

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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R. J. Lanthier Co., Inc. ) ASBCA No. 51636  
 )  
Under Contract No. N63387-90-C-6538 )

APPEARANCES FOR THE APPELLANT: Robert Sabahat, Esq.  
Bradley P. Knypstra, Esq.  
Ali Parvaneh, Esq.  
Madison Harbor, ALC  
Orange, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Stephen R. O'Neil, Esq.  
Assistant Director  
Evadne A. Sanichas, Esq.  
Senior Trial Attorney  
Western Office  
San Diego, CA

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

This appeal<sup>1</sup> involves a sponsored flow-through claim from R. J. Lanthier Co., Inc.'s (appellant) electrical switchgear equipment assembler, General Switchgear, Inc. (GSI) for constructive acceleration costs incurred by GSI due to defects in the contract specifications/drawings and "lack of reasonable cooperation and purposeful disablement by the Government and its agent." As finally presented, GSI, through appellant, seeks to recover the total sum of \$207,107, including interest. (Tr. 59-61, 702-51; app. supp. R4, tab 26; ex. A-3; app. reply br. at 1, 5) A five-day hearing was held in San Diego, California. Only entitlement is before the Board for decision herein (tr. 22-23).

FINDINGS OF FACT

1. Contract No. N63387-90-C-6538, as amended, "TO REPAIR GRAVING DOCK AND ELECTRICAL SYSTEMS FOR BUILDING 85, NAVAL STATION, SAN DIEGO, CALIFORNIA" was awarded on 10 April 1995 to appellant in the amount of \$4,499,000 by the Officer in Charge of Construction, Naval Public Works Center, San Diego, California

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<sup>1</sup> Administrative Judge Allan F. Elmore, the Board member who presided at the hearing on this appeal, has retired.

(R4, tabs 1, 25). The original contract completion date was 10 March 1996 (R4, tab 25). During contract performance, said completion date was bilaterally extended by appellant and the government to 25 June 1996 (R4, tabs 2, 561, 570).

2. The contract incorporated the following standard government contract clauses: FAR 52.214-6, EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984); FAR 52.233-1, DISPUTES (MAR 1994) - ALTERNATE I (DEC 1991); FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984); FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) - ALTERNATES I, II (APR 1984); FAR 52.252-1, SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (JUN 1988); FAR 52.243-4, CHANGES (AUG 1987); DFARS 252.236-7001, CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (DEC 1991); and DFARS 252.243-7001, PRICING OF CONTRACT MODIFICATIONS (DEC 1991) (R4, tab 1).

3. Part B (Repair Graving Dock and Electrical System Building 85) of the contract drawings included, *inter alia*, Drawing No. E-13.3 (Part B) (NAVFAC Drawing No. 8032445), entitled “480V UTILITY CONTROL SYSTEM DIAGRAM” (R4, tab 1, § 00501, ¶ 1.2, § 00721, ¶ 1.4).

4. Section 01400 (Quality Control) of the specification requires, *inter alia*, that the contractor provide a “Registered Electrical Engineer” to review and certify all electrical submittals (R4, tab 1, § 01400, ¶¶ 1.5.4, 1.11). Appellant utilized the services of Construction Testing & Engineering, Inc. (CTE) to perform these duties (R4, tabs 19, 48, 62).

5. Section 01300 (Submittals) of the specification requires, *inter alia*, as follows:

## 1.1 DEFINITIONS

### 1.1.1 Submittal

Shop drawings, product data, samples, and administrative submittals presented for review and approval. Contract Clauses “Material and Workmanship,” paragraph (b) and “Specifications and Drawings for Construction,” paragraphs (d), (e), and (f) apply to all “submittals.”

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### 1.3 PROCEDURES FOR SUBMITTALS

#### 1.3.1 Reviewing, Certifying, Approving Authority

The QC organization shall be responsible for reviewing and certifying that submittals are in compliance with contract requirements. The approving authority on submittals is the QC Manager unless otherwise specified for the specific submittal. At each "Submittal" paragraph in the individual specification Sections, a notation "G," following a submittal item, indicates the Contracting Officer is the approving authority for that submittal item.

#### 1.3.2 Constraints

- a. Submittals listed or specified in this Contract shall conform to the provisions of this Section, unless explicitly stated otherwise.
- b. Submittals shall be complete for each definable feature of work; components of the definable feature interrelated as a system shall be submitted at the same time.

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#### 1.3.3 Scheduling

- a. Coordinate scheduling, sequencing, preparing and processing of submittals with performance of the work so that work will not be delayed by submittal processing. Allow for potential requirements to resubmit.
- b. Except as specified otherwise, allow a review period, beginning with receipt by the approving authority, that includes at least 15 working days for submittals for QC Manager approval and 20 working days for submittals for Contracting Officer approval. The period of review for submittals with Contracting Officer approval begins when the Government receives the submittal from the QC organization.

The period of review for each resubmittal is the same as for the initial submittal.

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#### 1.3.4 Variations

Variations from contract requirements require Government approval pursuant to Contract Clause entitled “Specifications and Drawings for Construction” and will be considered where advantageous to the Government. When proposing a variation, submit a written request to the Contracting Officer, with documentation of the nature and features of the variation and why the variation is desirable and beneficial to the Government. If lower cost is a benefit, also include an estimate of the cost saving. Identify the proposed variation separately and include the documentation for the proposed variation along with the required submittal for the item. When submitting a variation for approval, the Contractor warrants the following:

##### 1.3.4.1 Variation Is Compatible

The Contract has been reviewed to establish that the variation, if incorporated, will be compatible with other elements of the work.

##### 1.3.4.2 Contractor Is Responsible

The Contractor shall take actions and bear the additional costs, including review costs by the Government, necessary due to the proposed variation.

##### 1.3.4.3 Review Schedule Is Modified

In addition to the normal submittal review period, a period of 15 working days will be allowed for consideration by the Government of submittals with variations.

#### 1.3.5 Contractor’s Responsibilities

- a. Determine and verify field measurements, materials, field construction criteria; review each submittal;

and check and coordinate each submittal with requirements of the work and Contract documents.

- b. Transmit submittals, which shall be complete by section number or be will [sic] returned by without review, to the QC organization in orderly sequence, in accordance with the Submittal Register, and to prevent delays in the work, delays to the Government, or delays to separate contractors.
- c. Advise the Contracting Officer of variation, as required by the paragraph entitled “Variations.”
- d. Correct and resubmit submittal as directed by the approving authority. Direct specific attention, in writing or on resubmitted submittal, to revisions not requested by the approving authority on previous submission.

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- f. Complete work which must be accomplished as a basis of a submittal in time to allow the submittal to occur as scheduled.
- g. Ensure no work has begun until submittals for that work have been returned as “approved,” or “approved as noted”.

#### 1.3.6 QC Organization Responsibilities

- a. Note the date on which the submittal was received from the contractor on each submittal for which the QC Manager is the approving authority.
- b. Determine and verify field measurements, materials, field construction criteria; review each submittal; and check and coordinate each submittal with requirements of the work and Contract documents.
- c. Review submittals for conformance with project design concepts and compliance with the Contract documents.

- d. Act on submittals, determining the appropriate action based on the QC organization’s review of the submittal.
  - (1) When the QC Manager is the approving authority, take the appropriate action on the submittal from the possible actions defined in the paragraph entitled, “Actions Possible.”
  - (2) When the Contracting Officer is the approving authority or when a variation has been proposed, forward the submittal to the Government with the certifying statement or return the submittal marked “not reviewed” or “revise and resubmit” as appropriate. The QC organization’s review of the submittal determines the appropriate action.

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- g. Sign the certifying statement or approval statement. The person signing the certifying statements shall be the QC organization member designated in the approved QC plan. The signatures shall be in original ink. Stamped signatures are not acceptable.

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### 1.3.7 Government’s Responsibilities

When the approving authority is the Contracting Officer, the Government will:

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- b. Review submittals for approval within the scheduling period specified and only for conformance with project design concepts and compliance with the Contract documents.
- c. Identify returned submittals with one of the actions defined in the paragraph entitled “Actions Possible”

and with markings appropriate for the action indicated.

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### 1.3.8 Actions Possible

Submittals will be returned with one of the following notations:

- a. Submittals marked “not reviewed” will indicate the submittal has been previously reviewed and approved, is not required as a submittal, does not have evidence of being reviewed and approved by the Contractor, or is not complete. A submittal marked “not reviewed” will be returned with an explanation of the reason it is not reviewed. Returned submittals deemed to lack review by the Contractor or to be incomplete shall be resubmitted with appropriate action, coordination, or change.
- b. Submittals marked “approved” “approved as submitted” authorize the Contractor to proceed with the work covered.
- c. Submittals marked “approved as noted resubmission not required” authorize the Contractor to proceed with the work as noted provided the Contractor takes no exception to the notations and provides corrections noted.
- d. Submittals marked “revise and resubmit” or “disapproved” indicate the submittal is incomplete or does not comply with the design concept or the requirements of the Contract documents and shall be resubmitted with appropriate changes.

(R4, tab 1)

6. (a) Appellant submitted its firm fixed-price bid in the amount of \$4,499,000 to the government on 20 March 1995 (R4, tabs 17, 21, 25). The “electrical” portion of appellant’s bid totaled \$3,038,364 (\$516,835 - labor and \$2,521,529 - material) (R4, tab 21). None of appellant’s personnel testified either at the hearing or by way of sworn statement and appellant’s bid estimate is not included in the evidentiary record

(*passim*). None of the fact witnesses who testified at the hearing had any direct knowledge as to the basis of appellant's bid herein with respect to any of the 22 items, *infra*, involved in this appeal (tr. 376, 846-47; *see* findings 9(b), 10, 15(c), 27, 31, 33-56).

(b) On 24 April 1995, appellant issued a letter of intent to subcontract the electrical portion of the work to Neal Electric, Inc. (Neal) for the amount of \$2,990,000 (R4, tabs 31, 35, 36, 41, 52). Neal thereafter issued a purchase order to Beacon Electric Supply (Beacon) for the entire switchgear portion (*i.e.*, low-voltage and medium-voltage switchgear equipment) of the electrical work, and Beacon (a distributor), in turn, issued a purchase order on 4 May 1995 to GSI, an "original manufacturer" of low-voltage and medium-voltage switchgear equipment, for this work (R4, tabs 32, 34, 37-39, 41, 43-46, 52; tr. 763-64, 784). Neal's subcontract with appellant was dated 22 May 1995 and was actually executed on 13 June 1995 (R4, tab 52). None of Neal's or Beacon's personnel testified either at the hearing or by way of a sworn statement (*passim*).

(c) GSI submitted its quote to Beacon in the amount of \$965,000 on 4 May 1995 to perform, *inter alia*, the low and medium voltage switchgear equipment portion of the work (R4, tabs 28-31, 34, 37-40, 42-47, 57, 597 at 3, 9; tr. 764-65, 822-30, 857-60). GSI's quotation for performing this work was prepared by its president, Mr. Ahmadi. Mr. Ahmadi reviewed the drawings and specifications in order to derive a "bill of material" (tr. 764-65). He did not conduct a site investigation in the course of preparing his quotation (tr. 814-15).

7. (a) GSI's purchase order with Beacon dated 4 May 1995 stressed the importance of obtaining approval of "PRELIMINARY DRAWINGS" in order for GSI to meet the planned delivery date of 15 November 1995. It provided, *inter alia*:

1. PRELIMINARY DRAWINGS SHALL BE PREPARED WITHIN THREE WEEKS COMMENCING FROM VERBAL DIRECTION ON MAY 1, 1995. THESE DRAWINGS SHALL BE USED FOR AN APPROVAL CONFERENCE. IT IS OUR INTENT PENDING OWNER ACCEPTANCE, THAT THE LONG LEAD BASIC COMPONENTS WILL BE ABLE TO BE APPROVED TO EXPIDITE [sic] THE SHIPMENT.
2. AFTER APPROVAL OF PRELIMINARY DRAWINGS THE MANUFACTURER SHALL HAVE A COMPLETE SET OF DRAWINGS INCLUDING WIRING DIAGRAMS IN FIVE (5) WEEKS.

....



4. [GSI] SHALL PROVIDE A SUPPLY BOND FOR MATERIAL . . . TO GUARANTEE THAT ALL EQUIPMENT WILL SHIP TO ARRIVE AT THE JOBSITE BY NOVEMBER 15, 1995 OR BEFORE. TIME IS OF THE ESSENCE AND EARLIER SHIPMENTS WILL BE ALLOWED. MATERIALS ARE REQUESTED BY OCTOBER 1, 1995.

(R4, tab 43)

(b) Appellant's "Preliminary schedule Barchart Diagram" for the project was first discussed at the 27 June 1995 meeting and showed, *inter alia*, that appellant planned to "submit preliminary switchgear" during the 26 April - 16 June 1995 period, "submit switchgear" during the 19 June - 28 July 1995 period, "approve switchgear" during the 31 July - 18 August 1995 period and "procure switchgear" during the 21 August - 13 November 1995 period (R4, tabs 33, 58, 77, 600 at 10, schedules; app. supp. R4, tab 26 at 3; ex. A-6; tr. 708, 730-31, 737, 1219-20, 1227-28). This preliminary bar chart graphically indicates that the above described "switchgear" activities were "critical path" items (R4, tabs 33, 58, 77, 600 at 10, schedules; tr. 110-12). The preliminary bar chart does not separate low-voltage switchgear (*e.g.*, 480 Volt Main switchgear, Service Mound switchboard, Pump Room switchboard) from medium-voltage switchgear (*e.g.*, 12KV switchgear, 2.4KV switchgear, 2.4KV Motor Starters) (R4, tab 1, §§ 16312, 16313, tabs 33, 600 at 10-11, 13, 15-17). Said bar chart does not designate the installation of "Switchgear" during the planned 14 November - 11 December 1995 period as a "critical path" activity (R4, tabs 33, 600 at 10, schedules).

