ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Alfair Development Company, Inc.	)	ASBCA Nos. 53119, 53120
	)	
Under Contract No. DACA01-94-C-0231	)	

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OPINION BY ADMINISTRATIVE JUDGE REED

These appeals arise under a construction contract that was terminated for the convenience of the government. This decision will resolve the quantum of termination costs and settlement expenses to which appellant is entitled. The government asserts that the contract would have been completed at a loss and that appellant is entitled to no profit on its performance costs. Appellant argues that the contract price should be increased. Therefore, to the extent necessary, this decision will determine whether appellant is entitled to increases in the contract price and, if entitled, the amount of any such increase(s). We will also decide to what extent appellant is entitled to profit on its performance costs.

FINDINGS OF FACT

Solicitation, Negotiation, and Award of the Contract

a. General

1. Request for Proposals No. DACA01-94-R-0074, dated 19 May 1994 (the RFP), was issued by the U.S. Army Engineer District, Mobile (the government) to Alfair Development Company, Inc. (Alfair, appellant, or the contractor) pursuant to § 8(a) of the Small Business Act, 15 U.S.C. § 637(a). The RFP requested prices for "Munitions Maintenance Facility," "Above Ground Maintenance Storage," "Site Work Munitions Maintenance Facility (Includes Security Fence)," and "Site Work Magazine Storage Facility." Each was a lump sum, fixed-price proposal item. In general, the work was to

construct two new buildings, a conventional munitions shop (the shop, the munitions maintenance facility, or the munitions building) and an above ground magazine (the magazine, above ground maintenance storage, or magazine storage facility) as well as road extensions, fencing, and other ancillary work, all within a munitions compound located at Hurlburt Field, Florida, near Fort Walton Beach, Florida. (R4, tab 4 at 1, 6-7, 78, 207-09, tab 5 at drawing Nos. X-1, C-1)

2. In response to the RFP, Alfair submitted an initial proposal dated 22 June 1994, in the total amount of $2,260,090.00. Alfair's president, Ms. Maggie Alford, prepared the proposal. The pre-award government estimate (GE), also dated 22 June 1994, amounted to $1,754,788.00, about 78% of Alfair's initial proposal price. Negotiations resulted in Alfair lowering its price to the amount awarded in the contract, $1,899,000.00. The GE was revised upward during negotiations to an amended total of $1,959,978.00, about 103% of Alfair's negotiated price. (Tr. 124-30, 755-67, 1258-67, 1636-38; R4, tab 98 at summary 7, tab 101, tab 292 at 64, tab 294)

3. Contract No. DACA01-94-C-0231 (the contract) was awarded, following negotiations to be described in part below, on 30 September 1994. The tripartite award document was signed for the government by contracting officer (CO) Edward M. Slana, a CO for the U.S. Small Business Administration, Jacqueline C. Johnson, and for the contractor by Ms. Alford. The contract included the following pertinent standard contract clauses: FAR 52.212-12, SUSPENSION OF WORK (APR 1984); FAR 52.233-1, DISPUTES (DEC 1991) (*inter alia*, making the contract subject to the Contract Disputes Act, 41 U.S.C. §§ 601-13 (the CDA)); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.243-4, CHANGES (AUG 1987); and FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984)--ALTERNATE I (APR 1984). (Tr. 120-22; R4, tab 4 at 1, 7, 23-25, 107, 156-58, 160-61, 169-70, 185-89, tab 5 at drawing No. C-1)

b. Site Work Negotiations

4. A foundation report finalized in 1992 was not provided to Alfair prior to award. Sandy soils, unstable soil conditions, "pumping," and potential soil removal and replacement for "Locally Unstable Areas" are indicated in the report. Groundwater was reported as being detected in subsurface borings at a depth of 1-3 feet, indicating the need for dewatering by "well points, or perimeter ditching and sump pumping." A drawing resembling what would become contract drawing No. C-3, the site layout plan for the shop, depicted a "wetland flag line." (Contract drawing No. C-3 includes no wetland flag line.) The shop structure, as it was planned and positioned in December 1992, was not in a wetland area; however, portions of the parking lot around the shop and portions of the driveway leading to the shop are shown in wetlands. (Tr. 302-06, 678-79, 689-90, 767-76, 1310-11, 1364-69; app. supp. R4, tabs 197, 215; R4, tab 5 at drawing No. C-3, tab 183 at 14, tab 292/43 (including handwritten entries))

5. Drawing No. C-1 shows Hurlburt Field located near the Gulf of Mexico and connected bodies of water. Drawing No. C-4 shows boring log indications and topographic elevations as low as 32 feet above sea level (el. 32). Ms. Alford, negotiator for Alfair, did not review available boring log information prior to award. That information indicated wet conditions. The location of the shop is several feet lower than the adjacent road such that the shop driveway slopes downward from about el. 38, across a low area less than el. 34, and on to the shop footprint location at el. 34-35. The southwest corner of the site, outside the footprint of the shop structure but including some of the driveway area, is shown to be lower than el. 33. Drawing Nos. H-3 and H-4 show a sewage lift station for the shop and indicate a sewage force main profile extending from about el. 31 to an existing manhole at el. 37. (Tr. 300-05, 770-72, 990-92; R4, tabs 5, 214)

6. The specifications included general dewatering requirements and indicated the presence of groundwater but were not specific as to horizontal location or elevation in connection with the structures to be placed. Ms. Alford was aware of these provisions. (Tr. 932; R4, tab 4 at specification § 02221, ¶¶ 3.5-3.5.2, § 02222, ¶¶ 2.2.1, 3.1.2)

7. Ms. Alford prepared Alfair's pre-award proposal, negotiated, and entered into the contract without conducting a visit to the site of the work. If she had visited the site, we find that she would have observed at least one surface stream running through the west side of the shop site. The RFP gave explicit information regarding coordination by appellant for a site visit or visits. Rather than contact the named individual at Hurlburt Field prior to finalizing the pre-award proposal, Ms. Alford first attempted to ask the government's pre-award negotiator, Ronnie A. Hathorne, Sr., whose duty location is Mobile, Alabama, to coordinate a visit during negotiations and after Alfair's proposal had been submitted. Ms. Alford did not contact the designated site visit coordinator. (Tr. 763-69, 777-79, 931, 984-85, 1243-64, 1289-90, 1311, 1640-41; R4, tab 4 at RFP-8, ¶ 15, tab 64, tab 294)

8. Mr. Hathorne informed Ms. Alford that the site was as indicated on the contract drawings. There was no discussion of dewatering or boring log information during the pre-award negotiations. (Tr. 769-71)

c. Electrical Work Negotiations

9. Interior and exterior electrical requirements required by the RFP drawings and specifications, among other things, included 15 power poles at the shop and 11 power poles at the magazine. As many as 14 poles were shown as 45 to 50-foot tall precast concrete poles supported by either a 24-foot deep reinforced concrete foundation or a 10-foot deep reinforced concrete foundation. These poles incorporate lightning protection features. The other poles are shown as 35-foot aluminum poles with

seven-foot deep reinforced concrete foundations. (Tr. 305, 793-95; R4, tab 5 at Drawing Nos. E-1, E-2, E-8, E-10, tab 117)

10. The record includes no separate written proposal from a proposed subcontractor for electrical work, although a lump sum proposed subcontract cost of $118,814.00 ($42,000.00 for the magazine + $76,814.00 for the shop) was listed in Alfair's pre-negotiation proposal. Adding proposed markups increases the proposed subcontract electrical costs to a proposed contractor price of $153,320.41. (Tr. 888-90, 1258-65, 1277, 1288; R4, tab 99 at 19, 55, 59, tab 111, tab 294 at 1, 5-6, 12) Included in the GE were costs of at least $212,049.00 for electrical work, about 178% of the contractor's proposed costs. Adding GE markups increases that amount to $272,896.14 (also about 178% of the contractor's initial proposal price with markups). (Tr. 1287; R4, tab 98 at summary 11, detail 57-69, 83-88, 109-18, 124-30)

11. Alfair later produced a handwritten note by Ms. Alford dated 30 August 1994 that recorded a telephone price quote of $115,000.00 from "Southeastern General & Mechanical Cont." (Southeastern). (Tr. 888-90; R4, tab 111) Neither Southeastern nor Alfair provided any other information concerning the quote (R4, tab 78 at 4-5). Inexplicably, Ms. Alford later wrote a letter dated 24 October 1997, in connection with the electrical claim described below at finding 36, stating that the original $115,000.00 subcontractor bid was received from Williams Electrical Company (Williams). She corrected herself at the hearing. (Tr. 887-88; app. supp. R4, tab 168). Neither Southeastern nor Williams performed electrical work under the contract (tr. 892-93; app. supp. R4, tab 183 at 61; R4, tab 289 at 302-04). In making Alfair's initial proposal and in negotiating the contract award price, Ms. Alford relied on the $115,000.00 quote. (Tr. 887-95)

12. After being revised during pre-award negotiations, the GE amount for electrical work was reduced to $175,968.00, that is, $60,968 more than and about 153% of the contractor's revised proposed price of $115,000.00. (R4, tab 78) Ms. Alford expressed no problems with understanding the general scope and meaning of the contract documents. (R4, tab 111 at 1) During performance of the contract, Ms. Alford told the government's resident engineer (RE), Jeremiah J. Walker, as related in an e-mail authored by RE Walker on 17 April 1998, that Alfair "either underbid or did not bid the major portion of the electrical work on the project" (tr. 1301-02; app. supp. R4, tab 243). There is no record evidence that Alfair ever identified a more specific or particular mistake that was made in its pre-award proposal as it related to electrical work.

13. Mr. Hathorne was aware of the single lump sum amount proposed by Alfair for subcontractor electrical work and that the GE included a higher total amount (tr. 1265-67, 1276-82; R4, tab 99 at 25, 29, tab 101 at 4, ¶ 8 and at 6, ¶ 20). Although Ms. Alford contends in later correspondence that Mr. Hathorne stated in negotiations that the parties were $14,000.00 apart on the electrical cost or price, which Ms. Alford

characterized as having "verified" the $115,000.00 bid, we find that Mr. Hathorne did not reveal to Alfair the extent of the difference between Alfair's lump sum proposal numbers and the amounts in the GE. (Tr. 758, 1276-87; app. supp. R4, tab 168, tab 183 at 61) (In her extensive testimony at the hearing, Ms. Alford did not repeat that assertion and it is not suggested in appellant's post-hearing briefs.) Instead, Mr. Hathorne requested a breakdown of the electrical subcontractor proposal and asked that written subcontractor quotes be provided as support for the proposal. Alfair provided no pre-award breakdown of its prices or written proposed subcontractor quoted prices for the electrical work. (Tr. 887, 1264-72, 1285-94; R4, tab 99 at 25, 29) Mr. Hathorne assumed, given the lack of detail in Alfair's proposal, that the cost or price differential was included elsewhere in the proposal (tr. 1277, 1285-86). We note that Alfair's initial proposal exceeded the unmodified GE by more than $500,000.00 and that the final negotiated contract price is much closer to the revised GE total (finding 2). A government claims analyst determined that some of the required electrical work involved placement of concrete ductbanks and pads such that those costs could have been included under other cost categories for concrete work. The original Alfair proposed price for concrete work, before markups, amounted to $114,766.69 (R4, tab 5 at drawing Nos. E-1, E-2, E-10, tab 78 at 4, tab 294 at 9)

14. Pre-award negotiations related to electrical work were limited to the lump sum line items in the RFP, the overall lump sum electrical subcontractor quoted cost to Alfair, and the government's attempts to obtain additional backup for that cost. The parties conducted no detailed discussion concerning the scope of the electrical work required by the RFP and included in the contractor's proposal or the GE. (Tr. 887-90, 1268, 1276-77, 1285; R4, tabs 101, 111)

d. Contractor Quality Control Representative (CQCR) Negotiations

15. The RFP specifications, § 01440, CONTRACTOR QUALITY CONTROL, ¶ 3.4.1.2, entitled "CQC System Manager," specify among other things that the "CQC System Manager shall be assigned no other duties" (R4, tab 4 at 263).

16. Alfair's initial pre-award proposal included labor costs for a superintendent, an assistant superintendent, and a project manager (PM). Ms. Alford planned for the assistant superintendent to perform CQCR duties, among other duties. Mr. Hathorne proposed that the project's superintendent perform the CQCR function and agreed to Alfair's revised proposal for two full-time supervisory or managerial persons on the job: a superintendent and a PM. On that basis, Ms. Alford "negotiated out" the costs for an assistant superintendent from Alfair's pre-award proposal because her firm had been allowed to use the superintendent as the CQCR on other Navy and Corps of Engineers jobs. (Tr. 128-29, 764-65, 964-65, 1275-76, 1650-51; R4, tab 101 at 1, tab 294 at 7)

Contract Performance

a. Contract Price and Time for Performance as Modified

17. The government issued 21 modifications to the contract. Contract Modification No. DACA01-94-C-0231-P00024 dated 12 March 1999 (mod 24) was the last issued. Mods 11 and 12 were either withdrawn or those modification numbers were not used. The parties agree that the total net contract price increase indicated by contract modifications is $596,000.64. Therefore, the agreed modified contract price is $2,495,000.64. (R4, tabs 6-26, tab 293, subtab 7 (293/7); app. br. at 37; gov't br. at 5-6)

18. Time for performance was specified in a tailored version of Special Clause SC-3, FAR 52.212-3, COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (APR 1984). That provision required completion 420 calendar days "after receipt of notice to proceed" (NTP). (R4, tab 4 at 203)

19. CO Slana provided NTP by letter dated 23 January 1995 and received by the contractor on 30 January 1995. The total of all time extensions allowed by the 21 issued modifications to the contract was 813 calendar days. Therefore, performance was to be completed by the contractor on or before 16 June 1998. A typed but unsigned and undated version of mod 21 that would have allowed 140 calendar days for non-compensable weather delays and that would have extended the contract completion date to 3 November 1998 is in the record. (R4, tab 4 at 15, tabs 7, 12, 17-18, 20-22, 24)

b. Government "Lockout" - Site Access and Security Checks

20. Much of the work was performed inside a secure area. A shortage of government personnel and other government actions limited the amount of time available for the contractor to access the portion of the work site inside the secure area. That limitation on access to a portion of the site was not contemplated in the contract's terms. To compensate for that limitation, the government examined contractor daily reports and allowed, in unilateral mod 17, a 150-calendar-day time extension and extended field overhead, without markups, amounting to $76,650.00 ($511.00 per day x 150 days). (Tr. 768, 968-70, 978-83, 1316, 1324-25, 1644; R4, tab 20 at 3, ¶ A., tab 64 at 5, ¶ 15)

21. To work inside the secure area required that workers undergo a security check upon entering and leaving the secure area. Work continued during the intermittent slowdowns caused by security checks. Government records reveal that the extent of the security checks exceeded that specified in the contract and caused labor inefficiencies and increased equipment costs. As compensation for these adverse impacts, the government estimated, based on contractor daily reports, and allowed, in mod 17, labor inefficiency costs of $40,000.00, extra equipment costs amounting to $10,000.00, and a

60-calendar-day time extension. (Tr. 906-08, 967-76, 1322-25; app. supp. R4, tab 183 at 85-86; R4, tab 20 at 3, ¶ B., tab 64 at 5, ¶ 15)

c. Site Work

22. The parties did not discover until after award the full extent of excessive subsurface water as it affected the soils conditions necessary for construction at the site of the work. The government recognized, at the shop location, the need for additional fill, an additional culvert under the driveway, and "demucking" that was not included in the contract. (Tr. 771-86, 835-36, 873, 1371-72; app. supp. R4, tab 183 at 16, 20-23, tabs 216, 223-24, 286)

23. Bilateral mod 2 was signed by Ms. Alford and by Ms. Johnson on 12 and 18 July 1995, respectively. Administrative CO Charles R. Bolen signed for the government on 28 July 1995. The modification included contract price and time increases ($58,000.00 and a 90-calendar-day time extension) related to, among other things, a revised site layout, a revised grading plan, and unsuitable soil removal and replacement (*i.e.*, "demucking") at the magazine. Mod 2 included a release and covered all extra costs attributable to the work described in mod 2. (Tr. 777-79, 957-58, 1001-05, 1312-15; R4, tab 7 at 2-5, 9)

24. Unilateral mod 17, signed by CO Slana only on 8 June 1998, allowed, among other things, a contract time and price increase related to wetlands at the shop location amounting to a time extension of 75 days and $38,325.00 (75 days x $511.00 per day) (Finding 20; R4, tab 20).

d. Low-Lift Block Installation

25. In placing masonry blocks, the contractor took the position that it could vertically place the blocks up to 20 feet high before including reinforced concrete and steel structures within the blocks for support. Authorized government representatives directed placement by the contractor of supporting beams at a lower level. The parties refer to this as the low-lift or high-lift block installation. Later, the government determined that the contract was ambiguous or the specifications defective on this point. Therefore, in mod 17, CO Slana allowed $10,000.00 plus markups for this matter. (Tr. 337-38, 1025-27, 1341-42, 1378-79, 1664; R4, tab 20)

e. Roll-Up Doors

26. By unilateral mod 10, the CO directed that the contractor replace 20 roll-up doors specified for the magazine with 20 sectional doors. The modification directed two other changes as well. Mod 10 allowed a total contract price increase of $39,125.00, of which at least $30,000.00 was for the door change. (Absent further

explanation, we were unable to determine the exact amount allowed for the door change). In mod 17, the government allowed an additional $30,000.00, plus markups, for the directed change of door types. (Tr. 942-43; R4, tabs 15, 20)

f. Electrical Work

27. After award, when Alfair learned that Southeastern would not perform, electrical subcontractor prices were resolicited. The contractor awarded a subcontract to Huff Electric, Inc. (Huff) in the amount of $340,000.00. On or about 24 October 1997, Alfair asserted that Huff's subcontract price did not include 19 light pole bases that were required by the contract. Alfair contended its price to install the light pole bases was estimated to be $76,000.00 plus markups. That contention became part of the larger electrical claim described below at finding 36. (Finding 11, tr. 893-94; app. supp. R4, tab 168; R4, tab 62 at 5-6, tab 77)

28. During performance of the contract, the government determined that the GE only included costs of wood poles directly buried in soil. The GE omitted costs for concrete or aluminum poles and for reinforced concrete foundations for the poles. (Finding 9; tr. 794, 1291-92, 1356-58, 1571-72, 1580-82; app. supp. R4, tabs 242-43; R4, tabs 112, 117)

g. Partial Suspension of Work

29. By letter dated 15 December 1998, the government partially suspended work under the contract by suspending "all work associated with the exterior electrical poles and electrical poles bases" (app. supp. R4, tab 165). Alfair continued work at the site until 21 January 1999 (tr. 1632).

h. CQCR

30. RE Walker, an authorized representative of the CO, directed in writing at the preconstruction conference, as pertinent here, that "A separate [CQCR] must be in charge of the [QC] Organization . . . ." Alfair thereafter employed CQCRs separate from the contractor's superintendent and incurred attendant labor expenses. The other full-time supervisory/managerial person negotiated by Alfair for this project, the PM, was not reassigned to CQCR duties. The apparent reason, as will be explained below at finding 55, was that the PM, Ms. Alford, did not work on-site and full-time under this contract throughout the life of the project. (Finding 16; tr. 965, 1359-60, 1650-51; R4, tab 103 at 11-12 (¶ I.1.a.(4))

Requests for Equitable Adjustment, Claims, and Appeals

a. Government Lockout, Wetlands, Low-Lift Block Installation, and Roll-up Doors

31. Alfair presented multiple requests for equitable adjustment in a letter dated 3 February 1997, with voluminous attachments. In response, CO Slana issued unilateral mod 17 dated 8 June 1998. That contract modification allowed a total price increase of $258,542.00 and a total time extension of 285 calendar days. Separate allowances purported to cover extra contractor costs and time for certain of the requests presented in the contractor's letter: two separate matters related to the so-called government lockout, wetlands issues at the shop, low-lift block installation, and roll-up doors at the magazine. Certain of the requests, including those related to the government lockout, totaled more than $100,000.00. (Findings 20-26; app. supp. R4, tab 183 at 5-10, 13-14, 15 (lower photograph), 16-27, 60, 77-78, 80-87, 92-93, 95; R4, tab 20 at 1-4, tab 66 at 26, 28-29, 31-34) No claim resulting from these requests for equitable adjustment was ever certified or submitted to the CO for a CO final decision (COFD) (tr. 878, 992-93).

32. Alfair failed to provide persuasive evidence that the extent of the delay or the extra costs caused by the so-called government lockout exceeded the amounts allowed in mod 17. Appellant has provided no evidence that labor costs or extra equipment costs exceeded the amounts allowed in mod 17 and proved no specific number of days of delay. Ms. Alford performed no comprehensive, detailed, persuasive delay analysis. The contractor's expert witness, Conrad Weihnacht, performed no delay analysis addressing the entire contract performance period, relying instead on Ms. Alford's assessment of delay. Mr. Weihnacht calculated a higher daily overhead amount, also increased by general and administrative expenses (G&A). Duration of some features of work may have been extended; however, appellant did not prove or even claim that work was suspended and failed to prove overall delay to contract work. The government's expert witness, Jordan B. Peck, III, P.E., McDonough Bolyard Peck (MBP), presented a delay analysis that addressed the entire performance period. While we do not accept the government's delay analysis in all respects, there is no persuasive analysis by appellant of all delays. Therefore, we rely on the government analysis to the extent indicated. Mr. Peck's delay analysis attributed no excusable and compensable delay to this matter and we find none. (Findings 20-21; tr. 291, 332, 605-06, 632-634, 937-42, 1304-05, 1606, 1608-34, 1644-47, 1660-61, 1671-90; app. supp. R4, tab 183 at 6-7, 85-86, tabs 295-96, tab 297, tables 4A, 5A-B at 15, 17-18; R4, tab 292 at 18-49, 67-69, tab 293 at 7-9, tab 299) We will address below, in connection with appellant's proven actual costs, the amounts allowed in mod 17 for extended field overhead and G&A.

33. Alfair provided no probative evidence that the extent of the delay or the extra costs caused by the site conditions, including wetlands, exceeded the amounts allowed in mods 2 and 17. Concerning wetlands at the shop, Alfair did not show that the extent of

the delay or the extra costs exceeded the amounts allowed in mod 17. Ms. Alford described a delay of at least 80 days (and as much as about six months) but was not specific in how she arrived at that number of days. Mr. Weihnacht presented a description of and an estimate for dewatering and soil replacement work that could have been performed to further ameliorate the effect on the contract work of wetlands and excessive water. However, Alfair did not perform the work that forms the basis of Mr. Weihnacht's estimate. The contractor planned for and performed general dewatering by way of rim ditches and pumping; however, neither well-pointing work nor large-scale demucking at the shop location of the extent estimated by appellant's expert witness was performed. Mr. Peck's worst-case analysis indicated a maximum of 63 days of government-caused delay and $35,312.76 in delay costs on account of unsuitable soil and wet site conditions plus under-compensation of $17,003.14 for sandy soil conditions. His worst-case analysis presumes an extended performance of the work, not a suspension of work. We find that no additional delay to overall contract completion was proved by appellant. (Findings 22-24; tr. 309-10, 319-21, 655-57, 702-16, 777-85, 1001-05, 1615-17, 1658-59, 1668-69, 1707-08; app. supp. R4, tab 183 at 13-27, 32, 34-38, 60, tab 297, tables 1A, 5A at 3, 17; R4, tab 292, table 5.1 at 19, 24-27, 30-31, 60-63, tab 293 at 1-3, 16-18; app. br. at 26, ¶¶ 53-54)

34. Alfair did not show that it experienced costs or time for performance that exceeded the amount allowed by mod 17 for the low-lift block installation change. The work activity at issue was delayed a "few days," according to Ms. Alford, by a "slowdown;" however, there is no evidence of a suspension of all work or any adverse impact on the project as a whole in excess of that previously recognized and allowed by the government. Mr. Weihnacht, without the benefit of a comprehensive delay analysis, said that this matter delayed the work for 97 days; however, he did not explain his rationale for that opinion. Mr. Peck's analysis of this matter attributed no additional costs in excess of that already allowed and no excusable and compensable delay. We find none. (Finding 25; tr. 337-38, 1341-42, 1378-79, 1664; app. supp. R4, tab 183 at 77, tab 297, table 5C at 19; R4, tab 292, at 19 (table 5.1), 33-36, 79-81, tab 293 at 19-20)

35. Evidence related to the door change does not show that the contractor experienced costs for performance that exceeded the amount allowed by mods 10 and 17. Mr. Peck's expert delay analysis attributed no excusable and compensable delay to this matter and we find none. (Finding 26; tr. 1344-46; app. supp. R4, tab 183 at 79; R4, tab 292 at 19 (table 5.1), 85-86)

b. Electrical Work

36. The contractor submitted a written request for equitable adjustment dated 24 October 1997 that addressed electrical work under the contract. By letter dated 16 February 1998, Alfair, through counsel, submitted a certified claim to CO Slana for electrical work in the amount of $435,250.00, including the alleged extra costs of

concrete light pole bases but reserving its demand for a time extension and not including electrical work issues related to wetlands. The claim presents either a mistake-in-bid type analysis or an alleged mutual mistake concerning the scope of the electrical work under the contract. The contractor asserted, among other things, that Mr. Hathorne knew that the contractor's pre-award pricing for electrical work was low (less than half the government's pre-award estimate (GE) for the same work) but that he did not undertake an adequate verification of that price or negotiate truthfully and in good faith. (Finding 27; app. supp. R4, tab 183 at 61; R4, tab 79)

37. By October 1998, CO Slana had determined that the claim had partial merit; however, the government lacked the funds necessary to obligate the price increases estimated by the government to be attributable to the claim. The contract completion date had been unilaterally extended to 16 June 1998 (and unsigned mod 21 would have extended completion to 3 November 1998), although work continued past those dates. Accordingly, the CO directed a partial suspension of work on 15 December 1998, stopping work on the exterior electrical poles and foundations. The CO determined that the time period to obtain the needed funds was unknown, although he estimated a minimum of 3-6 months. He was concerned about incurring liability for contractor extended overhead costs if all work was suspended. However, as shown by Mr. Peck's examination of the project's as-built schedule and other evidence, the contractor continued work other than electrical work under the contract until the termination was effected. (Finding 29; tr. 798-99, 879, 1215-16, 1357-61, 1386-87, 1553-63, 1573-80, 1597-1610; app. supp. R4, tabs 242, 256, 267; R4, tab 117, tab 292, table 5.4 at 22)

38. In a COFD dated 16 October 1998, CO Slana inferred that the error in Alfair's proposed electrical price, although "not entirely clear," was omission of electrical work external to the two buildings (R4, tab 84 at 3). He found that the disparity between the total amount in the GE for all electrical work, which he believed to be $269,463.00, and Alfair's pre-award proposal, $115,000.00, "[did] not establish, but [did] indicate, that both [Ms. Alford] and [Mr. Hathorne] were mistaken as to the cost of the electrical work." CO Slana determined that the government was at risk for "its non-disclosure of the differential in its estimate . . . and [Alfair's proposed subcontractor] quote." He also decided that "Alfair has never actually established what exactly its mistake or error was, nor has it provided conclusive evidence that the external electrical work was not a part of some other part of its bid." CO Slana concluded: "a sharing of [the] risk between the parties in this matter is reasonable. An equitable sharing of risks would be to put the parties in the position that they would have been, at the time of negotiations, and allow the . . . differential between the [GE] and [Alfair's proposed subcontractor] quote." Accordingly, he allowed a price increase of $154,463.00 ($269,463.00 - 115,000.00) and denied the balance of the claim. (R4, tab 84 at 2-4, tab 101 at 6)

39. CO Slana was aware that the GE had omitted certain costs for electrical poles and pole foundations. In connection with making his decision to terminate the contract

for the convenience of the government, he further inferred that the contractor had omitted from its pre-award proposal these same costs along with Alfair's admitted omission of other contractually required electrical work. (Findings 12, 28; tr. 793-800, 1291-92, 1356-58, 1388-89, 1571-72, 1580-82; app. supp. R4, tabs 242-43; R4, tabs 112, 117)

40. Mr. Weihnacht compiled the alleged total costs of all electrical work and attempted to relate it to the claim. He did not analyze the discrete bases for the price increase allowed by CO Slana. Instead, Mr. Weihnacht's testimony addressed the initial contract price negotiations, the disparity between Alfair's pre-award proposal and the GE, and the alleged total costs for all electrical work performed by Alfair. (Tr. 339-41, 667-71; app. supp. R4, tab 297, table 7 at 21)

41. By counsel's letter dated 12 January 1999, mailed on 13 January 1999, Alfair timely appealed from the COFD dated 16 October 1998. The appeal was docketed as ASBCA No. 51968. (ASBCA No. 51968 Bd. corr. file)

42. A contract modification fully implementing the COFD dated 16 October 1998 was not issued. Instead, mod 24 dated 12 March 1999, allowed $114,781.64. The portion allowed in mod 24 was determined by the government to be the portion of the relevant work completed by Alfair. (R4, tab 293/7)

c. Partial Suspension of Work

43. Alfair proved no delay and no extra costs caused by the partial suspension of work directed by the government on 15 December 1998. Mr. Peck's delay analysis, which assumed that the contract completion date had been extended to 3 November 1998, showed contractor delay during 4 November 1998 to 20 January 1999. Appellant did not rebut that analysis. We find, to the extent that features of the contract work may have been delayed during 4 November 1998 to 20 January 1999, the delay was not shown exclusively to be government-caused. (Finding 29; tr. 1632-33; R4, tab 292 at 47-49)

d. Termination for Convenience

44. By mod 23 dated 19 January 1999, effective 21 January 1999, CO Slana terminated the contract for the convenience of the government (TFC) pursuant to the applicable standard contract provision. The government's cover letter over mod 23 invited the contractor to submit a TFC settlement proposal (TFCSP) on Standard Forms 1436, SETTLEMENT PROPOSAL (TOTAL COST BASIS) and 1439, SCHEDULE OF ACCOUNTING INFORMATION. (Finding 1; R4, tabs 26, 86)

45. With counsel's letter dated 9 November 1999, the contractor submitted its TFCSP to the CO. The TFCSP demanded a net (additional) payment of $2,056,671.77, including settlement expenses, and reserved the right to amend the proposal and to add

later-incurred settlement expenses. (R4, tab 3) The document also summarized 13 "claim events" by which appellant asserted a right to equitable adjustments in the contract price and performance time. We have addressed some of those "claim events" above in connection with pre-award negotiations, contract performance, and requests for equitable adjustments and claims. Other claim events are not explicitly addressed in appellant's post-hearing briefs and are not separately developed in our findings: trailer location, weather, sandy soil (although this is touched upon in our decision with regard to the wetlands matter), defective plans and specifications (this "claim event" is described in a list of 57 separate line items at ex. A attached to the TFCSP; some of the items may relate to delay, the roll-up doors, wetlands, and the electrical claim; to that extent, the alleged defective plans and specifications are addressed in connection with those matters), and failure by the government to make proper and timely payments. (R4, tab 3 at 5-11, 14-17) The proposal document included, among numerous other documents, SF 1436 with pre-printed certificate, signed by Alfair's president, Ms. Alford, and dated 9 November 1999. (R4, tab 3 at 19-22)

46. Alfair's attempts to negotiate based on the TFCSP over the course of seven months after its submittal culminated in a meeting of Ms. Alford and contractor's counsel with CO Slana and his advisors on 20 June 2000. Ms. Alford felt that the government had no interest in negotiations; however, she and counsel attended the meeting "to verify whether the Government was prepared to enter into fair negotiations" and to "assess the Government's interest in negotiating a fair settlement." No settlement was reached at that meeting and contractor's counsel opined that the structure of the meeting "created an environment that was not conducive to effective negotiations and [was] non-productive . . . ." Alfair, by counsel's letter dated 30 June 2000, acknowledged and rejected the government's settlement offer made prior to the meeting. In the letter, the contractor provided a written settlement counteroffer that was available for "written acceptance within 30 days from the date of this letter . . . ." Given the passage of time and other facts, we consider the firm language and the fixed nature of the counteroffer letter to be an implicit request for a COFD. We find that further negotiations would have been fruitless. The settlement counteroffer was not accepted by the government and expired by its own terms on 30 July 2000. No later than that date, the parties having exchanged offers to settle that were far apart and the offers having been extinguished, an impasse was reached regarding the TFCSP as further evidenced by the COFD dated 9 August 2000 that denied entitlement to the contractor for any additional compensation under the TFCSP. The COFD addressed a number of the so-called "claim events." Settlement expenses were not specifically analyzed in writing by the COFD; however, the COFD recited the total amount claimed, including claimed settlement expenses, and denied any and all additional payments based on the total TFCSP amount. (Tr. 141; app. supp. R4, tab 192; R4, tabs 1, 91)

47. A second COFD dated 28 August 2000 was issued. In that decision, the CO separately and specifically denied entitlement to the contractor for TFC settlement expenses. (R4, tab 2)

48. By notice of appeal letter dated 12 October 2000, mailed on 30 October 2000, counsel for Alfair timely appealed from the COFDs dated 9 and 28 August 2000. The Board docketed the appeal from the COFD dated 9 August 2000 as ASBCA No. 53119 and the appeal from the COFD dated 28 August 2000 as ASBCA No. 53120. The Board consolidated the appeals. (Tr. 141; Bd. corr. file)

49. The parties agreed that the issues in ASBCA No. 51968 duplicated issues before the Board in ASBCA Nos. 53119 and 53120; accordingly, ASBCA No. 51968 was dismissed as moot by a Board Order of Dismissal dated 23 January 2002.

Contractor's Performance Costs

50. Appellant's accountants are generalists with limited awareness of the federal procurement system. The accountants have serviced the contractor over an extended time period, including accounting work for the contract. However, appellant is the accountants' only client that performs U.S. Government contract work and one of only two construction contractor clients. Further, the accountants relied completely on contractor personnel to assign expenses incurred by use of charge cards as direct, indirect, or extraneous expenses as such expenses related (or not) to the contract work. Errors in the accounting for the contract were discovered as a result of detailed reviews of appellant's financial books and records in preparation for the hearing and based on audit activities performed by the Defense Contract Audit Agency (DCAA). Certain of those errors were corrected by adjustments in the contractor's financial books and records, which resulted in changes to appellant's claimed costs. The final corrected claim amounts are set forth in appellant's post-hearing brief. Alfair now claims a net (additional) payment of $1,400,604.00. (Tr. 141-50, 177-87, 204-28, 243-52, 262-70, 1509-12; app. supp. R4, tab 288; R4, tabs 125, 293/2; app. br. at 3-4)

51. A DCAA auditor conducted an audit of the TFCSP claim on behalf of the government and prepared an audit report. The DCAA auditor has audited about ten such proposals over the past 23 years. He was very familiar with FAR provisions related to financial matters. (Tr. 1394-1407, 1527; R4, tab 125) In connection with accounting requirements specifically derived from the contract and the FAR, appellant's accountants were less persuasive than the DCAA auditor.

a. Performance Labor Costs

52. We find that the contractor incurred $252,758.67, the amount claimed in the final cost statement submitted by appellant, for wages of laborers and mechanics during

performance of the contract except for demobilization. Demobilization expenses are addressed below as a part of settlement expenses because demobilization occurred on and after the effective date of the TFC. We do not credit a lower figure recommended by the DCAA auditor because the auditor, having noted the difference (rounded to $547.00), did not explain it. Instead, he wrote that Alfair had accepted the audit report recommendations and had lowered its claim amount by $547.00 in accordance with those recommendations. That statement is not supported by record evidence. (Tr. 148-49, 253-54, 1409-10, 1537-38; app. supp. R4, tab 288; R4, tabs 125, 293/2)

53. Appellant claimed, the DCAA auditor agreed, and we find that Alfair incurred $75,571.00 for wages and/or salaries of superintendents during performance of the contract. Without explanation, the original amount claimed was increased about $276.00 (rounded off) in the final cost statement submitted by appellant. The DCAA auditor explained that the increase was a duplicated expense for a laborer. The amount of the increase has already been included in the amount incurred for wages and salaries of laborers and mechanics, as found above at finding 52. (Tr. 254-55; app. supp. R4, tab 288; R4, tabs 3, 125, 293/2)

54. Appellant claims and the government does not contest that the contractor incurred $88,433.53 for salaries of its contractor quality control representatives (CQCRs) during contract performance in 1995-98. The only disagreement related to the cost of CQCR work concerns 1999. In 1999, the CQCR, Jennifer Kohn, was being paid a salary of $442.31 per week or about $88.46 per day based on a five-day workweek. The contract was terminated effective 21 January 1999; therefore, CQCR Kohn was paid for fourteen workdays during 1-20 January 1999 (Friday, 1 January 1999 and Monday, 18 January 1999 were paid holidays). Her salary for contract performance during 1-20 January 1999 amounts to $1,238.44 ($88.46 x 14 workdays)). We find that appellant incurred a total of $89,671.97 ($88,433.53 + 1,238.44) for CQCR work during performance of the contract. (Tr. 185-86, 242, 255, 1410, 1525, 1537-38; app. supp. R4, tab 288; R4, tab 3, tab 125, tab 289 at 70-71, tab 293/2)

55. We find that Alfair accrued $179,166.42 ($23,629.50 + 48,687.60 + 106,849.32) for the salary of a project manager (PM) during performance of the contract, as explained below. Ms. Alford functioned as PM on this and other jobs during 1995-96. Therefore, her time was divided among various projects being performed by appellant. No time sheets or other evidence indicate the portion of her time spent directly managing the work under the contract in 1995-96. She relocated temporarily in October 1995 from Jacksonville, Florida to Fort Walton Beach, Florida to be physically near the contract work and remained in the vicinity until the job demobilized. By June 1996, appellant had concluded all other projects and had stopped bidding on other jobs. For 1995, Alfair allocated about 83.33% of Ms. Alford's taxable compensation of $53,100 to the contract work. The government concedes that about 44.50% ($23,629.50) should be allocated based on an analysis of total costs incurred by Alfair on the contract in 1995 as a

proportion of Alfair's total costs incurred for all projects in 1995. The contractor provided no probative evidence to support a different allocation. The parties agree that the PM's compensation for 1996 through termination in 1999 should be $52,000.00 per year as was included in Alfair's pre-award proposal on which the contract price was based. For 1996, Alfair allocated 100% of the PM's compensation to the contract work; the government allocated 93.60% ($48,672.00) based on the same allocation method used for 1995 costs. Based on the DCAA auditor's report, the allocation should be about 93.63% ($48,687.60). Appellant provided no persuasive evidence for a different allocation. During 1997 until the day prior to the effective date of the termination on 21 January 1999, the parties agree that Alfair performed work under the contract only and that Ms. Alford was employed full-time as the PM. Her accrued compensation for that period amounts to $106,849.32 ($52,000.00 for 1997 + $52,000.00 for 1998 + $2,849.32 for 1999 (20 days x ($52,000.00 divided by 365))). (Tr. 186, 246-50, 272-73, 934, 955, 979-86, 1230-33, 1410-19, 1507-12, 1525-38; app. supp. R4, tab 288; R4, tabs 3, 125, 293/2 at 48-50; app. br. at 3)

b. Labor Burden Costs

56. Appellant booked and claims and the DCAA auditor verified accounting entries amounting to $117,291.00 for labor burden expenses during the contract work performance period. However, the auditor questioned $12,302.00 of that amount. That sum is related to alleged payroll taxes on Alfair's president's salary during 1995-97 and was recorded in 1999 as an incurred cost in an account that is part of appellant's general ledger. The auditor noted that the contractor had established no "taxes payable account" for the questioned amount, that the amount had not appeared on Alfair's tax returns, and that the contractor had not submitted amended tax returns for 1995-97. The auditor further indicated that an unspecified portion of the sum of $12,302.00 was duplicated in another general ledger account. The contractor's accountant explained that the sum had not been expensed for federal tax purposes and indicated that the amounts could not be accrued and claimed by appellant as a business expense because Alfair's president had not claimed the amounts on her personal tax returns as income. The accountant elaborated that $12,302.00 had later been recorded as an accrued expense in anticipation of additional payments on account of the TFC. If paid, the appropriate tax withholdings and returns would then be generated. In that justification is an assumption by the accountant that all or part of that amount is not already accounted for in the gross salary amounts allowed for appellant's president in finding 21 above. As described by the accountant, withholdings for income taxes are typically included in the gross amount recorded as a labor expense. We find that the contractor has shown labor burden expenses amounting to $104,989.00 ($117,291.00 - 12,302.00). The remaining claimed amount, $12,302.00, has not been separately supported for allowance here by a preponderance of the evidence. The alleged costs were not contemporaneously recorded in appellant's accounting books and records, but were adjustments made as much as four years after the fact. Further, there is no probative evidence that the questioned amount is

not a duplication of costs allowed elsewhere. (Tr. 268-69, 1413-14, 1514-19; app. supp. R4, tab 288; R4, tabs 125, 289 at 32, 293/2; app. br. at 3)

57. Alfair's proven labor burden costs under the contract amount to 17.58% of all labor costs shown ($104,989.00 divided by ($252,758.67 + 75,571.00 + 89,671.97 + $179,166.42)) (findings 52-56).

c. Performance Materials Costs

58. The contractor's revised claim for materials amounts to $235,539.00. The government does not dispute that amount. We find that Alfair incurred that amount for materials for the contract work. (Tr. 1407; R4, tab 293/2; app. br. at 3)

d. Performance Subcontractors, Vendors, Freight, and Equipment Rental Costs

59. Appellant earlier claimed $1,274,069.06, rounded to $1,274,068.00, for these alleged costs. This sum apparently included $40,000.00 paid to resolve, by arbitration, a pre-termination performance claim by a subcontractor (AVCO) against Alfair and its surety. Alfair had terminated AVCO in January 1996 for alleged defective work and safety violations. In 1998, Alfair reimbursed the surety for costs to resolve the AVCO claim on Alfair's behalf. In its post-hearing brief at 3, Alfair now claims $1,261,204.00 for subcontractors, vendors, and equipment rental costs. This amounts to a reduction of $12,864.00 from the amount claimed earlier ($1,274,068.00 - 1,261,204.00). With reference to that figure, the DCAA auditor questioned $17,570.21, which represented four checks issued by appellant's disbursing agent that had been "voided," and the remainder, $28,233.79 for which the contractor could not provide an "audit trail." The DCAA auditor did not question the AVCO litigation resolution costs. Mr. Peck noted, without further analysis, that the costs were Alfair's responsibility. The four checks, totaling $17,570.21, were later disbursed and negotiated. Alfair's reduction of its claim reduced the amount lacking an "audit trail" to $15,369.79 ($28,233.79 – 12,864.00). Accordingly, the auditor did not question incurrence of $1,228,264.00 of the amount now claimed ($1,261,204.00 – 17,570.21 – 15,369.79). The government argues specifically against paying Alfair for amounts disbursed to resolve the AVCO litigation; however, the government generally and finally contends that "the Board [should] accept the DCAA and MBP findings for damages due Alfair." We find that the contractor incurred $1,245,834.21 ($1,228,264.00 + 17,570.21) for subcontractors, vendors, and equipment rental costs. (Tr. 187-88, 229-35, 243-46, 930-31, 977-78, 1229-30, 1414-15, 1513-14, 1533-35; app. supp. R4, tab 288 at 68; R4, tab 125, tab 292 at 12-13, tab 292/5, tab 293/2, chart at 41, ¶ 5 at 43-44; app. br. at 3; gov't br. at 87, gov't reply br. at 13) Alfair presented no probative evidence that supports the incurrence of $15,369.79, the balance of the claimed costs.

e. Owned Equipment Costs

60. Concerning equipment owned or controlled by Alfair (not including rented equipment) and furnished for performance of work under the contract, allowable costs under the contract are governed by contract Special Clause SC-27, "EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE." That provision allows actual contractor costs for equipment ownership and operating costs based on the contractor's accounting records. Absent the ability to determine actual equipment ownership and operating costs from the contractor's accounting records, the provision requires that such "costs shall be based upon the applicable provisions of EP [Engineer Pamphlet] 1110-1-8, 'Construction Equipment Ownership and Operating Expense Schedule,' Region III." EP 1110-1-8 provides for different rates during periods of equipment use (at higher cost) versus periods of lower cost equipment idle or standby time. The contractor did not employ EP 1110-1-8 for compiling claimed equipment costs. (Tr. 169-70, 1400-01, 1416-18, 1520; R4, tab 4 at 44, 226-27, tabs 125, 293/2)

61. Alfair alleged an acquisition date and a "book value" for each item of owned equipment. The DCAA auditor was unable to verify those entries. Appellant otherwise provided no accounting records that support actual equipment ownership and operating costs. Monthly usage costs were claimed based on monthly rental rates that were not produced for the record or monthly rates derived from the "Means Construction Cost Data Book" (1994) (Means), although in one instance, a Means rate was overstated. Mr. Peck noted in his report that the Means rates include unallowable interest and overhead costs that are accounted for elsewhere. The auditor also found that rental rates are "burdened" rates that include unallowable interest and costs and/or profit that are duplicated elsewhere in the claim. The contractor's claim makes no differentiation between periods during which the equipment was being operated versus standby periods for which a reduced rate is appropriate. Instead, the claim assumes that the equipment was in constant use for the months during which costs are claimed. The record shows otherwise. With regard to one item of equipment, according to Mr. Weihnacht, the claimed equipment costs were not reasonable when compared with the "asset value." He further stated that ownership and operating rates are "generally going to be less than what you could rent [an equipment item] for." We find that Alfair's owned equipment costs claim is overstated, is not supported by adequate evidence, and is not prepared in accordance with the requirements of the contract. (Finding 60; tr. 168-70, 632, 640-44, 675-76, 1398-1400, 1416-17, 1519-24, 1532-33, 1606, 1669-70; app. supp. R4, tabs 288, 295-96; R4, tab 125, tab 293/2 at 45, tab 299)

62. The contractor proposed no owned equipment costs in its pre-award proposals (tr. 1262-63; R4, tabs 292/1, 294).

63. Mr. Peck evaluated owned equipment costs based on EP 1110-1-8, as required by the contract when actual cost data is unavailable. However, he analyzed and

computed owned equipment standby costs, only, amounting to $29,613.98. No operating costs were allowed in the analysis. Mr. Peck had earlier prepared an analysis that calculated a "reasonable monthly rental rate" for each item of owned equipment valued over $1,000.00. Claimed acquisition cost for each item was divided by his assessment of the life expectancy in months for each item. That rate was then multiplied by the number of months the equipment was on site. Five equipment items with a claimed acquisition cost of less than $1,000.00 were fully expensed to the job, as were four other items with claimed values exceeding $1,000.00. By that method, Mr. Peck calculated total owned equipment costs of $43,861.00. Mr. Weihnacht criticized Mr. Peck's approach but produced no calculation pursuant to the contract requirements or otherwise. (Tr. 673-75, 1666-68, 1694-96; R4, tab 293/2 at 37-38)

64. We find that the best approximation of appellant's actual costs for equipment operating and ownership costs, for time during which owned equipment was being used and for standby periods is $43,861.00. There is no dispute that Alfair employed certain owned equipment during some portion of the contract performance period and that costs for owned equipment use were incurred. However, appellant provided no evidence of those costs from its accounting books and records. The contractor also presented no analysis that follows the alternative equipment cost calculation method pursuant to EP 1180-1-8 as specified in the contract. The government's evidence concerning the alternative method, resulting in an allowance of $29,613.98, is understated because it considered only standby time periods and ignored operating costs during periods of operation. Therefore, the costs are greater than $29,613.98. Neither party provided an analysis of the operational time periods for the equipment or an operational costs calculation pursuant to the alternative contract method. Use of any of the stated amounts presented by the parties, other than $43,861.00, is rejected for the reasons stated above. Use of any amount other than $43,861.00, which we consider to be in the nature of a government concession of the least amount of costs allowable, would be based on speculation. (Findings 60-63)

f. Other Field Overhead Costs

65. There is no dispute and we find that Alfair incurred $95,485.00 for other field office overhead type expenses not allowed elsewhere, *i.e.*, 4.29% of all other proven direct field costs ($95,485.00 divided by ($252,758.67 + 75,571.00 + 89,671.97 + 179,166.42 + 104,989.00 + 235,539.00 + 1,245,834.21 + 43,861.00)) (findings 57-59, 64; R4, tab 293/2; app. br. at 3).

g. General and Administrative (G&A) Costs

66. There is no dispute and we find that appellant incurred $225,202.00 for G&A overhead type expenses that are allocable to the contract, that is, 9.69% of all proven direct and field overhead costs ($225,202.00 divided by (($252,758.67 + 75,571.00 +

89,671.97 + 179,166.42 + 104,989.00 + 235,539.00 + 1,245,834.21 + 43,861.00 + 95,485.00)) (finding 65; tr. 152, 190-91, 252-56, 1420, 1528, 1539-41; R4, tab 125, ¶ 11 at 14-15, tab 293/2 at 41; app. br. at 3).

67. In calculating a daily amount for extended field overhead, Messrs. Weihnacht and Peck agree and we find that time-driven costs include the labor costs and labor burden for supervisory personnel (superintendent, quality control manager, and project manager), owned equipment costs, and other field overhead costs. Including all owned equipment costs may over or understate a daily rate for time-driven costs for the project on a particular day or days because all equipment was not present all the time. However, we have no basis in the record to deviate from the total owned equipment costs allowed above. We know that owned equipment costs were incurred and our findings above were based on our "best approximation" of what the record shows. Including all other field overhead costs may overstate a daily rate for time-driven costs for the project because no showing has been made that all other field overhead costs allowed above accrued over time. However, we have no basis in the record to segregate non-time-driven costs from time-driven costs and thereby deviate from the total other field overhead expenses allowed above. Mr. Weihnacht would also add a G&A markup, thereby calculating a daily rate that includes all overhead costs. The parties do not dispute the dates during which Alfair was committed to the contract work: from receipt of NTP, 30 January 1995, to the day prior to termination, 20 January 1999, a period of 1,451 days. Therefore, the proven daily field overhead and total overhead costs are no more than the following amounts:

Superintendent, quality control, project manager labor costs	$344,409.39
Labor burden (17.58%) costs	$ 60,547.17
Owned equipment costs	$ 43,861.00
Other field overhead costs	$ 95,485.00
Total field overhead costs	$544,302.56
Divided by 1,451 days	$ 375.12 per day
Add 9.69% G&A	$ 411.47 per day

Therefore, since a daily rate of $511.00 without markups was previously allowed, appellant has not proved by actual costs that the daily-extended field overhead allowance in unilateral mod 17, even if delay were proved, should be increased. (Findings 19-21, 24, 32-33, 43-44, 53-55, 57, 60-66; tr. 327-29; app. supp. R4, tab 297, table 4A at 15; R4, tab 293/2 at 37)

h. Bond Costs

68. In an earlier audit report dated 4 September 1998 concerning Alfair's electrical claim described above at finding 36, a DCAA auditor determined and we find that appellant's bond costs amounted to 2.50% of the first $100,000.00 of costs under the

contract ($2,500.00) and 1.00% on all amounts in excess of $100,000.00 (R4, tab 289 at 48). The total costs incurred by Alfair under the contract, before adding the bond premium, total $2,548,078.27 ($252,758.67 + 75,571.00 + 89,671.97 + 179,166.42 + 104,989.00 + 235,539.00 + 1,245,834.21 + 43,861.00 + 95,485.00 + 225,202.00) (finding 66). At the audited rates, the contractor's bond costs amount to $26,980.78 ($2,500.00 + 24,480.78 (1% of $2,548,078.27 - 100,000.00).

i. Total Performance Costs

69. The contractor's proven costs amount to $2,575,059.05 ($252,758.67 + 75,571.00 + 89,671.97 + 179,166.42 + 104,989.00 + 235,539.00 + 1,245,834.21 + 43,861.00 + 95,485.00 + 225,202.00 + 26,980.78). Without considering Alfair's assertions that the contract price should be adjusted upward, prior to determining the cost to complete the work remaining after termination, and absent any allowance for profit, the contractor's costs exceed the modified contract price of $2,495,000.64. (Findings 17, 68)

Payments Under the Contract

70. To date, appellant has been paid $2,384,674.68 under the contract. The balance of the contract price, $110,325.96 ($2,495,000.64 - 2,384,674.68), has not been disbursed. (Finding 17; tr. 166-67; R4, tab 290 at 137; app. br. at 37 (proposed finding 60); gov't reply br. at 11-12)

Cost to Complete

71. Appellant has provided no evidence concerning projected costs to complete the contract work, relying instead on its position that the contract price should be increased on account of various "claim events" such that the contract price would exceed its actual performance costs (app. br. at 5, 6 (proposed finding 7), 18 (proposed findings 27-28), 21 (proposed finding 34); app. reply br. at 7-8). The government argues, based on a calculation by Mr. Peck, that the cost to complete would have amounted to $501,020.00 (R4, tab 292 at 57; gov't br. at 79). Mr. Peck started from the total award price, to another 8(a) contractor working in the vicinity, for completion of the work. That price was for two sole-source supplemental agreements awarded in September 1999 and appended to an ongoing contract being performed by the other 8(a) contractor. Mr. Peck then reduced that price by what he determined to be the costs for duplicative work (R4, tab 292 at 57, tab 292/3). The government provided no other detailed evidence or persuasive explanation regarding the scope of work awarded in the supplemental agreements, the effect on costs or price of the passage of time from January to September 1999, or the reason for a sole-source rather than competitive procurement of completion of the work.

72. In the final payment estimate dated 13 April 1999, the government noted that the contract work was 93.23% complete (R4, tab 290 at 137). Based on that percentage and appellant's total actual performance costs, $2,575,059.05, the projected cost to complete all work under the contract would amount to a total of $2,762,049.82 ($2,575,059.05 divided by 0.9323), an additional estimated cost of $186,990.77.

Settlement Expenses

a. Demobilization Costs After Effective Date of Termination

73. Ms. Alford oversaw and CQCR Kohn assisted with demobilization activities during 21 January through 2 February 1999. Ms. Alford's annual salary during that period amounts to $1,852.05 (13 days x ($52,000 divided by 365)). Ms. Kohn's weekly salary for nine workdays during that period amounts to $796.14 ($88.46 x 9). Three laborers were paid $1,210.50 to assist with demobilization during 21 January through 2 February 1999. (Findings 54-55; tr. 205-06, 242, 1410, 1524-25, 1537-38; app. supp. R4, tab 288 at 134-35, 142; R4, tab 289 at 71, tab 293/2 at 52) Including labor burden (finding 57), demobilization labor costs total $4,537.05 (($1,852.05 + 796.14 + 1,210.50) x 1.1758).

74. The DCAA auditor took no exception to the following equipment rental costs and other demobilization expenses incurred during 21 January - 2 February 1999: $352.31 for rental of a forklift at the work site, freight costs of $1,451.80 for shipping from Hurlburt Field to Jacksonville, and $410.00 for a crane rental for offloading in Jacksonville (app. supp. R4, tab 288 at 173, 187-89, 192-93; R4, tab 125 at 16-17, tab 293/2 at 51). Concerning a claimed $798.50 for rental of a truck to haul Alfair property back to Jacksonville, the DCAA audit report implies that the expense is duplicated in field overhead. The audit report states that the "cost has already been claimed in field overhead" (app. supp. R4, tab 288 at 173, 186, 190; R4, tab 125, ¶ 13c(2) at 17 (underlining added)). The DCAA auditor disallowed claimed field overhead costs that were allegedly duplicated, but we have no listing in the record of the alleged duplicated costs and the $798.50 figure does not appear in the auditor's working papers (R4, tab 125, ¶ 9a at 11, tab 292 at 106-16). The auditor, concerning rental equipment, reviewed appellant's booked costs only through 1998 (R4, tab 125, ¶ 7b at 10). Costs for demobilization, including the rental truck, were incurred in 1999 (finding 44). The audit report does not make clear that the government allowed the truck rental cost either in field overhead or elsewhere. The government has not rebutted the incurrence of $798.50 for the demobilization rental truck. These expenses listed here total $3,012.61.

b. Labor to Develop TFCSP

75. On 3 February 1999, following demobilization and return to appellant's home office in Jacksonville, both Ms. Alford and former CQCR Kohn began, among other

things, organizing contract-related records for the purpose of formulating a TFCSP. They created a log of their activities. The log shows work by one or both individuals until 9 November 1999, when the TFCSP was submitted, related to organizing and copying project files, conducting activities resulting from the TFC, performing general business activities related to Alfair's continuing operation, and/or developing materials in support of claims to be submitted to the government. The DCAA auditor included lump sum payments to Ms. Alford's husband in G&A. Based on our examination of the record and appellant's agreement with the government's accounting of G&A, in its revised cost presentation as set out in its post-hearing brief, we find no basis for any further allowance for settlement labor costs attributable to payments to Ms. Alford's husband. (Findings 44, 73; tr. 206, 1403-04, 1525, 1539-41; app. supp. R4, tab 288; R4, tab 125 at 14-15)

76. As early as on or about 23 through 26 February 1999, work began on the electrical claim and other requests for equitable adjustment discussed above. As of 16 March 1999, appellant was in contact with Mr. Weihnacht. He was hired by the contractor "to develop a claim on unilateral [mod] 17," the original contract price negotiations, and unilateral change orders. His work was not related to the TFCSP. On 22 March 1999, contractor representatives met with Mr. Weihnacht and heard his requests for project information. We conclude that from on or about 23 through 26 February 1999 forward, the work to organize and analyze Alfair's project records took on dual purposes of supporting the TFCSP preparation effort and of developing claims. Logged activities after 16 April 1999 and prior to 1 September 1999 were for the purpose of claims preparation only. (Findings 31, 36; tr. 637-38, 647, 1423, 1638-39, 1694; app. supp. R4, tab 288 at 144-46, 161, 184-85)

77. Based on our examination of the log, we find that Ms. Alford expended 88 hours in support of TFC, non-claim efforts on and after 3 February 1999 and prior to 23 through 26 February 1999. Ms. Kohn logged 68 hours for the same purpose during that same time period. From 23 February through 16 April 1999 and during 1 September through 9 November 1999, Ms. Alford logged 443 hours on matters not specifically related to claims. Given the dual purposes of her activities, we find that one-half of that time or 221.5 hours are allocable to settlement expenses. During those same time periods and on the same basis, we find that Ms. Kohn performed TFCSP-related activities for 175 hours. In making that determination concerning Ms. Kohn, we note that payroll records submitted by appellant show that Ms. Kohn was paid half her prior weekly salary after 10 September 1999. We infer that she became a half-time employee after that date. Ms. Kohn assisted with supplying documents for review by the DCAA auditor, thereby exhibiting a working knowledge of Alfair's financial records. (Tr. 1403-04, 1530-31, 1539; app. supp. R4, tab 288; R4, tab 289)

78. The DCAA auditor determined that the log listed a maximum of 3,078 hours. He questioned all but 200 hours for Ms. Alford. His 200-hour estimate was based on an examination of the log, consultation with his superiors, the auditor's experience with

prior TFC audits, his view that the records should have been better organized and updated while the contract was being performed, time guidance pre-printed on SF 1436 (at the heading just below the form title), and the time the auditor spent performing his audit work (162 hours). The auditor also relied on his view that a revised version of the log addressed only the hours claimed for Ms. Alford. (Tr. 1404, 1422-24, 1526-30, 1538-48; R4, tabs 3, 125 at 16) The government presented no other factual rebuttal of the logged hours.

79. Based on the rates found above for Ms. Alford's annual compensation and Ms. Kohn's weekly pay rate, we find that an hourly rate for each would amount to $25.00 and $11.06, respectively. The number of hours found above, at those rates, amounts to $7,737.50 ($25.00 per hour x (88 + 221.5 hours)) for Ms. Alford and $2,687.58 ($11.06 per hour x (68 + 175 hours)) for Ms. Kohn. The total, marked up by the labor burden rate we find applicable (14.96%), amounts to $11,984.67 (($7,737.50 + $2,687.58) x 1.1496). The labor burden rate used here, 14.96%, is reduced from that incurred on labor costs in the field, 17.58%, because the DCAA auditor noted and we find that workers' compensation coverage is less expensive in an office environment compared with a construction site. (Findings 54-55, 57, 75-78; tr. 205-06, 1539; app. supp. R4, tab 288; R4, tab 125 at 17)

c. Cash Paid as Settlement Expenses

80. Alfair claims that it paid $450.00 in cash as a settlement expense (app. supp. R4, tab 288 at 133). We find no evidence in the record to support the claim.

d. Office Materials for Settlement

81. Alfair claims $386.15 for office materials dedicated to preparation of the TFCSP. Copies of receipts in the record show that $29.88 was spent prior to 23 February 1999. During 23 February through 16 April 1999 and on 12 November 1999, a few days after the TFCSP was submitted but before it ripened into a claim, appellant spent $21.42 + $17.00, of which we allow half. We find that $49.09 ($29.88 + ($21.42 + 17.00 divided by 2)) can be allocated to development of and resolving the TFCSP only. All other expenses were incurred after 16 April 1999 and before 1 September 1999 for the purpose of preparing and submitting claims to the government. (Findings 45-46, 76; app. supp. R4, tab 288 at 165)

e. Other Settlement Costs

82. Alfair claims $1,043.57 for the purchase of books, commercial courier service, equipment rental (a forklift), and copying services. We allowed the cost of the forklift rental above in connection with demobilization. Copies of invoices show that the commercial courier and copying services were performed after 16 April 1999 and before

1 September 1999 in connection with development of claims against the government. Copies of a cancelled check and invoices show, with two exceptions, that the books purchased were related to development of claims. Two books, with invoices totaling $244.25, concerned TFC and audit preparation. We find that amount to be allowable here. (Findings 74, 76; app. supp. R4, tab 288 at 170)

f. Professional Services

83. Alfair claims attorney's fees in the amount of $31,825.00, supported by an itemized, descriptive statement from appellant's counsel. Entries on the statement date from 23 January 1999 to 9 November 1999, show a total of 127.3 hours, and are billed at $250.00 per hour. Based on our review of the statement, correlated with Alfair's settlement log and the dates and activities described above, we find that 7.6 billed hours relate to TFCSP issues only and that 88.1 hours served dual purposes of TFCSP preparation and claims development. The remaining hours on the statement are described in terms of claims preparation. One-half of the dual-purpose hours plus 7.6 hours, at the billed rate, totals $12,912.50. (Finding 76; app. supp. R4, tab 288 at 182-83)

g. Accountant Fees

84. Appellant claims $895.00 for the services of its accountant based on invoices dated 30 September and 1 November 1999. The invoices show that the claimed expenses relate to accounting for the terminated project. The government took no exception to the claimed expenses. We find that Alfair incurred these costs in connection with preparation of the TFCSP. (App. supp. R4, tab 288; R4, tab 125)

h. Consultant Fees

85. The contractor seeks the fees, amounting to $3,933.00, billed in March and April 1999 by its claims consultant. As we found above, the claims consultant was hired by the contractor "to develop a claim on unilateral [mod] 17" and his work was not related to the TFCSP. (Finding 76; app. supp. R4, tab 288 at 184-85)

i. Vehicle Rental and Other Alleged Costs

86. Under this category, Alfair claims the costs of equipment rental and freight costs that were incurred for demobilization from the jobsite back to appellant's home office. Those costs have been allowed above in connection with demobilization expenses. The contractor also claims the cost of a Load Report Citation issued by State of Florida Department of Transportation Motor Carrier Compliance officials for an overloaded truck, Budget rental vehicle expenses, and costs for a silt fence and hay bales. The Budget rental vehicle invoice is unreadable. Further, the rental of the vehicle has not been shown to be related to TFC activities. The alleged invoice for silt fence materials

(actually a "fax" cover sheet with a note) is dated 4 January 1999, during the performance period and more than two weeks before the TFC, contains no monetary entries that match the claimed amount, and has not been shown to be connected with the TFC. The alleged invoice for hay bales is undated, shows no monetary entries that indicate the claimed amount, and is not a proven TFC-related expense. (Finding 74; tr. 157-58, 928-29, 1423; app. supp. R4, tab 288)

j. G&A on Settlement Expenses

87. Appellant alleges that its total G&A expenses for 1999 totaled $46,644.45 (app. supp. R4, tab 287 at 124, tab 288 at 131). The DCAA auditor questioned duplicated costs and costs that were said to be unallowable pursuant to the FAR. The amount not questioned for 1999 amounted to $28,227.00. (R4, tab 125 at 5, 12-14) In its final cost summary, the contractor claims, without further detailed explanation, all G&A costs said to be allowable for the period 21 January through 1 November 1999, a total of $24,054.00 (tr. 157-58, 207; app. br. at 4). The DCAA auditor questioned the full amount (R4, tab 293/2 at 51, 53). The contractor failed to segregate G&A costs not related to payroll taxes, fringe benefits, occupancy costs, and immediate supervision as indicated by FAR 31.205-42(g)(1)(iii).

DECISION

Termination for Convenience

Pursuant to the TFC provision of the contract, the government terminated the contract; Alfair submitted a timely TFCSP in accordance with FAR 49.206-1(a) and FAR 52.249-2(d). The parties attempted, during a period of more than seven months, to negotiate a settlement of TFC costs and expenses as well as a number of so-called "claim events." Those attempts produced negotiations that were conducted in an "environment that was . . . non-productive," that generated final offers to settle that were very far apart, and that did not result in a settlement. Additional attempts to negotiate would have been fruitless. An impasse was reached no later than 30 July 2000 as evidenced by the parties' rejections of settlement offers, an implicit request for a COFD by appellant's letter dated 30 June 2000, and the issuance of COFDs on 9 and 28 August 2000. (Findings 3, 44-47) The TFCSP ripened into a claim on or before 30 July 2000. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996); *see Dual, Inc.*, ASBCA No. 53827, 04-2 BCA ¶ 32,636 at 161,492 (impasse reached on TFCSP when contractor rejected government's final settlement offer and requested a unilateral determination).

The claim was denied by the CO and timely appealed to the Board by appellant pursuant to 41 U.S.C. § 606 and FAR 52.249-2(i) (findings 3 (Disputes and TFC contract provisions), 46-48).

The contractor asserts entitlement to an amount for performance costs greater than that paid by the government under the contract and for settlement costs that were denied by the CO. "As a general rule, the termination for convenience of a fixed-price contract serves to change the mode of compensation under the contract from payment of the fixed price to payment based on reimbursement of allowable costs incurred for performance of the terminated work." *Singleton Contracting Corp.*, ASBCA No. 51692, 03-2 BCA ¶ 32,360 at 160,076.

Alfair must prove, by a preponderance of the evidence, that it is entitled to a total amount, for incurred performance costs and settlement expenses, that exceeds the amount already paid by the government (finding 3 (TFC contract provision); FAR 52.249-2(f)--ALTERNATE I). In effect, when a contract is terminated for the convenience of the government, it is administered as a cost type contract within certain limitations. The overall purpose of a termination for convenience settlement "is to fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with" work performed under the contract including any costs resulting from compensable events such as changes. *Nicon, Inc. v. United States*, 331 F.3d 878, 885-86 (Fed. Cir. 2003); *General Dynamics Land Systems, Inc.*, ASBCA No. 52283, 02-1 BCA ¶ 31,659 at 156,411; FAR 49.113; FAR 49.201(a), (c).

A limitation on recovery is set by the contract price. There may also be a disallowance of profit and the application of an adjustment for loss if it is determined that the contract would have been completed at a loss. *Balimoy Manufacturing Co. of Venice, Inc.*, ASBCA Nos. 47140, 48165, 98-2 BCA ¶ 30,017 at 148,513-14, *aff'd*, 243 F.3d 561 (Fed. Cir. 2000) (table); FAR 49.113, 49.203, 52.249-1(e), (f)(1)(iii)--ALTERNATE I.

Performance Costs

Alfair incurred a total of $2,575,059.05 in performance costs. The most reliable evidence further reveals that the cost to complete the contract work would have amounted to a total of $2,762,049.82. (Findings 69, 71-72) *See Charles G. Williams Construction, Inc.*, ASBCA No. 49775, 00-2 BCA ¶ 31,047 (findings 27-28; contractor total incurred costs and government estimate of progress percentage evidenced total cost at termination), *vacated and remanded on other grounds*, 271 F.3d 1055 (Fed. Cir. 2001), *adhered to on remand*, 02-1 BCA ¶ 31,833, *aff'd*, 326 F.3d 1376 (Fed. Cir. 2003).

The government argues that it should not be responsible for appellant's costs incurred on account of errors in judgment by the contractor in formulating its price, poor performance, and/or any amount that exceeds the sums agreed in bilateral modifications to the contract. In summary, the government contends: "The total cost approach utilized by Alfair is not a fair method of computing damages in conformance with FAR" (gov't br. at 78).

Following a complete TFC of a construction contractor's right to proceed under the contract, a contractor is entitled to recover its reasonable, allocable, and allowable costs even if all work performed did not comply in all respects with contract requirements. Costs of poor and/or defective work are included in the recovery unless the government establishes that the expense resulted from the contractor's gross disregard of its contractual duties. *D.E.W., Inc. and D.E. Wurzbach, A Joint Venture*, ASBCA Nos. 50796, 51190, 00-2 BCA ¶ 31,104 at 153,633-34, *recon. granted in part and denied in part*, 01-1 BCA ¶ 31,150; *New York Shipbuilding Co., A Division of Merritt-Chapman & Scott Corp.*, ASBCA No. 15443, 73-1 BCA ¶ 9852 at 46,018-20; FAR 49.206-2(b)(4)(i).

The government has not proved gross disregard by appellant. To the extent that Alfair's costs were excessive on account of simple neglect in pricing, performance, or cost control under the contract and/or other causes not attributable to government acts or omissions, the contractor's profit/loss position at termination will be impacted.

The government suggests that *Balimoy Manufacturing Co.*, cited above, stands for the proposition that a bilateral modification precludes recovery of actual costs and allows only the price agreed in the modification. In that case, a contract for supply of 2,000,000 rounds of ammunition was terminated for default. The contract was then reinstated, in part (to supply 1,000,000 rounds), by a bilateral modification that reaffirmed the original price per round, albeit for the lower quantity of ammunition. Only 200,000 rounds were delivered and the reinstated contract was again terminated for default. By agreement of the parties, the second default termination was converted to a TFC. *Balimoy Manufacturing Co.*, 98-2 BCA at 148,501-05 (findings 10, 17-18, 31-32, 35). The contract modification by which reinstatement of the contract was accomplished and from which the government formulates its argument, in effect, set the entire (reinstated) contract price. The modification was not an agreement to resolve a particular compensable event under, *e.g.*, a Changes provision. The Board's decision there does not depart from the general rule that recovery under a TFC is limited to the contract price. *Balimoy*, 98-2 BCA at 148,510-12.

Based on *White Buffalo Construction, Inc. v. United States*, 52 Fed. Cl. 1 (2002), the government contends that it should not be required to reimburse appellant for costs paid to resolve the AVCO dispute to which the government was not a party (finding 59). In *White Buffalo*, the court denied recovery for wages based on time spent by plaintiff's principal when he was engaged in *pro se* legal representation of plaintiff after the TFC. The legal representation allegedly concerned claims and litigation against the replacement contractor and a separate matter before a Board of Contract Appeals. 52 Fed. Cl. at 2, 16-17.

Alfair's situation is distinguishable from that denied by the court. Alfair terminated AVCO, a subcontractor, under the contract at issue here for reasons related to performance of the contract. The surety defended the ensuing claim brought by the

terminated subcontractor and looked to Alfair for reimbursement. (Finding 59) The costs to resolve the claim were incurred before the TFC and were incident to Alfair's performance of the contract. The costs are recoverable subject to limitations imposed by the contract price. FAR 52.249-2(f)(1)(i)--ALTERNATE I.

a. Profit or Loss

The projected cost to complete the entire contract work when added to costs already incurred, $2,762,049.82, exceeds the modified contract price of $2,495,000.64 (findings 17, 72). Accordingly, the government alleges that the contractor is in a loss position, should receive no profit for its work, and that the loss formula specified in the contract and further implemented in the FAR should be applied to limit the contractor's recovery. As to this proposition, the government has the burden of proof. That burden has been carried by probative record evidence of the appellant's proven incurred costs (finding 69) and, based on those incurred costs and the percentage of completion documented by the government, the projected costs to complete performance of the contract work (finding 72). *R&B Bewachungs GmbH*, ASBCA No. 42214, 92-3 BCA ¶ 25,105 at 125,158; FAR 49.203(a), (c)(2); FAR 52.249-2(e), (f)(1)(iii)--ALTERNATE I.

However, the contractor asserts overall government responsibility for the financial condition of the contract or, in the alternative, that the modified contract price should be increased to account for alleged compensable events. In furtherance of that position, Alfair alleged 13 causes in its TFCSP that it says ought to result in price increases. Following the hearing, in Alfair's post-hearing brief, the list of alleged reasons for an increased modified contract price had been reduced to eight. We consider the other alleged causes abandoned (trailer location, weather, sandy soil (although this is touched upon in our decision with regard to the wetlands matter), defective plans and specifications (some of the items originally listed under this allegation may relate to delay, the roll-up doors, wetlands, and the electrical claim; to that extent, they are addressed in connection with those matters), and failure by the government to make proper and timely payments). (Finding 45) We examined and considered each of the remaining allegations in our findings above (findings 4-16, 20-43).

The disallowance of profit and application of the loss formula will be eliminated if the government "substantially contributed to the increased costs *and* it is not possible to separate that portion of the loss from possible losses caused by the contractor" (emphasis added). *Safeco Insurance Co. of America*, ASBCA No. 52107, 03-2 BCA ¶ 32,341 at 160,023. It would be incorrect to apply the contract price limitation or loss formula without first considering alleged compensable events. FAR 49.114; FAR 49.203 (CO to consider "other factors affecting the cost to complete"); *see Information Systems & Networks Corp.*, ASBCA No. 46119, 02-2 BCA ¶ 31,952 at 157,873 (application of contract price limit under indefinite delivery type contract).

In this case, after presentation by the parties at the hearing and based on our further examination of the record as indicated in our findings above, we conclude that it is possible to separate extra costs and delay attributable to the government from losses caused by the contractor. Those findings and conclusions distinguish this case from those argued by appellant, *e.g.*, *Wolfe Construction Co.*, ENG BCA No. 5309, 88-3 BCA ¶ 21,122 at 106,655-56, *correction granted in part and denied in part*, 89-1 BCA ¶ 21,504, *clarified*, 89-3 BCA ¶ 22,187, in which the former Corps of Engineers Board of Contract Appeals dispensed with attempting to determine whether the loss formula and contract price limitation should be imposed on account of the number of compensable events, exacerbated by government "pervasive maladministration" of the contracts, and a "chaotic pricing situation" also caused by the government. Accordingly, we reject Alfair's argument that the loss formula cannot apply and that it is entitled to a profit markup of 30%.

b. Increases to Modified Contract Price

In general, Alfair must prove the basic facts of liability, causation, and resultant injury to obtain an equitable adjustment in the contract price. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *Balimoy*, 98-2 BCA at 148,513-14. To the extent that compensable delay is alleged, appellant must show that portion of delay attributable to government acts or omissions. *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); *Durette, GmbH*, ASBCA No. 34072, 91-2 BCA ¶ 23,756 at 118,972. Such proof must be sufficiently certain so that a determination of an equitable adjustment will be more than "mere speculation." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987), quoting *Willems Industries, Inc. v. United States*, 155 Ct. Cl. 360, 376, 295 F.2d 822, 831 (1961), *cert. denied*, 370 U.S. 903 (1962); *Durette*, *id.* Given that the contract was for lump sum fixed-price payment items, where the books for the terminated contract need not show the cost for each separate feature of the work, such proof may be presented in the form of estimates. *Lockheed Martin Corp., Naval Electronics & Surveillance Systems - Surface Systems*, ASBCA Nos. 53032, 54064, 04-1 BCA ¶ 32,559 at 161,050.

At the hearing and in previous correspondence, the contractor made many accusations of government-caused problems that adversely impacted performance of the contract work. However, such assertions without support in the facts are insufficient to cause us to treat this case, as appellant contends, like the situations in cases such as *Astro Dynamics, Inc.*, ASBCA No. 41825, 91-2 BCA ¶ 23,807 and *M.E. Brown*, ASBCA No. 40043, 91-1 BCA ¶ 23,293. The record shows that work under the contract was not commercially impracticable. In the main, the government assisted Alfair adequately and compensated it fairly. For the contractor's part, the record shows that it experienced difficulties of its own making. At the hearing, other than the appellant's accountant and Mr. Weihnacht, the only witness was Ms. Alford. No other person familiar with the work - superintendent, CQCR, subcontractor, or trades worker - testified.

An examination of appellant's books revealed errors and/or defects in appellant's accounting (findings 50, 53, 55-56, 59, 61). Alfair exhibited inadequate proposal preparation and estimating techniques (findings 5, 7, 10-13). We rejected, in part, the contractor's expert analysis and conclusions (findings 32-33, 40). Time growth was experienced during contract performance but the contractor failed to prove discrete time delays caused by the government beyond those already reflected in the contract as modified (findings 19, 23, 32-35, 43).

(1) Site Work

Appellant has proved no basis for a price or time increase that exceeds the adjustments to the contract terms already agreed to by the parties or allowed by the government on account of alleged extra work brought on by conditions at the site. While all available information concerning site conditions was not provided to Alfair in the RFP, the solicitation included indications that soils information existed. Ms. Alford did not review that information before entering into the contract. The RFP showed the project site to be near the Florida Gulf coast and in a low-lying area. The specifications indicated the general presence of groundwater by providing for general dewatering requirements. Ms. Alford did not visit and examine the site prior to agreeing to the initial contract price. If she had visited the work site, she would have observed wet conditions. We find no flawed pre-award negotiations as argued by the contractor. There were no misleading statements by the government's negotiator, Mr. Hathorne. Mr. Hathorne had no superior knowledge that could not have been obtained by Ms. Alford if she had visited the site and conducted due diligence with regard to available soils information. (Findings 1, 4-8, 23-24)

It is well established that a prospective offeror, pursuant to the SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK provision (finding 3), is charged with the knowledge that could have been obtained by a reasonable investigation of the site. *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1346 (Fed. Cir. 1998); *Atherton Construction, Inc.*, ASBCA Nos. 44293, *et al.*, 02-2 BCA ¶ 31,918 at 157,711.

The government acknowledged some extra work caused by subsurface water. The parties agreed, in mod 2, to a $58,000.00 price increase and a 90-day time extension related to wet conditions at the magazine. The government, in mod 17, unilaterally allowed an additional $38,325.00 and 75 days for wet conditions at the shop. (Findings 22-24) Alfair failed to prove that extended overhead costs were more than the government already allowed in mod 17 (findings 24, 33, 67).

The contractor cannot rely on a unilateral modification as proof of its claim or any part of it, *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987). On the other hand, the government has conceded, by mod 2, that extra work related to wet

conditions was performed at the magazine, has not claimed that mod 17 should be revoked or reduced, and has presented expert evidence that up to 63 days of extended performance of work of site work (not necessarily delaying the entire project) and extra costs of $35,312.76 plus $17,003.14 could be attributed to unsuitable soil and wet site conditions (finding 33).

Accordingly, we leave the parties where we find them. The contract price, as modified, is unchanged for lack of proof by appellant that the contract price or time for performance should be increased on account of the site conditions.

(2) Electrical Work

Alfair argues in its post-hearing brief at 29-31 that its pre-award price was too low, that the government negotiator knew that the price was too low, but that the government failed to notify Alfair that the price was too low and failed to seek verification of the price. The apparent legal theory for an increase in the contract price is reformation of the contract price on account of a mistake-in-bid.

In the alternative, the contractor contends, at page 32 of its post-hearing brief, that the parties were mutually mistaken "as to a material price component, that is, the electrical work." Appellant also suggests that the government was "mistaken in its belief that the electrical price arrived at during the negotiations was fair and reasonable. . . . Alfair likewise was mistaken in its belief that the electrical work required by the Contract could be subcontracted and performed for the proposed $115,000.00 price."

For its part, the government's post-hearing brief asserts that appellant's mistake concerning its proposed electrical price was unilateral in that Ms. Alford relied on one telephone quote from a proposed subcontractor that later did not perform (findings 10-11, 27), matters for which the government was not responsible.

A party seeking reformation of a contract due to mutual mistake must establish:

> (1) the parties to the contract were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party seeking reformation.

Atlas Corp. v. United States, 895 F.2d 745, 750 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990); *The Boeing Company*, ASBCA No. 52256, 02-1 BCA ¶ 31,811 at 157,214.

The only alleged mutually mistaken belief regarding a fact recited in appellant's argument seems to be the overall price for all electrical work under the contract.

However, the contract was priced based on four lump sum items, none of which was for electrical work as a unit (finding 1). The parties had no agreement concerning the fact of a separate price or cost for electrical work (findings 13-14). To the extent that the lump sum proposal items included (or should have included) the costs and markups for electrical work, such work and the price for it was an undifferentiated component part of a price for the work as a whole (finding 2).

Further, while arrival at a negotiated agreement for lump sum item prices can involve agreements as to certain underlying facts related to the scope of the work and specific prices for labor, materials, equipment, and markups, such negotiations are also concerned with making multiple judgments in estimating and in agreeing on a price that will cover all costs and yield a profit for performance of the work. Given the inherent uncertainties and contingencies of work to be performed in the future, agreement to a lump sum price for work is essentially a judgment or a prediction about the adequacy of a price. The parties were not dealing with an existing fact about which they might be mutually mistaken. *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994). Thus, appellant's mutual mistake theory fails as to element one.

Absent proof of a mutual mistake regarding a fact, elements two and three cannot be sustained. We also are not persuaded concerning element four. Alfair bore the risk of gaining a proper understanding of the electrical scope of work and devising a comprehensive estimate for that work, typically supported by obtaining adequate electrical subcontractor quotes. The contractor has failed to point to any defect in the contract terms that would hinder Alfair's ability to understand the clear electrical requirements in the solicitation and contract. Appellant also has not shown how the government was responsible for any inadequacies in Alfair's estimating and/or subcontracting practices.

Appellant's primary argument is a mistake-in-bid type analysis (findings 9, 12, 27-28, 36-39). Such requires clear and convincing evidence that

> (1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error; (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested [cost or price] verification; (4) the Government did not request [cost or price] verification or its request . . . was inadequate; and (5) proof of the intended [cost or price] is established.

McClure Electrical Constructors, Inc. v. Dalton, 132 F.3d 709, 711 (Fed. Cir. 1997) quoting *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901 at 133,954.

Appellant has not shown what specific mistake it made in proposing its electrical price. Therefore, element one is not proved.

If Alfair made a mistake in the electrical price, that is, if the costs were not included elsewhere in the pre-award proposal (as thought by Mr. Hathorne, finding 13), the mistake would appear to be a failure to develop an adequate understanding of the electrical requirements of the job, relying instead on a proposed subcontractor quote that Alfair did not critically evaluate and that the proposed subcontractor would not honor. Such a mistake would be a judgmental error and has not been shown to be a clear-cut, clerical or mathematical error or a misreading of the specifications. Ms. Alford admitted as much (finding 12). There is no evidence that Alfair omitted a cost or price for any particular electrical work. No document or witness proved any mistake by appellant was a clear-cut, clerical or mathematical error or a misreading of the specifications. Accordingly, element two is not supported.

With respect to element four, Mr. Hathorne assumed that the costs were elsewhere in Alfair's proposal. In an attempt to clarify the assumption and to isolate the reason for the price disparity, Mr. Hathorne requested additional data from Ms. Alford concerning the basis for Alfair's proposed price component. However, Alfair provided no detailed information and Mr. Hathorne could make no further examination of the underlying support for appellant's proposed electrical price because there was none (finding 13). After revision of Alfair's proposal and the GE, the bottom line totals did not indicate error and tend to support Mr. Hathorne's assumption that Alfair's price, overall, included all required contract work (finding 2). Given the circumstances, we cannot say that Mr. Hathorne's attempted verification was inadequate.

Appellant presented no evidence of the intended price for all electrical work. Elements one, two, four, and five of a mistake-in-bid type analysis have not been satisfied. The evidence falls far short of the clear and convincing standard required.

Pursuant to *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (*en banc*), we are obliged to consider the matter of the electrical claim *de novo*. CO Slana's fact-finding and decision cannot be presumed correct. The contractor must meet its burden of proof regardless of CO Slana's earlier decision on the claim.

The government has not claimed that mod 24 should be revoked or reduced. Therefore, we again leave the parties where we find them. The contract price, as modified, is unchanged for lack of proof by appellant that the contract price or time for performance should be increased on account of the electrical work.

(3) CQCR Labor Price Increase

Appellant has failed to show that the contract price should be increased on account of increased CQCR labor costs. To recover for a constructive change**,** a contractor must prove that: (1) the contractor was compelled to perform work not required under the terms of the contract, (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract, (3) the contractor's performance requirements were enlarged, and (4) the added work was not volunteered, but resulted from the direction of the government's officer. *The Len Co. and Associates v. United States*, 181 Ct. Cl. 29, 38, 385 F.2d 438, 443 (1967).

The RFP was clear that the CQCR could not also function as Alfair's superintendent. In the course of pre-award negotiations, Mr. Hathorne suggested that Alfair include only two supervisory and managerial persons on the job. Ms. Alford agreed. She eliminated the assistant superintendent/CQCR in favor of a PM, the role that she intended to perform. (Findings 15-16, 55)

When performance began, Mr. Walker properly directed Alfair to comply with the contract terms as they related to a separate CQCR (findings 15, 30). Because Ms. Alford had not yet assigned herself to this job full-time and because the superintendent could not also function as the CQCR, Alfair elected to incur additional labor costs for a CQCR (findings 30, 55).

Elements one and three of a constructive change have not been shown. Mr. Walker did not direct the contractor to perform work not required under the terms of the contract and the contractor's performance requirements were not enlarged. He did not direct that the contractor take on a third supervisory or managerial person. Instead, he simply enforced the requirement that the CQCR be separate from the superintendent, the only full-time supervisory and managerial person on the job at the start of work at the site.

Ms. Alford made the decision to assign herself as PM for this and other jobs, thereby making herself unavailable as full-time CQCR for this project. By that action and by agreeing in the negotiations to eliminate the third managerial and supervisory person for Alfair, she effectively volunteered her services as the full-time CQCR and then made a contractor-initiated change that resulted in greater labor costs. The fourth element of a constructive change analysis is not supported.

(4) Other Alleged Increases to Modified Contract Price

Concerning the government lockout, low-lift block installation, and roll-up doors, Alfair failed to prove any basis for contract price increases or time extensions beyond those already allowed by the government. The government has not claimed that mods 10

and 17 should be revoked or reduced. (Findings 20-21, 25-26, 31-32, 34-35) The contract price, as modified, is unchanged.

Appellant has shown no basis for a contract price or time increase based on either a delay from 4 November 1998 to the TFC or the government-directed partial suspension of work from 15 December 1998 to the TFC (findings 29, 43).

Loss Contract

The adjustment for loss applies in this case because appellant would have incurred a loss if the entire contract had been completed by it. *Atlantic, Gulf & Pacific Co. of Manila, Inc.*, ASBCA No. 13533, 72-1 BCA ¶ 9415 at 43,740, *aff'd on recon.*, 72-2 BCA ¶ 9698, *aff'd*, 215 Ct. Cl. 938 (1977).

The modified contract price is $2,495,000.64 (finding 17). Alfair's performance costs plus the estimated cost to complete total $2,762,049.82 (finding 72). To that extent, appellant was in a loss position at termination. The calculated loss ratio is derived by dividing $2,495,000.64 by $2,762,049.82. That operation yields 0.9033. Alfair is entitled to recover 90.33% of its incurred costs, *i.e.*, $2,326,050.84 ($2,575,059.05 (finding 69) x 0.9033) but no profit. *Voices R Us, Inc.*, ASBCA Nos. 51565, 52307, 01-1 BCA ¶ 31,328 at 154,746-47 (findings 18-21); FAR 49.202(b)(7); FAR 49.203(a), (c)(2).

Settlement Expenses

Proven, allowable, and allocable settlement expenses total $33,635.17 (findings 73-74, 79, 81-84). Demobilization expenses were incurred on and after the effective date of the TFC (findings 73-74). Therefore, they are to be accounted for as settlement expenses, not performance costs, *i.e.*, costs incurred before the effective date of termination. FAR 52.249-2(f)(1)--ALTERNATE I.

We have allowed Ms. Alford's labor costs as immediate supervision and have added labor burden costs to proven settlement labor expenses (findings 73, 79). FAR 31.205-42(g)(1)(iii) provides that settlement expenses may include "[i]ndirect costs related to salary and wages incurred as settlement expenses [but that] normally, such indirect costs shall be limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs." Appellant did not segregate non-allowable G&A costs from those allowable under that FAR part (finding 87). Other than labor burden costs and immediate supervision, no other allowable overhead costs, such as for occupancy costs, were shown.

Profit is not allowable on settlement expenses. *Techno Engineering & Construction, Ltd.*, ASBCA No. 36869, 90-1 BCA ¶ 22,566 at 113,250; FAR 49.202(a).

We have examined the objective evidence of the nature of the proposed settlement expenses to determine whether costs were incurred in support of preparation of the TFCSP or development of claims against the government. *Acme Process Equipment Co. v. United States*, 171 Ct. Cl. 251, 262, 347 F.2d 538, 545, *recon. denied in part and granted in part*, 171 Ct. Cl. 322, 351 F.2d 656 (1965); *Mediax Interactive Technologies, Inc.*, ASBCA Nos. 43961, 46408, 50054, 99-1 BCA ¶ 30,318 at 149,930-31, *aff'd on recon.*, 99-2 BCA ¶ 30,453.

Reduction of costs claimed by the contractor to the amounts allowed by our findings and decision resulted from our determination that the costs were incurred for reasons other than preparation, presentation, and negotiation of the settlement proposal (findings 75-79, 81-83, 85-86). In one instance, no evidence supported claimed settlement expenses (finding 80).

Alfair is responsible for segregating its contract performance, contract administration, and/or TFC settlement preparation costs from the costs of developing CDA claims for prosecution. *R.G. Robbins & Co.*, ASBCA No. 27516, 83-1 BCA ¶ 16,420 at 81,693. Appellant made no such allocation; however, it was clear from the testimony of the contractor's claims expert and other evidence that a portion of the claimed expenses were for preparation of claims against the government (findings 76-77, 81-83, 85-86). The proposed expert's testimony that he consulted with Alfair and counsel, beginning in March 1999, for the purpose of developing claims, not to assist with preparation of the TFCSP, is sufficient to overcome the presumption that costs incurred before a CDA claim arises are not incurred in connection with prosecution of a claim. *American Mechanical, Inc.*, ASBCA No. 52033, 03-1 BCA ¶ 32,134 at 158,894, citing *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1549-51 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (*en banc*).

The Load Report Citation and resulting payment is in the nature of a fine for a traffic violation (finding 86). There is no evidence that the truck was overloaded as a result of compliance with specific terms and conditions of the contract or pursuant to instructions from the CO or other authorized representative of the CO. The payment of the fine is unallowable pursuant to FAR 31.205-15(a).

SUMMARY

Alfair is entitled to payment of its incurred costs reduced by a loss ratio to $2,326,050.84 plus proven settlement expenses totaling $33,635.17, a grand total of $2,359,686.01. To date, the government has paid appellant $2,384,674.68 (finding 70) under the contract. Accordingly, the contractor is not entitled to payment of any additional amount.

Under the TFC provision of the contract, a TFC claim for performance costs and settlement expenses is a single claim. FAR 52.249-2(f)--ALTERNATE I. The second COFD dated 28 August 2000 was redundant and the appeal from that decision, ASBCA No. 53120, was duplicative of the appeal from the COFD dated 9 August 2000, ASBCA No. 53119. The former COFD denied additional payments to appellant based on the total amount claimed by appellant, including settlement expenses. (Findings 46-47) Accordingly, ASBCA No. 53119 is denied and ASBCA No. 53120 is dismissed as duplicative.

Dated: 9 June 2005

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53119 and 53120, Appeals of Alfair Development Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals