments after these units are turned over to the contractor by the government.

(5) Each remaining increment of four apartments shall be completed within 75 calendar days after work begins therein after these units are turned over to the contractor by the government.

NOTE: The day that work is started shall be included in the specified number of days allowed for completion of work specified in Paragraph (c)a. above.

b. All housing units will be unoccupied during performance of the contract work, but will contain Government-Owned, free-standing kitchen ranges and refrigerators.

c. Housing units will generally be made available within the same general area–for accomplishment of the contract work; however, in some cases the contractor may be required to temporarily skip certain buildings due to nonavailability at that time and to perform the work at a later date during the contract period.

(R4, tab 1 at 000014-000015) The contracting officer testified, however, that it was "Air Force policy [at Eglin AFB] not to turn over units unless the contractor is performing satisfactory [sic]" (tr. 4/25). This policy stemmed from "a housing incident where . . . a [previous] contractor had torn up the entire housing unit and left the job and they could not find him. And after that incident, unless the contractor was performing satisfactory [sic], no further units would be turned over" (tr. 4/25-26; R4, tab 1). The contracting officer acknowledged that said policy was not set forth in the contract herein (*id.*). Paragraph H-803, "Inspection and Surveillance," of the contract provides, in pertinent part:

> The Director, Civil Engineering, Eglin Air Force Base, Florida, is designated as the representative of the Contracting Officer for the purpose of surveillance and inspection of performance of work under this contract. This designation does not include authority to direct or authorize the Contractor to make changes in the scope or terms of the contract without the written authority of the Contracting Officer.

(R4, tab 1) Paragraph H-829, "Hazardous Waste Removal," provides:

> The Contractor shall dispose of all hazardous waste in accordance with all applicable local, federal and state environmental laws and regulations, including but not limited to 40 CFR 260-268, Hazardous Waste Management, and Rule 17-30 Florida Administrative Code. The Contractor shall assume the responsibility of determining what constitutes "hazardous waste" and when environmental laws and regulations govern its removal.

(*Id.*) Paragraph H-837, "Daily Report to Inspector," provides:

> (a) The Contractor shall submit a daily report to 96 ABW/CEEC inspector on AFDTC Form 4003. The report shall include weather conditions, work accomplished, test accomplished, test reports, delays and discrepancies.

(*Id.*)

5. The specification provides in § 01500, GENERAL ENVIRONMENTAL PROTECTION, that:

> 2. GENERAL: The contractor shall comply with all applicable local, state, federal, and Air Force environmental regulations. These items include, but are not limited to the following:
>
> . . . .
>
> c. All Hazardous wastes such as sandblast media, chlorinated solvents, paint, paint thinners, cleaners, and fuels shall be labeled and an inventory management system will be initiated to ensure timely removal and proper disposal. No on-base disposal will be allowed.

(R4, tab 2) The specification states in § 02050, DEMOLITION AND REMOVAL, that:

> 6. REMOVAL OF EXISTING WORK: . . . Contractor shall dispose of all hazardous waste in accordance with all applicable Federal, State and Local Laws and regulations governing hazardous waste disposal including but not limited to 40 CFR 260-268 and FAC Rule 17-30.

(*Id*.) The specification addresses the requirements for manufacturer's certifications with respect to both exterior and interior doors in § 08200, WOOD DOORS AND FRAMES:

> 1. SCOPE: This section covers wood doors and frames, complete.
>
> . . . .
>
> c. National Wood Window and Door Association (NWWDA) Standards.
>
> I.S.1, Wood Flush Doors.
>
> I.S.5, Ponderosa Pine Doors.
>
> . . . .
>
> 9. SUBMITTALS: a. Descriptive Data. Furnish for approval, cuts, descriptive material and samples showing each type of door included. Show sizes, thicknesses, construction, methods of assembly, sticking and all other necessary information. Before delivery of doors to the project site, submit a sample section of each type of door which shows the stile, rail, veneer and core construction. The contractor shall also furnish certification from the door manufacturer stating that the doors meet the requirements specified herein.

(*Id*.) The specification provides in § 09230, SYNTHETIC STUCCO WALL FINISH, that:

> 3. GENERAL REQUIREMENTS. a. General. . . . All existing painted surfaces to receive new wall finish shall be completely sand-blasted to remove existing paint prior to application of the wall finish.
>
> . . . .
>
> 5. PREPARATION OF SURFACES. a. General. . . . Existing painted concrete and masonry surfaces shall be sand-blasted as specified below.

> b. Sandblasting. Existing painted concrete and masonry surfaces to receive new stucco wall finish shall be completely sand blasted to remove all paint. Paint shall be removed down to the concrete or masonry. Sandblasting shall be accomplished with suitable conventional equipment and the use of sand or other aggregate of type approved by the Contracting Officer. All sandblasting shall be performed within an approved containment system and all paint chips, runoff, sandblast media, dust and other sandblast debris shall be captured, collected, sampled, characterized and properly disposed of in accordance with all applicable Federal, State and Local laws and regulations governing hazardous waste. . . . All sandblasting shall be performed using the wet blast method by mixing a small amount of water with the blasting aggregate as it leaves the nozzle. The amount of water used shall be only enough to keep the dust resulting from the sandblasting operations to a minimum. "Water Blasting" does not meet the requirements specified herein for sandblasting and is not acceptable. . . . [S]uch other measures, including suitable fabric enclosures, shall be taken as may be necessary to prevent blasting aggregate, paint particles, or water from entering the buildings or soiling adjacent surfaces. . . . All sandblasting shall be done in accordance with all applicable Federal, State and Local laws and regulations governing air pollution including but not limited to 40 CFR 50-61 and FAC Rule 17-2.620.

(*Id*.)

6. On 20 September 1994, the contracting officer informed appellant by letter that only "the Contracting Officer is authorized to make changes in the contract," that § 01010, Statement Of Work, required that all material submissions be submitted within 10 days after appellant's receipt of the notice to proceed and that the "[c]ontract expiration date is 262 calendar days after receipt of the Notice to Proceed" (R4, tab 3).

7. On 30 September 1994, appellant advised that Robert Thornton would be its designated Project Superintendent, on site during contract performance and authorized to act on behalf of appellant (R4, tab 4).

8. On 7 October 1994, the Preconstruction Conference was held. In attendance for appellant were Robert Thornton, Ernest LoFurno (Project Coordinator) and Joseph Carosella (President) (R4, tab 6). In handwritten notes taken at said conference by

appellant's Mr. LoFurno, it was noted that "AFTER FIRST 8 DONE – ADDITIONAL UNITS WILL BE RELEASED . . . BOB THORNTON SAID 12/1 START – NOV. 29TH START DATE ASSIGNED." (R4, tabs 195, 228; tr. 1/156-61) Mr. LoFurno's notes state that "* SANDBLASTING MUST BE DONE UNDER COVER" and that this was "NOT AS BID" (tr. 1/158-59; R4, tab 195). Mr. LoFurno had been a primary participant in the preparation of appellant's bid (R4, tabs 251, 266; tr. 1/123-24, 130-31, 136-37).

