ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Performance Construction, Inc.	)	ASBCA No. 53575
	)	
Under Contract No. N44255-96-C-0143	)	

APPEARANCE FOR THE APPELLANT: Denver C. Snuffer, Jr.
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APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

This appeal is from a final decision denying multiple claims under a contract for improvements to housing units at the Jackson Park Family Housing Area, Bremerton, Washington. A five-day hearing was held in Silverdale, Washington. The record for decision consists of the transcript of that hearing (tr.); the Rule 4 file submitted by the government in 12 volumes (R4, tabs 1-125); a supplemental Rule 4 file submitted by the government in 11 volumes (R4, tabs 126-315); and appellant's supplement to the Rule 4 file in two volumes (app. supp. R4, tabs 1-38).[1] Each party filed an initial and a reply brief.

While only entitlement is before us, it was understood that the number of days of delay is an element of entitlement (tr. 6).

FINDINGS OF FACT

General

1. On 7 April 1997, the Commanding Officer, Engineering Field Activity, Northwest, Naval Facilities Engineering Command, Poulsbo, Washington (government)

[1] App. supp. R4, tabs 27-30, 36 and 37 were excluded from the record (tr. 16, 18, 1275).

issued Solicitation No. N44255-96-R-0143, a negotiated procurement, for "WHOLEHOUSE IMPROVEMENTS TO FY68 UNITS AT JACKSON PARK FAMILY HOUSING AREA, BREMERTON, WA."[2] A technical proposal and a sealed price proposal were due 7 May 1997. (R4, tab 3)

2. The work was to be performed in accordance with drawings and specifications included with the solicitation and was described in § 01010, SUMMARY OF WORK, ¶ 1.1.1, Project Description, of the specifications as follows:

> The work includes all labor, supervision, materials and equipment required to complete the whole site improvements including demolition, clearing, asbestos removal, potentially hazardous paint work, earthwork, soil disposal, asphalt concrete, storm drainage, play equipment, site furnishings, landscaping, concrete, carpentry, insulation, asphalt shingles, doors, windows, skylights, interior finishes, painting, specialties, kitchen equipment, cabinets, window blinds, plumbing, ductwork, electrical and incidental related work.

(R4, tab 3)

3. On 1 June 1998, the government awarded Contract No. N44255-96-C-0143 to Performance Construction Inc. (PCI) to perform the work called for in the aforementioned solicitation in the amount of $7,166,500 plus $71,000 for bid, performance and payments bonds. In accordance with the solicitation and resulting contract, work was to begin within 15 calendar days and be completed within 690 calendar days. Thus, work was to begin on 16 June 1998 and was required to be completed by 6 May 2000. (*Id.*) As we find below, work actually was complete on 30 August 2001, a 481-day delay.

4. During the course of performing the work, several disputes arose between the parties. On 21 March 2001, PCI submitted a certified claim to the contracting officer seeking $421,000 for cost overruns due to electrical changes;[3] $140,000 for cabinet changes; $620,000 in direct costs and $709,779.53 for 557 days of delay for changed

[2] Amendment No. 1 to that solicitation was also issued the same day.

[3] While the claim shows a total of $421,000 claimed for electrical changes, the components of that sum actually add up to $416,631.

work related to soils;[4] and $231,500 and 270 days of delay due to additional asbestos removal and disposal.[5] (R4, tab 112)

5. On 30 April 2001, the contracting officer advised PCI that the information provided in the claim was insufficient in several respects to issue a final decision. A corrected certification was among the additional information requested. (R4, tab 114) On 10 May 2001, PCI provided additional information including a corrected certification, which was received by the contracting officer on 29 May 2001 (R4, tab 115). By letter dated 12 October 2001, PCI filed a notice of appeal from the failure of the contracting officer to issue a final decision (deemed denial) and the appeal was docketed as ASBCA No. 53575. We make further findings with respect to each claim below.

Electrical

6. The contract incorporated DFARS 252.236.7001, CONTRACT DRAWINGS, MAPS AND SPECIFICATIONS (DEC 1991) which called for the government to furnish the drawings and the specifications to the contractor and one of the contractor's obligations with regard to those drawings and specifications was as follows:

> (b) The Contractor shall - -
>
> (1) Check all drawings furnished immediately upon receipt;
>
> (2) Compare all drawings and verify the figures before laying out the work;
>
> (3) Promptly notify the Contracting Officer of any discrepancies; and
>
> (4) Be responsible for any errors which might have been avoided by complying with this paragraph (b).

(R4, tab 3, § 00721 at 15)

7. General Note 3 on drawing title sheet T-1 states:

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[4] While the claim shows a total of $620,000 in direct costs for soils, the components of that sum actually add up to $672,000.

[5] The certification failed to state that the certifier was authorized to make the certification.

ALL BUILDINGS ARE EXISTING. ALL WORK IS NEW
UNLESS NOTED OR INDICATED AS EXISTING.

(R4, tab 315)

8. Drawing E-1 defines the electrical symbols used on the contract drawings. The symbol for an existing receptacle is a circle with two parallel lines running from the top of the circle and extending through the bottom of the circle and with a parenthetical E beside it. (*Id.*)

9. Drawings E-2 through E-7 depict the demolition required and the electrical plan for each type of housing unit A through F respectively. The floor plans on drawings E-2 through E-7 all depict several locations with existing receptacles. The demolition symbols and the General Notes are similar on each of the six drawings. For example, notes five, six and seven on drawings E-2, E-4, E-5 and E-6 are as follows:

5. REMOVE EXIST. AND PROVIDE ALL DUPLEX RECEPTACLES, STANDARD AND GFI-TYPE, AND ALL LIGHT SWITCHES, 2, 3 AND 4-WAY.
6. WIRING SHALL BE NM 2/12 WITH GROUND, UNLESS NOTED OTHERWISE.
7. REFER TO PANEL SCHEDULES FOR CIRCUITS TO BE CHANGED FROM 15A TO 20A.

(*Id.*)

10. Drawing E-8 includes a panel schedule for each of the six types of units included in the project. For Units A, B, C, D, and E, certain described circuits are followed by three asterisks (***) and the Notes to each of those panel schedules indicates that three asterisks means:

REWIRE EXISTING CIRCUIT
REPLACE 15A-1P BREAKER WITH 20A-1P

11. Section 16011 of the contract specifications included the ELECTRICAL GENERAL REQUIREMENTS. Paragraph 1.3, DEFINITIONS, provided in pertinent part as follows:

d. When the word “REPLACE” is used in the Drawings or Specifications, this means remove existing and provide new.

(R4, tab 3)

12. Paragraph 1.7 of the ELECTRICAL GENERAL REQUIREMENTS states:

> Electrical installations shall conform to ANSI C2, NFPA 70, and requirements specified herein.

(R4, tab 3) Both were incorporated into the specification in ¶ 1.1 of § 16011.

13. Section 16402 of the contract specifications covers INTERIOR WIRING SYSTEMS. Pertinent portions of that section are as follows:

> 2.1 MATERIALS AND EQUIPMENT
>
> Materials, equipment, and devices shall, as minimum, meet requirements of UL, where UL standards are established for those items, and requirements of NFPA 70.
>
> . . . .
>
> 2.6.1.2 Minimum Conductor Sizes
>
> Minimum size for branch circuits shall be No. 12 AWG; . . . .
>
> . . . .
>
> 3.1.1 Wiring Methods
>
> Interior wiring shall be NM cable with integral ground wire. . . .
>
> . . . .
>
> 3.1.16 Replace Existing 15A-1P Breakers
>
> Replace all 15A-1P circuit breakers with 20A-1P breakers. Disconnect all devices and equipment fed by 15A circuits and

> remove wire back to circuit breaker. Reconnect devices and equipment previously fed by 15A wire with 20A wire.

(R4, tab 3)

14. Brent Butcher (Butcher), appellant's president, prepared the bid for PCI. He testified that at the time he prepared the bid, he understood, based upon his review of the bid documents, that the government wished to rewire the existing circuits so they needed to rewire a new breaker into the panel. Butcher was of the opinion that such work would not require PCI to go in and remove the wire that was inside the walls. Therefore his bid did not include the cost of removing and replacing the wire that was inside the walls. (Tr. 110) The only bid paper in the record is a list of lump sums for various aspects of the work with the post award addition of subcontractor identification on the bid. With respect to electrical, the bid paper shows $328,000 for "electrical & fixtures." (R4, tab 115; tr. 84-85)

15. Kevin Shumway (Shumway) was the PCI superintendent when the job began and had worked for PCI on other projects (tr. 161-62). The electrical issue arose before he left the company's employ (tr. 178). In a CQC meeting attended by Shumway on 19 November 1998, PCI informed the Navy of a discrepancy with respect to the electrical work and that notice was summarized by PCI in the minutes of the meeting as follows:

> The scope of the electrical work was improperly shown on drawings, i.e. plans show existing circuits untouched and to remain as is, but a note on the panel schedule calls for re-wiring these circuits. This was not readily evident and was not bid. This discrepancy in the drawings was only recently discovered. PCI will submit a Request for Equitable Adjustment. The major portion of the hidden work is removal of GWB [gypsum wall board] to access existing wiring.

(R4, tab 25, meeting #004; tr. 217-219)

16. On 20 January 1999, Charles Baldridge (Baldridge), the PCI project manager, advised the ROICC as follows:

> The . . . drawings provide conflicting information that was not apparent until well after the job was contracted and underway. In drawing T-1, the General Notes #3 states the

following: "All buildings are existing. All work is new **unless noted or indicated as existing.**" . . .

The floor plans shown on the referenced drawings E-2 thru E-7 indicate new work, and existing work to remain, showing which circuits are to be rewired and which are to remain as is. The work was bid with the expectation that it was fully and adequately described as shown on the floor plans, and that the General Notes are in force. These plans have notes regarding rewiring, but in those cases the rewiring is clearly indicated with bolded lines, and not called out as existing.