8. At the hearing, Mr. Ahmadi acknowledged that GSI's purchase order with Beacon was premised on the assumption that the government would immediately approve GSI's long lead components based only on preliminary drawings without a formal submittal (tr. 831-32; R4, tab 45). Mr. Ahmadi stated that the government's preliminary approval was essential to GSI's ability to meet its schedule commitment for delivery of the switchgear:

Q. And in order to meet that commitment, there are terms in here where Beacon is indicating, okay, and we'll get this preliminary approval from the Navy in order to allow you to meet your commitment for the November 15th date, right?

A. It sounds like it, yes.

Q. Well –

A. It is. Yes. It is here, Yes. I can't deny it.

(Tr. 834-35) The evidentiary record herein does not establish that the government ever agreed to said preliminary approval condition posited by GSI hereinabove.

9. (a) On 23 May 1995, the representatives of appellant, Neal, GSI, the government and the government's low-voltage switchgear designer, The Engineering Partners, Inc. (EPI), met to discuss GSI's 22 May 1995 list of "Clarifications and Exceptions" relating to the 480 volt switchgear (R4, tabs 53, 55-56; app. supp. R4, tab 5; tr. 70, 82). GSI's list of "Clarifications and Exceptions" was not a submittal as that term is defined in section 01300 of the specification but rather was an incomplete, preliminary working document that, *inter alia*, had not been reviewed by appellant's quality control organization (*i.e.*, CTE) (tr. 83-85, 90, 104-05, 331, 887-91, 897, 921; findings 4, 5; R4, tab 73). Said list appears to represent GSI's implementation of its plan for approval of preliminary drawings as described, *supra* (findings 7, 8).

(b) GSI's list of "Clarifications and Exceptions" for the low-voltage switchgear contained 14 separate items:

1. System voltage is 480 V.303W from an ungrounded delta. The ground fault protection as specified and provided will not function until the switchgear in [sic] connected to a 480 V.303W from a grounded wye system.
2. The submittals are based on one-line (sheets E-5, E-6), elevation (sheets E-11, E-27), and control detail (sheets E-33, E[-]33.1). Sheet E-13.3 was not considered because it was not referenced in and it conflicted with the one-line, elevation, and control drawings.
3. Potential transformers changed from (3) 288:120 V wye-wye configuration to (2) 480:120 V open-delta configuration due to the 3-wire system. (Specification ask for open-delta configuration.)
4. Potential transformers are not mounted on drawout drawer in low voltage equipment.
5. Voltmeters are not provided on all feeder breakers because the voltage at all feeders is the same. A separated voltmeter, with potential transformers, are provided on all bus that may have different voltages. (Line and load of each main breaker.)

6. Control power transformers are not provided in low voltage switchgear. 208/120 VAC and 48 VDC supplied from source outside of the low voltage switchgear.
7. Wiring will be GSI standard. Wires are not color coded but have wire markers on each end of every wire.
8. Electrical interlocking between main-tie-main in Main 480 Switchgear must be provided by UCS. Breakers are provided with electrical-mechanical interlock that requires 120 VAC to close the breaker electrically or mechanically. Once the breaker is closed device can be de-energized. (Device is designed for continuous operation.)
9. Feeder breakers in Main 480V Switchgear feeding bus duct to Service Mound Switchboard are manually operated due to key interlock.
10. Bus duct between Main 480 V Switchgear and Service Mound Switchboard is one run with a "T". This eliminates excess bus duct and an extra incoming section on the Service Mound Switchboard.
11. Breakers in Pump Room Switchboard are rated 65 KAIC. The maximum available fault current is less than [sic] 40 KA. The 50AT / 125 AF breakers are current limiting type rated at 200 KAIC.
12. Mains and Tie breakers in Pump Room Switchboard are manually operated due to key interlock.
13. Spare molded case breakers for Pump Room Switchboard are 50 AT. 45 AT are not available.
14. ATS in Pump Room Switchboard is 3-wire. A switched neutral is not provided because there is not a neutral bus in the switchboard.

(R4, tabs 53, 56; app. supp. R4, tab 5; tr. 91-94, 158-60, 305-29) Said list was prepared by GSI's program manager, Mr. Preszler (tr. 78, 88-90).

(c) Mr. Ahmadi admitted that he was aware of the matters described as items 1, 2, 5 and 7 in GSI's 22 May 1995 list of "Clarifications and Exceptions" at the time he prepared GSI's quotation to perform the low-voltage switchgear work (tr. 553, 774-75, 792-95, 809-13, 831, 857-58; finding 6(c)). The evidentiary record does not show that GSI, Beacon, Neal or appellant requested clarification from the government regarding said four items or, indeed, any of the other items set forth on said list prior to 22 May 1995 (*passim*).

10. By letter dated 12 June 1995, the government "hand carried" its "courtesy review" response to GSI's 22 May 1995 list of "Clarifications and Exceptions" to appellant. The government's "courtesy review" was prepared by its consulting electrical engineers, EPI. (Tr. 152, 158, 889, 894-96, 912-14; R4, tabs 64, 65, 72-75, 601) The courtesy review fully and adequately addressed all 14 items described, *supra* (*id.*; finding 9(b); *see infra* at findings 36(c), 37(b), 38(f), 39(e), 40(c), 41(f), 42(c), 43(c), 44(c), 45(c), 46(c), 47(d), 48(c)). Said review also fully and adequately addressed four additional items: (15) crane heaters were required to be motorized (electrically operated); (16) all Building 85 breakers were required to be electrically operated; (17) all main pumphouse breakers were required to be electrically operated; and (18) the switchgear and switchboard were to be jigsaw-welded (*id.*; *see infra* at findings 49(c), 50(d), 51(c), 52(e)).

11. On 19 June 1995, appellant amended its subcontract with Neal to require as follows regarding submittals and substitutions or variations:

3. CONTRACTOR AND SUBCONTRACTOR FURTHER AGREE:

- a. Submittals will be in compliance with the contract requirements and will be forwarded to the Owner for RECORD only or approval as stipulated in the Contract documents.
- b. Any submittal or portion of submittal that does not comply with the contract requirements shall be submitted individually and identified as a deviation with Owner Approval requested.
- c. Any submittal that is a complete substitution shall be identified as such and submitted for Owner approval.
- d. It is understood that Owner Approval of substitution and deviations can take sixty (60) days with no assurance of approval, and the Subcontractor remains

responsible for completing all portions of his work in accordance with the Contractor's schedule.

(R4, tab 52 at addendum 1)

12. (a) By letter dated 17 July 1995, appellant responded to the government's 12 June 1995 courtesy review of the low-voltage switchgear list of "Clarifications and Exceptions" by attaching Neal's 17 July 1995 proposal in the amount of \$94,440 for additional costs to comply therewith. Appellant did not submit "this cost as a formal PCO" and stated, further, that the "discrepancies regarding low voltage switchgear requirements for this project . . . [are] causing a continuing delay in the production of the switchgear, a critical path item." Said "continuing delay" and its effect on overall contract completion was not quantified and a time extension related thereto was not requested. (R4, tabs 94, 95)

(b) Appellant's 17 July 1995 letter to the government enclosed: (1) a GSI letter of 30 June 1995 wherein GSI asserted that the aforementioned "items" constituted changes in the work that merited variances and additional compensation; and, (2) a letter from Neal that forwarded GSI's request to appellant (R4, tab 95). GSI's letter of 30 June 1995 addressed the matters set forth in the government's 12 June 1995 courtesy review (R4, tabs 79, 84, 94, 95). GSI reiterated, *inter alia*, that it did not agree that the matters depicted on Drawing No. E-13.3 (Part B) (item 2, *supra*) were properly included as part of its performance under the contract. GSI then stated that incorporating said drawing would result in adding current (*i.e.*, amp) transducers to the service mound switchgear portion of the low-voltage switchgear portion of its work (R4, tabs 84, 95; tr. 1118-23). GSI stated that it would not release the switchgear for production unless its demands for additional compensation and variances were met. GSI asserted its right to compensation for items 1, 2, 6, 12, 15, and 16 but did not indicate either that it was being delayed or that it was seeking a time extension. (R4, tabs 79, 84, 95; findings 9(b), 10) Item 2 (compliance with Drawing No. E-13.3 (Part B) requirements for metering in connection with the main breakers, main bus and feeder breakers) accounted for the largest amount (\$47,098 plus profit) of compensation. GSI did not seek any compensation for items 3, 4, 7-9, 11, 13, 14, 17, 18. GSI offered a credit associated with items 5 and 10. (*Id.*) GSI stated that it was "preparing the formal submittals based upon the above" (R4, tab 95). Neal's 17 July 1995 forwarding letter expressly stated that no time extension was being requested with respect to GSI's 30 June 1995 request (R4, tabs 94, 95).

13. The government responded to appellant's letter of 17 July 1995 by letter dated 19 July 1995 as follows:

. . . [Y]ou request direction on how to proceed with the low voltage switchgear requirements. The government has not received a formal submittal for the switchgear as of this date, therefore we fail to understand what continuing delay you

are referencing. In addition, you are reminded that the government is allowed up to 20 working days for review of this submittal. Variations, if any, shall be submitted in accordance with Section 01300 paragraph 1.3.4 of subject contract.

(R4, tab 99; tr. 898-900) Appellant/GSI had not submitted formal variation requests relating to the low-voltage switchgear equipment as of 19 July 1995 (tr. 899-900).

14. Appellant responded to the government's letter of 19 July 1995 by letter dated 21 July 1995, stating "we have directed Neal Electric to formally submit the switchgear per plans and specifications as soon as possible, advising us of their concerns in the submittal" (R4, tab 104; tr. 118-20).

15. (a) The parties met on 27 July 1995 to discuss the low-voltage switchgear. GSI reiterated that it would not start production without payment for alleged changes. Appellant's representative then informed GSI that its proper recourse was to continue to perform the work in question and to submit a claim regarding any areas of dispute. (R4, tabs 110, 111; tr. 356-57, 397-98, 459-63, 902-04)

(b) At the 27 July 1995 meeting, the government agreed to start a concurrent, informal review of GSI's submittals at the same time these were submitted to appellant's quality control organization, CTE. The government's formal time for review would still start only when it received the submittals from appellant with CTE's comments. (R4, tabs 110, 111; tr. 519, 909-10, 928-29)

(c) At the 27 July 1995 meeting, appellant, Neal, Beacon, GSI and the government fully and appropriately discussed GSI's informal list of desired variances and questions and, in conjunction with the government's 12 June 1995 response, believed that they had reached agreement on the issues described, *supra*, as items 1-18 (R4, tabs 110, 111; tr. 424, 434-35, 900-01; findings 9(b), 10; *see infra* at findings 35(c), 36(c), 37(b), 38(h), 39(g), 40(e), 41(h), 42(e), 43(c), 44(d-e), 45(c), 46(c), 47(d), 48(c), 49(d-e), 50(f), 51(d), 52(f)). It also appears that the government asserted that appellant was obliged to furnish watt-hour transducers with respect to the low-voltage switchgear equipment at this meeting (tr. 137-39, 357-61, 368; *see infra* at findings 53(c-d)).

(d) During the 27 July 1995 meeting, GSI promised to provide submittals for the low-voltage switchgear equipment by 14 August 1995 (R4, tabs 110, 111, 130). The parties believed that all issues had been resolved and that GSI was ready to prepare its submittals as promised (tr. 393, 398, 463, 903-04).

(e) As of 27 July 1995, there were still no formal variations requests from appellant relating to the low-voltage switchgear equipment (tr. 124, 903).

(f) The “critical path” during the June - July 1995 period continued to be through, *inter alia*, the generic “switchgear” submittal/approval/procurement activities (R4, tabs 85, 107, 119, 126, 600 at 10-11, schedules).

16. (a) During August 1995, GSI prepared partial submittal 31G with respect to the low-voltage switchgear equipment involved herein. GSI’s partial submittal included revised “Clarifications and Exceptions,” dated 10 August 1995, consisting of 12 items for the “MAIN 480 SWITCHGEAR” and 12 items for the “SERVICE MOUND SWITCHBOARD.” These revised “Clarifications and Exceptions” encompassed the inclusion of Drawing No. E-13.3 (Part B) of the drawings as a contract requirement. (R4, tabs 3, 124, 129, 136; tr. 440, 463-64, 936-42)

(b) CTE reviewed partial submittal 31G and, by letter dated 18 August 1995, properly identified six items that did not comply with the low-voltage switchgear contract requirements (R4, tab 128).

(c) By internal memorandum dated 21 August 1995, the government’s engineering technician, Mr. Ausler, “concurred,” on the basis of his informal review and memory regarding the consensus reached by all of the attendees at the 27 July 1995 meeting, with some of GSI’s 10 August 1995 clarifications and exceptions (R4, tab 129, tr. 165-71, 415-58).

17. By “fax memo” to Neal dated 22 August 1995, appellant’s quality control manager (*i.e.*, Mr. Wilkinson, CTE) noted that GSI had not yet provided complete submittals for the low-voltage switchgear stating, *inter alia*, that “[t]he lack of the rest of the LV Submittal and the absence of any part of the . . . [medium-voltage switchgear] submittal has now become a serious impact to the CPM schedule” (R4, tab 130).

18. Beacon forwarded CTE’s 18 August 1995 comments to GSI’s program manager, Mr. Preszler, by fax dated 23 August 1995. Beacon’s fax asked Mr. Preszler to “review and advise” regarding CTE’s comments. Mr. Preszler, however, inappropriately refused to address CTE’s comments and faxed back the reply “I will not respond until I get submittals from Gov’t.” (Finding 5, § 01300, ¶ 1.3.1; R4, tab 131; tr. 403)

19. On 30 August 1995, appellant forwarded its first formal switchgear submittal to the government. This was a partial submittal only, consisting of section G for the low-voltage switchgear (R4, tab 137).

20. The government did not receive appellant’s partial submittal (31G) for the 480 Volt Switchgear until 7 September 1995. This partial submittal included the 18 August 1995 comments from CTE which GSI had refused to address. (R4, tabs 3, 128, 156, 173; tr. 909-10)

21. The government received appellant's medium-voltage switchgear submittal on about 12 September 1995 and rejected it on 29 September 1995 (R4, tab 200).

22. (a) By transmittal to appellant dated 19 September 1995, the government approved appellant's partial submittal 31G for the low-voltage switchgear "WITH CORRECTIONS NOTED" and stated:

Per 9/19/95 AREICC transmittal letter w/ 9/19/95 EPI letter attached:

- 1 Approval is contingent upon signed modification of contract
- 2 Submit substantiating data confirming compliance with all items in CTE 8/18/95, and page 2 of EPI 9/19/95 letters

(R4, tab 174; tr. 904-07)

(b) EPI's letter of 19 September 1995, enclosed with the government's approval "WITH CORRECTIONS NOTED" of appellant's partial submittal 31G stated as follows regarding variances from the contract:

Our review assumes Government acceptance of various credits to the Government for variations allowed to the contract. Should the Government not accept amounts offered to the Government, the contractor must provide items as per original plans and specs. The submittal page labeled as "Clarifications and Exceptions" defines some of the items and are as follows:

- #4 Credit for one PT per location.
- #6 Deletion of voltmeter locations from feeder breakers is dependent on Government approval of credit amount.
- #7 Grey SIS wiring approval dependent on Government acceptance of credit amount.
- #11 Approval of switchboard bolted construction is dependent on Government approval of credit amount.



It is noted, that the watt-hour transducers as specified are not included in this submittal. It was determined in the meeting that they could be deleted with a credit to the Government. If credit is not approved by the Government, the watt-hour transducers must be installed with one per metering location.

(R4, tabs 173, 174; tr. 357-59; *see infra* at findings 35(c-d), 38(h), 41(i), 52(f), 53(c-j))  
The evidentiary record herein suggests that the above mentioned “meeting” was the 27 July 1995 meeting, *supra* (findings 15(a-e); tr. 137-39, 357-61, 368; app. supp. R4, tab 8).

23. Beacon forwarded the government’s approval “WITH CORRECTIONS NOTED” to GSI by transmittal dated 25 September 1995 and directed GSI as follows regarding the low-voltage switchgear:

Attached find approved as noted drawings. Please release for immediate manufacture and shipment. Any cost impact items should be resolved by the 9/28/95 meeting.

Advise schedule of when we will see the swgr at the jobsite.

(R4, tab 187)

24. By letter to Beacon dated 27 September 1995, GSI explained that watt-hour transducers were not required (and thus a credit was not due the government) because the contract drawings did not identify “the location and need for these transducers.” GSI acknowledged that section 16312, paragraphs 2.3.21.7-13 “specify the construction” of said watt-hour transducers by describing the salient characteristics thereof. (R4, tab 189; tr. 356-61) Mr. Preszler explained:

So, if the drawing shows me one thing and the specs are in conflict with it, or ask for, or gives me a performance requirement for a device that’s not shown on the drawings, and doesn’t tell me where to install that device on the drawings, I ignore that portion of the specs.

(Tr. 360-61, 365-71)

25. On 28 September 1995 and by letter dated 9 October 1995, appellant again told “Neal Electric (GSI)”:

. . . [T]o proceed immediately with fabrication on the switchgear as determined by the [government]. If you consider

the [government's] position to be unjustified, you have the option to claim for equitable adjustment per the disputes clause of the specifications.

(R4, tab 217; finding 15(a); tr. 1254)

26. GSI's first formal requests for variances in accordance with, *inter alia*, section 01300, paragraphs 1.3.4, 1.3.4.3 of the contract appear to have commenced on 17 October 1995 (R4, tabs 235, 240-41, 250-51; *see infra* at findings 41(i-1), 52(f-g)): (a) GSI requested "a variance to the jig welding requirement of the requirement" and identified section 16312, paragraph 2.3.2, and section 16313, paragraph 2.1.4.2 of the specification as "requir[ing] the framework of the switchgear to be welded together in a jig" (R4, tab 240); (b) GSI requested "a variance to the color coding wiring require [sic] in this project" and identified a note on "NAV.FAC Drawing 8032445 (Part B. E13.3)" as describing the "[n]ine (9) different colors of SIS wire . . . required" (R4, tab 241).

27. By letter dated 18 October 1995, GSI: (a) expanded upon its previous variance request relating to jig welding (R4, tab 251); and (b) requested a variance to the section 16312, paragraph 2.3.1.2 and NAVFAC Drawing No. 8032432 (Part B, E-5) requirements for "200 KA bracing of the bus on the Service Mound Switchgear." GSI offered a \$1,500 cost reduction as consideration for the variance. (R4, tab 250) Thereafter, appellant/GSI provided additional submissions and variance requests with respect to the low-voltage switchgear equipment for submission to the government (*passim*). According to appellant's electrical switchboard expert, Mr. Lewis, the response time of the government "fell within the intent of the specifications" (tr. 533-47, 617-22).

28. (a) GSI subsequently released the low-voltage switchgear for production sometime during early November 1995 (tr. 363-64, 401-02; R4, tab 591 at GOV00475-78). Its decision to finally release the low-voltage switchgear for production stemmed from its knowledge that the government needed the equipment and concern about liquidated damages (tr. 363-64). GSI thus "took [it] on our own to get [the project] completed on time" (*id.*; tr. 401).

(b) By November 1995, appellant's updated schedules contained separate activities for low-voltage and medium-voltage switchgear work (R4, tabs 127, 166-68, 363, 600 at 11-12, schedules). The "critical path" included the "medium voltage/station D" activities. None of the low-voltage switchgear components are depicted as "critical path" activities. (R4, tabs 363, 600 at 12, schedules)

29. The low-voltage switchgear equipment appears to have been delivered to the job site between 11 January and mid-February (R4, tabs 457, 459, 468, 471-74, 476-79, 485, 488, 600 at 10-14, 17, schedules; tr. 363-64, 401, 516-17, 734, 1229-34). The usable completion date for the project occurred on 19 April 1996 (tr. 519-21; R4, tab 561).

30. (a) During the June 1995 - April 1996 period, appellant/Neal/Beacon/GSI complained to the government on several occasions that the switchgear and thus contract completion was being delayed by “design issues as well as supplier issues” and indicated that it intended to file a request for a time extension (R4, tabs 71, 77, 126, 134, 168, 363, 400, 420, 561, 583-84, 600 at 13-14). The term “switchgear” was not limited to low-voltage electrical switchgear equipment in terms of the 22 items involved herein but rather included other classes of electrical switchgear equipment (*i.e.*, medium-voltage) (*id.*; *see* findings 7(b), 35-56). The evidentiary record herein does not appear to contain either a general or a specific request (*i.e.*, delay dates apportioned on a per item basis) from appellant, Neal, Beacon or GSI for a quantified time extension relating to the low-voltage switchgear equipment (*id.*; *see also* tr. 397-400, 785-86, 848-50, 1220-21, 1224; R4, tabs 2, 263).

(b) By letter to appellant, dated 20 October 1995, the government stated, *inter alia*, that:

. . . 55 percent of the contract time has elapsed. To date, you have completed only 25 percent of the work. . . .

At this time, this office is not aware of any justification for an extension of time. It is imperative that you exercise every effort to complete the subject contract within the time allowed. Failure to do so may result in the assessment of liquidated damages in accordance with contract specifications.

(R4, tab 263; tr. 400)

31. On 5 November 1997, appellant certified and forwarded Neal’s certified request for an equitable adjustment in the amount of \$717,190.98 (R4, tabs 591, 592). Neal’s claim sought, *inter alia*, constructive acceleration costs for GSI, with mark-ups only for Beacon and Neal, as follows:

The Government failed to permit Lanthier, Neal and lower tier subcontractors to perform the specified work in accordance with its original schedule as a result of the Government delaying, suspending and disrupting Neal’s progress on the referenced project by, *inter alia*, by [sic] failing to provide complete and accurate Plans and Specifications, by providing Plans and Specifications which contained excessive numbers of errors, omissions and conflicts, by failing to provide timely direction regarding design conflicts, by providing overly ambiguous and vague

directions, by providing conflicting directions, by failing to timely respond to requests for information, by failing to negotiate contract modifications timely, and by failing to acknowledge excusable time extensions requests thereby causing Neal and its suppliers and vendors to constructively accelerate the work.

Neal's request is supported by the fact that the prolonged submittal review and design clarification process together with various disputes arising from the errors and omissions in the contract documents delayed and disrupted Neal's Switchgear supplier Beacon and its manufacturer GSI with respect to the medium and low voltage switchgear fabrication. The Government refused to extend the performance time for these delays, thereby accelerating Lanthier, Neal and lower tier subcontractors. Specifically, the contract documents do not indicate that either amp transducers for 480 volt service mound switchboard or watt hour transducers for the medium and low voltage switchgear equipment are required. The Government insisted that they were.

(R4, tab 591 at 2) Neal's above-described request for equitable adjustment "was supported by 22 tabbed documents" which address the above-quoted matters and include the 18 items described in findings 9(b) and 10, *supra* (R4, tabs 591, 595, 596; app. supp. R4, tabs 26, 27; ex. A-3; *R.J. Lanthier Co.*, ASBCA No. 51636, 02-1 BCA ¶ 31,717). Also included in said "22 tabbed documents" is correspondence that generally addresses GSI's proposed paint for the low-voltage switchgear equipment involved herein (R4, tabs 173, 470, 475, 477, 591 at GOV00466; app. supp. R4, tab 20).

32. By final decision, dated 7 April 1998, the contracting officer denied subject claim (R4, tab 593). By letter dated 7 July 1998, appellant filed its notice of appeal with this Board. Appellant withdrew two direct cost line items consisting of Neal's acceleration costs and Neal's claim preparation costs originally included in the subject claim (R4, tabs 591, 592; tr. 50-63). At trial, appellant's counsel stated that the claims herein relate only to the low-voltage switchgear equipment (tr. 25, 69).

33. Appellant's complaint herein (filed by predecessor counsel) specifically addresses only the allegedly improper insistence by the government that the contract required the contractor to furnish and install watt-hour transducers for the low-voltage switchgear equipment and amp transducers for the 480 volt service mound switchboard. Said pleading blames "[t]hese actions and others by the Navy . . . [for delaying] fabrication

of the electrical components” thereby causing GSI to constructively accelerate its performance of the work. (Compl., ¶¶ 4-6)

34. Appellant’s brief herein specifically addresses only the items described, *supra*, as items numbered 1, 4, 5, 7-9, 12, and 18 as well as the additional watt-hour transducer requirement, the improperly specified zinc paint issue and the improperly specified 2.4KV motor starter issue (app. br. at 10-16; findings 9(b), 10, 31).

35. Grounded/Ungrounded Fault System (Item 1)

(a) The parties agree that the contract calls for two inconsistent ground fault systems—ungrounded fault detection and grounded fault protection (tr. 86, 91-92, 117-18, 165-68, 171, 305-11, 386-87, 420-30, 471-74, 554-61, 664, 672-78, 695, 1031-36, 1061, 1173-76; R4, tab 1, § 16000, ¶¶ 2.3.9, 2.3.13.3, § 16312, ¶ 2.3.13.3, drawings nos. E-5, E-33-1, tabs 53-56, 64, 65, 129; findings 9(a-c)).

(b) GSI was aware of the patent inconsistencies regarding the item 1 work when it prepared its quote (finding 9(c); tr. 644). GSI first stated that it would provide an ungrounded system without ground fault protection in its 22 May 1995 list of “Clarifications and Exceptions,” *supra* (findings 9(a-b); tr. 305-11, 472-73; R4, tab 53). GSI’s 30 June 1995 proposal to perform said item 1 work was forwarded by appellant to the government by letter dated 17 July 1995. Appellant, Neal, Beacon, and GSI indicated that GSI’S proposed performance of said item 1 work involved payment of additional costs associated therewith by the government. (R4, tabs 94, 95) GSI stated that “[a]n equitable [sic] adjustment to the price must be agreed to before the switchgear will be released for production” (R4, tab 95 at RJO4569).

(c) On 27 July 1995, the parties appear to have agreed that GSI would provide its proposed ungrounded detection system (R4, tab 110). By 19 September 1995, this issue appears to have been resolved by the parties (R4, tabs 172, 173). Neither party, however, has directed our attention to evidentiary documents or testimony that reflects the disposition of said item 1 work by way of a formal contract modification.

(d) GSI installed the ungrounded detection system as *per* its statement at the 23 May 1995 “Clarifications and Exceptions” meeting (tr. 92, 422).

36. Drawing No. E-13.3 (Part B) (Item 2)

(a) Although Drawing No. E-13.3 (Part B) (NAVFAC Drawing 8032445), entitled “480V Utility Control System Diagram,” was physically located out-of-sequence in the contract drawings, said drawing and the work it depicted and required was included under the contract involved herein (R4, tab 1, § 00501, ¶¶ 1.1.1, 1.2, § 00721, ¶ 1.4(c), drawings; tr. 92-94, 313-14, 576, 586, 643-44, 683, 812-13, 1012-13, 1045-46).

(b) GSI was aware of the presence of Drawing No. E-13.3 (Part B) in the solicitation package but did not either seek clarification thereof prior to submitting its quote or choose to include the cost of performing the low-voltage switchgear work depicted therein in its quote (finding 9(c); *see* tr. 313-14, 553, 643-44).

(c) Appellant's first assertion that the work depicted on Drawing No. E-13.3 (Part B) was not required was contained in its 22 May 1995 list of "Clarifications and Exceptions," *supra* (findings 9(a-b)). By letter dated 12 June 1995, the government responded that performance of the work depicted thereon was, in fact, required (finding 10; R4, tabs 64, 65, 94, 95, 110, 111; tr. 117-22, 332-33). The parties agreed at the 27 July 1995 meeting that GSI would perform the work depicted on Drawing No. E-13.3 (Part B) "with the one major deviation that the P.T's [sic] will be mounted on the load side of the main breakers (2 sections)" (R4, tabs 110, 111; tr. 431-32).

(d) Drawing No. E-13.3 (Part B) included, *inter alia*, performance of the aforementioned work designated as items 3-7, and service mound switchgear amp transducers (findings 9(b), 12(b), 37(a), 38(a), 39(a), 40(a-d), 41(a, f), 56(a-b); tr. 311-16, 319, 356-57, 369, 553, 586, 651-53, 794, 1012-15; R4, tabs 1, 65, 94-95, 110-11). It is not readily apparent from the evidentiary record whether appellant or Neal or Beacon included said items in their respective bid estimates (findings 6(a-b); *passim*).

(e) At the hearing, Mr. Preszler testified that inclusion of Drawing No. E-13.3 (Part B) work involved 16 to 18 hours of additional engineering and fabrication work as well as "major delays" to GSI's performance due to the time it took to obtain approvals of the submittals from the government (tr. 383-86, 488).

### 37. Potential Transformers Connection (Item 3)

(a) Specification section 16312, paragraph 2.5 requires that "[p]otential transformers shall be connected open delta" (R4, tabs 1, 53, 600 at 7; app. supp. R4, tab 27 at 2-3; tr. 313-16, 567-68, 1139-42). Drawing No. E-13.3 (Part B) states that the potential transformers shall be "CONNECTED DELTA WYE" (*id.*; R4, tab 1, drawing no. E-13.3 (Part B) at note 8). The parties agree that this conflict was an obvious error in the specification (R4, tabs 53, 64, 129, 600 at 7; app. supp. R4, tab 27 at 2-3; tr. 316, 406-08, 433, 567-68, 1139).

(b) Appellant/GSI first notified the government as to the existence of this conflict in its 22 May 1995 list of "Clarifications and Exceptions" (findings 9(a-b)). The government expressed its agreement that the connections should be "open delta" in its 12 June 1995 courtesy review (R4, tabs 64, 65, 95, 110, 129, 600 at 7; tr. 333, 587-88, 1139).

(c) By letter to appellant dated 3 October 1995, the government requested, *inter alia*, a cost proposal for the change of the wye connection for the potential transformers to open delta. The government designated this work together with the deletion of an alleged requirement for watt-hour transducers, *infra* at finding 53, as proposed change (PC) #17. (R4, tab 205) Appellant provided the requested cost proposals for PC #17 by letters dated 30 October 1995 and 12 January 1996 (R4, tabs 299, 462).

(d) Bilateral Modification No. P00046, effective as of 26 March 1996, reflected the parties' agreement on an amount of \$781.00 as a credit to the government for the change to an open delta connection. Modification No. P00046 included the following, unqualified release language:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

(R4, tab 2 at NA0062-63; *see* R4, tab 600 at PC #17 section). This contract modification was executed by appellant's president, Rod Harris (*id.*).

### 38. Drawout Potential Transformer (Item 4)

(a) Section 16312 (Low-Voltage Switchgear And Secondary Unit Substations) of the specification provides, in pertinent part:

#### 2.5 POTENTIAL TRANSFORMERS

. . . Primary fuse holders shall be an integral part of the assembly. . . . Drawout assembly for potential transformers shall be rollout movable carriage trays with potential transformers mounted on trays. Rollout movable carriage trays shall be equipped with primary and secondary disconnecting devices so that assembly shall be de-energized before it is exposed.

(R4, tab 1, § 16312, ¶ 2.5; tr. 333, 771-74, 1090-95, 1180-85) Drawing No. E-13.3 (Part B) depicts a "fixed mounting of the potential transformer" and shows "draw out type fuses" (R4, tab 1 at drawings; app. supp. R4, tab 27 at 2-3; tr. 334-35, 568-73, 765-70, 1078, 1089-99, 1182). The evidentiary record does not reflect any pre-bid request for clarification by appellant, Neal, Beacon or GSI with respect to this inconsistency between the specifications and the drawings (*passim*).

(b) Although it was not customary in the electrical industry for the low-voltage potential transformers to be mounted on drawout assemblies, the designer EPI of the project herein provided for the drawout low-voltage potential transformers at the request of the Naval Public Works Center, Utilities Department, San Diego, California (tr. 316-17, 483-88, 568-73, 771, 1048, 1090-99).

(c) Applicable American National Standards Institute (ANSI) publications do not prohibit rollout moveable carriage trays with low-voltage switchgear potential transformers mounted on trays (R4, tabs 599, 600 at 6; tr. 483-88, 665-66).

(d) Utilization of drawout low-voltage switchgear potential transformers was feasible although more costly than utilization of fixed in place potential transformers (tr. 483-88, 568-73, 665-66, 1090-99).

(e) GSI first raised the issue concerning the specification requirement for the low-voltage drawout potential transformers in its 22 May 1995 list of “Clarifications and Exceptions” when it asserted that it would not provide drawout drawers for the low-voltage switchgear (finding 9(b); R4, tab 53).

(f) The government’s 12 June 1995 letter to appellant stated that the government wanted the potential transformers to be drawout as specified (finding 10; R4, tab 65; tr. 588-90, 665, 1090-99).

(g) Appellant’s letter to the government of 17 July 1995 forwarded GSI’s letter of 30 June 1995, which stated that GSI still refused to provide low-voltage drawout potential transformers (R4, tabs 94, 95).

(h) At the 27 July 1995 meeting, the government agreed to allow appellant/GSI to vary from the specification direction to provide low-voltage drawout potential transformers in return for providing a credit to the government. The amount of said credit was not then determined. The parties herein have not directed the Board’s attention to the document(s) or testimony(ies) in the evidentiary record that reflect the amount of said credit. (Findings 15(c-e), 22(b); R4, tabs 110, 111, 129, 173, 174; app. supp. R4, tab 8; tr. 137-39, 357-61, 368, 393, 432-33, 486)

### 39. Voltmeters (Item 5)

(a) The parties agree that the contract required a total of 32 voltmeters for the low-voltage switchboards (R4, tab 1, drawing nos. E-5 (Part B), E-11 (Part B) at note 3, E-13.3 (Part B), tab 600 at 4-5; app. supp. R4, tab 27 at 1-2; tr. 318, 554-55, 568, 590-91, 672-74, 1062-64, 1100-09).



(b) Although it was not customary or necessary in the electrical industry to install voltmeters at every feeder circuit breaker location, such installation was feasible (*id.*).

(c) Mr. Ahmadi included the cost of furnishing and installing said voltmeters in his quote to Beacon (findings 6(c), 9(c); tr. 857-58).

(d) Appellant first informed the government that it would not furnish all 32 voltmeters in its 22 May 1995 list of “Clarifications and Exceptions” (findings 9(a-b)). Appellant felt that providing all 32 voltmeters amounted to “overkill” (tr. 318, 554-55, 590-91, 672-74).

(e) By letter dated 12 June 1995 to appellant, the government stated that GSI’s refusal to provide the required 32 voltmeters constituted a “variation” and would result in a “Government credit,” if allowed (finding 10; R4, tabs 65, 72-75, 601; tr. 335-36).

(f) By letter dated 17 July 1995, appellant forwarded GSI’s 30 June 1995 letter wherein GSI continued to refuse to provide all 32 voltmeters (finding 12(b); R4, tabs 94, 95).

(g) On or before the 27 July 1995 meeting, the parties agreed that all 32 voltmeters would not be required to be furnished and installed and that “[t]his change addressed in PCO [proposed change order] 5B” (findings 15(c-e), 22(b); tr. 357-59, 433, 1062-63; R4, tabs 110-11, 173-74, 600 at 5). The parties herein have not directed the Board’s attention to the document(s) and/or testimony(ies) in the evidentiary record that reflect the amount attributable to said deletion (*id.*).

#### 40. Control Power Transformers (Item 6)

(a) The parties agree that the contract called for furnishing and installation of control power transformers, but did not provide for a contactor which was necessary to switch control power over to operate certain circuit breakers (R4, tab 1, § 16312, ¶ 2.3.13, drawing no. E-13.3 (Part B), tabs 53, 64, 65; app. supp. R4, tab 27 at 3; tr. 319, 433, 572-74, 1109-11).

(b) Appellant first informed the government in its 22 May 1995 list of “Clarifications and Exceptions” that control power transformers were not necessary based on its conclusion that Drawing No. E-13.3 (Part B) was not included in the contract (findings 9(a-b); R4, tab 53; tr. 319).

(c) By letter dated 12 June 1995 to appellant, the government stated Drawing No. E-13.3 (Part B) provided that “CPT (control power transformer) for metering power is indicated in the 480 volt [low-voltage] switchboard” (finding 10; R4, tabs 65, 72-75; tr. 337-38, 433, 572-74, 592-94).

(d) By letter dated 17 July 1995, appellant forwarded GSI's 30 June 1995 letter wherein GSI indicated that it would provide control power transformers as part of incorporating Drawing No. E-13.3 (Part B). GSI now asserted, however, that the contract documents "do not call for a method of transferring control power on the double-ended switchgear" and stated that "[a]n electrical and mechanical interlocked contactor needs to be added." (R4, tabs 94, 95; app. supp. R4, tab 27 at 3; tr. 433, 572-74)

(e) At the meeting on 27 July 1995, the parties agreed that GSI would provide control power transformers with relay contacts used for the control power transfer function (findings 15(c-e); R4, tabs 110, 111). The parties herein have not directed the Board's attention to the document(s) and/or testimony(ies) in the evidentiary record that reflect the administrative disposition, by way of change order or otherwise, of this item of work (*passim*).

#### 41. Color-Coded Wiring (Item 7)

(a) Contract Drawing No. E-13.3 (Part B) requires the utilization of the color-coded wiring involved herein (findings 9(a-b); tr. 320, 338, 412-13, 490-94, 574-79, 651, 792-94, 1046, 1066-68, 1185; R4, tab 1, drawing no. E-13.3 (Part B), general note, tabs 53, 65; app. supp. R4, tab 27 at 3).

(b) Although it was not customary in the electrical industry to use color-coded wiring *vice* grey SIS wiring within the switchboard portion of the low-voltage switchgear, such wiring was available (tr. 321-22, 412-13, 574-79, 591-93, 1046, 1067, 1186-87; app. supp. R4, tab 12). The procurement of color-coded wiring involved lead time of approximately 12 weeks and required the purchase of said wiring in minimum quantities in excess of the quantities required for the project involved herein (*id.*; tr. 338, 507-09, 650-53; app. supp. R4, tab 27 at 3).

(c) Mr. Preszler testified that SIS color-coded wiring with the higher VWI fire resistance rating (adopted by GSI during 1995 as an internal standard) was not commercially available. SIS color-coded wiring with a VWI fire resistance rating was, however, neither required by the contract nor by applicable 1995 standards. (Tr. 339; app. supp. R4, tab 12; finding 9(b))

(d) Mr. Ahmadi, included the cost (as material burden) for color-coded wiring in his quote with respect to the low-voltage switchgear portion of the project herein (tr. 792-94). He did not ascertain the availability of such wiring at the time he prepared GSI's quote (tr. 795).

(e) Appellant first informed the government that GSI was going to provide grey wiring in lieu of the specified color-coded wiring in its 22 May 1995 list of “Clarifications and Exceptions” (findings 9(a-b); R4, tab 53; tr. 319-21).

(f) By letter to appellant dated 12 June 1995, the government stated that the wiring should conform, *inter alia*, to the requirements of Drawing No. E-13.3 (Part B) (R4, tabs 64, 65; tr. 338, 412-13, 574-79, 591-93).

(g) By letter to the government dated 17 July 1995, appellant forwarded GSI’s letter of 30 June 1995, which stated that GSI wanted “a waiver to the color coding wiring requirement of Sheet 13.3” due to the “long lead time” for obtaining the specified color-coded wiring (R4, tabs 94, 95 at RJO4568).

(h) At the meeting on 27 July 1995, the government agreed to allow a variation from the contractually required color-coded wiring, and appellant acknowledged that the government was entitled to a credit for this (R4, tabs 110, 111, 129; tr. 122-24, 131-35, 792-94, 804).

(i) Appellant provided its partial 3IG submittal for the low-voltage switchgear switchboard to the government on about 7 September 1995 (findings 19, 20; R4, tab 173; tr. 909-10). This partial submittal indicated that appellant was going to provide grey (*i.e.*, not color-coded) wiring (R4, tab 173). The government’s 19 September 1995 response to this partial submittal approved it “WITH CORRECTIONS NOTED” subject, among other things, to the government’s approval of a credit amount for the variance from the color-coded wiring requirement (finding 22(b); R4, tabs 129, 172, 173; tr. 169-70).

(j) Bilateral Modification No. P00018, effective as of 16 November 1995, reflected the parties’ agreement on \$12,945.00 as a combined credit for approval of appellant’s requested variance from the contractual requirements for the color-coded wiring and for jig-welding. The contract performance period remained unchanged. This modification included the following, unqualified release language:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

(R4, tabs 2, 600 at 7; tr. 792-94, 804) Said modification was executed by appellant’s president, Rod Harris on 10 November 1995 (*id.*).

(k) Appellant/GSI contends that Modification No. P00018 was not “bilaterally” executed because:

. . . The signature on that modification does not match those signed by the Appellant. It seems the Navy had an internal system to sign on behalf of the Appellant. There is no evidence that Appellant even authorized that signature. The Government never sought to authenticate the signature during the hearing, and has not established that Appellant consented to it in any manner.

(App. reply br. at 10-11) However, the signature of appellant's president that appears on, *inter alia*, preceding contract Modification Nos. P00005, P00006, and P00017 and, *inter alia*, succeeding contract Modification Nos. P00022, P00046, and P00058 appears to be the same as the signature that appears on Modification No. P00018 (R4, tab 2). The authenticity of said modifications are not now questioned by appellant. The authenticity of Modification No. P00018 was not questioned or otherwise objected to by appellant/GSI either prior to or during the hearing of subject appeal (tr. 10-13).

(l) By bilateral Subcontract Revision No. 4, dated 1 December 1995, appellant and Neal agreed, *inter alia*, to a decrease in the amount of their subcontract of \$11,547 for deletion of the contractual requirements for the color-coded wiring and for jig-welding. The contract performance period remained unchanged. Subcontract Revision No. 4 included the following release language:

The foregoing is agreed to as constituting full and complete equitable adjustment in full accord with general conditions to the contract. The contractor hereby release[s] R.J. Lanthier Co., Inc. from any and all liability for further equitable adjustment, to include time and overhead cost, attributable to such facts or circumstances giving rise to this proposal.

(R4, tab 52 at RJ08883; *see also* tr. 793, 804)

(m) The color-coded wiring issue significantly impacted GSI and delayed production (tr. 488-89, 782, 793-96, 804). Mr. Ahmadi testified that he could not separate out the delays and impacts caused by this issue from those caused by other issues, because they were all "interwoven" (tr. 803-04; *see also* tr. 488-90).

#### 42. Electrical Interlock on Tie Breaker (Item 8)

(a) Drawing No. E-5 (Part B), entitled "One-Line Diagram - Building 85 - New Work," depicts electrically operated breakers on the 480V main-tie-main (R4, tab 1 at drawings; app. supp. R4, tab 27 at 4; tr. 321-27, 580-81).

(b) Appellant first informed the government that GSI would not provide said electrical interlocking in its 22 May 1995 list of “Clarifications and Exceptions” (findings 9(a-b); R4, tab 53; tr. 321-22). Instead, GSI proposed to furnish “electrical-mechanical interlock that requires 120 VAC to close the breaker electrically or mechanically” (R4, tab 53). GSI’s proposal stemmed from its belief that “[w]ithout special precautions, it’s very unsafe to close both main breakers and the tie breakers which parallels the system without special precaution” (tr. 322; *see* tr. 339-40, 580-81, 682; app. supp. R4, tab 27 at 4-5).

(c) By letter to appellant dated 12 June 1995, the government rejected appellant’s proposal and stated that the “[m]ain-tie-main will be without interlocks” to “permit paralleling [sic] by PWC [Public Works Center]” (R4, tabs 64, 65; tr. 591-92). The underlying rationale for the government’s requirement was its need for “continuous service. . . . There are requirements for welding and what not that are going on and sight is imperative. The lights take time for a supplementary system to kick in, they may not be adequate.” (Tr. 1156-58)

(d) The government’s requirement for electrically operated breakers on the 480V main-tie-main without interlocks did not constitute either a violation of the “NEC [National Electric Code]” or otherwise equate to a “defect in the drawings or specifications” (tr. 682, 1158).

(e) The government’s 12 June 1995 response resolved the electrical tie breaker interlocking issue (R4, tabs 64, 65, 94, 95, 110, 111; tr. 339-40, 591). Appellant installed electrically operated breakers in accordance with the requirements of Drawing No. E-5 (Part B) (tr. 478-80).

(f) During the hearing, appellant’s counsel stated that any “possible hazardous condition” created by the contract requirement herein is “not a part of this appeal” (tr. 1151-52; app. supp. R4, tab 27 at 4-5).

#### 43. Electric Service Mound Switchboard Key Interlocks (Item 9)

(a) Drawing No. E-11 (Part B), entitled “Building 85 - Miscellaneous Details” required the service mound switchboard main breakers to be electrically motorized (R4, tab 1 at drawings; tr. 322-25). Drawing No. E-5 (Part B), *supra*, required this same switchboard to be “key interlocked” (*id.*).

(b) Appellant first informed the government that GSI would not provide said electrically motorized, key interlocked main breakers in its 22 May 1995 list of “Clarifications and Exceptions” (findings 9(a-b); R4, tab 53; tr. 322-25). Instead, GSI proposed to provide manually operated feeder breakers because it considered the contractually specified requirement to be “unusual.”

. . . It's very unusual to key interlock electrically operated breakers. It's not totally incorrect if the system is designed right and the breakers are designed to allow that, but its unusual.

(Tr. 324)

(c) By letter to appellant dated 12 June 1995, the government rejected appellant's proposal and insisted that appellant satisfy the contract requirements (R4, tabs 64, 65, 94, 95, 110, 111). Mr. Preszler testified:

He said it. I did it. Its highly unusual to key interlock electrically operated breakers. But the drawing shows that way. I dropped it at the point.

(Tr. 340-41; finding 9(b))

#### 44. Bus Duct Layout (Item 10)

(a) The parties agree that certain unspecified contract drawings depict and require two distinct runs of bus duct between the main switchboard and the service mount switchboard (R4, tab 1 at drawings, tab 600 at 6; tr. 325-26, 1135-36).

(b) Appellant first notified the government that GSI would not provide these two distinct runs of bus duct in its 22 May 1995 list of "Clarifications and Exceptions" (findings 9(a-b)). Instead, GSI proposed to provide "one run with a 'T'" (*id.*). The basis of GSI's proposal was "to save some money" and achieve a more "efficient design" (tr. 325-26, 581-83). There was nothing "wrong with the existing [bus duct] system the way it was" and said item 10 did not constitute "reasonable requests for clarification and exception regarding this project" according to the sworn testimony of appellant's electrical switchgear consultant, Mr. Lewis (tr. 533-47, 581-83).

(c) By letter to appellant dated 12 June 1995, the government stated that GSI's bus duct proposal was "a variation and will result in a government credit [\$27,256], if allowed" (R4, tabs 64, 65; tr. 341). GSI regarded the amount of said credit as excessive and "dropped it, put in the two bus sticks [sic]" (tr. 341-42, 581-83, 1135-36; app. supp. R4, tab 27 at 5).

(d) Appellant, Neal, and GSI, however, continued to press for approval of GSI's bus duct proposal during July 1995 (R4, tabs 94, 95, 110, 111). The evidentiary record does not contain any further correspondence between the parties regarding item 10 after 27 July 1995 (*id.*; findings 15(c-d)).

(e) The bus duct involved herein was installed exactly in accordance with the contract drawings (tr. 341, 1135-36).

45. 65 KAIC Breakers (Item 11)

(a) Section 16312, paragraphs 2.3.10 (Switchboards Pump Room) and 2.3.13 (Circuit Breakers) indicate a rating of 65 KAIC for breakers in the pump room switchboard (R4, tab 1; tr. 326-27). Drawing No. E-6 (Part B) indicates a rating of 100 KAIC for these same breakers (*id.*; R4, tab 1 at drawings).

(b) Appellant notified the government that GSI would provide said breakers with a rating of 65 KAIC on 22 May 1995 in its list of “Clarifications and Exceptions” (R4, tab 53; tr. 327). GSI included this item in its list because “[t]here is no point in putting breakers with a higher rating than 65KAIC” (tr. 327, 1137-38; *see app. supp.* R4, tab 27 at 4).

(c) By letter to appellant dated 12 June 1995, the government stated, without reservation, that 65 KAIC breakers were acceptable (R4, tabs 64, 65; tr. 342, 593). Mr. Preszler testified that this response “resolved the problem” (tr. 342; *see also* R4, tabs 94, 95, 110, 111; tr. 593).

46. Pump Room Mains and Tie Breakers (Item 12)

(a) Section 16312, paragraph 2.3.13 (Circuit Breakers) of the specification provides, *inter alia*, for electrically operated mains and tie breakers in the pump room switchboard (R4, tab 1; tr. 327, 1142). Contract Drawing No. E-6 (Part B) does not depict said requirement (*id.*; R4, tab 1 at drawings).

(b) Appellant notified the government that GSI proposed to provide manually operated mains and tie breakers at said location “due to [the] key interlock [requirement]” in its 22 May 1995 list of “Clarifications and Exceptions” (R4, tab 53; tr. 327). Mr. Preszler testified that he included said item 12 in GSI’s list of “Clarifications and Exceptions” because he “thought the best design would be . . . manually operated [mains and tie breakers]” (*id.*).

(c) By letter to appellant dated 12 June 1995, the government stated, without reservation, that said “breakers shall be electrically operated” (R4, tabs 64, 65; tr. 342). Mr. Preszler testified that said response was definitive albeit the requirement was “[h]ighly unusual. Its show [sic] that way, so I provided it that way” (tr. 343; *see also* R4, tabs 94, 95, 110, 111, 600 at 7; tr. 593).

47. Pump Room Spare Molded Case Breakers (Item 13)

(a) Drawing No. E-6 (Part B) depicts two spare molded case breakers with a 45 amp trip rating (R4, tab 1 at drawings, *see also* tab 1, § 16312, ¶ 2.3.14; tr. 327-28).

(b) Appellant first notified the government that GSI proposed to provide said space molded case breakers with 50 amp trip rating in its 22 May 1995 list of “Clarifications and Exceptions” (R4, tab 53; tr. 327-28). GSI’s stated reason for not providing said spares with a 45 amp trip rating was that said spares were not “available” from GSI’s manufacturer (*i.e.*, Siemens) thereof (*id.*, tr. 495-96, 499-500, 1138-39).

(c) GSI had voluntarily pre-selected Siemens as its manufacturer by the time it submitted its quote to perform the work involved herein (tr. 495-96, 499-500). Molded case breakers with a 45 amp trip rating were available from other manufacturers (tr. 328, 1139).

(d) By letter to appellant dated 12 June 1995, the government stated, without reservation, that spare molded case breakers with a 50 amp trip rating were acceptable (R4, tabs 64, 65; tr. 343). Mr. Preszler testified that said response was “fair” and that it resolved the status of item 13 (*id.*; *see also* R4, tabs 94, 95, 110, 111, 600 at 7).

48. Automatic Transfer Switch Pump Room (Item 14)

(a) Section 16312, paragraph 2.7 (Automatic Transfer Switch (ATS) Pump Room Switchboard) of the specification requires that the ATS be “switch neutral” (R4, tab 1; tr. 328). The drawings, however, depicted a three wire, ungrounded system that did not allow for a switch neutral ATS (R4, tab 1 at drawings, tab 53; tr. 329).

(b) Appellant first informed the government that GSI would not provide the item 14 switch neutral ATS in its 22 May 1995 list of “Clarifications and Exceptions” (R4, tab 53; tr. 328-29). Mr. Preszler explained that he was “just stating the obviously [sic]” because the system was ungrounded, three wire, three phase without a neutral (*id.*; *see also* tr. 670-72).

(c) By letter to appellant dated 12 June 1995, the government stated, without reservation, that “3-Wire A.T.S. is acceptable” (R4, tabs 64, 65; tr. 343, 594). Mr. Preszler testified that the government’s response “resolved” the item 14 issue (tr. 343; *see also* R4, tabs 94, 95, 110, 111).

49. Crane Heater Breakers (Item 15)

(a) Section 16312, paragraph 2.3.13 (Circuit Breaker) required, *inter alia*, that all breakers, including the crane heater breakers, be electrically operated (R4, tabs 1, 600 at 8;



tr. 1141-43). Drawing No. E-5 (Part B) depicts the crane heater breaker circuits (R4, tab 1 at drawings). The switchboard schedule portion of Drawing No. E-11 (Part B) does not indicate that the crane heater outlets are to be electrically operated (*i.e.*, motorized) (*id.*; tr. 343).

(b) Sometime during the 23 May - 12 June 1995 period, Mr. Preszler questioned the need for electrically operated crane heater breakers because said crane heaters plugged into a “box out on the graving dock, that . . . had a [sic] on plus [sic] button and an off push button” (tr. 343). Instead, GSI proposed to provide manually operated breakers for the crane heaters (*id.*; *see also* tr. 1141-42; R4, tabs 110, 111).

(c) By letter to appellant dated 12 June 1995, the government stated, without reservation, that “Yes, crane heater breakers are required to be motorized (electrically operated)” (R4, tabs 64, 65; tr. 343-44).

(d) Appellant confirmed that GSI would provide said electrically operated crane heater breakers by letter to the government dated 17 July 1995 (R4, tab 94, *see* tab 95 at RJO4569; tr. 1142).

(e) At the 27 July 1995 meeting, however, the parties appear to have agreed that said crane heater breakers would be “manually operated with 120VAC shunt close & 48 VDC trip” (R4, tabs 110, 111). Neither party has directed our attention to evidentiary documents or testimony that reflects the administrative disposition with respect to said item 15 work.

#### 50. Building 85 Breakers (Item 16)

(a) The specification required, *inter alia*, that all breakers, including the Building 85 breakers, be electrically operated (*i.e.*, motorized) (R4, tab 1, § 16312, ¶ 2.3.13, tab 600 at 8; tr. 344, 346-47, 1142).

(b) The switchboard schedule portion of Drawing No. E-11 (Part B) only states that four categories of breakers contained in Building 85 were to be electrically operated (*i.e.*, motorized) (R4, tab 1 at drawings, tab 600 at 8; tr. 346-47, 1142).

(c) Sometime during the 23 May -12 June 1995 period, appellant/GSI apparently objected to furnishing electrically operated (motorized) breakers for all breaker locations at Building 85 due to the disparity described hereinabove between the specifications and Drawing No. E-11 (Part B) at the switchboard schedule (findings 50(a-b); *see* R4, tabs 94, 95).

(d) By letter to appellant dated 12 June 1995, the government stated, without reservation, that “[a]ll Bldg. 85 breakers shall be electrically operated - 120V close and VDC [sic] trip” (R4, tabs 64, 65).

(e) By letter to the government dated 17 July 1995, appellant forwarded GSI’s 30 June 1995 letter to Beacon wherein GSI stated:

16. All breakers . . . on sheet E-11 . . . identified as electrically operated will have 120 VAC close and 48 VDC trip circuits. Breakers not identified as electrically operated in sheet E-11 will be manually operated. Please advise me if you desire electrically operated breakers in all circuits of the Main 480 V Switchgear.

(R4, tabs 94, 95 at RJO4569, *see* tab 1 at drawing no. E-11 (Part B), switchboard schedule, item 1). GSI’s 30 June 1995 letter included a pricing sheet wherein GSI specified the sum of \$11,988.00 (\$47,028.00 minus \$35,040.00) as extra compensation for providing 12 additional electrically operated breakers at Building 85 *vice* 12 manually operated breakers at that location (R4, tab 95 at RJO4574). Neal’s 17 July 1995 change order request to appellant also asked, *inter alia*, for the same \$11,988.00 as extra compensation with respect to this item 16 but expressly stated that a time extension associated therewith was not necessary (R4, tab 95 at RJO4563, RJO4565). Appellant forwarded Neal’s 17 July 1995 proposal to the government on 17 July 1995 but did not submit:

. . . [T]his cost as a formal PCO. Obviously, there are major discrepancies regarding low voltage switchgear requirements for this project, and a follow up meeting is in order. This is causing a continuing delay in the production of the switchgear, a critical path item.

(R4, tab 94 at NA02783, NA02786)

(f) At the 27 July 1995 meeting, the parties appear to have agreed that “16. All Sheet E11 [sic] breaker s [sic] to be 120VAC close 48 VDC trip” (R4, tab 110 at GOV00265). The government representative’s handwritten notes with respect to this item at the 27 July 1995 meeting appear to state “16. Manually operated breaker” with additional, indecipherable writing (R4, tab 111 at GOV00270). Neither party has directed our attention to evidentiary documents or testimony which either adequately explains the meaning of the above quoted entries in Rule 4, tabs 110 and 111 or reflects the administrative disposition with respect to item 16 work.

## 51. Main Pump Room Switchboard Breakers (Item 17)

(a) At the hearing, Mr. Preszler acknowledged that section 16312, paragraph 2.3.13 (Circuit Breakers), *supra*, required that the main pump room switchboard breakers be electrically operated (R4, tab 1; tr. 347).

(b) Sometime during the 23 May - 12 June 1995 period, appellant apparently objected to furnishing electrically operated breakers for the main pump room switchboard (tr. 347; *see* R4, tabs 94, 95).

(c) By letter to appellant dated 12 June 1995, the government stated, without reservation, that “[m]ain pumproom breakers shall be electrically operated - 120V close and trip” (R4, tab 95 at RJO4577).

(d) GSI, Beacon, Neal, and appellant did not claim any extra compensation or time extension with respect to item 17 in their respective 30 June 1995 and 17 July 1995 low-voltage switchgear communications (R4, tabs 94, 95; finding 12(b)) or at the 27 July 1995 meeting (R4, tabs 110, 111; findings 15(a-e)).

## 52. Jig-Welding (Item 18)

(a) Section 16312, paragraph 2.3.2 of the specification requires, *inter alia*, that the “framework of each unit shall be constructed of steel, channel or angles, and formed plates accurately welded together in a jig and reinforced to form a rigid, self-supporting structure” (R4, tab 1; tr. 348-49, 774, 796-98).

(b) Mr. Ahmadi was aware of the jig-welding requirement at the time he prepared GSI’s quote and testified that GSI was capable of performing said jig-welding requirement although GSI did not then have that in-house capability (tr. 774-75, 796-99, *see also* tr. 496, 653-55, 659-61; R4, tabs 84, 595 at addendum, ¶ D.2.d., tabs 653-655).

(c) The jig-welding requirement stemmed from the government’s desire to receive a “better quality product . . . [b]ecause it’s rigid” (tr. 1078, *see also* tr. 348-49, 496-98, 594-95, 1189-1200). Jig-welding was not, however, necessary and was an “old-fashioned” manufacturing technique according to GSI (tr. 799, 1079, *see also* tr. 348-49, 496-99, 594-95, 1189-1200).

(d) Sometime during the 23 May - 12 June 1995 period, appellant/GSI informed the government that it would furnish bolted-type cabinet units *vice* the jig-welded units (*see* tr. 348-49, 496-99, 799; R4, tabs 94, 95).

(e) By letter to appellant, dated 12 June 1995 as amended on 13 June 1995, the government stated that “[s]witchboard framing angles shall be jig-welded with individual sections bolted” (R4, tabs 64-66; tr. 348-49, 496-97, 1078-79).

(f) At the 27 July 1995 meeting, the parties agreed that “18. Standard ‘bolt together’ construction will be acceptable to government, pending approval of credit” (R4, tab 110 at GOV00265; *see* finding 22(b)).

(g) Bilateral Modification No. P00018, *supra*, provided, *inter alia*, for the payment by appellant of a credit to the government that reflected the agreed upon cost difference attributable to using standard bolt-together construction *vice* jig-welding. Said modification also contained a full release with respect to said jig-welding issue. The contract performance time remained unchanged. (Findings 41(j-k)) The evidentiary record also contains a bilateral subcontract agreement between appellant and Neal that reflects a credit for bolted construction *vice* jig-welding and also contains a full release with respect to said item 18 issue (finding 41(l)).

(h) Mr. Ahmadi testified that the government’s allegedly delayed responses to GSI’s inquiries regarding jig-welding (item 18), color coding (item 7), watt/watthour transducers, and zinc paint “were nothing but delaying the project” (tr. 782). According to Mr. Ahmadi GSI’s production work was greatly delayed by the “long time” it took to resolve the jig-welding issue because “I cannot move until I know how I should move, and if they are talking about jig welding and I am waiting for them to resolve it, then its delay” (tr. 802-03, *see* tr. 497). Mr. Ahmadi could not “separate out” the “part of the delays caused by the jig weld issue from the part of the delays caused by other issues” (*id.*).

### 53. Watt/Watthour Transducers

(a) Section 16312, paragraphs 2.3.21.7 through 2.3.21.13 of the specification describe the performance characteristics of “the Watt/Watthour Transducer” (R4, tabs 1, 366, 462; tr. 359-62, 365-67, 371, 448-49, 452-58, 506-07, 649-50, 1052-53, 1123, 1131, 1166). None of these specification provisions, however, directly state that said watt/watthour transducer is to be “provided,” “installed,” or otherwise “furnished” (R4, tabs 1, 366; tr. 371, 451-58, 476-77, 506-07). The “watt/watthour” transducer is not otherwise mentioned in the specification (R4, tab 1 at amend. 0003; tr. 1052-54, 1125-26, 1162-64, 1249-51).

(b) The contract drawings do not directly depict either the quantity or location(s) of said transducers with respect to the low-voltage switchgear equipment (R4, tab 1 at drawings, tab 366; tr. 357-62, 369-71, 441-77, 506-07, 603, 649-50, 1049, 1077, 1168-72, 1250-51).

(c) The first mention of the requirement to furnish watt/watthour transducers seems to have occurred at the 27 July meeting wherein the government apparently suggested that said transducers could be deleted if an appropriate credit was offered to the government by appellant (tr. 137-39, 357-59, 368; finding 15(c)).

(d) By letter dated 19 September 1995 to appellant, the government again stated that the watthour transducers could be deleted in return for an appropriate credit (finding 22(b)).

(e) In response to GSI's 27 September 1995 statement that watthour transducers were not required, the government, on 3 October 1995, solicited a cost proposal ("PC # 17") for deleting the watthour transducers requirement and revising the "PT callout of WYE connection to Open Delta" (R4, tab 462 at RJO1818).

(f) Appellant submitted the requested proposal on 30 October 1995 stating, *inter alia*:

[Beacon takes its] original stand that no credit is due [for the watthour transducers] because no WHM transducers are shown on [the contract drawings].

(R4, tab 299 at RJO1815, RJO8017). A credit apparently attributable only to the revision of the PT call-out to open-delta, was offered by appellant (*id.*).

(g) By letter dated 3 January 1996, appellant told Neal that the government had reviewed the PC # 17 proposal ("DELETE TRANSDUCERS AND REVISE PT's"):

They have agreed to your material credit of \$110 per [PT callout] location[.] However, they feel a labor credit of \$25 per location is also due . . . [.]

(R4, tab 462 at RJO1811) Appellant's revised proposal, entitled "REVISED PCO #14 FOR PC #17 - DELETE TRANSDUCERS & REVISE PT's [sic]" included the requested labor credit for the revised PTs and was submitted to the government by letter dated 12 January 1996 (R4, tab 462 at RJO1806).

(h) Bilateral Contract Modification No. P00046 states, in pertinent part:

As negotiated on 16 January 1996, the parties hereto mutually agree to the following contract prices as complete equitable adjustment for the following:

PC # 17: Re: . . . Revise PT callout of WYE connection to  
Open Delta.  
AMOUNT: \$ -781.00

As a result of the Modification agreed to herein, the total contract price is hereby decreased by \$ -781.00 . . . . The contract period of performance remains unchanged.

(R4, tab 2 at NA10063; *see* finding 37) It does not expressly refer to the watt/watthour transducers (*id.*).

(i) Mr. Ahmadi testified that, when preparing GSI's quote, he did not "see" any contract requirement to furnish and install "the transducers, they were not there at all" (tr. 807). It is not apparent from the evidentiary record whether appellant, Neal, or Beacon included the cost of said watt/watthour transducers in their respective bid prices (findings 6(a-b); *passim*).

(j) The evidentiary record does not establish that GSI ever installed the watt/watthour transducers in connection with the low-voltage switchgear equipment involved herein (*passim*). Although certain transducers depicted on Contract Drawing No. E-13.3 (Part B) were, in fact, installed by GSI, these were not the watthour transducers involved herein (R4, tab 1 at drawing no. E-13.3 (Part B), electrical notes 10A-C, tabs 84, 95; tr. 357, 383).

#### 54. Zinc Paint

(a) Section 16312, paragraph 2.3.4.1 of the specification requires, *inter alia*, that:

Welded assemblies shall be first degreased by dipping the entire unit into a degreasing tank . . . . All metal shall be given one coat of zinc rich epoxy primer containing 3.1 to 5.3 pounds of zinc dust per gallon.

(R4, tab 1)

(b) Mr. Ahmadi was aware of the specification paint requirements at the time he prepared GSI's quote but believed he could furnish a different paint because he intended to provide paint of the highest quality that had been previously used on other, similar government projects (tr. 786, 807-09). He testified that the paint he intended to offer was "[t]he best paint available. Now, what should I worry about the paint that they ask for?" (tr. 808).

(c) Mr. Ahmadi also testified that one of his employees had advised him that the zinc content of the specified paint did not satisfy Environmental Protection Agency (EPA) requirements (tr. 786, 808, 842-45). Appellant does not proffer either the unnamed employee's testimony or the EPA requirements that were allegedly violated by the specified paint (*id.*). The evidentiary record is otherwise silent as to any contemporaneously communicated complaint from GSI, Beacon, Neal, or appellant as to the specified paint violating EPA requirements (*passim*).

(d) By transmittal to appellant dated 19 September 1995, the government stated, *inter alia*, that appellant's 22 August 1995 partial submittal for the low-voltage switchgear did not provide information establishing compliance with "specifications as to . . . zinc content of primer" (R4, tab 173 at 3). The partial submittal had been received by the government on 7 September 1995 (R4, tabs 3, 128 at 1, tabs 156, 173; tr. 909).

(e) Between 27 September and 12 December 1995, the parties, Neal, Beacon and GSI exchanged correspondence with respect to GSI's evolving request for a variance from the degreasing and zinc content requirements of the specification (R4, tabs 189, 270, 275, 308, 310, 317, 332, 345, 348, 353, 360, 382, 402; tr. 789-91). GSI's paint variance request was approved, in its final form, at "no extra cost" to the government by the middle of December 1995 (*id.*; tr. 786-88).

#### 55. 2.4KV Motor Starters

(a) Appellant's brief herein asserts that "the 2.4KV motor starter was improperly specified, causing further delays and expense for GSI" (app. br. at 16). The specification sections alluded to by the parties indicate that the motor starters cited by appellant were installed as a part of the medium-voltage switchgear *vice* the low-voltage switchgear work that forms the basis of every other instance of alleged government action or inaction that allegedly caused GSI to accelerate its performance (R4, tab 1, § 16313, ¶¶ 2.2, 2.2.2, § 16402, ¶ 2.17, tabs 522, 600 at 9, motor starter section; tr. 776-79, 1068, 1159).

(b) On or about 1 March 1996, the parties, Neal, Beacon, and GSI determined that the 2.4KV motor starters, as installed, would be unsafe to operate without additional, new resistors (tr. 776-79, 1068-73, 1158-60; R4, tabs 526, 531, 534-35, 564).

(c) GSI successfully performed the additional work thereafter (tr. 776-80, 1158-61; R4, tabs 576, 577).

(d) Bilateral Modification No. P00058 reflected the parties' 12 July 1996 agreement on the amount of \$28,958.00 as a "complete equitable adjustment" for furnishing and installing additional, engineered resistors for designated 2.4KV motor starters. The contract performance period remained unchanged. (R4, tab 2) This modification included the same unqualified, full and complete release language set forth

hereinabove that was contained in Modification No. P00046, *supra* (finding 37(d); R4, tabs 576, 577). Said modification was executed by appellant's president, Rod Harris (R4, tab 2).

#### 56. Service Mound Switchgear Amp Transducers

(a) The requirement for providing amp (*i.e.*, current) transducers with respect to the service mound switchgear equipment is set forth in Drawing No. E-13.3 (Part B) (R4, tab 1 at drawings, electrical notes 10A-C, tabs 84, 95, 594 at discovery request no. 37, tab 595 at 15-19, tab 600 at 3-6; tr. 1118-23).

(b) The issue associated with the amp transducers appears to have first arisen during the 22 May - 30 June 1995 period in connection with appellant's statement that the work depicted on Drawing No. E-13.3 (Part B) was not properly included as a part of the low-voltage switchgear work (*id.*; findings 9(b), 12(b)).

(c) The service mound switchgear transducers were installed by appellant (*id.*).

(d) Neither party addresses the effect, if any, in their post-hearing briefs, that this requirement had with respect to the claim involved herein (*passim*).

57. At the hearing, Mr. Ahmadi and Mr. Preszler testified that items 1-22, *supra*, "translated . . . into major delays in the submittal process, review and approval process" (tr. 488-90; *see* findings 41(m), 52(h)). Neither Mr. Ahmadi or Mr. Preszler was "sure which straw broke the camel's back . . . trying to isolate one from the other, I'm not really sure I can" (*id.*). Appellant's expert on damages, Mr. Larkin, acknowledged that his study did not attempt to allocate labor inefficiencies between contractor-responsible and government-responsible causes (tr. 696-98, 724-25; *see* R4, tab 600 at 19; app. supp. R4, tab 26; ex. A-3). Appellant's technical expert, Mr. Lewis, acknowledged that the time associated with the government's responses was in accordance with specification requirements (findings 5, 27).

#### 58. Constructive Acceleration

(a) At the hearing, Mr. Larkin confirmed that the portion of appellant's original claim that sought recovery for the difference between GSI's actual performance cost and its bid cost was an inappropriate total cost approach measure of GSI's damages herein (tr. 701-07, 710-11; app. supp. R4, tab 26). He testified that appellant/GSI claims only "loss of productivity" caused by the constructive acceleration of GSI's work that allegedly resulted from the government's delay in approving GSI's submittals. According to Mr. Larkin, GSI's "loss of productivity" damages were of two types: (1) inefficiencies caused by excessive overtime, and (2) inefficiencies caused by overcrowding at the job site. (Tr. 701-02; app. supp. R4, tab 26; ex. A-3)



(b) Mr. Larkin's study posits that GSI planned to "fabricate" (*i.e.*, procure) the switchgear during a 16-week period between 26 July and 13 November 1995 (tr. 708, 737, 1219-20, 1228; app. supp. R4, tab 26 at 8, ex. A-6). Appellant's "Preliminary schedule Barchart Diagram," however, showed that procurement of the switchgear was scheduled for a 12-week period between 21 August and 13 November 1995 (tr. 1219-20, 1228; finding 7(b)).

(c) At trial, Mr. Ahmadi testified that the government's alleged delay in approving GSI's submittals caused GSI to accelerate procurement/fabrication work by working overtime and double shifts at the beginning of the actual fabrication/production period (tr. 787, 801-02, *see* tr. 401). According to Mr. Larkin, GSI's employees worked at least an average of 47 hours per week during the period from 5 January through 1 March 1996 thereby resulting in an 18.8 per cent loss of efficiency compared to a regular 40-hour week (tr. 701-07; app. supp. R4, tab 26 at 6, 8, 9; ex. A-3 at 6). Mr. Larkin acknowledged, however, that he did not investigate GSI's planned manning levels with respect to the fabrication/procurement of the switchgear and could not confirm that all the overtime/double shift work cited in his report actually involved performance of fabrication/procurement work on subject project involved herein (tr. 708, 716-32, 739-44, 1224-28, 1253; app. supp. R4, tab 26; ex. A-3; R4, tab 600 at 19).

(d) Mr. Larkin also testified that "overcrowding" during the 5 January - 1 March 1996 period resulted in a 10 per cent loss of efficiency to GSI (tr. 707-10; app. supp. R4, tab 26 at 7, 9; ex. A-3 at 7). He acknowledged, however, that he did not know the number of employees that GSI planned to use during the fabrication/procurement activity or whether all of the GSI employees who worked on the switchgear during the 5 January - 1 March 1996 period were working "on the floor" - *i.e.*, the "overcrowded" area (tr. 726, 728-40, 1224-28, 1253; R4, tab 600 at 19; finding 58(c)).

## DECISION

Appellant/GSI argues that, under California law, the government is liable for constructive acceleration costs incurred as a result of the government's intentional failure to timely resolve the 11 of the 22 alleged contract defects described, *supra*, as items 1, 4, 5, 7-9, 12, 18, watt/watt hour transducers, zinc paint and 2.4KV motor starters (findings 35, 38-39, 41-43, 46, 52-55). In this regard, appellant/GSI seeks reimbursement for costs associated with inefficiencies caused by excessive overtime and overcrowding at GSI's manufacturing site plus interest (app. br. at 5).

The government denies that it failed to appropriately respond to any of appellant/GSI's informal inquiries in a timely manner noting that appellant/GSI did not even attempt to comply with the contract provisions regarding submittals and requests for variances until after 27 July 1995. The government also asserts that it was entitled to strict compliance with the unambiguous contract requirements designated as items 5, 7-10, 12,

17-18, and zinc paint and argues that appellant/GSI must bear any and all consequences associated with its refusal to release the low-voltage switchgear equipment for production until the amount of the credit for government-approved variances was agreed upon by the parties. With respect to the alleged defects that appellant/GSI designates as items 1, 4, 5, 7, 18, watt/watthour transducers, and zinc paint, the government contends that appellant/GSI cannot premise their claim on, *arguendo*, patent defects which it either knew or should have known about prior to contract award. The government also contends that items 3, 7, 18, watt/watthour transducers, and 2.4KV motor starters were completely resolved by bilateral contract modifications containing full and complete releases thereby precluding appellant/GSI's reliance thereon in conjunction with this appeal. The government also points to appellant/GSI's failures to either offer a delay analysis or to formally and contemporaneously request a time extension in connection with the alleged specification/drawing defects as precluding appellant/GSI's claims herein. Moreover, the government notes that appellant/GSI has failed to prove that there was any delay in overall contract completion and, assuming *arguendo* that appellant was delayed with respect to the low-voltage switchgear equipment, any such delays were either caused by appellant/GSI or were concurrent and inseparable from contractor-caused delays.

A. Applicability of State Law

We reject appellant/GSI's contention that the laws of the State of California govern the disposition of this appeal. *Quiller Construction Co.*, ASBCA No. 14964, 72-1 BCA ¶ 9322 at 43,218 and cases cited therein. The issues involved in this appeal are, instead, squarely governed by applicable federal statutes, regulations and federal case law (*id.*).

B. Timeliness of Government Responses to Appellant/GSI's Informal and Formal Submittals/Requests for Variances

Our findings establish that appellant, Neal, Beacon, and GSI were required by sections 01300 (Submittals) and 01400 (Quality Control) of the contract to provide the formal submittals for, *inter alia*, the low-voltage switchgear equipment to CTE, appellant's registered electrical engineer, for review and certification thereof (findings 4, 5). Section 01300 also required that "[v]ariations from contract requirements" be identified separately and include cost benefits associated therewith, documentation of the nature and features of the variation and why the variation is desirable and beneficial to the government (*id.*).

GSI effectively ignored these requirements when it unilaterally opted to proffer its initial 22 May 1995 informal, preliminary list of "Clarifications and Exceptions" and its subsequent 30 June 1995 informal request for an equitable adjustment (findings 7(a), 8, 9(a-b), 12(a-b), 13-15(e)). Even so, the government responded in a timely and appropriately complete manner on 12 June 1995 to GSI's initial 22 May 1995 communication (*i.e.*, 21 days) and on 27 July 1995 to GSI's subsequent 30 June 1995 request which had been received by the government on 17 July 1995 (*i.e.*, 10 days)

(findings 10, 12(a), 15(a, c-d)). In this regard, we note that even if these two informal GSI communications had, in fact, been reviewed and certified by CTE (within a 15-day working period *per* § 01300, ¶ 1.3.3(b)), the same contract provision allowed the government an additional 20 working days for review thereof after it received the formal, certified submittal from CTE (findings 4, 5). Moreover section 01300, paragraph 1.3.4.3 of the contract allowed the government an additional 15 working days for consideration of formal submittals with “variations”—*e.g.*, items 4, 5, 7, 10, 11, 13, 15, 18, and zinc paint (*id.*; *see* findings 26, 27, 38, 39, 41, 44, 45, 47, 49, 52, 54). We also note that during this period GSI refused to release the low-voltage switchgear for production until its informal demands for variances and additional compensation were granted (findings 12(b), 15(a)). The timeliness of the government’s actions regarding GSI’s two informal review requests is thus not a viable basis for appellant’s claim herein.

GSI’s 10 August 1995 partial submittal for the low-voltage switchgear equipment and CTE’s 18 August 1995 review thereof were officially forwarded to the government on 7 September 1995 (findings 15(b), 16(a-c), 18-20). The government’s 19 September 1995 conditional approval thereof was both timely and appropriately complete (findings 4, 5, 15(b), 22(a-b)). We note that GSI had refused to address or otherwise rectify the deficiencies identified by CTE prior to submission thereof to the government (findings 16(b), 18). The government’s 19 September 1995 conditional approval was forwarded by Beacon to GSI on 25 September 1995 together with Beacon’s request that GSI “release [the low-voltage switchgear equipment associated therewith] for immediate manufacture and shipment” (finding 23). Moreover, appellant directed Neal/GSI, on 28 September and 9 October 1995, “to proceed immediately with fabrication on the [low-voltage electrical] switchgear . . . [with] the option to claim for equitable adjustment per the disputes clause of the specifications” (finding 25). GSI, however, refused to proceed with fabrication and continued to insist that no credit was due and owing to the government because the watt/watthour transducers item was not required by the contract (findings 22(b), 24).

Thereafter, during October 1995, GSI formally requested variances with respect to, *inter alia*, the jig-welding and color-coded wiring items (findings 26, 27). Appellant/GSI’s own electrical switchboard equipment expert confirmed the government’s response time “fell within the intent of the specifications” (finding 27). It was not until early November 1995, however, that GSI released the low-voltage electrical switchgear for production (finding 28(a)). By this time, none of the low-voltage electrical switchgear equipment items were “critical path” items (finding 28(b)).

The government’s actions with respect to appellant’s informal and formal submissions were timely and appropriate. Appellant/GSI cannot prevail upon its claim for constructive acceleration insofar as it is premised on alleged excusable government delay in responding thereto.

### C. Unambiguous Contract Requirements

Our findings establish that the contract clearly and unambiguously requires that appellant/GSI perform seven of the eleven items that presently form the basis of appellant/GSI's appeal—*i.e.*, item 5 (voltmeters), item 7 (color-coded wiring), item 8 (electrical interlock on tie breaker), item 9 (electric service mound switchboard key interlocks), item 12 (pump room mains and tie breakers), item 18 (jig-welding) and zinc paint (unnumbered) as well as two more of the items originally identified by appellant/GSI as defects—*i.e.*, item 10 (bus duct layout), and item 17 (main pump room switchboard breakers) (findings 3, 36(a-d), 39(a-c), 41(a-1), 42(a-f), 43(a-c), 44, 46, 51, 52, 54(a-e)). In this regard, we have found that Drawing No. E-13.3 (Part B) which, *inter alia*, required appellant/GSI to provide the color-coded wiring involved herein, was included in the contract (findings 3, 36(a-d), 41(a-1)). Appellant/GSI's rationales for not providing said items because it would amount to "overkill" (item 5), or was not "customary" (item 7), or was "highly unusual" (items 9 and 12) or was "old-fashioned" (item 18) do not suffice either to excuse appellant/GSI's performance thereof in strict compliance with the contract requirements or to allow appellant/GSI to substitute its own judgment as to what the government's actual needs might be (findings 39(d), 41(b), 43(b-c), 46(c), 52(c)). *See M.A. Mortenson Co.*, ASBCA Nos. 43062 *et al.*, 01-2 BCA ¶ 31,573 at 155,908, 155,911-12 and cases cited therein. With respect to item 8 (electrical interlock on tie breaker), appellant/GSI has withdrawn the "possible hazardous condition" basis for not otherwise providing this unambiguously required item (findings 42(b, d, f)). With respect to the zinc paint item, appellant/GSI has failed to prove that the zinc content of this otherwise unambiguous requirement violated EPA requirements (finding 54(c)).

These seven contractually required items were ultimately either performed by appellant/GSI in strict accordance with the contract requirements (items 8, 9, and 12) or were performed in accordance with a "variance" consented to by the government (items 5, 7, 18, zinc paint) (findings 39(g), 41(d, g-1), 42(d-e), 43(c), 46(c), 52(f-g), 54(e)). We have previously stated that the government's responses to both informal and formal submittals/requests for variances by appellant/GSI were both timely and reasonable. If, in fact, any delay was experienced by appellant/GSI with respect to these seven unambiguous contract requirements, said delay was caused by GSI's own refusal to start production until its demands for additional compensation and variances were satisfied *vice* following the express directives from appellant and Neal to perform said work and submit a "claim for equitable adjustment per the disputes clause of the specifications" (findings 12(b), 13-15(a), 25, 28)).

The government's refusal to grant immediate variances pursuant to appellant/GSI's incomplete, preliminary working document in connection with these seven unambiguous, contractually required items was not a violation of its contractual duties. Appellant/GSI is thus precluded from prevailing upon its present claim for constructive acceleration based upon alleged excusable delays arising therefrom.

#### D. Failure to Seek Clarification Prior to Bid Submission

With respect to item 4 (drawout potential transformer), the specification requires that the drawout assembly for potential transformers “shall be rollout movable carriage trays with potential transformers mounted on trays” (finding 38(a)). The drawings, however, depict a “fixed mounting of the potential transformer” and show “draw out type fuses” (*id.*). Under the order of precedence in the Specifications and Drawings for Construction clause (finding 2), the specifications govern thereby precluding appellant/GSI from prevailing upon its present claim for constructive acceleration based upon excusable delays stemming from said item 4. *Hensel Phelps Construction Co. v. United States*, 886 F.2d 1296 (Fed. Cir. 1989). Moreover, if said clause is somehow deemed to be inapplicable, these conflicting requirements are patent and constitute an obvious inconsistency which triggered a legal obligation on the part of appellant, Neal, Beacon, and GSI to seek clarification from the government before bid submission if they intended “to bridge the crevasse in [their] own favor.” *W. B. Meredith II, Inc.*, ASBCA No. 53590, 03-1 BCA ¶ 32,166 at 159,050-051, and cases cited therein. The evidentiary record does not reflect that appellant, Neal, Beacon, or GSI sought such clarification (findings 9(c), 38(a, e)).

Mr. Ahmadi readily acknowledged during his testimony that he was fully aware that the specification/drawings bid package contained what he regarded as obvious discrepancies with respect to the six low-voltage electrical switchgear items designated, *supra*, as items: 1 (grounded/ungrounded fault system); 2 (inclusion of Drawing No. E-13.3 (Part B)); 5 (voltmeters); 7 (color-coded wiring); 18 (jig-welding); and the zinc paint item (findings 9(c), 35(b), 36(b), 39(c), 41(d), 52(b) and 54(b)). The evidentiary record, however, does not establish, or even suggest, that Mr. Ahmadi (or, indeed, any other employee of GSI, Beacon, Neal, or appellant) requested clarification from the government regarding these perceived defects prior to contract award (findings 1, 6(a-c), 9(b-c), 31, 54(b)). Moreover, the evidentiary record does not establish the basis of appellant’s bid with respect to these 6 items, the watt/watt hour transducers item, or, indeed, any of the 22 items involved herein. Appellant has thus failed to demonstrate that it relied on any interpretation thereof advanced by GSI subsequent to contract award (findings 6(a-b), 9(b), 10, 15(c), 27, 31, 33-56).

Assuming, *arguendo*, that the above-described eight items are defects, the failure to seek clarification thereof from the government regarding said discrepancies prior to contract award and the failure to demonstrate reliance by appellant at the time of bid on the interpretations now advanced precludes appellant/GSI from now prevailing upon its present claim insofar as it is based upon excusable delay stemming from said alleged defects. *See Centex Construction Co.*, ASBCA Nos. 51906 *et al.*, 2003 WL 22283904, slip op. dated 30 September 2003 at 24-25. A bidder who knows, or should know of obvious defects in a contract must make timely inquiry or otherwise proceed at its own risk.

### E. Bilateral Contract Modifications

Appellant/GSI has already been fully compensated for and has agreed through bilateral contract modifications (*i.e.*, Modification Nos. P00018, P00046, and P00058) that the government is released from liability for items: 3 (potential transformers connection); 7 (color-coded wiring); 18 (jig welding); and 2.4KV motor starters<sup>2</sup> (findings 37(d), 41(j), 52(g), 55(d)). Said contract modifications reflect the requisite meeting of the parties' minds, are supported by consideration, expressly include any and all costs, impact effect and delays and disruptions, were executed without reservation by appellant and contain full releases that bar appellant/GSI's present claim for constructive acceleration based upon alleged delays stemming from the above-described items. *See Biggs General Contracting, Inc.*, ASBCA No. 46979, 97-2 BCA ¶ 28,999 at 144,478.

Appellant/GSI's contention (first raised on pages 10-11 of its reply brief), that the government "had an internal system to sign [Modification No. P00018 (color-coded wiring and jig-welding)] on behalf of Appellant" thereby negating the accord and satisfaction effect of said modification is disingenuous, at best, and without support in the evidentiary record (findings 41(j-1), 52(g)). *See Slingsby Aviation Limited*, ASBCA No. 50473, 03-1 BCA ¶ 32,252 at 159,472, 159,481. The subject matter of this evidentiary ambush attempt was not contemporaneously asserted, was not asserted after claim submission or addressed in the final decision or in the pleadings, is belied by the presence of the same signatures on behalf of appellant on both preceding and succeeding contract modifications and is consistent with contemporaneous, bilateral modifications to the subcontract between appellant and Neal (*id.*).

### F. Concurrent Delay/Constructive Acceleration

In order to ascertain whether a constructive acceleration has occurred, the evidentiary record must establish the traditional elements of acceleration:

. . . First, there must be excusable delay. Second, the contractor must give notice of excusable delay and specifically request a time extension accompanied by sufficient supporting information to allow the Government to make a reasonable determination concerning how to proceed. Third, the Government must fail or refuse to grant the requested time extension within a reasonable time. Fourth, the Government must order the contractor to accelerate the work, either expressly or by implication, without regard to excusable delay. The contractor must give notice to the CO that the alleged

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<sup>2</sup> It does not appear that the watt/watt-hour transducers item was resolved by bilateral contract modification (findings 53(f-h, j)).

order to accelerate constitutes a constructive change so that the CO is afforded the opportunity to assess the circumstances and take appropriate action to avoid the added costs of the acceleration order. Fifth, the contractor must actually undertake reasonable efforts to accelerate and incur added costs. [Citations omitted]

*Commercial Contractors Equipment, Inc.*, ASBCA Nos. 52930 *et al.*, slip op. dated 17 September 2003 at 43, and cases cited therein; *accord Woerner Engineering, Inc.*, ASBCA No. 52248, 03-1 BCA ¶ 32,196 at 159,143 and cases cited therein; *Hemphill Contracting Co.*, ENGBCA Nos. 5698 *et al.*, 94-1 BCA ¶ 26,491 at 131,853; *Fermont Division, Dynamics Corp. of America*, ASBCA No. 15806, 75-1 BCA ¶ 11,139 at 52,999-53,000, *aff'd*, 216 Ct. Cl. 448 (1978).

The low-voltage switchgear equipment delays that allegedly fostered the situation wherein appellant/GSI was allegedly forced to accelerate have not been persuasively established as affecting the critical path of overall job performance/completion (findings 7(a-b), 8, 12(a), 15(f), 28(b), 30(a)). The first element of constructive acceleration is thus lacking herein. *See Woerner Engineering, Inc.*, *supra*, 03-1 BCA at 159,143.

Assuming *arguendo*, however, that appellant/GSI's performance was delayed, it is clear that all of the alleged delays were not, in fact, excusable. We have held that the government's actions with respect to appellant/GSI's submissions were timely and appropriate. Further, any delays that may have been experienced by GSI with respect to the unambiguous contract requirements designated herein as items 5, 7-10, 12, 17-18, and zinc paint were caused by GSI's own refusal to start production until all of its demands for variances and additional compensation were granted. Finally, we have held that appellant/GSI's failure to seek pre-bid clarification of patent discrepancies such as items 1, 2, 4, 5, 7, 18, and zinc paint precludes appellant/GSI's present claim for constructive acceleration based thereon. There are thus GSI-caused delays attributable to items 1, 2, 4, 5, 7-9, 18, and zinc paint that are by GSI's own admission fully concurrent with any other alleged government-caused delays during the 22 May 1995 - early November 1995 period. (*See* findings 9(a), 12(a), 28(a), 31, 36(e), 41(m), 52(h), 57) Furthermore, our attention has not been directed to any credible basis in this record that allows us to apportion any definable portion of the alleged delay exclusively to excusable government actions or inactions (findings 7(b), 8, 12(a), 17, 28(b), 30(a), 31, 32, 33, 34, 36(e), 41(m), 52(h), 57).

When performance is, *arguendo*, "delayed by multiple causes acting concurrently, and only one cause is excusable, *i.e.*, where other causes lie with the contractor, courts and boards have adopted the approach that neither party will benefit from the delay. Consequently, in a 'Changes' clause analysis, a contractor cannot recover acceleration costs flowing from a concurrent delay, unless the record supports a clear apportionment of the delay and expense attributable to each party [citations omitted]." *Hemphill Contracting*

*Co., supra*, 94-1 BCA at 131,853; *see Woerner Engineering, Inc., supra*, 03-1 BCA at 159,143. Appellant/GSI's own delays were fully concurrent with any alleged government delays and were not separable therefrom. Again, appellant has failed to satisfy the first element of proof with respect to recovery for constructive acceleration.

With respect to the second, third, and fourth elements of acceleration, our findings establish that appellant/Neal/Beacon/GSI did not request a time extension for excusable delays either generally or on a specific delay period per "item" of delay basis associated with the performance of the low-voltage electric switchgear equipment work during the June 1995 - April 1996 period (findings 12(a-b), 30(a)). Although the evidentiary record contains a 20 October 1995 communication from the government that can fairly be regarded as exhortative with respect to "complet[ing] subject contract within the time allowed," the government did not state either that properly justified time extensions therefore would not be granted or that the contract completion date must be met without regard to excusable delays (*id.*, finding 30(b)). We do not regard this government pressure to be unreasonable or tantamount to an acceleration order particularly in the absence of a proper request for a quantified time extension based solely on excusable delay. *See Hemphill Contracting Co., supra*, 94-1 BCA at 131,853-54; *Hawaiian Dredging & Construction Co.*, ASBCA No. 25594, 84-2 BCA ¶ 17,290 at 86,114-15; *Fermont Division, Dynamics Corp. of America, supra*, 75-1 BCA at 52,996-53,002 and cases cited therein. Indeed, GSI "took [it] on our own to get [the project] completed on time" (finding 28(a)). Appellant/GSI has thus failed to adequately prove the second, third and fourth elements of constructive acceleration.

Since appellant/GSI has failed to prove acceleration elements 1-4, it is not necessary to address acceleration element 5. We note, however, that appellant/GSI's evidence that it expended "excessive" overtime and double shift work resulting in loss of productivity during its alleged efforts to accelerate performance is suspect because the record herein is bereft of evidence as to appellant/GSI's planned manning levels for the low-voltage electrical switchgear equipment work and, further, does not appear to adequately segregate such overtime/double shift work from other work that was being concurrently performed (findings 6(a-b), 7(b), 58(b-c)). Similarly, appellant/GSI's proof regarding overcrowding and consequent loss of productivity during its alleged efforts to accelerate performance is equally suspect inasmuch as the record is again bereft of evidence as to planned manning levels or, indeed, as to how many of GSI's employees were actually then working "on the floor" in an overcrowding type of situation (finding 58(d)).

We deny appellant/GSI's acceleration claim in its entirety. The appeal is denied.

Dated: 9 December 2003



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

(Signatures continued)

I concur

I concur

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

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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. 51636, Appeal of R. J. Lanthier Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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