Alleged Delays Associated with Government's Late Turnovers of Housing Units

9. The Notice to Proceed was issued on 7 October 1994 and acknowledged by appellant on that date. It provided that "[t]he contract start date is 29 NOV 94 and the completion date is 17 AUG 95. Accordingly, work shall begin within five (5) calendar days and will be completed no later than the date shown above" (R4, tabs 1, 7, 152 through 153, 236; tr. 5/10). Pursuant to ¶ H-807(c) of the contract, *supra*, "[w]ork at the jobsite [was not to] commence until 75 calendar days after notice to proceed [*i.e.*, 21 December 1994] to provide time for submittals, approval and delivery of materials, and to allow time for accumulation of vacant housing units" (*id*.; tr. 1/42-43, 120-22; R4, tabs 68, 125). The evidentiary record does not establish that the earlier (*i.e*., 29 November 1994) start date for actual work on the specified family housing units was supported by bargained-for consideration (*id*.). In addition, the notice to proceed miscalculated the contract completion date, which should have been 26 June 1995, 262 days after receipt of notice to proceed.

10. Sometime between 7 October and 29 November 1994, appellant began its preparation for mobilization to the job site and commencement of contract work (tr. 1/43-6, 2/203, 5/12-13, 75-76; R4, tabs 181, 184, 248 through 249, 261 through 262). Mr. Thornton stated that he had several people in the Eglin AFB area from this date, but that there are no daily reports until 3 January1995 because "I was not doing any government work" (tr. 5/75-78). There are also no certified payrolls prior to January 1995 (tr. 5/79-80; R4, tabs 181, 184, 248 through 249). Appellant's certified claim submission states that the Government delayed the start-up of actual work on the family housing units for 13 calendar days from 22 December 1994 through 3 January 1995 (tr. 3/70-72, 89-91, 136-37, 5/79; R4, tab 125).

11. Appellant's approved progress schedule shows that appellant's planned sequence of construction activities (including, where applicable, demolition, removal, repair, replacement, new construction, etc.) for the initially released group of eight units and the incrementally released groups of four units (hereinafter "weeks - / -") was generally, as follows: excavate walls, patios, footings and pads (weeks 1-7/1-6); plumbing and gas (weeks 2-12/2-10) together with heating, ventilation and air conditioning (weeks 2-9/2-8); framing, drywall and insulation (weeks 3-12/3-11) together with electrical (weeks 3-5/3-5); block walls and stucco (weeks 5-8/5-8) together with roofing and gutters (weeks 5-6/5-6);

ceramic tile, carpet and vinyl together with windows, doors and trim (weeks 5-7/5-7); cabinets, wall covering, bath accessories, painting (weeks 6-7/6-7); landscaping and cleanup (intermittent through week 13/intermittent through week 11) (tr. 1/70-75, 90-95, 176-77, 208-23, 2/115-40, 193, 3/22-24; R4, tabs 1, 15, 78, 125 at ex. 10, tabs 198, 253, 255). Said approved progress schedule shows that appellant planned to perform the work on the respective groups of four units by sequentially shifting work crews as additional groups of units became available in accordance with the release/completion schedule set forth in ¶ H-807 of the contract—*i.e.*, not on the basis of completing one group of units prior to the release of the next group of units (*id.*).

12. Appellant "did not want to work over the Christmas-New Year holiday week and would have lost that week if he had started on 22 Dec 94. It was mutually agreed not to start until after Jan. 1." (R4, tabs 228, 236, 250; tr. 3/30, 76, 93-94). Appellant acknowledged, as late as 1 June 1995, that 3 January 1995 constituted the agreed-upon start date for construction work at the site (R4, tabs 45, 125). The 24 housing units covered by subject contract were all vacant by 30 December 1994 (tr. 1/100-01, 5/33). On 22 June 1995, appellant's counsel complained about alleged Government-caused delay of appellant's commencement of work on the family housing units from 22 December 1994 through 3 January 1995 although this alleged delay did not necessarily impair appellant's "ability to complete this project within the original schedule"(tr. 1/120-22, 3/89-90; R4, tabs 63, 125). At that time, the contracting officer stated that "the time for completion time of 262 days will be computed from 3 Jan 95 which will extend the contract performance period to 21 Sep 95" (R4, tabs 68, 125). The parties thereafter treated 21 September 1995 as the contract completion date thereby effectively adding 87 additional days of contract performance time (*i.e.*, from the original contract completion date, 26 June 1995, to 21 September 1995) (*id.*, findings 3, 9).

13. (a) Appellant began work at the job site on 3 January 1995 when the Government released units 1-8 (101-108 Wakulla Road) to appellant (tr. 1/46, 179, 3/76-77; R4, tabs 124, 255). In accordance with ¶ H-807(c) of the contract, the scheduled completion date for this work was 2 April 1995, 89 days after the release thereof (R4, tab 1; tr. 1/181). Six of these first eight units were actually completed by 19 August 1995, more than 18 weeks after the scheduled completion date (R4, tab 124). The evidentiary record does not reflect the actual date of completion of work for the remaining two units in this initial group.

(b) The Government actually released units 9-12 (102, 104, 106 and 108 Ossipee Road) to appellant on 22 February 1995, one day after the contract's scheduled release date of 21 February 1995 (R4, tabs 124, 255; tr. 1/180-81, 3/75). The scheduled completion date for these four units was thus 8 May 1995, 75 days after the actual release thereof *(id.)*. Three of these four units were actually completed by 1 September 1995, approximately 15 weeks after the scheduled completion date (R4, tab 124). Appellant's payrolls for the units

1-12 actual performance period (January through August 1995) show consistent manning levels except mid-May through June 1995 when said levels declined due to the exterior door and lead-base paint controversies, *infra* (tr. 1/87-103, 175-83, 5/32-37, 93-97; R4, tabs 124, 262; findings 15-27).

(c) Appellant's president, Mr. Carosella, testified that the aforesaid units (1-12) were not completed within the contractually mandated time durations because of "delays associated with lead-based paint, doors, . . . [and] adverse weather" (tr. 1/71-74, 88-92, 182-83; R4, tabs 18 through 26). During the 14 March through 7 August 1995 time period, appellant actually performed approximately 50 per cent of the units 1-12 work, or, stated differently, approximately 25 per cent of the entire contract work (R4, tabs 15, 22, 24 through 27, 30 through 32, 34 through 37, 40 through 41, 43, 52, 58, 60, 66 through 67, 69 through 73, 75, 77, 79 through 82, 124, 198). Appellant's president opines, however, that appellant was capable of performing all work on units 13-24 during the 14 March through 27 June 1995 period, except work that was dependent upon the installation of exterior doors and/or completion of sand blasting (tr. 1/100-01, 176, 5/33; R4, tabs 1, 124; findings 18-19, 27, *infra*).

(d) On 27 April 1995, 24 May 1995, 1 June 1995, 22 June 1995, 30 June 1995, 5 July 1995 and 12 July 1995, appellant asserted that the Government's failure to release units 13-24 was delaying project completion and demanded that the Government release, as required, *inter alia*, by ¶ H-807 of the contract, additional units for contract performance by appellant (tr. 3/229-30, 4/33-38, 5/32; R4, tabs 42, 44 through 45, 63, 68, 70, 124 through 125, 162, 214, 218, 226, 236). The Government suspended commencement of work on units 13-24 for an indefinite period by refusing said requests on the basis that appellant was far behind schedule on units 1-12 stating that additional units would only be released if appellant put forth "a concerted effort and substantially completes the units provided" (*id*.; tr. 1/94, 179-82, 4/19-20, 24-26; R4, tabs 26, 36, 53, 59, 68). In this regard, the Government had previously issued a "delinquency" letter to appellant on 5 April 1995 and a "cure" notice to appellant on 15 June 1995 wherein appellant was warned that its failure to make progress could result in default termination of subject contract (R4, tabs 28, 59). By letter dated 30 June 1995, the Government further advised appellant that it "will be monitoring this contract . . . and will require Carousel to carry through on their assurances that the contract will be completed [by 21 September 1995]" (R4, tab 68 at 4). The weekly progress report shows that appellant had completed approximately 46 per cent of the work on units 1-12 (or 23 per cent of the total contract work) as of 15 July 1995 (R4, tab 75).

(e) The Government did not release units 13-16 (101, 103, 105 and 107 Ossipee) to appellant until 7 August 1995, approximately 146 days after the contract's originally scheduled release date of 14 March 1995 and prior to the date(s) that appellant actually finished units 1-12 (tr. 3/67-69; R4, tabs 1, 124 through 125, 171, 253, 255; findings

13(a)-(b)). The "new" scheduled completion date for units 13-16 was thus 21 October 1995, 75 days after the actual release thereof (*id.*; R4, tab 91). One of these units was completed by 17 October 1995; the remaining three units were completed by 15 November 1995, approximately 23 days after the scheduled completion date thereof (R4, tabs 1, 124).

(f) The Government released units 17-20 (532, 534, 536 and 538 Chinquapin Road) to appellant on 18 August 1995, approximately 136 days after the contract's originally scheduled release date of 4 April 1995 (tr. 3/67-69; R4, tabs 1, 91, 124 through 125, 171, 253, 255). Pursuant to ¶ H-807(c)(a)(3) of the contract, however, said units 17-20 should have been released to appellant on 28 August 1995, 21 calendar days after the Government had released units 13-16 (findings 4, 13(e)). The "new, adjusted" completion date for units 17-20 should thus have been 11 November 1995, 75 days after the "adjusted" release date of 28 August 1995 (*id.*). The evidentiary record indicates only that said units were completed no later than 12 January 1996 (R4, tabs 117 through 118).

(g) The Government released units 21-24 (533, 535, 537 and 539 Chinquapin) to appellant on 5 September 1995, approximately 133 days after the contract's originally scheduled release date of 25 April 1995 (tr. 1/94, 97-98, 101, 3/67-69; R4, tabs 1, 91, 124, 125, 171, 253, 255). Pursuant to ¶ H-8-7(c)(a)(3) of the contract, however, said units 21-24 should have been released to appellant on 18 September 1995, 21 calendar days after the adjusted release date of 28 August 1995 for units 17-20 (findings 4, 13(e), 13(f)). The new, adjusted completion date for units 21-24 should thus have been 2 December 1995, 75 days after the "adjusted" release date of 18 September 1995 (*id.*). The evidentiary record indicates only that said units were completed no later than 12 January 1996 (tr. 2/205; R4, tab 118). Appellant's payrolls for the units 13-24 performance period (August 1995 through 12 January 1996) show consistent manning levels until mid-December 1995 through 12 January 1996 when said levels declined for reasons not readily apparent from the evidentiary record (tr. 1/87-103, 175-83, 5/32-37, 93-97; R4, tabs 124, 262). Appellant's manning levels for the work periods associated with units 1-12 and with units 13-24 are similar except for the above-described two periods of decline (*id.*; finding 13(b)).

(h) The durations, *supra*, between the contractually mandated release dates for units 13-24 and the actual release dates thereof were "uncertain" insofar as only appellant could predict when it would finish units 1-12 and only the Government could know when it would actually release units 13-24 (findings 13(c)-(g)).

(i) Appellant allegedly incurred $3,340 in direct labor overtime costs while performing its work on units 13-24 between 18 August 1995 and 12 January 1996 in, according to its scheduling expert, a "painfully obvious" effort to speed up performance and satisfy the then-extant contract completion date(s) of 21 September 1995 and 4 October 1995 (tr. 2/157-58, 4/81-95; R4, tabs 91, 94, 99, 105, 181; ex. A-1; app. br. at 47-49).

Appellant, however, has not adequately established, either through contemporaneous documents or through testimony, why it authorized and performed said overtime. We note, in this regard, that appellant's level of effort did not markedly vary during this period, appellant's completion of units 13-24 was also delayed by unusually severe weather and that appellant was then accusing its roofing subcontractor of delaying contract completion (findings 30-41, *infra*).

14. Appellant's claim, dated 30 December 1996, but received by the contracting officer on 24 February 1997 and certified under the Contract Disputes Act (CDA) by appellant's president on 7 March 1997, states that the delayed turnover of the housing units by the Government (*i.e.*, initial turnover delay associated with units 1-8 and the delay associated with the late turnovers of units 13-24) delayed project completion until 29 December 1995 (tr. 2/120-36; R4, tab 125 at 1, tabs 12 through 13, appendix 4, 9-11). Appellant's scheduling expert acknowledged that his "as-planned, as-impacted" schedule analysis herein does not show when any particular work activity was actually performed and is based on the assumption that appellant was not responsible for any other delays to the contract work (tr. 2/83-89, 114-39, 188-93, 214-15, 217-19; R4, tab 125 at 12, appendix 10, 11, 12). Said schedule analysis does not segregate the delay effect(s) associated with the late turnover(s) of units 13-24 from the delay effects of the late turnover of the initial eight units and does not independently account either for delays to units 1-12 or for possible delays to units 13-24 caused by the late approval of door submittals or the presence of lead-based paint (*id.*). We are, therefore, unable to determine the additional extent, *vel non*, beyond the delays/impacts described in findings 13(e)-13(g), *supra*, to which the Government's late turnover(s) of units 13-24 may have delayed/impacted appellant's performance of work thereon even assuming, *arguendo*, the validity of said "as-planned, as-impacted" analysis. The Government did not proffer either a scheduling expert or a formal delay analysis. The Government has never granted any time extension to appellant in connection with its failure to timely release units 13-24 to appellant.

Alleged Delays Associated with Door Approvals

15. Appellant's job progress schedule shows that appellant planned to begin installing the doors during the week of 29 January 1995 (R4, tab 198). Appellant's first material approval submittal with respect to interior and exterior doors was not submitted until 14 February 1995 (R4, tabs 129, 157, 202; tr. 1/47-57, 226-29, 3/14-18, 43-52). Appellant proposed to furnish "doors" made by the Crown Door Corporation but did not clearly identify either the specific types of doors or the salient features thereof that it intended to furnish (*id.*). The descriptive literature regarding the Crown Door Corporation "doors" contained various alternatives (*e.g.*, particleboard core, glue types and face veneers) which did not comply with specification requirements (*id.*). The only "certification" provided by appellant was the generic, pre-printed statement contained in the descriptive literature:

> Ratings
> Available to meet or exceed NWWDA IS1-86 and all amendments, AWI Specification Type C (particleboard core), type AA (wood stave core).

(*Id.*). The Government properly rejected appellant's 14 February 1995 door submittal on 22 February 1995 stating that appellant had failed to furnish the "certification from the door manufacturer" stating that "the [particular] doors [proposed by appellant] met the requirements specified" as required by ¶ 08200.9, *supra* (*id.*; R4, tab 2).