Drawing E-8, contains the panel schedules, and hidden in these schedules are asterisks which refer to notes calling for the rewiring of circuits shown to be existing and to remain untouched. If these notes are considered to take precedence over the floor plans and general notes, they would require that the entire unit be rewired, and this is clearly not the intent of the drawings, and it was not bid that way. This conflict was brought to the ROICC's attention, and we were instructed to submit a Request for Equitable Adjustment.

If the Navy wishes us to comply with the panel notes vs. the General Notes and the floor plans, we will be entitled to an equitable adjustment of $194,338.69. [Emphasis in original]

(R4, tab 29)

17. Butcher testified that he reviewed and approved the foregoing letter before it was sent and the letter was provoked by being asked by the Navy to perform work beyond the scope of the contract (tr. 108). Butcher said they were "being asked to replace wire where we should only be rewiring a circuit, and it's completely different one from the other, and we were being asked to put in additional wire, cut out sheetrock, and do additional work." (Tr. 108-09)

18. The Navy denied liability for the alleged additional costs taking the position that no conflict existed between the drawings, the general notes and the plan schedules with regard to which circuits were to be rewired and upgraded to 20A circuits. Using housing unit A as an example representative of units B, C, D, E and F, the Navy explained its rationale for denial of liability in part as follows:

a. Drawing E-2, for Unit type A, finds that First and Second Floor Plans show new wiring and light fixtures are to be provided in all Bedrooms. Adjacent to Bedroom 1 is a note that states "Re-wire Bedroom receptacles such that only light fixtures are switched (Typ of all Bedrooms)", this is further described by electrical tasks note 7 which has similar language. Furthermore, adjacent to the existing electrical receptacle at the top of the drawing in Bedroom 3, is a reference to note 6 and an indication that this reference is also typical. Note 6 states "Wiring shall be 2/12 with ground unless noted otherwise.", meaning that 2 new number 12 conductors and a ground wire are required.
b. Both the First and Second Floor Plans for Unit A show installation of new lighting fixtures and new wiring for these fixtures throughout the housing unit. These new fixtures are identified by call outs like WF-1, SF-10, SF-11, SF-7, SF-5, ect. [sic]
c. The First floor plan for Unit A shows new wiring to the new lighting fixtures, and existing receptacles in the Dining/Living Room (see upper left corner of Dining Room), as well as addition of a new receptacle adjacent to Panel "A". This drawing also shows extensive modifications to the electrical circuits in the kitchen area, including new wiring for the Dishwasher, Disposal, Range, and Hood.
d. General Note 7 on E-2 states "Refer to panel schedules for circuits to be changed from 15A to 20A." The Panel Schedule for Unit type A, on drawing E-8, includes three (3) asterisks in the Circuit Description for the Upstairs Bedrooms, Dining Room, Living Room, Lights, Disposal and Hood. The notes at the bottom of the Panel Schedule indicate that the three (3) asterisks indicate that the Contractor is to "Rewire existing circuits replace 15A-1P breaker with 20A-1P."

(R4, tab 38)

19. The Government invited PCI to request a contracting officer's final decision if they disagreed with the determination that no conflict existed (*id.*). Appellant received

the government's letter on or about 26 March 1999 and Butcher testified that he understood it to be a direction to put in new wire (tr. 111).

20. Butcher estimated that PCI would need about 50,000 linear feet (LF) of wire in its bid (tr. 103-04). On direct Butcher explained how he came up with the amount of electrical wiring that would have to be installed:

> The first step that was probably taken as I recall is the plans were given out to a couple of supply houses to get an estimate on fixtures and boxes and wire, and you know, miscellaneous devices.
>
> And I believe at some point in time I ran a wheel and did the multiplications of the different type of units to come up with an approximate amount of wire.
>
> . . . .
>
> [A wheel is] an estimating wheel. It's a little too[l] about 6 inches long. It has a wheel on it, and it has a little digital readout with some settings, and you can set for the type of plan that you have, the scale, and then run the wheel and it will tell you how many feet.

(Tr. 102-03)

21. PCI ultimately installed approximately 133,500 LF of wire or about 83,500 LF of wire in excess of the amount estimated in its bid (R4, tab 101; tr. 111-12). An estimate for #12 NM cable included in the design basis for the project prepared by the government's consultant (A-E), totaled 41,100 LF (R4, tab 2). At least some of the existing cable in the walls, which was removed, was 12-gauge, suitable for 20-amp and the new cable installed was also 12-gauge (tr. 751-52). On cross-examination, Butcher agreed that no one explicitly directed them to replace old 12-gauge wire with new 12-guage wire (tr. 419).

22. Baldridge testified that the electrical code requires 14-gauge wire with a 15-amp circuit and 12-gauge wire with a 20-amp circuit (tr. 686-87).

23. On 26 October 1998, PCI submitted Request for Information (RFI) No. 21 primarily concerning the condition of the drywall and its asbestos content. However, in the context of the RFI, PCI stated:

> At present, removal of the existing drywall to accomplish electrical work[] is being done by the asbestos abatement contractor.

(R4, tab 18) This work occurred prior to PCI raising the issue of the extra wiring.

24. According to Shumway, the problem was that the Government "hid" the requirement to replace existing wire in the panel schedule rather than on the drawings and thus, when they "discovered" the requirement it was "a new thing" (tr. 274).

25. Butcher testified that the take-off for materials and fixtures related to the electrical was probably done by a wholesale house, not by him (tr. 404). Butcher does not have a specific recollection he looked at the general notes on sheet E-2 of the drawings when he did his pre-bid estimate.

26. In his deposition Butcher testified that when he first looked at the original electrical drawings, he did not think they had conflicting information and the conflicting information did not become apparent until after the job was awarded and was underway. He agreed that if he had looked at the drawings longer, harder and more carefully, as he later did, the conflicting information could perhaps have been apparent prior to the time of bid. (Tr. 408-09) When he realized, after award, that there was conflicting information, it was clearly ambiguous in his mind (tr. 410).

Decision – Electrical

Appellant takes the position in its amended complaint and in its initial brief that electrical drawings E-2 to E-7 show floor plans and work to be performed; that the same drawings depict the demolition work to be performed; that the sheets show clearly and unambiguously that there are numerous electrical receptacles which are to remain and concludes that since the Navy took the trouble to depict the receptacles which were to remain, appellant reasonably concluded they should remain, otherwise the depiction was wasted.[6] (Am. compl. at 1-2 of 10; app. br. at 4-5) In its brief, appellant further argues:

> As part of the electrical work, the remodel required some of the existing 15A circuitry to be converted to 20A circuitry. Performance interpreted the drawings to require that the receptacles and circuit breakers were to be replaced so as to accommodate that requirement. When Performance proceeded with the work in accordance with their

[6] Appellant's brief uses the word circuits rather than receptacles.

> understanding of the drawings, the Navy objected and required the removal of all wiring and replacement with a whole new wire, circuit breakers and new receptacles. This aggressive and unwarranted demand by the Navy contradicted the information contained in the bid documents and contract drawings on Sheets E-2 through E-7. The Navy insisted that the requirement to redo all the electrical work was required by a set of asterisks on Sheet E-8. Sheet E-8, however, should not require that information depicted with great care and consistency on Sheets E-2 through E-7 be ignored. Yet the interpretation of the Navy does just that.
>
> The only proper way to interpret the asterisks on Sheet E-8 is to read them in light of the extensive details shown on the other sheets of the electrical plans. That is, the meaning of the asterisks is that where a circuit breaker is shown to be replaced, then the replacement should involve a 20 amp circuit breaker replacing the existing 15 amp circuit breaker. However, this does not require the bidder or the contractor to determine that he is to replace all wiring in the circuit, along with the circuit breakers. Such an overreaching interpretation would have the effect of ignoring information provided at great effort by the Navy in the bid documents.

(App. br. at 5-6)

Appellant argues that the electrical specifications were defective in that the plans made clear the existing circuits that were to remain, but were made unclear by the Navy's interpretation of the panel schedule (app. br. at 31). Inconsistently, appellant also argues that the contract provisions relating to the electrical requirements are clear and unambiguous, but if the Board finds otherwise, then the ambiguity is "not patently so" (*id*. at 35).

Using these alternative theories appellant seeks to recover the costs of rewiring in the walls including dry wall and drywall abatement work, along with the circuit breakers in the housing units which were to be renovated. The government denies liability for those costs.

The inquiry into the meaning of the contract begins with the proposition that an interpretation which gives a reasonable meaning to all parts of an instrument is preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous. Moreover, no provision should be construed as being in

conflict with another one unless no other reasonable interpretation is possible. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965); *Centex Construction Co.*, ASBCA No. 51073, 02-1 BCA ¶ 31,719. An ambiguous contract is susceptible to more than one reasonable interpretation. *Sun Shipbuilding & Dry Dock Co. v. United Stat*es, 393 F.2d 807, 815 (Ct. Cl. 1968). To recover for a patent ambiguity the contractor must seek clarification prior to submitting its bid. *Froeschle Sons, Inc. v. United States*, 891 F.2d 270, 273 (Fed. Cir. 1989). Moreover, a patent ambiguity must be blatant and significant rather than sudden, hidden or minor. *S.O.G. of Arkansas v. United States*, 546 F.2d 367, 370 (Ct. Cl. 1976). If an ambiguity is latent, the contractor must prove that it relied on its present interpretation during bid preparation. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430, 1432 (Fed. Cir. 1990).

We analyze the requirements with respect to Unit type A, which is typical in terms of its requirements, with Unit types B, C, D, E and F. On sheet E-2, both the first and second floor plans for Unit type A show several existing receptacles. Appellant says this means that not only were the receptacles to remain, but so was the wiring forming a part of the circuit for the receptacles. Such conclusion is not self-evident on a review of the drawing. Moreover, appellant's interpretation ignores the notes on E-2 which unequivocally state that existing receptacles are to be removed and instead the contractor is to provide all duplex receptacles. The notes give two additional relevant pieces of information. They describe the type of wiring to be provided and they refer the reader to the panel schedule for circuits to be changed from 15A to 20A.

The panel schedule for Unit type A lists the various circuits on that panel and three asterisks follow several of the entries. The notes to panel schedule A tell the bidder that three asterisks mean rewire existing circuit and replace 15A-1P breaker with 20A-1P breaker. As the specifications make clear, all devices and equipment fed by 15-amp circuits were to be disconnected and its wiring removed back to the circuit breaker. As to the reconnected devices and equipment, the specifications require that they be fed by 20-amp wire.

Appellant's interpretation requires a disregard of clear provisions requiring replacement of existing wire and, as such, is unreasonable. Consequently, the contract is susceptible to only one reasonable interpretation, *i.e.*, that the contract required replacement of existing wire to accommodate the change from wire for 15-amp breakers to wire for 20-amp breakers. To the extent appellant replaced 12-guage wire with 12-guage wire, it did so without direction from the government and may not recover for that voluntary work.

Furthermore, Butcher's testimony concerning appellant's bid is not persuasive. On the one hand, he testified based upon his review of the bid documents, the government only wanted him to rewire a new breaker into the panel, not remove the wire

inside the walls. This view clearly ignores provisions requiring the replacement of wire suitable for 15-amp breakers with wire suitable for 20-amp breakers. On the other hand, Butcher testified in his deposition that had he looked at the drawings longer and harder and more carefully the alleged conflicting information could have been apparent before submitting his bid. Moreover, Butcher did not do the take-off for materials and fixtures which was done by a wholesale house and he has no recollection that he ever looked at the notes on sheets E-2 through E-7 when he estimated the costs for his bid. Butcher does not even recall looking at the panel schedules when bidding the job and it was unreasonable not to do so. We are not clear on the demarcation between what Butcher estimated and what the wholesaler estimated. Thus we lack such confidence in appellant's electrical bid as would allow us to find that PCI relied on the current interpretation of wiring requirements at the time of bid. The claim is denied.

Asbestos

27. Section 02081 of the specifications, ENGINEERING CONTROL OF ASBESTOS CONTAINING MATERIALS, covered the manner in which materials containing asbestos should be handled during work on the project. Paragraph 1.3.1 of that section provides:

> The work covered by this section includes the handling of asbestos containing materials which are encountered during repair, and construction projects and describes some of the resultant procedures and equipment required to protect workers and occupants of building or area, or both, from contact with airborne asbestos fibers. [T]he work also includes the disposal of the generated asbestos containing materials. More specific operational procedures will be outlined in the Asbestos Hazard Abatement Plan called for elsewhere in this specification. The asbestos work includes the removal of VAT, mastic, sheet vinyl (and backing and mastic), kitchen sinks, stove heat shields and foil/paper insulation at light fixtures. Provide full containment and glovebag techniques as outlined in this specification.

(R4, tab 3)

28. Paragraph 1.4.2.1, Asbestos Hazard Abatement Plan, provided in part as follows:

> Submit a detailed plan of the safety precautions . . . and work procedures to be used in the removal of materials containing asbestos. The plan shall be prepared, signed, and sealed by the PQP. . . . The Asbestos Hazard Abatement Plan must be approved in writing prior to starting any asbestos work. The Contractor, Asbestos Hazard Control Supervisor, and PQP shall meet with the Contracting Officer prior to beginning work, to discuss in detail the asbestos hazard abatement plan, including work procedures and safety precautions. Once approved by the Contracting Officer, the plan will be enforced as if an addition to the specification.[7]

(R4, tab 3)

29. In 1993, prior to issuing the solicitation, the government initiated an asbestos survey and that survey was furnished to PCI on 12 November 1998, after award of the contract. Included in that survey was a section entitled Miscellaneous, which provided as follows:

> Gypsum wall board mud was found to contain asbestos. However, L&I [State of Washington Department of Labor and Industry] considers this as part of the wall board itself and does not usually require special removal precautions. Care should be exercised anyway to not disturb larger or excessive areas of wall board mud.

(R4, tab 192; tr. 1004)

30. Drawings A-13 to A-18 set forth the demolition plans for each floor of each unit type. Several plans (for example, A-13, A-16) required the removal of gypsum wall board (GWB). Drawings A-13 to A-17, however, included identical ASBESTOS DEMOLITION NOTES that provided in pertinent part as follows:

> A. PROVIDE ASBESTOS CONTROL MEASURES FOR REMOVAL AND DISPOSAL OF ITEMS INDICATED AS CONTAINING ASBESTOS.
> B. ASBESTOS CONTAINING MATERIALS:

[7] A PQP or Private Qualified Person was to be hired by the contractor to perform certain specified tasks with respect to asbestos abatement. (R4, tab 3 § 02081 at 5)

1. ALL EXST VAT & MASTIC BELOW VAT CONTAIN ASBESTOS
2. ALL EXST VAT IS NON-FRIABLE
3. FOIL/PAPER INSULATION @ MISC LIGHT FIXTURES CONTAINS ASBESTOS. REFER TO ELECTRICAL PLANS FOR LOCATIONS OF FIXTURES CONTAINING ASBESTOS & REQUIRING REMOVAL.
4. EXST KITCHEN SINK COATING CONTAINS ASBESTOS & REQUIRES REMOVAL.
5. EXST GWB MUD CONTAINS ASBESTOS. DO NOT DISTURB MORE AREAS THAN REQUIRED
6. EXST HEAT SHIELD UNDER CABINET AT STOVE CONTAINS ASBESTOS

(R4, tab 315)

31. Drawing A-18 included all six of the listed materials plus an additional note:

> ALL BACKING & MASTIC ON EXST SHEET VINYL CONTAIN ASBESTOS.

(*Id.*)

32. The estimate included in the design submission by the A-E for Asbestos Abatement and Disposal under § 02081, included line items for removal of VFT and underlayment or mastic, kitchen sinks, heat shields and incandescent fixtures. It did not include an amount for gypsum wall board mud (R4, tab 2 at 6 of 26).

33. A Mutual Understanding Meeting was held on 23 October 1998 between government and contractor personnel. John Wade (Wade), appellant's CQC Manager prepared the minutes of that meeting. With respect to drywall in the existing units, Wade wrote:

> Drywall mud contains asbestos. The contract instructs the KTR to disturb that material as little as possible. Where new work is required, the existing drywall must be demo'd by an asbestos abatement contractor and repaired in such a manner that no dust is created.

(R4, tab 22)

34. Shortly after issuance of the solicitation and prior to award of the contract, on 29 April 1997, PCI was provided a lump sum quote for certain of the work called for in the solicitation by a firm called F.S. & GS. Services, Inc. (FS&GS). The bid was submitted by Gordon Williams (Williams), president. With respect to asbestos, the quote included § 02081 asbestos removal and removal of sheet rock in kitchen and baths. Excluded from the bid was spot removal of sheet rock and, if required, a unit price was included. (R4, tabs 133-34)

35. On or about 10 September 1998 PCI and FS&GS finalized a subcontract agreement for performance of asbestos abatement work called for in § 02081 as part of a firm fixed price and additional sheetrock work at a unit price (R4, tab 156). FS&GS prepared the asbestos abatement plan, submitted it to PCI, and PCI in turn submitted it to the government for approval on 17 August 1998 (R4, tab 158; tr. 524, 528).

36. The government approved the plan with comments and returned it on 16 September 1998. PCI forwarded same to FS&GS a couple of days later (tr. 529). FS&GS resubmitted the plan on 2 October 1998 (R4, tab 318; tr. 998-99). The resubmitted plan was consistent with the way Williams bid the job and the work was performed consistent with the work plan (tr. 1000).

37. In preparing a bid to PCI, Williams reviewed the specifications and drawings and concluded that the sheetrock contained asbestos that had to be removed under abatement conditions from the kitchens and baths as identified in the contract. He recognized also that there was a requirement for possible spot removal in other areas as well. (Tr. 988-89)

38. PCI's asbestos abatement plan affirmatively stated that the asbestos work included the removal of bathroom and kitchen sheet rock as asbestos containing material. Moreover, the plan, prepared by FS&GS, affirmed the contractor's understanding that "all textured sheet rock walls do contain asbestos and will be handled with coordination of the general contractor on a unit cost basis" (R4, tab 158 at 129).

39. Butcher knew that an asbestos abatement plan was submitted under the subject contract, yet in preparing his asbestos claim, he did not review that plan, nor was he aware of anyone else taking that plan into consideration prior to submission of the asbestos-related claim (tr. 479-80).

Decision – Asbestos Abatement

In its amended complaint, PCI sought $132,488 for gypsum wall board removal under abatement conditions (am. compl. at 9). The amount was increased to $181,906 on 28 February 2003. Appellant alleges the government withheld superior knowledge pertaining to the abatement of asbestos when it failed to disclose a paragraph from a 1993 study commissioned by the government and that such failure to disclose caused cost overruns. We find the contention to be without merit.

We set forth appellant's burden of proof with respect to the superior knowledge doctrine, as follows:

> As the superior knowledge doctrine is generally formulated, the contractor bears the burden of proving that (1) it undertook to perform the contract without vital knowledge of a fact that affects performance costs or direction, (2) the Government was aware the contractor had no knowledge of and had no reason to obtain the information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the Government failed to provide the relevant information.

Johnson Controls World Services, Inc., ASBCA Nos. 40233, 47885, 96-2 ¶ 28,458 at 142,140. The information said to be withheld bears repeating:

> Gypsum wall board mud was found to contain asbestos. However, L&I [State of Washington Department of Labor and Industry] considers this as part of the wall board itself and does not usually require special removal precautions. Care should be exercised anyway to not disturb larger or excessive areas of wall board mud.

(R4, tab 192) The first and third sentences were essentially included in the contract and thus the contractor was on notice that gypsum wall board mud contained asbestos and it was on notice that it should be careful not to disturb more areas than required. The second sentence was not included and thus is the only provision against which we evaluate the superior knowledge doctrine. As to the first element of proof, appellant has not shown that knowledge of an opinion of a department of the State of Washington was vital information that affected performance costs or direction.

Appellant states repeatedly in its reply brief that vital information was withheld without demonstrating that the information was vital. The following statement is the closest appellant comes to demonstrating the information was vital:

> In the present case, the Navy withheld valuable information regarding the asbestos containing drywall. The preparation of the bid for the abatement was done exclusively by Mr. Butcher of Performance Construction. See response to Respondent's paragraph 4 above, (see also transcript p. 373-377.). Mr. Butcher testified that he relied solely on his own experience, and not on the knowledge or information of FS&GS when preparing his bid. *Id.* He read the clear disclosures of the contract, which failed to include "sheetrock" or "drywall" in the items requiring abatement for removal. Performance relied on the contract's clear terms which excluded drywall from abatement and planned accordingly.

(App. reply br. at 76)

The contention that PCI "relied on the contract's clear terms which excluded drywall from abatement" is not accurate. The clear terms of the contract did not exclude drywall from abatement. The drawing notes advised that the drywall contained asbestos and that control measures applied thereto. The notes merely cautioned that the drywall should not be disturbed more than required.

As to the second element of proof necessary, there has been no showing that the government was aware the contractor had no knowledge of the opinion of the Department of Labor and Industry of the State of Washington. Appellant's ultimate subcontractor was certainly aware of it. Moreover, we cannot discern how knowledge of that sentence could have changed appellant's approach to bidding the job. Further, there is no evidence that any provision included in the contract misled appellant or did not put it on notice to inquire with regard to the opinion of the Department of Labor and Industry of the State of Washington. Accordingly, the claim for additional asbestos abatement costs, including claims for delay and impact costs, is denied.

Cabinets

40. Section 12391 of the contract specifications covered RESIDENTIAL KITCHEN AND VANITY CABINETS. Cabinets were generally described in ¶ 2.1 of § 12391, in part as follows:

The work includes providing new factory-finished kitchen wall and base cabinets with high pressure decorative laminate (HPDL) countertops, bathroom vanity cabinets with HPDL countertops, and electrical panel cabinet door cover. The cabinets shall be manufacturer's standard or custom fabricated product which conforms to ANSI/KCMA A161.1, the requirements specified herein, and bear the "KCMA Certified Cabinet" seal of the Kitchen Cabinet Manufacturers Association. In lieu the KCMA seal, manufacturer shall submit test reports from an approval laboratory that cabinets meet requirements of ANSI/KCMA A161.1.

(R4, tab 3)

41. Other pertinent portions of the cabinet specifications follow:

2.2.3 Hardwood

All exposed surfaces shall be oak consistent with the specified finish.

. . . .

2.2.6 Particleboard

ANSI A208.1, Grade 1-M-2 or 2-M-2 or better. Particleboard may be used in lieu of plywood if both faces and all exposed edges are covered with wood veneer or HPDL, except drawer sides and back shall be plywood.

. . . .

2.3 FABRICATION

2.3.1 Cabinets

Kitchen wall and base cabinets and vanities shall be same type of construction and appearance. . . . Ends, bottoms, tops, and partitions shall be hardwood plywood or particleboard not less than ½-inch thick. . . . Finish all exposed edges of

plywood and particleboard with hardwood strips or high-pressure decorative laminate. . . .

. . . .

2.4 FINISHES

2.4.1 Cabinet Finishes

Provide factory applied stained wood finish on all external surfaces except underside of drawer bottoms. External surfaces shall be hardwood with no exposed materials except hardwood. Set and fill exposed staple or nails to match cabinet finish. Internal surfaces shall be provided with HPDL (plastic laminate) finish.

(*Id.*)

42. In ¶ 1.1 of § 12391, the KITCHEN CABINET MANUFACTURING ASSOCIATION (KCMA) standard, ANSI/KCMA A161.1, 1990 Kitchen and Vanity Cabinets, was incorporated by reference into the contract. (R4, tab 3). Said standard, entitled Recommended Performance & Construction Standards for Kitchen and Vanity Cabinets, provides in pertinent part as follows:

8.0 FINISH SPECIFICATIONS
8.1 General. These tests create, in accelerated form, the cumulative effects of years of normal kitchen conditions on prefinished cabinets.

Except where otherwise specified, a cabinet door shall be used for evaluation in the finishing tests. However, it is implicit that all exterior exposed surfaces (any part of the surface that can be seen in normal usage after installation) shall have the ability to pass the same tests.

Exceptions: (1) Sides do not have to be finished on individual units, but exposed sides have to be factory finished or covered with factory-finished panels in the field. (2) Toe rails do not have to be finished, but have to be covered or finished in the field. (3) Undersides of wall-cabinet bottoms are considered to be interior exposed surfaces.

(R4, tab 36)

43. On or about 3 August 1998, PCI's cabinet supplier, Terry M. Steele CABINETS & COUNTERTOPS (Steele), submitted a quote for furnishing cabinets and therein stated that the cabinet construction was per specification § 12391 and that "EXPOSED ENDS [would be] FACTORY FINISHED." (R4, tab 148)

44. On 10 August 1998, Steele presented its submittal package to PCI for § 12391 (tr. 929). Steele stated:

> THE FOLLOWING KEY ITEMS ARE PRESENTED AS VARIANCES BUT ARE THE MANUFACTURES [SIC] STANDARD PRODUCT AND SHOULD BE CONSIDERED EQUAL[.]
>
> 1. CABINET CONSTRUCTION TO BE A COMBINATION OF INDUSTRIAL GRADE PARTICLE BOARD AND MEDIUM DENSITY FIBERBOARD (MDF) WITH WHITE **VINYL OVERLAY INTERIOR** EXCEPT FOR THE BOTTOM OF ALL SINK CABINETS WHICH WILL BE HIGH PRESSURE LAMINATE TO MATCH THE COUNTERTOPS.[] [Emphasis in original]

(R4, tab 151) Steele explained that the variance in this case was offering something not exactly called for by the specification, but constituting a better product (tr. 930). With respect to cabinet ends, Steele stated:

> ½" INDUSTRIAL GRADE PARTICLE BOARD OR MDF WITH WHITE VINYL OVERLAY INTERIOR. EXPOSED ENDS ARE 3/4" WITH OAK VENEER TO MATCH THE FACE. SEMI-EXPOSED SIDES NEXT TO THE RANGE ARE WHITE VINYL.

With respect to cabinet tops and bottoms, Steele stated:

> ½" INDUSTRIAL GRADE PARTICLE BOARD WITH WHITE VINYL OVERLAY 2 SIDES ON WALL

> CABINETS, 1 SIDE ON BASE EXCEPT FOR SINK CABINETS WHICH HAVE HPDL TO MATCH THE COUNTERTOP. TOP AND BOTTOM ARE DADOED INTO THE SIDES

(R4, tab 151)

45. On 12 September 1998, Wade advised Steele that the submittal was disapproved because the variance was not acceptable to the government and asked him to resubmit with all cabinet work complying with the specification (R4, tab 173; tr. 930-31).

46. On 15 September 1998, PCI submitted for approval its first cabinet submittal under specification § 12391 (Submittal No. 063). Said submittal included Steele's 10 August 1998 submittal to PCI. Certain variances from the specification were sought with a corresponding credit proposed. The government disapproved the submittal. (R4, tab 20)

47. On 13 November 1998, PCI submitted its second cabinet submittal for approval. This submittal included some of the same information as had been included in Steele's 10 August submission to PCI and in the 15 September submission by PCI to the government, including the language with respect to cabinet ends: "EXPOSED ENDS ARE ¾" WITH OAK VENEER TO MATCH THE FACE. SEMI-EXPOSED SIDES NEXT TO THE RANGE ARE WHITE VINYL." On 10 December 1998, this submittal was also disapproved with the comment that the contractor should, "[p]rovide hardwood surfaces per para 2.4.1, vs white vinyl at 'semi-exposed sides.'" (R4, tab 27)

48. Terry Steele testified that the term "semi-exposed sides" is an industry term (tr. 932), but agreed that those words were not used in the specification, which in ¶ 2.4.1 refers to internal and external surfaces (tr. 933).

49. PCI made a third cabinet submittal on 30 December 1998. With respect to cabinet ends this submittal stated:

> ½" INDUSTRIAL GRADE PARTICLE BOARD OR MDF WITH WHITE CL20 BOTH SIDES. EXPOSED ENDS HAVE AN OAK VENEER FIELD INSTALLED. SEMI EXPOSED AREAS NEXT TO THE RANGE AND DISHWASHER WILL HAVE THE EASY CLEAN CL20.

(R4, tab 30) On 1 February 1999, this submittal was also disapproved (*id.*). CL20 is a type of HPDL.

50. A fourth submission on 8 February 1999 was approved on 23 February 1999 subject to the following "CORRECTIONS NOTED:"

> 1. PROVIDE HPDL FINISH FOR ALL INTERNAL SURFACES OF DRAWER BOX, PER PARA 2.4.1.
>
> 2. CABINETS SHALL CONFORM TO ANSI/KCMA A161.1

(R4, tab 32) Terry Steele agrees that none of the comments by the ROICC in this document refer to semi-exposed ends next to the range and dishwasher (tr. 943).

51. Wade's job diary for 8 March 1999 records the following:

> [T]el con Don Truscott: underside needs to be wood. [I]ts an <u>exposed</u> surface. (Who interprets?)

(R4, tab 271 at 88-89) Truscott was the government's project manager/architect. Considering the many submissions and reviews for the cabinets we find this note of a telephone call to be unpersuasive evidence of a direction by the government for the installation of wood on the underside of cabinets. Neither Wade nor Truscott testified so we have no explanation of what prompted the call.

52. On 8 April 1999, Steele complained to PCI that the government specification was out of sync with industry standards and that he provided the same product on the FY70 project that had the same specification as the FY68 project (project in question) and it was accepted by the same A-E and same ROICC. (R4, tab 44)

53. On 24 May 1999, Steele wrote to PCI and asked them to review an enclosed specification for the project. Steele further stated that it would honor its original estimate and the "EXPOSED END SKINS AND UNDER WALL PANELS WILL BE SHIPPED LOOSE FOR FIELD INSTALLATION." (R4, tab 220) With respect to ends, the specification which was enclosed, stated:

> ½" industrial grade particle board with white CL20 both sides except for the exposed ends which have CL20 one side and a 1/8" oak veneer plywood skin field installed. The semi

> exposed areas next to the range and dishwasher will have the easy clean CL20.

The specification further provided:

> Wall cabinet ends are recessed from the bottom of the face frame to provide clearance for special 1/8" oak veneer plywood "under wall panel" to be field installed.

(R4, tab 221)

54. On 10 October 2000, counsel for Performance submitted a claim to the contracting officer. With respect to cabinets, the claim was based upon the government's alleged refusal to accept cabinets, not strictly meeting the specifications, which had been accepted under a similar specification in another contract. There was nothing in that claim about the government requiring PCI to install oak veneer on the wall cabinet bottoms or end panels next to ranges and refrigerators. (R4, tab 94)

55. On 18 January 2001, counsel for PCI wrote to his client regarding a meeting recently held with the Navy. With regard to cabinets, counsel recounted that the Navy was awaiting a newly submitted claim package that would explain:

> What the specific complaints for the cabinet change is/are. For example, is the problem with the doors, the laminate used instead of the pressed wood, or is it the bottom covers on the upper cabinets. This needs to be reconciled with the earlier letter from the supplier.

(R4, tab 254)

56. On 21 March 2001, PCI submitted to the contracting officer what was intended as a complete statement of claims, resubmitted as a result of discussions with the Navy. With respect to cabinets, the claim made no specific statement concerning a requirement for oak veneer on wall cabinet bottoms and end panels next to ranges and refrigerators. (Finding 4; R4, tab 112)

57. On 28 February 2003, appellant amended its claim and the amount included for cabinet changes was $25,489 (R4, tab 317). This amount was lowered from $140,000 (tr. 381). Counsel for PCI confirmed at trial that PCI is no longer claiming the doors, the

hardware, the boxes, or the construction of the drawers and is now claiming only the wood on the end next to the stove and refrigerator and under the wall cabinet (tr. 697).

58. Steele supplied the cabinets and countertops for the job as a vendor to PCI, providing material only, and not labor. He interfaced with and took direction from John Wade and Charlie Baldridge. (Tr. 928)

59. According to Steele, "Semi-exposed" with respect to cabinets is an industry term that describes an area next to a range or behind a door that is only exposed when the door is opened (tr. 934) while an exposed surface is one that you will see at all times (tr. 935).

Decision – Cabinets

In its amended complaint, appellant claimed about $140,000 due to an alleged change in the cabinet requirements. The allegation is that the government used the same cabinet specification under a prior contract, and for the instant contract the government rejected that cabinet and required a more expensive one. At trial appellant changed the amount of its claim to $25,489 and changed the theory of recovery, stating that the contract required the installation of HPDL (high pressure decorative laminate) under the wall cabinet bottoms and at end panels next to the ranges and refrigerators, but that the government insisted on the installation of finished wood (oak veneers) at these locations which had to be field installed.

Paragraph 2.4.1 of the cabinet specification called for hardwood on external surfaces of the cabinets. The ANSI/KCMA standard for cabinets, which was incorporated into the contract, defined the undersides of wall-cabinet bottoms to be considered interior exposed surfaces. The term semi-exposed is not used in the standard or in the specification. Thus the contract required hardwood on the sides next to ranges and refrigerators but not on the undersides of the cabinets. There is no credible evidence the government directed the installation of wood on the underside of cabinets. Therefore the cabinet claim is denied.

Soil and Earthwork

60. Jackson Park is approximately a 15-acre site, sitting mainly on a hillside. It had rock walls in front of some of the buildings to stabilize the hills and is fairly wooded for a residential area. It has lots of tall evergreens and some of the spaces in which work was to be performed were tight. (Tr. 247-48, 1099-1100) The contract divided the work areas into site one through site seven and contained a soil disposal area at a place called Elwood Point, which was east of the work areas (R4, tab 315 at drawings T-1, T-2).

61. Section 01010, ¶ 1.4.1, Order of Release of Work Areas, of the specification as modified by Solicitation/Amendment No. 1 to the solicitation provided as follows:

> Work areas will be release [sic] for work in the following order. Sites are indicated on Sheet T-2 of the drawings.
>
> a. Initial Release: The following work areas will be released at the start of construction:
>
> Site 2
> Site 4
> Site 5
> Site 6
> Soil Disposal area and access route
>
> b. Subsequent work areas will be released in the following order:
>
> Site 3
> Site 1
> Site 7".

(R4, tab 3) Paragraph 1.4.2 of § 01010, Limitations on Release of Work Areas, of the specification as amended by Solicitation/Amendment No. 1 stated that in order to allow residents to move into completed units, Site 3 would not be released for work until 45 days after acceptance of Site 2; Site 1 would not be released until 45 days after acceptance of Site 5; and Site 7 would not be released until 45 days after acceptance of Site 4 (*id.*).

62. Paragraph 1.9, Disposition of Surplus Soil Material and Sod, of § 01010 of the specification as amended by Solicitation/Amendment No. 1 stated:

> a. Approximately 7,500 cubic yards of surplus material shall be removed from Government Property. This material shall be tested to the minimum test requirements specified herein prior to being removed from Government Property. For purposes of bidding, assume this soil will not need to be disposed of as hazardous waste.
>
> b. All remaining surplus material shall be assumed sufficiently clean to be re-used on Government Property

unless free product, strong odors, or visible contamination (e.g., hazardous materials or visible soil stains) is encountered, in which case, work shall be stopped and spill procedures implemented per Section 01560, "Temporary Controls." All surplus material shall be placed in the Soil Disposal Area indicated.

c. The Contractor shall design and construct the soil disposal area to conform to all requirements of Section 01560, "Temporary Controls" and other requirements included in these specifications. The exact limits of the soil disposal area will be determined by the Contracting Officer.

d. The existing Soil Disposal Area is of less than 5 percent slope and has sod.

e. No contaminated soil shall be removed from Government Property by the contractor.

(*Id*.)

63. Paragraph 1.9.2 of § 01010, Stockpile Soil, stated:

> All soil stockpiled for testing shall be temporarily stored on a continuous plastic liner material. Protect stockpiles from wind, precipitation, and runoff by covering with a continuous plastic tarp. Liner and tarp seams shall be bonded, welded, or taped both sides. The stockpile boundaries shall be defined by concrete blocks, timbers, hay bales, or similar materials.

(R4, tab 3)

64. Specification § 01500, CONSTRUCTION FACILITIES, ¶ 1.7, TEMPORARY FENCING, required the contractor to provide temporary fencing around all work including soil disposal areas and the fence was to be relocated or new fencing provided when new areas were released for work (R4, tab 3).

65. Specification § 01560, TEMPORARY CONTROLS, ¶ 3.3.2, Protection of Erodible Soils, required the contractor to plan and conduct earthwork in such a way as to minimize the duration and exposure of unprotected soils (R4, tab 3).

66. Specification § 02102, CLEARING AND GRUBBING, ¶ 3.5.3, Sod Removal and Disposal, said that sod removed from the site could not be disposed of off site, but had to be disposed of at the indicated soil disposal area in accordance with § 02221, EARTHWORK (R4, tab 3).

67. Specification § 02221, EARTHWORK, ¶ 1.2.16.1, On-Site Topsoil, defined that term as "[e]xisting surface soil stripped, amended, and stockpiled on the site." Specification § 02221, ¶ 3.1.5.1, Disposal of Excess Excavated Material, called for placing excess excavated material in designated on site areas in a manner that did not obstruct the flow of runoff or be detrimental to the completed work (R4, tab 3).

68. Specification § 02221, ¶ 3.2.2, Stockpiling Topsoil, provided:

> Strip approved topsoil to a depth of 4 inches from the site where excavation or grading is indicated and stockpile separately from other excavated material. Locate topsoil so that the material can be used readily for the finished grading. Protect and store in segregated piles until needed.

(R4, tab 3)

69. Specification § 02221, ¶ 3.12.4, Disposition of Surplus Soil Material and Sod, provided that the contractor was to place surplus or other soil material and sod not required or suitable for filling, backfilling, or embankment in the soil disposal areas indicated (R4, tab 3).

70. Specification § 02930, TURF, ¶ 1.5.1.1, Sod, allowed sod to be laid from 1 March to 1 May for spring planting and from 15 September to 30 October for fall planting (R4, tab 3).

71. Specification § 02930, ¶ 2.2.1 allowed existing onsite topsoil to be used under offsite topsoil for subgrade. Paragraph 2.2.2, On-Site Topsoil, provided that reusable surface soil stripped and stockpiled on the site was acceptable for use under offsite topsoil only.

72. Specification § 02950, TREES, PLANTS AND GROUND COVERS, ¶ 1.5, Planting Dates, allowed planting same from 1 March to 1 May for spring planting and from 15 September to 28 February for fall planting. Paragraph 2.2.2 of that specification, On-Site Topsoil, provided that on-site topsoil should be applied to planting areas below

off-site topsoil and that such on-site topsoil should not be stripped and placed without stockpiling in approved areas.

73. There were further contract requirements for use of on-site and off-site topsoil for sod areas, ground cover areas, shrub areas and tree pits (R4, tab 315, drawing L-35, detail 8).

74. In June 1998 Dames & Moore (D&M) was under contract with the government for work at the Shoreline Recreation Area, Jackson Park, Bremerton, Washington. The Shoreline Recreation area was located at Elwood Point, the designated disposal site under the contract with PCI. On 5 and 8 June 1998, just after award of the PCI contract (1 June 1998), but prior to commencement of onsite work, D&M discovered ammunition casings below the ground surface while trenching for the installation of silt fencing.[8] (R4, tabs 10, 14)

75. As of 8 June 1998, the work under the D&M contract was suspended until 15 March 1999 to facilitate munitions sweeping and clean-up activities at the Shoreline site (R4, tabs 10, 17). As of 9 June 1998, the soil disposal area at Elwood Point was unavailable for PCI to use (tr. 153). On or about 8 July 1998, a preconstruction meeting was held which was attended by representatives of the Navy and of PCI. At the meeting they discussed the problems at the Shoreline project. PCI was informed that D&M could start working again in March 1999 and they discussed possible soil changes, other options and ways of mitigating costs. (R4, tab 23) The Navy expressed a desire for PCI to mobilize on four sites at once and begin performing certain earthwork in order to deliver about 12,000 of the needed 16,000 cubic yards of excess soil to the Shoreline project by 15 March 1999. The 7,500 cubic yards of material scheduled to be disposed off site would also be delivered to the Shoreline project. (R4, tab 23)

76. PCI expressed three concerns about this request. First, they were concerned about the effect of stripping the whole site and leaving it that way for an extended period, exposing it to weather. Second, they were concerned about the effect of transporting a large quantity of questionable soil through neighboring housing areas. Third, they were concerned about the possible contamination of storm water due to contamination with silt and heavy metals that might be present in the soils. As an alternative PCI suggested that it be allowed to purchase the required soil, and have it delivered directly to the Shoreline project. Under that alternative, the cost of purchasing the required soil off site for delivery to the Shoreline project, in PCI's view, "would be offset by a change in the

[8] Actual on site work by PCI did not commence until 19 October 1998. Prior thereto, appellant worked on submittals (R4, tab 125, QC reports 1 July 1998 to 19 October 1998, Contractor Production Report No. 01).

handling and provision of the topsoil required by the contract, and a credit to the Navy." PCI agreed to prepare and submit a written proposal for that alternative. (R4, tabs 22-23)

77. On 27 July 1998, PCI's Wade sent the following message to the ROICC:

> At the pre-con meeting on 8 July 98, the navy requested that all site grading and excess soil export be accomplished prior to 15 March 1999. To perform the work in that order will require a complete change to the work sequence as presently scheduled, and greatly impact the overall project by creating bare ground that must be stabilized and protected to prevent erosion during the remainder of the contract period, and requiring special provisions for access to the units for demolition and construction. Please confirm that this is the sequence of work desired, as this will require a major rescheduling of the work.

The ROICC responded on 4 August 1998 as follows:

> PER YOUR CONVERSATION WITH SHERRY BARNETT ON 7-29-98, YOU SHALL INDICATE HOW YOU WOULD GO ABOUT PERFORMING THE EARTHWORK. THE PLAN SHALL ADDRESS AREAS REQUIRING THE GREATEST CUTS. SOIL SHALL BE STOCKPILED ON GOVERNMENT PROPERTY, ELIMINATING OFF SITE DISPOSAL. IMPACTS SHALL BE DETERMINED FROM YOUR PLAN.

(R4, tab 18)

78. On 23 October 1998, government and contractor representatives held a Mutual Understanding Meeting. In that meeting they agreed that the contract start date or notice to proceed date would be rolled forward to 19 October 1998 with no additional costs associated with the time change and the contract performance period remaining at 690 days as originally agreed to plus 30 days each for Modification Nos. 1 and 2 for a total of 750 days. (R4, tab 22) Modification No. A00004, however, was unilaterally issued on 10 November 1998, and, as agreed in the 23 October meeting, changed the start date to 19 October 1998 with the contract duration and price remaining unchanged (R4, tab 4).

79. On 17 November 1998, appellant submitted its proposal for modifying contract soil requirements by purchasing the soil needed for the Shoreline project as follows:

> a) PCI will remove the earth mound between buildings 17 A-D, and 17 E-I, and deliver it to the shoreline site, ...
> b) PCI will purchase an additional +-12000 cy of soil and deliver it to the shoreline site.
> c) PCI will work their sites in phases relative to the building renovation to reduce the environmental impact on the area.
> d) At the appropriate time and in conjunction with the building renovation, the existing sod will be turned under and mixed with the existing topsoil, and the whole amended with the proper import material to provide a growing medium consistent with the recommended topsoil composition for this area; the site will be graded to the contract finish grades. Trenches for utilities will be backfilled with the native soil excavated from the trenches. Excess soil, if any, will be used to extend areas indicated to be filled.
> e) In order to provide assurance of a consistent recommended soil condition, Performance will test 52 spots within the site at the governments chosen locations. Any area not within range of acceptable standards may be re-tested up to two (2) places within the same area.
> f) PCI will provide a credit of $41,165 to the Navy

(R4, tab 26)

80. On 15 March 1999, Baldrige noted in his daily report that this day was the due date for soil delivery to the Shoreline project and they were still waiting for direction (R4, tab 125, vol. 7, report 122). As of 16 March 1999, the government had communicated no decision to PCI relative to its November proposal to purchase the needed soil and other provisions, for which appellant had offered a credit. On that date, appellant's project manager advised the ROICC that PCI needs "to have this issue reconciled as expeditiously as possible, since we are ready to begin site work and need to know how to proceed and where to deposit excess soil, especially sod." (R4, tab 35) Thus PCI was not ready to proceed with work involving the soils until 16 March 1999.

81. Baldridge reported that PCI received verbal notice on 24 March 1999 that no soils were necessary for D&M (R4, tab 134). With respect to soil procedures, on 25 March 1999, at a Quality Control meeting, the government directed PCI "to proceed with storm drainage work in accordance with the current contract documents with the exception of soil stockpiling" which was to be stockpiled between units 17 E-I and Meyers Road until further direction from the contracting officers (R4, tab 40). Verbal notice was given to PCI on 29 March 1999 that backfilling with native soil was acceptable except under concrete (R4, tab 125, vol. 7, report 134).

82. Shumway originally was the PCI superintendent on the project (tr. 161-62) and while in that position no on site work was performed (tr. 164). He left PCI on 9 December 1998 in order to form his own company, LMO Construction. Butcher assisted Shumway in starting his company by giving him two excavators worth approximately $17,000 each (R4, tab 191; tr. 240). LMO in turn entered into a subcontract with PCI to perform all of the concrete work, the storm drain work and the playground work. Ultimately LMO also performed phone and cable trenching for PCI and installed conduit (R4, tab 191; tr. 165-66, 239). LMO mobilized on site on 29 March 1999 for its first day of subcontract work (R4, tab 125, vol. 7, report 134; tr. 268). Thereafter LMO performed excavation for and installation of storm drains as well as all the concrete work including sidewalks, patios, and footings (tr. 1119-20).

83. On 5 May 1999, the contracting officer advised PCI as follows:

> You are directed to temporarily stockpile excavated soil on site, east side of 63I–L, then east of 63A–D if additional space is necessary. Any additional costs from this action will be included in PC [proposed change] #003. This PC to also include revised topsoil amending and revised soil testing, as previously discussed. Estimate the request for proposal will be sent to you by 20 May 1999.
>
> The stockpiled soil to be handled and protected per the current contract requirements.

(R4, tab 55)

84. On 28 July 1999, the government advised PCI that it was considering a modification to the contract, PC 3, to REVISE TOPSOIL AND SOIL DISPOSAL REQUIREMENTS, a copy of which was enclosed. The proposed modification included changes to drawings C-15, L-1, L-35 and specification §§ 01010, 01400, 02221, 02930, and 02950. PCI was asked to submit an estimated cost of performing the change on or

before 11 August 1999. The request asked that the estimate show the breakdown of costs as to labor, material, equipment, overhead and profit. Time extensions if requested were to be justified. (App. supp. R4, tab 11) The government's retained landscape architect performed an estimate of the additional cost of performing PC 3 and that estimate, dated 29 July 1999, concluded that the contractor would owe a credit to the government of $38,166. (R4, tab 67)

85. On 10 August 1999 a meeting was held to discuss PC 3 that was attended by representatives from the Navy, PCI, the architects and the landscape architects. The participants discussed the meaning of each paragraph of PC 3 so all would understand what was required and they generally agreed that all parties were desirous of working together to efficiently accomplish the work (R4, tab 68).

86. On 8 November 1999, PCI submitted a soil proposal prepared by its master gardener, which recommended changes and concluded with respect to those recommended changes:

> For the most part we are in compliance with [the] original contract specifications, but not those of the change order.

(R4, tab 71) Appellant stated that the recommended changes would result in no change in contract price, but requested a 180 day time extension for landscape work due to delay in coming to agreement on soil disposal and amendment issues as well as the specified planting seasons. (*Id.*)

87. By letter of 8 December 1999 to the ROICC, PCI called attention to several areas of concern with regard to timely completion of the work, pertinent portions of which follows:

> The first concern is the status of the Soils, PC-3. It is imperative that this issue is resolved as soon as possible. We understand that the A/E is reviewing our proposal, but we have been given no indication how long this will be. We are ready to discuss the issue in depth, and come to an agreement so that we can proceed with our work. The ramifications of PC-3 are not restricted to the quality of the soil, but also involve the planting seasons, and the acquisition of plant material.

> We have already experienced a 10% price increase on our plant order due to the lack of direction on how we should proceed. We have been unable to place a delivery order since we don't know when we can plant, and we do not have the space or facilities to maintain the plants for an extended and unknown period of time. Our proposal provides a no-cost change, while providing a growing medium that meets the contract requirements and disposes of excess soil in accordance with current Navy directives. This should not be a difficult issue to resolve. Please advise us when we can negotiate this change.
>
> . . . .
>
> We have been told that since we have the whole site to work on, these issues have not delayed us. The facts are that any PC that goes unresolved is a [sic] impediment to our progress. PC's that involve site work, involve seasonal planning of the work; and work that cannot be done in dry weather is either postponed or accomplished at addition[al] costs during wet weather. . . . Also, even though we have the whole site, the performance of work not on the critical path, does not help us meet the time limitations of the contract.

(R4, tab 74)

88. On 7 January 2000, PCI submitted a proposal for performing PC-3, which had been requested by the government on 28 July 1999. PCI sought a price increase of $169,870.26 along with a six-month time extension "due to delay in settling this issue." (R4, tab 76) On the same day, PCI submitted a proposal for performing what it termed PC-3A, which was PCI's own Soil Proposal II submitted to the government on 8 November 1999. Among other things, PC-3A offered a credit for deleting direct costs of topsoil in the amount of $76,110 ($44,814 for materials and $31,296 for labor). The proposal for PC-3A gave a net credit to the government of $35,054.57 and also sought a six-month extension "due to delay in settling this issue." (*Id.*; tr. 727)

89. The government advised PCI by letter of 10 February 2000 as follows:

> The Government has completed its technical analysis of your proposal for PC03, Topsoil Requirements and Soil Disposal. In general your proposed method of performance

> in PC3A is acceptable to the Government, however there are areas of the scope that need further clarification. In addition there are elements of cost that have not been fully addressed by your proposal.

(R4, tab 81) Further the government asked PCI to review and respond to several items, several of which concerned technical aspects of the proposal and several of which questioned the absence of a credit for deleted work. The proposal did not include a quote of unit costs for gravel and offsite topsoil, did not provide a credit for deletion of cutting sod, hauling excess soil, stock piling topsoil, scarifying subgrade, or equipment costs for deletion of gravel and topsoil. (*Id.*)

90. Appellant's soils proposal PC-3C, dated 8 March 2000, further refined its estimate and gave a net credit to the government of $18,021.40 and a request for a six month time extension "due to delay in settling this issue" (R4, tab 82).

91. On 4 April 2000, the government issued unilateral Modification No. A00014, directing PCI to make the changes described in PC-3. The modification was further described as follows:

> Negotiations were conducted on 04 April 2000, resulting in a failure of the parties to agree to an equitable adjustment for the changed work. As a result the Contracting Officer has determined the amount of the contract adjustment as follows:
>
> PC# 03 REVISE TOPSOIL AND SOIL DISPOSAL REQUIREMENTS
> AMOUNT: ($47,470.31)
>
> TOTAL MOD AMOUNT: ($47,470.31)
>
> As a result of the ABOVE, the total contract price is hereby decreased BY ($47,470.31) from $7,987,005.31 to $7,939,535.00. An extension of contract time is not required by reason of this modification.

(R4, tab 4) The changed work called for in the unilateral modification reduced the soil disposal requirements by using amended existing topsoil for sod areas, ground cover areas, shrub areas, and for tree pits. The modification also specified the use of local soil for backfill and deleted the requirement for use of off-site topsoil. The trenching

requirements were also reduced by allowing the use of local soil instead of gravel. Any remaining surplus soil was to be placed at Elwood Point, with the testing requirement deleted. (R4, tab 3 at mod. 14) We find as a fact that the principal change made in Modification No. A00014 was the deletion of work.

92. By letter dated 2 December 2000, appellant updated its request for an equitable adjustment due to the change in the soil specification. PCI sought $495,000 in direct costs and $809,174.15 for 635 calendar days of delay measured from the date of the pre-construction conference. PCI recognized in the letter, that some of the 635 days claimed might be concurrent with delays claimed due to other causes. (R4, tab 106)

93. The claim was based on the premise that the original specification was the correct way to do the soil and further states:

> Had Performance been permitted to proceed with the original work and cleared the 6" of soil off from the project, they could then have taken the ground to final sub-grade prior [sic] the installation of the concrete work. They could have saved literally hundreds of thousands of dollars, not to mention months of delay and overhead costs.
>
> Because of the Government's action the contractor was forced to stockpile soil and move it repeatedly because of the Government's failure to timely provide a place to permanently dispose of it. Furthermore excavation for the concrete was far more costly than simply removing all of the soil it [sic] in its entirety in the first place as the original specs called for. By changing the order for the work, Performance has had to work in confined areas with a roto-tiller in an attempt to add the amendments to the soil. This is, of course, more costly than simply buying the pre-mixed soil, having it delivered and spread.

(R4, tab 112 at 5 of 11)

94. Appellant's amended complaint of 12 December 2001 revised upward the amount claimed for changed work related to the soil work to $672,000 although descriptions of the components of that claim did not change. The amended complaint broke down the components as follows:

Effects on storm drain because the project was not taken to sub-grade with large equipment that could move the excavated material expediently offsite and only move it ONCE.

$62,000.00

Effects on Concrete patios and additions because much smaller equipment had to be used due to the confined nature or the area allowed to be worked in and again because the project was not taken to sub-grade with large equipment that could move the excavated material expediently offsite and only move it ONCE.

$196,000.00

Effects on Concrete sidewalks because much smaller equipment had to be used due to the confined nature or the area allowed to be worked in and again because the project was not taken to sub-grade with large equipment that could move the excavated material expediently offsite and only move it ONCE.

$115,000.00

Out of sequence work created additional costs to the project created by Government caused delay in getting answers to Differing Site Conditions which stopped concrete and let other trades go ahead of concrete causing additional costs to be incurred protecting the out of sequence work.

$15,000.00

Double, triple and sometimes quadruple moving of soils because of the Government's failure to reach a decision on where and how to dispose of the excess material.

$112,000.00

Maintaining erosion control on the stockpiles of material that should have been removed under the original contract and therefore would not have had to be dealt with[.]

$84,000.00

Sod Cutting and removal, which would have not been required under the original contract since it, would have been hauled out with the soil while being cut to sub-grade.

$12,000.00

Soil amendments done by hand spreading and roto-tilling, this work is extremely time consuming and labor intense, not to mention having to deal with tree roots, rocks and other obstructions encountered during the process. Under the original contract the amended soil which was clean and free

from rocks roots and other obstructions would have simply been spread compacted and planted or sod applied.

$41,000.00

Fence and maintain entire site which prior to contract was clearly un-maintained by the Government and yet not be allowed to work on the entire site due to the Government Caused Delays[.]

$35,000.00

Total Direct Costs To Date : $672,000.00
Profit 8.5% $57,120.00

(Am. compl. at 6-7 of 10)

95. The Government accepted the first units on 17 August 2000 and accepted the last units on 30 August 2001 (R4, tab 310). By letter of 4 September 2001, the government informed PCI that possession of the subject contract occurred on 30 August 2001 (R4, tab 309).

Decision – Soils

There is no dispute that the government took a long time to determine a resolution to the soils problem. While the problem first arose in June 1998 when the munitions were found at the disposal site, PCI was not ready to commence site work until 16 March 1999, and LMO, which performed a large part of the work involving soils, did not even mobilize on site until 29 March 1999.

Other than delay in decision-making, the biggest problem cited by appellant was the maintenance and movement of several piles of soil on site. However, the contract, in several places required the stockpiling of soil on site. Appellant makes no distinction between work that would have been performed with respect to soil had no problems arose and work that was in fact due to the soil problems.

One element of a case presented on entitlement is to show that some damage was incurred. *Cosmo Construction Co. v. United States*, 451 F.2d 602, 605 (Ct. Cl. 1971). In light of the several cost estimates, both government and contractor, which called for credits due to the changed work, it was incumbent on appellant to show there was in fact a cost increase due to the change. There was no need to be precise, as quantum was reserved. On this record, we conclude that in the context of a modification deleting work, appellant has not proved entitlement to any affirmative recovery. Accordingly, we deny the claim for increased direct costs due to delays and changes to the soil work.

Delay

96. In its amended complaint, appellant alleges there were 635 calendar days from the pre-construction conference until the issuance of unilateral Modification No. A00014 and claims entitlement to 557 days of delay at $1,274.29 per day plus profit at 8.5%. The subcontractor delay rate was stated to be unknown as of the date of the amended complaint and PCI acknowledged that some of the delay might be concurrent with other claimed delays such as electrical. PCI alleged that the 557 days showed the entire delay after reduction for concurrent delay and bilateral modifications. (Am. compl. ¶¶ 44, 54-55)

97. In order to prove its delay claim, appellant offered the testimony of Robert B. Christiansen. Mr. Christiansen testified at length about his extensive experience in the construction industry, primarily in management of construction projects. (Tr. 753-766) Christiansen's first experience with CPM was in 1983 for a barracks construction project using a program called Project Management 2. He thereafter went to work for Triax Company that used a program called Mac Project to do CPM schedules. (Tr. 766) After Triax he went to U.S. General where he used PMS-80, an upgraded form of PMS-02 and later they used SureTrak. He has also run Microsoft Project, another scheduling program. (Tr. 767)

98. With respect to the various programs he had used for CPM scheduling, Christensen was asked on direct if he had been the one who actually prepared the schedules for the projects he had mentioned on which the various scheduling programs were used and he responded as follows:

> In some cases, I've prepared them from start to finish. In other cases, I took them over part way through and did the updates and completed the project. In other cases, . . . I just used it to analyze the data and run what-if scenarios for the claim. . . .

(Tr. 767-68)

99. Christiansen also testified as to his claim preparation experience, which, except for two claims on behalf of a masonry contractor, were claims prepared on jobs he managed or otherwise worked on (tr. 768-72). He participated in preparing the claim that is now at issue (tr. 787, 794, 1040). Christiansen also had prior experience testifying as an expert witness in delay, disruption and impact. In several of the cases, he also prepared a CPM analysis. (Tr. 772-784)

100. Christiansen was allowed to testify as an expert witness on delay, impact, disruption, acceleration and CPM analysis (tr. 785).

101. Christiansen is a personal friend of Butcher (tr. 787). Christiansen knows Shumway as well and his three sons worked for LMO, the primary subcontractor on the job (tr. 788-89). LMO was founded with assistance from Butcher. In order to get his business started Butcher gave Shumway two excavators worth about $17,000 each and agreed to pay LMO rapidly for performance under the subject contract (tr. 240).

102. Christiansen's analysis concludes that the government is liable for 571 days of government caused delays (tr. 813; app. supp. R4, tab 36 at 8 of 8). The basis for that conclusion was a CPM analysis of the entire job, all daily reports, schedules, correspondence, specifications, contract files, and correspondence from the government and it was stated that all concurrent delay was eliminated. (Tr. 815; app. supp. R4, tab 36)

103. Christiansen performed the CPM analysis on his computer, which, when printed, was over 23 feet long. He had no intention of using the analysis at the hearing because he did not want to have to explain it to anybody who had no knowledge of CPM scheduling, and thus he summarized the data in a chart which was a more simplified version for use by the Board (tr. 819, 1065; R4, tab 112; app. supp. R4, tab 36). The computer, on which the analysis was saved, malfunctioned and the program was lost and he was not able to recover it (tr. 819-20). He also discarded the paper working copy (tr. 1065). Christiansen prepared the final delay analysis he used at trial without the benefit of the CPM analysis, he merely extended the bars to take into account the actual dates (tr. 820-21; app. supp. R4, tab 36).

104. Christiansen testified "the critical path runs into soils right after the pre-con and doesn't leave there." When asked why that was, he responded with an opinion concerning how the job should have been done and where the critical path would have been had it been done in that way. (Tr. 821-23) When pressed further by his counsel, Christiansen added that the soils became the critical path because it "was delayed for more than half the job. The soil itself and the landscaping was delayed for more than half the entire project." (Tr. 823)

105. Christiansen believes the government is responsible for acceleration by PCI because he believed the contract required the government to accept the buildings without the landscaping on them and when they did not it forced acceleration (tr. 827-28). However, he bases that position, not on the contract between the parties, but upon a schedule included with an estimate prepared for the government before the job was bid, a schedule that was not available to PCI when the job was bid (tr. 828).

106. Christiansen admitted that he had made up his mind that the government caused 635 days of delay on the soils before he even completed the CPM analysis (tr. 1045-46).

107. Neither Christiansen's initial delay analysis (app. supp. R4, tab 36) nor his final delay analysis (R4, tab 112) nor his expert report (app. supp. R4, tab 36) include the words "critical path." (Tr. 1070, 1073) The methodology used to prepare the CPM is not described in Christiansen's report (tr. 1073). Nowhere in the documents prepared by Christiansen, nor in his testimony does any form of the word "float" appear.

108. Christiansen testified that the preconstruction conference caused the soils to go on the critical path because it stopped soils completely, yet he did not know and could not show on his summary when PCI was ready to commence soils (tr. 1075-76).

109. Christiansen used the baseline from the design basis for the project prepared by a government consultant, because he felt "it accurately depicted the way the contract should have been done" (tr. 1086).

110. The government called Charles R. Heckman (Heckman) as an expert witness. The Board accepted the parties' stipulation that Heckman qualified as an expert on schedule delay, disruption and efficiency.[9] (Tr. 1163-64)

111. Heckman's resume shows that he has been retained as a consultant or expert on over 15 claims, many of which involved claims for delay. His expertise includes CPM scheduling utilizing various software programs including Primavera and SureTrak. He has a Bachelor's of Civil Engineering degree and is a registered professional engineer. (R4, tab 289 at 6)

112. In performing his review of the delay portion of the claim, Heckman reviewed the plans and specifications, modifications, correspondence, project CPM reports, requests for information, Contractor Production Reports (CPR) and Contractor Quality Control Reports (CQCR). He was furnished floppy disks containing SureTrak Project Manager electronic files submitted by PCI on a monthly basis. He was also

[9] Heckman's testimony closely followed his expert report and the supporting documentation, which also included his resume (R4, tab 289). Accordingly, we will refer only to the documents, while recognizing that credibility determinations were based on his live testimony and his report.

provided certified payrolls in a scanned electronic format and he obtained historical weather data from NOAA from the Internet. [10]

113. Twenty-eight modifications were issued under the contract and 10 of them included time extensions. Nine of the 10 were bilateral and the 10th was unilateral. Heckman found several errors in the computation of the revised contract completion dates for those modifications and corrected them, such that as of the final modification granting time, the revised contract completion date was 16 April 2001. (R4, tab 289 at 2 of 16)

114. Heckman adopted PCI's baseline CPM schedule submitted as required under § 01311 of the specifications. Despite certain flaws identified in the baseline schedule Heckman found it to be a realistic and reasonable baseline model for the project because:[11]

> 1) Logic within each subproject is coded. This logic defines the intended sequence of work within each unit.
>
> 2) Logic between subprojects is depicted. This logic illustrates the intended sequence of work between units and buildings.
>
> 3) During construction, the daily CPR's identify work in progress consistent with the work activities included in the [baseline] schedule.
>
> 4) An examination of the as built sequence of work validates the logic coded within units and depicted between units in the [baseline] schedule.
>
> 5) Activity durations are supported by planned manhours coded within the schedule and again validated by the actual durations experienced within the daily CPR's.

[10] Heckman later found the certified payrolls to be incomplete and used other documents to summarize labor hours worked (tr. 1205).

[11] "The . . . schedule is not properly resource loaded. It employs only one resource titled 'LUMPSUM'. This resource tracks manhours per activity. The schedule is not resource driven, in other words the application of this resource does not affect schedule projections." (R4, tab 289 at 3 of 16)

(*Id.* at 4 of 16)

115. As between the analysis prepared by Heckman and by Christiansen, we find the Heckman analysis more credible. Christiansen is too close personally to the principals to assure his opinions are not driven by the relationship rather than the facts; his expertise as an expert in critical path method scheduling is inferior to that of Heckman; and finally, and most critically, he used a baseline schedule which was prepared by unknowns, was not the schedule PCI intended to use, and thus, does not present a viable plan of work against which to compare the actual progression of the work. Accordingly the findings that follow flow only from the report and testimony of Heckman.

116. Heckman analyzed the as built status in five distinct periods of time, identified the controlling activities on the critical path and determined the extent to which delay to the job as a whole was experienced by appellant during each of those periods.

117. The first period analyzed was 16 June 1998 (the day work was scheduled to begin) through 19 October 1998 (the revised start date due to unilateral Modification No. A00004). The revision to the start date delayed the critical path 126 calendar days. On the other hand, Heckman observed that the initial controlling activity on the critical path was Asbestos and Lead Abatement and the preparation, approval and delivery of the approved abatement plan to the asbestos removal subcontractor was delayed 121 days, all concurrent with the delay due to the change in start date.

118. Even though Modification No. A00004 was issued unilaterally, appellant previously had agreed that the contract performance period would be rolled forward at no additional cost to either party, and since appellant was behind schedule on the asbestos abatement submittals, we find as a fact that Modification No. A00004 was for the benefit of both parties.

119. The second period analyzed by Heckman was 19 October 1998 through 1 May 1999. The controlling activity during this period continued to be asbestos abatement and the critical path saved 277 calendar days of float by the end of the period. This was due to asbestos abatement proceeding more efficiently than planned and the beneficence of three bilateral time extensions totaling 81 days which were agreed to without the benefit of a time impact analysis.

120. During the third period examined, 1 May 1999 through 1 April 2000, the critical path shifted to exterior work - excavation, placement of concrete and exterior framing of buildings. The good progress of asbestos abatement was responsible for the shift of the critical path to exterior activities. Further, during this third period, two

bilateral modifications (A00008 and A000013) extended the contract completion date by 47 calendar days and the result is that no project delay occurred during this period.

121. The fourth review period covered 1 April 2000 through 1 November 2000 and the controlling activity on the critical path was landscaping. There were minus 23 calendar days of float at the end of the period. The contract completion date was extended during this period for a total of 49 calendar days (Modification Nos. A00020 and A00022). Heckman concludes that 11 calendar days of delay due to landscaping activities occurred during this period of time. We find the delay due to landscaping changes.

122. The fifth and final period reviewed was 1 November 2000 through 8 June 2001. This period ended with –74 days of float on the critical path. After contract completion, bilateral Modification No. A00028 extended the contract completion date by 21 days to 16 April 2001 which reduced the final project completion delay to 53 calendar days. Heckman attributed 42 calendar days of delay during this final period to poor performance on the interior final activities (finish hardware, final clean and inspection).

123. Heckman also analyzed the weather data for the area and made conclusions with respect to the number of days of abnormally severe weather that were concurrent with other delays. However there is no credible proof of the extent to which abnormally severe weather actually affected the work. We therefore make no findings with respect to weather.

124. Finally, Heckman analyzed appellant's claim that a dramatic loss of efficiency occurred due to soil related activities. He used the planned labor in the baseline schedule since no detailed bid worksheets were available and compared it with actual man-hours reported on the daily CPRs since a complete set of certified payrolls was not available.

125. He reviewed the landscaping subcontractor labor hours expended and concluded that there was no documented overrun for landscaping. He also reviewed budgeted labor for LMO. LMO was the subcontractor created by Shumway with assistance from Butcher. That subcontractor performed demolition, excavation, concrete excluding walks, demolition of carports, excavation for carports, concrete for carports, clearing and grubbing, storm drains, water distribution, gas distribution, and concrete including walks. The CPR's indicate that LMO performed interior concrete work even though it was not part of planned labor, so Heckman included planned labor from the baseline in the total planned labor (25,825 hours) and compared it with actual labor hours reported for LMO (33,229 hours). The result is an overrun of labor experienced by LMO of 7,404 or a variance of 29%. (R4, tab 289 at 15 of 16)

126. There is no credible proof that appellant was on standby or unable to take on other work during any period of contract performance.

Decision – Delay damages under the Eichleay formula

Appellant has not demonstrated that it is entitled to any delay damages. The government analysis allows a basis for a determination of an amount of delay to which appellant may be entitled. Based upon the time extensions granted, most of which were bilateral and inclusive of all costs, appellant finished 136 days beyond the contract completion date. Eleven days were due to landscaping changes and we grant a time extension for those days. However, appellant has failed to show that it was on standby or was unable to take on other work, both of which are critical elements of a claim for Eichleay damages for unabsorbed home office overhead. *Charles G. Williams Construction, Inc. v. White*, 271 F.3d 1055, 1058 (Fed. Cir. 2001).

Appellant is entitled to a time extension of 11 days with no unabsorbed overhead associated therewith. Otherwise the claim is denied.

CONCLUSION

Appellant is entitled to a time extension of 11 days but not to unabsorbed overhead. The appeal is denied in all other respects.

Dated: 11 July 2005

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53575, Appeal of Performance Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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