16. During the period 23 March through 23 June 1995, appellant complained that overall job performance/completion had been delayed due to, *inter alia*, the Government's 22 February 1995 disapproval of appellant's interior and exterior door submittals, *supra*, alleged unavailability of the specified doors "stem[ming] from either an obsolete or unobtainable manufacture [*sic*] specification," and alleged refusal of door manufacturers to provide the certification mandated by ¶ 08200.9 of the specification (R4, tabs 29, 124 through 125, 159 through 162, 164, 171, 207 through 210, 214 through 220, 222, 226, 236, 250, 251 at 10-16; tr. 1/59-62, 70-74, 89-92, 125-27, 139-47, 180, 226-29, 2/222-29, 3/18-19, 22-24, 39-52, 58-67, 99-101, 107, 114-16, 224-30, 4/32-33, 5/15-20, 80-83).

17. Appellant's second material approval submittal for interior and exterior doors identified specific doors made by the Florida Made Door Company and Benton Doors, Inc.[*] and was finally submitted by appellant to the Government on 26 April 1995 (R4, tabs 124, 129, 160, 171, 213 through 220, 222, 251, 265; tr. 1/62-67, 143-47, 180, 226-29, 2/224-32, 3/20, 66-67, 4/11-12). The certification from the Florida Made Door Company stated that the proposed "doors meet or exceed the current N.W.W.D.A.I.S. 1-87 specifications" and was furnished on 15 May 1995 (*id.;* finding 5). The certification from Benton Doors, Inc. that the "exterior doors . . . do meet NWWDA IS-1 or IS-5 requirements and meet or exceed specifications as indicated in Section 08200" was furnished on 22 May 1995 (*id.*). The Government's approval of these interior and exterior door submittals was dated 22 May 1995 (*id.*).

18. The interior and exterior doors for the first 12 units arrived at the project site on 27 June 1995 (R4, tabs 51, 124, 236; tr. 1/67). Carpets and pads were delivered to the job site on 26 June 1995 (R4, tabs 124, 213). The wood cabinets were delivered to the job site on 29 June 1995 (R4, tabs 42, 49, 124, 158, 203). The evidentiary record does not establish when the door locks and latches were obtained or installed by appellant (R4, tabs

[*] The Crown Door Corporation products that were originally submitted for approval by appellant were not being produced as of 9 May 1995 (R4, tab 218; tr. 1/143-47).

54 through 55, 124, 213). The installation of carpets/pads, wood cabinets and locks/latches was dependent upon the installation of the doors (tr. 1/70-71, 89-92, 3/22, 61, 4/22-24). Whether, and to what extent, the delivery of the above mentioned items (carpets, pads, wood cabinets, locks and latches) impacted appellant's performance of work on units 1-12 is not apparent from the evidentiary record herein (R4, tabs 42, 49, 124, 158, 203, 213; finding 14).

19. Appellant claims that the Government inexcusably delayed approving appellant's door submittals for approximately 81 work-days. According to appellant's schedule analysis, this delay coupled with the Government's concurrent late release of units 13-24, *supra*, delayed project completion until 27 March 1996 (findings 13, 15-18; tr. 2/131-38, 193-205, R4, tab 125 at 1-14, appendix 5, 9-12; app. br. at 18). Appellant, however, does not now "claim any delays beyond the actual 12 January 1996 project completion date" (*id.*; tr. 2/136-39; R4, tabs 74, 104, 120; app. br. at 44).

Alleged Delays Associated With Lead-Based Paint

20. Appellant's job progress schedule shows that appellant planned to start the stucco work (including the removal of existing paint by the sandblasting method) during the week of 29 January 1995 (R4, tabs 198, 253, 255). Appellant actually commenced performance of its sandblasting operations on 19 April 1995 (tr. 5/25-26; R4, tab 124). On 20 April 1995, the Government's inspector stopped appellant's sandblasting operation because appellant was not utilizing any "containment system" and was not utilizing the "wet blast method" (tr. 1/103-06, 115-16, 162, 2/232-35, 3/103-07, 154, 5/24-26, 28, 86-87; R4, tabs 1, 2 at §§ 02050.6, 09230.5, tabs 124, 212, 250).

21. Appellant's contemporaneous notes taken with respect to the 7 October 1994 Preconstruction Conference indicate that appellant failed to account for the sandblasting containment, collection and disposal requirements of the contract in its bid (tr. 1/165-67; R4, tab 195; findings 2, 4-5, 8).

22. Tests for the presence of lead-based paint at the housing units involved herein were conducted by the Government prior to the issuance of the solicitation for the instant contract. Said tests did not reveal the presence of paint that contained prohibited levels of lead (tr. 2/244-45, 3/25, 53-54, 126, 155-56, 160-62, 166, 170, 174-76, 203-04; R4, tabs 142, 188, 258, 267). None of these test results were provided to appellant prior to the award of subject contract (R4, tab 142).

23. The presence, *vel non*, of lead-based paint at the housing units was first raised by appellant on 5 May 1995 (R4, tab 124). Appellant had caused paint samples to be obtained on 2 May 1995 for its own testing purposes (R4, tabs 221 through 222). The results of appellant's testing initiative were furnished to the Government on 17 May 1995;

said results did not show the presence of paint containing impermissible levels of lead (tr. 3/109, 151-54, 166, 5/24-28; R4, tabs 38, 42, 125, 148, 156, 223, 224, 260).

24. During the 24 May through 2 June 1995 time period, appellant requested guidance/direction from the Government regarding its performance of sandblasting work in view of the presence of lead in the exterior paint on the housing units (R4, tabs 38, 42, 46, 125). Appellant equated the presence of any lead at all in the paint as constituting lead-based paint and, thus, dangerous *per se* (tr. 1/169-75). The Government directed appellant to proceed with performance of the sandblasting work in accordance with the protective procedures, *supra*, set forth in §§ 01500.2 and 09230.5 of the specification (finding 5; tr. 1/173-74, 3/25-26, 232-35; R4, tabs 48, 124, 125, 165, 223, 226, 227). These procedures provide adequate safety protection if, in fact, said exterior paint at the housing units contained either any lead at all or lead levels in excess of that permitted by applicable standards (*id*.).

25. During the 2 through 9 June 1995 time period, appellant did not proceed with the sandblasting work but, rather, asserted that a sandblasting plan prepared by a certified industrial hygienist was necessary before its sandblasting work could be recommenced (R4, tabs 50, 56, 125). The contracting officer advised appellant that the contract did not require such a plan and, again, directed appellant to proceed with the performance of the sandblasting work in accordance with the specification procedures (tr. 3/168-69, 194, 204, 4/31; R4, tabs 3, 125).

26. By letter dated 9 June 1995, appellant suggested an alternative to sandblasting wherein all loose paint would be removed and the units would then be encapsulated with wire lath and stucco. By letter dated 22 June 1995, appellant ultimately proffered said alternative "at no additional costs to the government" (tr. 5/27-28; R4, tabs 57, 62, 64, 68, 125, 133, 231, 232, 234, 235). The Government approved appellant's alternative proposal on 23 June 1995 (*id*.; tr. 3/26-29). Appellant began "wrapping wire mesh on bldgs" on 26 June 1995 (R4, tab 124).

27. Appellant claims that its overall job progress was delayed since its "sandblasting operation . . . was delayed from May 5, 1995 until June 22, 1995 or forty-seven (47) calendar days while the government was agreeing on an alternate method of dealing with the lead paint on the walls" (R4, tabs 42, 46, 50, 56, 124, 125 at 8-10). According to appellant, it was unable to proceed with stuccoing, painting, landscaping, cleanup and other finishing operations during said period (*id*.; tr. 1/88-89). Appellant does not seek to recover "direct costs" associated with the alleged lead-based paint problem but, rather, seeks only time and money in the form of unabsorbed overhead because there were delays in the form of idle time for appellant's employees associated with the Government's ultimate decision to accept appellant's alternative "encapsulation" plan (tr. 1/171-75). Appellant's scheduling expert did not prepare a schedule analysis with respect to the delays associated with the

alleged presence of lead-based paint (tr. 2/119-40; R4, tab 125 at 8-10, 12-14). The entire period encompassed by the alleged delays associated with the lead-based paint problem is concurrent with a portion of the delay period associated with approval of door submittals (findings 13, 15-26).

28. (a) While performing the work associated with its no-cost, alternative encapsulation proposal, tests for the presence of paint containing excessive levels of lead revealed two samples wherein exterior paint on the units exceeded permissible levels of lead content, as defined by appellant (tr. 2/16-22, 28-29, 40-41, 62-65; R4, tab 171). Appellant's subcontractor, Reliance Environmental Management Inc., also submitted several invoices for removing "lead base paint" from the exterior walls of subject housing units during the 10 July through12 September 1995 time period (R4, tab 156). The evidentiary record, however, does not contain test data that reflects the lead content of the paint removed by Reliance Environmental Management, Inc. (*id*.). Additional, extensive testing for excessive lead content in the exterior paint at the housing units did not reveal the presence of paint with excessive levels of lead content (tr. 2/65, 80-81, 3/151-77, 193-94, 203-04; R4, tabs 168, 188, 258, 260, 267). Appellant does not seek recovery for its costs associated with the removal of the "lead base paint" described hereinabove.

(b) Appellant's daily reports indicate that the Government's inspector said on 22 June 1995 that appellant was applying "the wrong paint on the exterior of the units. Enamel is being used instead of latex." (R4, tab 124). Subsequently, on 20 September 1995, appellant asked for permission to use "water base latex paint vs. oil base Enamel as required" (R4, tab 140). Whether, and to what extent, appellant's use of "wrong paint" on unidentified exterior surfaces impacted its job performance is not apparent from the evidentiary record herein (R4, tabs 1, 124).

Alleged Delays Associated with Unusually Severe Weather and Roofing Work

29. By letter dated 22 June 1995, appellant told the Government that its work progress had been delayed by "unusually adverse weather" on unspecified occasions (R4, tabs 63, 68, 236).

30. Contrary to the Government's allegation that appellant did not perform roofing work prior to 6 July 1995 (Gov't br. at 53, 98), appellant's contemporaneously prepared daily reports indicate that appellant had roofers working on the units 1-12 roofs for 48 work days during the March through June 1995 period: 10, 14, 17, 20-24 and 27 March; 6-7, 10-14, 17-20 and 26-27 April; 8, 15-19, 22-26 and 30-31 May; and, 1-2, 6-9, 12-13, 15, 17, 19 and 21-22 June (R4, tab 124). There is no persuasive evidence that appellant's level of roofing effort during this period was inadequate or otherwise delaying contract performance.

31. During July through 1 August 1995, appellant had roofers working on units 1-12 for nine work days (tr. 5/75; R4, tab 124).

32. Hurricane Erin struck the Eglin AFB area on 3 August 1995 precluding the performance of any work on that day and severely limiting work performance on 4-6 August 1995 (R4, tab 124).

33. During the 2 August through 1 September 1995 period, appellant had roofers working for nine days at the site (*id*.).

34. By letter dated 24 August 1995, appellant requested a 25 calendar day time extension based on excessive rainfall--15 days between 3 January-30 June 1995 and 10 days due to the alleged impact of Hurricane Erin between 3 through 12 August 1995 (tr. 1/182-87; R4, tabs 84, 91, 99, 124, 125, 155). With respect to appellant's 3 January through 30 June 1995 weather-caused delay request, five of the days claimed were Saturdays and there is no indication that appellant planned or requested to work on said Saturdays (*id*.; R4, tab 1; tr. 1/187-90, 203-06). Moreover, on 2 June 1995 (one of the excessive rainfall days claimed by appellant), appellant's own daily report shows that work at the site was not affected by rainfall (*id*.; tr. 1/189-90, 203-06). Hurricane Erin delayed appellant's work at the job site for no more than four days (*id*.; tr. 1/190-95; R4, tab 239). The Government properly granted appellant a 13 calendar day time extension for unusually severe weather in response to appellant's 24 August 1995 request by issuing unilateral contract Modification No. P00002, dated 14 November 1995, which extended the contract completion date from 21 September through 4 October 1995 (*id*.; R4, tabs 94, 99, 105). Appellant's scheduling expert testified that said "rain or weather related delays that [appellant] suffered occurred concurrently with the late turnover of housing units that caused delays through September 1995" (tr. 2/128-30; R4, tab 125).

35. By letter dated 25 August 199[5], appellant accused its roofing subcontractor, Buddy Flores Roofing, Inc. of "not performing by not manning the job after several oral requests by [appellant's] job super[intendent]" (tr. 1/208-09; R4, tab 238). On 29-30 August 1995, appellant's job superintendent opined that "gutters, down spouts and splash blocks caused a weeks [sic] delay in turning over two [unidentified] bldgs" (R4, tab 124).

36. During the 8 September through 3 October 1995 time period, appellant increased the level of roofing activity at the site averaging almost six roofers for each of the 16 days that it worked (R4, tab 124).

37. Hurricane Opal struck the Eglin AFB area on 3-5 October 1995 causing extensive property damage (tr. 1/196-97, 5/28; R4, tabs 104, 124). Electricity was not restored until 8 October 1995 (*id*.). Storm damage repair and cleanup as well as

contract work recommenced at the job site on 9 October 1995 (*id*.). Appellant's job superintendent noted on the daily reports for 10-14 October 1995 that the roofers were again "falling behind and causing . . . delay [to the job]" and that, with the exception of 11 October 1995 (3 roofers), no roofers worked that week at the site (*id*.).

38. Appellant's president and job superintendent both testified that each believed that the Government diverted appellant's roofing subcontractor to perform "emergency" roofing work at other portions of Eglin AFB after Hurricane Opal (tr. 1/102-03, 195-96, 5/29-30, 89-91). In this regard, appellant's superintendent stated that on 6 November 1995 he saw employees of Buddy Flores Roofing, Inc. working on a damaged roof elsewhere on Eglin AFB (*id*.; R4, tab 124). Appellant's president and its job superintendent both admitted, however, that neither had personal knowledge that said employees of appellant's roofing subcontractor were, in fact, working directly for the Government or for another contractor with an Eglin AFB contract (*id*.). None of appellant's roofing subcontractor's personnel testified at the hearing. Moreover, the evidentiary record does not contain the terms of appellant's subcontract with Buddy Flores Roofing, Inc.

39. On 16 October 1995, appellant told its roofing subcontractor to report for work within 48 hours or its roofing subcontract would be canceled (*id*.). Two roofers worked at the job site hanging gutters on 17-19 October 1995 and four to seven roofers removed and replaced old roofs at the site on a daily basis during the 23 October through 2 November 1995 period (*id*.). Work was rained out on 3 November 1995; no roofers worked on 5-8 November 1995 (*id*.). Roofers worked at the site on a regular basis after 9 November 1995 (*id*.). Neither party proffered a scheduling expert or formal delay analysis with respect to the impact, *vel non*, of appellant's actual performance of roofing work upon its job progress.

40. On 13 November 1995, appellant requested an additional extension of 38 days to the performance period as a result of alleged adverse weather. The request included 28 days of alleged rain in excess of 1/2 inch or more from July through September 1995. The remaining 10 days requested were allegedly due to Hurricane Opal and unspecified "substantial rains" for "several days" (R4, tabs 104, 125). Appellant's request does not specify on which particular days the alleged adverse weather took place (*id*.; tr. 1/196). Appellant has never either identified or otherwise provided supporting data for the entirety of these claimed 38 days (tr. 1/197-201; R4, tabs 104, 125, 251). Appellant's president admitted that his request included every date on which it rained 1/2 inch or more, whether or not his forces were stopped from working at the site (*id*.). Appellant's scheduling expert testified that his "as-planned, as-impacted" schedule analyses do not independently account for the impact of the adverse weather included in appellant's above described 38 day time extension request (tr. 2/204-05; R4, tab 125).

41. Based upon appellant's contemporaneously prepared daily records and official weather records maintained by Eglin AFB Weather Squadron, the Government properly concluded that subject contract performance period should be extended from 4 October through 20 October 1995 (16 calendar days) due to the occurrence of unusually severe weather, including Hurricane Opal and its aftermath (6 days), that excusably delayed appellant's performance during the mid-August through 13 November 1995 time period—*i.e.*, latter half of August (3 days), September (5 days), October (6 days), and 1-19 November (2 days) (tr. 1/188, 3/29, 111-14; R4, tabs 84, 120, 124, 125, 155, 170, 176, 246, 247). In this regard, unilateral contract Modification No. P00003 was executed by the contracting officer on 11 April 1996 and, *inter alia*, granted said 16 calendar day time extension (*id.*). Appellant does not claim that its contract progress during November 1995 through 12 January 1996 was further delayed by unusually severe weather.

Contract Completion and Appellant's Claim

42. Appellant's daily reports for November-December 1995 and January 1996, establish that appellant generally worked on a 5-days per week basis through 12 January 1996, the date of contract completion, but that appellant's manning levels decreased during mid-December 1995 through 12 January 1996 (finding 13(g); R4, tabs 120, 124, 125).

43. The Government assessed liquidated damages against appellant in the amount of $7,286.16 from the revised contract completion date of 20 October 1995 through 12 January 1996 through unilateral contract Modification No. P00003, dated 11 April 1996 (R4, tabs 120, 246 through 247). The Government did not assess liquidated damages on a per unit basis using incremental due dates as set forth in ¶¶ F-20 and H-807(c)(a)(4) and (5) of the contract (*id.*; R4, tabs 1, 125 at appendix 2). The evidentiary record herein does not explain why the Government waived assessing liquidated damages in accordance with said ¶ F-20.

44. The Government concedes that its assessment of liquidated damages was improper simply by stating, per testimony of the contracting officer, without explanation, that appellant's performance period should have been extended through 12 January 1996, the actual contract completion date (tr. 4/29-30, 35-36; R4, tab 120; Gov't br. at 68, 110). The evidentiary record, however, supports only a time extension of 43 calendar days from 20 October 1995, the contract completion date, as presently extended, for the Government's tardy release of units 21-24 through 2 December 1995, the "new" scheduled completion date thereof, plus an additional 13-day time extension through 15 December 1995 for unusually severe weather that the Government acknowledged, through contract Modification No. P00003, had impacted appellant's performance of work on units 21-24 commencing in September 1995 (findings 13(g), 14, 41).

45. Appellant's 30 December 1996 claim, certified on 7 March 1997, sought recovery of $307,011.11 including remission of the liquidated damages of $7,286.16 (R4, tab 125). Appellant's claim stems from: the Government's alleged delay of the start of contract performance from 22 December 1994 through 3 January 1995; the Government's alleged delay in approving appellant's door submittals; alleged Government delays associated with the presence of lead-based paint; the Government's delayed release of units 13-24 to appellant; weather delays that appellant "suffered . . . concurrently with the late turnover of housing units [13-24] that caused delays through September 1995" and eight days of delay "caused by a combination of Hurricane Opal and November rain storms [which] . . . are excusable because the project would have been completed by September 14, 1995 but for other delays caused by the government which are not attributed to acts of nature" (*id.*).

46. Appellant now seeks recovery first "in the amount of $359,452 on a modified total cost basis, plus applicable CDA interest" (app. br. 53, *see* at 27-32). If recovery on a modified total cost basis is denied, appellant seeks recovery in the alternative amount of $109,777, plus CDA interest, as follows: Extended Field Overhead-$24,089; Eichleay-$40,969; Liquidated Damages-$7,286; Costs Incurred Due to Delayed Start Date-$15,042; Acceleration Costs-$3,340; Overhead and Profit-$19,051 (ex. A-1; app. br. 53, *see* at 32-52). Appellant seeks profit where applicable at the rate of ten per cent. Said rate was utilized by the Government in contract Modification No. P00001 (R4, tab 240; app. br. at 52-53). Appellant did not experience any inefficiency in its performance of work on units 13-24 and states that any inefficiency that it may have experienced while working on units 1-12 cannot be attributed to any specific cause (tr. 2/154-57, 186, 4/81-93, 131-35; R4, tabs 171, 178, 181 through 183(b), 261 through 262; ex. A-1; app. br. at 49).

47. No final decision on appellant's claim was ever issued by the contracting officer. While the contracting officer was awaiting the performance of an audit of said claim, appellant filed its appeal based upon the contracting officer's failure to issue a final decision within a reasonable time.

48. Appellant claims that its allegedly unabsorbed field overhead costs in the amount $24,089 were incurred while performing work on units 13-24 during the period 22 September 1995 through 12 January 1996 (tr. 2/146-53, 61-63, 76-79,94-96, 102-03; R4, tabs 125, 178, 181 through 184, 261; ex. A-1; findings 13(b)-(i)).

49. Appellant's "Eichleay" calculations, as presented during the hearing, yielded a daily contract overhead rate of $362.56 (tr. 4/70-73; ex. A-1).

50. The DCAA auditor's "Eichleay" calculations resulted in a daily overhead rate of $310 (tr. 4/70-76, 105-07; R4, tabs 171, 178, 261).

DECISION

Appellant asserts that the Government is monetarily responsible for the delay and constructive acceleration that stemmed from the Government's allegedly late turnovers of the initial group of eight units and of units 13-24, the Government's allegedly late approval of door submittals, the alleged presence of lead-based paint on the units and Hurricane Opal (app. br. at 15-26; app. reply br. at 6-11). Appellant asks that its quantum recovery be calculated on a "modified total cost" basis or, in the alternative, based upon discrete claim elements (app. br. at 27-53; finding 46).

The Government contends that "[a]ny delay associated with [its] failure to release more units was concurrent with a host of contractor-caused delays . . . and is, therefore, not compensable" (Gov't br. at 97). The "host" of contractor-caused delays includes incomplete door submissions, late delivery of kitchen cabinets, late delivery of carpets and pads, late delivery of door locks and latches, unjustified delay of paint sandblasting, use of "wrong" exterior paint and improper manning of the job by appellant's roofing subcontractor (*id*. at 97-99). The Government states that appellant's "failure to complete housing units as required by [clause H-807] and the contractor-caused reasons therefor were the real causes of delays in completing this project" (*id.* at 97).

Alleged Late Release of Initial Eight Units

The Government was contractually obligated to release the first eight housing units to appellant on 21 December 1994 (findings 3-4, 9). We are persuaded that the parties mutually agreed to defer the actual start of contract performance at the site until 3 January 1995 (findings 10, 12-13(a)). The Government turned over the first eight housing units to appellant on 3 January 1995 (*id*.). Appellant's commencement of work on the first eight housing units was not improperly delayed by the Government. In this regard, our conclusion is buttressed by appellant's lack of certified payrolls for periods prior to 3 January 1995 and appellant's six-month delay in complaining about the alleged delay by the Government in releasing the first eight units for work (*id*.). This aspect of appellant's claim is denied in its entirety.

Alleged Delays Associated with Door Approvals

Appellant's first interior and exterior door submittals, dated 14 February 1995, were properly and timely disapproved on 22 February 1995 by the Government because said submittals, while stating that various doors with various, unspecified features were "available" that "meet or exceed NWWDA" standards, did not identify or propose or certify particular doors with the particular features that met the requirements (including "NWWDA Standards") set forth in § 08200 of the contract (findings 5, 15). Appellant thus not only failed to furnish the required "certification from the door manufacturer" but also failed to

demonstrate that the proposed doors met contract specifications (*id.*). *See Davis Group, Inc.*, ASBCA No. 51832, 00-2 BCA ¶ 30,985. Appellant's subsequent difficulties regarding alleged unavailability of doors and refusal of door manufacturers to provide the required certification are appellant's responsibility alone (finding 16). The specified doors and certifications were, in fact, ultimately available and obtained by appellant during May 1995 (finding 17). Applicable delays to appellant's work on the first 12 units related to the approval of appellant's door submittals during the 14 February through 27 June 1995 (the date when the doors for the first 12 units were delivered to the job site (finding 18)) are thus solely the responsibility of appellant. This aspect of appellant's claim is denied in its entirety.

Alleged Delays Associated with Late Delivery of Kitchen Cabinets, Carpets and Pads and Door Locks and Latches

Installation of kitchen cabinets, carpets and pads, and locks and latches was dependent upon the installation of interior and exterior doors (findings 11, 18). The dates for delivery and installation of locks and latches are not established in the evidentiary record *(id.)*. The evidentiary record does not address or otherwise purport to establish any specific impact of these Government-alleged delays upon appellant's performance *(id.)*. In this regard, we note that the kitchen cabinets, carpets and padding were on-hand at or near the time that the interior and exterior doors were delivered to the job site *(id.)*. The Government, except to assert that the late delivery of cabinets, carpets, pads, door locks and latches, delayed appellant's overall job performance, has provided no proof as to the extent to which the contract schedule was impacted *(id.)*. We, therefore, reject the Government's contentions regarding appellant-caused delays after the end of June 1995 with respect to said cabinets, carpets, pads, door locks and latches.

Alleged Delays Associated With Lead-Based Paint and Appellant's Usage of "Wrong Paint"

Appellant actually commenced performance of its sandblasting operations in connection with units 1-12 on 19 April 1995, approximately three months after the planned start date shown on its approved job progress schedule (findings 11, 20). Appellant's sandblasting operation was properly halted for violation of the contract's requirements to utilize a "containment system" and the "wet blast method" *(id.)*. On 5 May 1995, appellant stated that the exteriors of the housing units contained lead-based paint thus precluding its performance of sandblasting (finding 23). Said exterior paint, however, did not actually contain impermissible levels of lead *(id.)*. The sandblasting procedures set forth as contractual requirements provided adequate safety protection regardless of the lead content of said exterior paint (findings 4-5, 8, 20-24). Appellant refused to proceed with sandblasting despite the Government's repeated directives during the 24 May through 9 June 1995 period to proceed with sandblasting that conformed to the contractually required protective measures (findings 24, 25). Appellant ultimately proffered, on 22 June 1995, an

alternative to sandblasting "at no additional costs to the Government" (finding 26). The Government timely approved the utilization of appellant's said "alternative" on 23 June 1995 *(id.).*

Under these circumstances, we must conclude that appellant alone bears responsibility for any delay to applicable work during the 5 May through 22 June 1995 time period caused by its refusal to perform then-required sandblasting work on the first 12 units. Any delay or disruption to appellant's work upon the first 12 units caused by its failure to perform sandblasting in accordance with contract requirements is concurrent with the delay period associated with appellant's door submittals, *supra*. This aspect of appellant's claim is denied.

The Government's bare contention that appellant applied the "wrong paint" on the exterior of the units thereby delaying and/or disrupting contract performance, is, at best, confusing and not supported by the record (finding 28(b)). We reject this contention in its entirety.

Late Release of Units 13-24

The contract unequivocally states at ¶ H-807 that units 13-24 would be turned over to appellant on specific dates during March through April 1995 rather than on the dates in August through September 1995 when said units were actually released to appellant (findings 3, 4, 13(e)-(g)). The contract remedies available to the Government for appellant's failure to timely complete units 1-12 included the assessment of liquidated damages pursuant to ¶ F-20 and the standard Liquidated Damages—Construction clause and default termination under the standard Default (Fixed-Price Construction) clause (findings 2-3). Nothing in the contract justified the Government's refusal to turn over units 13-24 to appellant on the contractually specified dates. The Government's contractual obligation to turn over said units to appellant as scheduled is not obviated because of its concerns stemming from appellant's failure to timely complete the first 12 units. The Government could have easily taken into account its concern about the potential for a contractor to "t[ear] up the entire housing unit and [leave] the job" (finding 4) when it drafted the contract herein. Instead, the Government adopted an unwritten policy of not turning over the units as scheduled "unless the contractor was performing satisfactory [sic]" *(id.;* findings 4, 8, 13(c)-(g)). The Government thus wrongfully denied appellant access to its work sites for units 13-24 for unreasonable and indefinite lengths of time (units 13-16, 146 days; units 17-20, 136 days; units 21-24, 133 days) thereby triggering the operation of the Suspension of Work clause of the contract (findings 2-4, 13(e)-(g)). *See Wheatley Associates dba Eagle Constructors*, ASBCA No. 24629, 80-2 BCA ¶ 14,639. We conclude that appellant is thus entitled to relief under said clause in the form of a 43-day time extension from the contract completion date, as already extended (20 October 1995), through 2 December 1995, the new scheduled completion date for units 21-24, due to the Government's tardy

release thereof (*id.)*. The evidentiary record does not adequately establish entitlement to any additional delay/impact time directly related to the Government's tardy release of units 13-24 (*id*.; finding 14). Said delay in granting access to units 13-24 is, however, monetarily compensable only to the extent that it caused an actual increase in the cost of contract performance.

The Government's contentions that the appellant-caused delays associated with incomplete door submittals and sandblasting, *supra*, were concurrent with the Government's failure to release units 13-24 thereby precluding compensation miss the mark. These appellant-caused delays occurred prior to the Government's actual release of units 13-24 to appellant. Simply stated, the activities associated with work on units 13-24 during the applicable portions of the 14 March through 5 September 1995 time period were not impacted by the door submittal and sandblasting delays because appellant could not even start to work thereon solely due to the Government's refusal to release said units to appellant. Door installation and sandblasting are activities that were scheduled to be performed relatively late in the planned construction sequence (finding 11). Preceding activities to be performed on units 13-24 simply were not affected by these appellant-caused delays prior to the resolution thereof in late June 1995 (*id*.; findings 12-13(g), 14-28).

Acceleration

Appellant claims entitlement to acceleration costs in the amount of $3,340 allegedly incurred for overtime work on units 13-24 between 18 August 1995 and 12 January 1996 (finding 13(i); app. br. at 44-49, 53). Appellant, however, has failed to adequately establish that it incurred said overtime due to Government actions/inactions *vice* unusually severe weather and/or the alleged failures of its roofing subcontractor to man the job (findings 13(d)-(i), 14, 35-41). Under these circumstances, we cannot conclude that appellant's work was constructively accelerated by Government actions/inactions. This aspect of appellant's claim is denied in its entirety.

Alleged Delays Associated with Unusually Severe Weather and Roofing Work

Our findings confirm that appellant's work upon units 1-12 during the 3 January through 7 August 1995 time period was excusably delayed by unusually severe weather for 13 calendar days as properly acknowledged by the Government in contract Modification No. P00002 (finding 34). Said modification, *inter alia*, extended the contract completion date to 4 October 1995 (*id*.). Appellant's work on units 1-24, as applicable during the mid-August through 13 November 1995 period, was additionally delayed by unusually severe weather for 16 calendar days as properly acknowledged by the Government in contract Modification No. P00003 (findings 13(a)-(g), 37, 40-41). Said 16-day time extension included six days attributable to Hurricane Opal and its aftermath (*id*.). Eight of the

unusually severe weather days occurred during mid-August through September 1995, while appellant was working on units 13-24 and before Hurricane Opal struck (*id*.). Job completion was, therefore, excusably delayed past the date when Hurricane Opal struck Eglin AFB (*id*.). Appellant's reliance on *Commercial Roofing Company*, ASBCA No. 46664, 95-1 BCA ¶ 27,563, is thus misplaced and its claim for an equitable adjustment in the contract price due to the effects of Hurricane Opal and its aftermath is denied. In this regard, we cannot conclude from the evidentiary record herein, that appellant could or would have completed subject contract prior to the date Hurricane Opal struck even if units 13-24 had been timely released to appellant (findings 4, 9-11, 13-44).

The evidentiary record does not adequately support appellant's allegation that the Government improperly diverted the efforts of appellant's roofing subcontractor (finding 38). Moreover, the evidentiary record does not purport to establish the impact of said Government interference on appellant's overall job progress *(id*.; finding 39). This aspect of appellant's claim is denied.

Our findings indicate that on several intermittent occasions during August and October 1995, appellant accused its roofing subcontractor of delay due to said subcontractor's failure to man the job (findings 35, 37, 39). The actual impact, *vel non*, of these alleged failures of appellant's roofing subcontractor is, however, not established in the evidentiary record *(id.).* We, therefore, reject the Government's contention that appellant's overall job progress was delayed by the above described intermittent failures of appellant's roofing subcontractor.

Modified Total Cost

Appellant was responsible for many of the delays and consequent expenses associated therewith that it may have incurred during its performance of subject contract (findings 15-27). Appellant's performance was also delayed by unusually severe weather (findings 32, 34, 37, 40-41). Appellant's proposed "modified total cost" method of calculating quantum is premised on its mistaken assertion that it "was not responsible for any of the delays to Contract performance" (app. br. at 30). Utilization of the requested total cost methodology is, under these circumstances, neither justified nor permissible. *See WRB Corporation et al., A Joint Venture d/b/a Robertson Construction Company v. United States*, 183 Ct. Cl. 409, 426 (1968); *S. W. Electronics & Manufacturing Corp. v. United States*, 655 F.2d 1078, 1086-87 (Ct. Cl. 1981).

Eichleay (Unabsorbed Extended Home Office Overhead) and Extended Field Overhead Damages

The Government wrongfully suspended appellant's performance of work on units 13-24 by refusing to release said units to appellant at the time(s) specified by ¶ H-807 of

the bargained-for contract herein (findings 1-4, 13(a)-(i)). Appellant states that it was required to stand by, at least with respect to performing work on units 13-24, during these Government-caused suspensions of work and was unable to take on new work during said periods (*id*.). The recovery of so-called *Eichleay* unabsorbed home office overhead damages is not precluded if appellant "continued to perform minor tasks throughout the period of government indecision." *Altmayer v. Johnson*, 79 F.3d 1129, 1134 (Fed. Cir. 1996). However, appellant's work force continued to perform substantial amounts of work (*i.e*., approximately one-half of the units 1-12 work or, stated differently, approximately one quarter of the entire scope of contract work) during the time period that the Government refused to release units 13-24 to appellant (finding 13(c)). We cannot, therefore, term the work that appellant performed on units 1-12 during the suspension period(s) as "minor" and thus appellant was not on "standby" for purposes of recovering alleged unabsorbed field and home office overhead costs. *See, All Seasons Construction & Roofing, Inc.*, ASBCA No. 45583, 98-2 BCA ¶ 30,061 at 148,736-37 and cases cited therein. Appellant has simply not adequately demonstrated that it incurred either unabsorbed home office overhead or unabsorbed field overhead expenses. In this regard, we note that appellant expressly renounces any claim herein with respect to any inefficiency/disruption costs associated with its performance (finding 46). The unabsorbed field and home office overhead aspects of appellant's claim are thus denied for failure of proof.

Liquidated Damages

The Government's concession that its assessment of liquidated damages for the 21 October 1995 through 12 January 1996 period in the amount of $7,286.16 was improper and that appellant's performance period should be extended through 12 January 1996 is neither supported nor explained by the evidentiary record herein (findings 13-44). Rather, the evidentiary record only establishes that subject contract should be properly extended for 56 calendar days (due to the Government's tardy release of units 13-24 (43 days) and unusually severe weather during the September through 2 December 1995 period (13 days)) through 15 December 1995 *vice* 12 January 1996 (*id*.). Appellant's claim for remission of liquidated damages is thus sustained in the amount of $4,857.44 (56 days multiplied by the daily liquidated damages rate of $86.74) plus applicable interest under the CDA. *See Skip Kirchdorfer, Inc.*. ASBCA No. 40516, 00-1 BCA ¶ 30,625 at 151,182 and cases cited therein.

CONCLUSION

In accordance with the foregoing, appellant's claim for remission of liquidated damages is sustained in the amount of $4,857.44 plus applicable CDA interest from 7 March 1997. The remainder of appellant's claims are denied.

Dated: 23 January 2001

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50719, Appeal of Carousel Development, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals