ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Fru-Con Construction Corporation	)	ASBCA Nos. 55197, 55248
	)	
Under Contract No. DACW69-93-C-0022	)	

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

At issue are quantum disputes resulting from our earlier decision on entitlement in two consolidated cases involving a contract to rehabilitate the existing dam and deactivate the old locks at the Robert C. Byrd Locks and Dam on the Ohio River. *Fru-Con Construction Corp.*, ASBCA Nos. 53544, 53794, 05-1 BCA ¶ 32,936, *recons. granted to clarify award and otherwise denied*, 05-2 BCA ¶ 33,082. ASBCA No. 53544 was a pass-through claim by appellant Fru-Con Construction Corporation (Fru-Con) on behalf of its subcontractor Noell, Inc. (Noell) in which we concluded that appellant was entitled to a contract time extension of eight days associated with the difficulty of identifying the cause of the apron seal interface problem on Roller Gate No. 1 after the poiree dam had been deleted, together with an appropriate corresponding adjustment to the contract price and reasonable contract administration costs, if any, associated with preparation of the Request for Equitable Adjustment (REA) by Navigant Consulting (Navigant) and Seyfarth Shaw LLP. *Fru-Con*, 05-1 BCA at 163,164. ASBCA No. 53794 was a government claim for deductive change time credits in which we concluded that the government was entitled to a credit of 84 days associated with its waiver of 14-day commissioning periods, together with an appropriate contract price adjustment. *Fru-Con*, 05-1 BCA at 163,168, *as clarified by* 05-2 BCA at 163,986.

The parties were unable to resolve the quantum issues. An appeal associated with Fru-Con's quantum claims was docketed as ASBCA No. 55197; an appeal associated with the government's quantum claims was docketed as ASBCA No. 55248. The two quantum appeals were consolidated for a four-day hearing and decision. We refer to our earlier entitlement opinion as necessary to resolve the quantum disputes now at issue in these appeals.

Appellant called Mr. David M. Lynch, Jr. of Navigant as an accounting expert on the cost items contained in a report that he prepared and he testified as an accounting expert without objection by the government (ex. A-14; tr. 2/201, 213-15). The government called Mr. Stuart Ockman as an expert in scheduling, construction means and methods, estimating and cost engineering (tr. 4/12). Appellant objected to Mr. Ockman's qualifications as an expert with respect to matters relating to cost accounting, and in particular with respect to the field and home office overhead calculations for Fru-Con and Noell (tr. 4/21, 23). The presiding judge acknowledged the distinction between a cost accounting expert and a construction expert with specialized knowledge of construction means and methods, estimating and cost engineering and permitted Mr. Ockman to testify (tr. 4/25). We have not relied upon Mr. Ockman for any cost accounting expertise.

Additionally, the presiding judge left the record open at the conclusion of the hearing for the purpose of permitting the government to file a Defense Contract Audit Agency (DCAA) report pertaining to Fru-Con's mark-ups and allowing appellant to take appropriate related discovery. The government timely filed with the Board this DCAA audit report, which was marked exhibit G-26 and is included in the hearing record. It does not appear that appellant found it necessary to take any discovery on exhibit G-26. Instead, it filed a motion for leave to admit the affidavit of Fru-Con employee Eric Anderson as exhibit A-19, which responded to exhibit G-26. The government has not opposed this motion. Accordingly, appellant's motion is granted and exhibit A-19 is also included in the hearing record.

ASBCA No. 55197

At the direction of the Board, appellant prepared and filed a Statement of Costs it claims in ASBCA No. 55197. The Statement of Costs was amended twice. (Ex. A-17) Interest under the Contract Disputes Act (CDA) is claimed from 28 December 2000, the date upon which appellant submitted its REA to the contracting officer. *Fru-Con*, 05-1 BCA at 163,155. The following claim items are included in the Second Amended Statement of Costs:

I. Contract Time Extension: Eight Days. $47,454

II. Direct Costs Impacted by Poiree Dam Deletion

Divers (plus overhead and profit) 86,645
Surveyors (plus overhead and profit) 69,066
Remedying Gate 1 (plus overhead and profit) 904,828

III. Gate Openings before November 30, 1996 250,000

IV. Contract Administration 733,709
(Revised at the hearing to $736,158)

Subtotal $ 2,091,702

V. Home Office Overhead Rate: 5.87%

VI. Profit Computation: 15%

VII. Fru-Con Markups 661,552

Total $ 2,753,254

VIII. Interest (from 28 December 2000 until paid)

The parties reached several stipulations at the hearing for purposes of ASBCA No. 55197 only. For Noell, for Claim Item I they stipulated a field overhead daily rate of $4,872 and for Claim Item V they stipulated a home office overhead rate of 5.87 percent. For Fru-Con, they stipulated a home office overhead rate of 4 percent and a bond and insurance rate of 1.32 percent, both of which are included as part of Claim Item VII. (Tr. 1/8) We apply these stipulations as appropriate.

There is no presumption as to appellant's Second Amended Statement of Costs and it bears the burden of proof on each of its claimed cost items. *See Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 05-1 BCA ¶ 32,903 at 163,109, *modified on other grounds on recons.*, 05-2 BCA ¶ 33,073; *Frank Lill & Son, Inc.*, ASBCA Nos. 44523, 44524, 96-1 BCA ¶ 27,951. It must prove both the reasonableness of each cost claimed and its causal connection to the event upon which the cost is based. *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 53447, 04-1 BCA ¶ 32,478 at 160,635; *J.W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053 at 124,863. The proof must be

sufficiently certain so that a determination as to the amount for which the government is liable is more than mere speculation. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987). If appellant fails to provide reliable evidence to substantiate its quantum recovery, its claim fails for lack of proof. *See Reese Industries*, ASBCA No. 29029, 86-2 BCA ¶ 18,962 at 95,746.

Contract Time Extension

Findings of Fact

In Claim Item I of its Second Amended Statement of Costs, appellant seeks $47,454 in damages for Noell for the eight days of extended contract performance time we awarded. It computes the amount claimed by using the stipulated Noell daily rate of $4,872, plus the stipulated Noell home office overhead rate of 5.87 percent from Claim Item V, multiplied by eight days ($4,872 x .0587 = $286 + $4,872 = $5,158 x 8 = $41,264). It then adds 15 percent profit from Claim Item VI ($41,264 x .15 = $6,190) to reach its total of $47,454. (Ex. A-17 at 4)

Noell's bid and subcontract included 15 percent profit (R4, tab H-1; tr. 1/232). There was no evidence, however, that Noell ever received 15 percent profit on any modification on this contract.

Installation of the poiree dam was deleted from the contract work by Modification No. P00029 under the Changes clause on 18 December 1995. The modification did not address or resolve possible cost or time impacts relating to installation of the roller gates. *Fru-Con*, 05-1 BCA at 163,146. Noell used 10 percent profit in the initial REAs it prepared and submitted via Fru-Con to the government in 1995 relating to additional work it claimed resulted from the deletion of the poiree dam (R4, tab I-2 at 4 of 4, tab I-6, part I at 3-12, part II at 3-5). A profit of 10 percent was also used in the REA prepared by Noell's first consultant, Revay and Associates (Revay), and submitted to the government on 29 October 1996 (R4, tab G-13 at 3-11). *Fru-Con*, 05-1 BCA at 163,146. Noell experienced a substantial loss on its subcontract (tr. 2/156-57, 164, 219).

Discussion

The government's position is that appellant is not entitled to contract time extension damages because there was no overall delay on the project. It asserts that its waiver of the commissioning requirement, for which we awarded the government a credit of 84 days, enabled appellant to complete the project earlier than it otherwise would have and resulted in a net schedule improvement of 76 days.

We concluded that appellant was entitled to an eight-day compensable contract time extension for additional work associated with identifying the cause of the sill seal interface problems Noell encountered when installing roller Gate No. 1 after the government deleted installation of the poiree dam. *Fru-Con*, 05-1 BCA at 163,162. While it is true that we also awarded the government a contract time credit of 84 days because it waived the commissioning requirement on six of the eight roller gates and that there was a net improvement to the contract schedule, we view the government's argument as one that relates to a possible set-off. *See Johnson v. All-State Construction, Inc.*, 329 F.3d 848, 852 (Fed. Cir. 2003) (government has common law right of set-off). The government's argument overlooks the theoretical possibility that the damages may be different in different time periods. Accordingly, we must determine the quantum of appellant's entitlement in ASBCA No. 55197 and the quantum of the government's entitlement in ASBCA No. 55248.

As noted above, the parties stipulated to a daily rate of $4,872 for Noell's field overhead and a fixed rate of 5.87 percent for its home office overhead. Appellant's reliance upon *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364 (Fed. Cir. 2003), as authority for recovery of Noell's home office overhead, however, is misplaced (app. br. at 50). The issue here is extended home office overhead, not unabsorbed home office overhead computed by the so-called *Eichleay* formula resulting from a stand-by of an uncertain duration. Extended home office overhead is recoverable as a fixed percentage mark-up of costs incurred from a contract time extension due to changed or additional work. *See C.B.C Enterprises, Inc. v. United States*, 978 F.2d 699, 671-72 (Fed. Cir. 1992); *Sherman R. Smoot Corp.*, ASBCA No. 52261, 01-1 BCA ¶ 31,267 at 154,453; *C.E.R., Inc.*, ASBCA Nos. 41767, 44788, 96-1 BCA ¶ 28,029 at 139,934. Noell's stipulated 5.87 percent home office overhead is applicable to its daily rate of $4,872, a recovery of $41,264 for eight days.

As to profit, the government contends that, when the weighted guidelines and the fact that the Suspension of Work clause excludes profit are considered, Noell's profit rate should be 10 percent. The contract modification deleting the poiree dam, however, was issued under the Changes clause, not the Suspension of Work clause.

Noell is entitled to recover a "reasonable and customary allowance for profit," notwithstanding the fact it suffered a loss on the contract. *See Stewart & Stevenson Services, Inc.*, ASBCA No. 43631, 97-2 BCA ¶ 29,252 at 145,522, *aff'd on recons.*, 98-1 BCA ¶ 29,653. We believe that 10 percent profit for Noell in this case is reasonable inasmuch as it is the rate used both by Noell itself and its first consultant for the REAs initially submitted to the government through Fru-Con. There was no evidence that Noell received 15 percent profit on any modification performed on this contract. The profit for Noell at 10 percent for the contract time extension is thus $4,126.

In sum, we award a total of $45,390 for Noell's costs associated with the eight day contract time extension ($41,264 + $4,126 = $45,390).

Direct Costs Impacted By Poiree Dam Deletion

Preliminary Findings of Fact

Claim Item II of appellant's Second Amended Statement of Costs seeks a total of $1,060,539 in direct costs for Noell that appellant asserts were proximately caused by deletion of the poiree dam: $86,645 for divers, $69,066 for surveyors, and $904,828 for Gate No. 1 repairs (ex. A-17, tab II). These same costs were included in the REA prepared by Navigant (R4, tab C-1 at 45-50). Noell's home office overhead at the stipulated rate of 5.87 percent and profit at 15 percent are added to these direct costs.

The government moved to strike Claim Item II. We denied the motion, allowing appellant the opportunity to come forward with hearing evidence of the causal connection and resultant injury associated with our findings on entitlement with regard to Gate No. 1. *See LA Limited, supra*, 04-1 BCA at 160,635.

Paragraph 5 of the Fru-Con/Noell subcontract excluded dewatering and the installation and removal of the poiree dam from Noell's scope of work. Consistent with the prime contract specifications, the construction schedule attached to the subcontract indicated that no work would be performed during the 1 December through 31 May seasonal restriction, referred to by the government as the "winter shut-down." *Fru-Con*, 05-1 BCA at 163,139 and 142.

Appellant's Impact Period I (1 June 1994 to 7 September 1994) addressed the deletion of the poiree dam. Our conclusion regarding its impact claim for this period was as follows:

> With respect to Impact Period I, we found that appellant was responsible for the late installation of the upstream bulkheads, the late delivery of Gate No. 1, and the delay in removing the old gate. While we accept, conceptually, the concept that installation of the roller gates should be more difficult to perform in wet conditions than in dry conditions, any impact resulting from the deletion of the poiree dam cannot be evaluated without taking into account the possible impact resulting from these earlier performance delays.

Fru-Con, 05-1 BCA at 163,162.

In Impact Period II (7 September 1994 to 24 September 1995), appellant claimed 115 days of compensable delay associated with the inspection and evaluation of seal difficulties with Gate No. 1, which it alleged would have been immediately apparent had the work been performed in a dewatered state. *Fru-Con*, 05-1 BCA at 163,148. We rejected appellant's analysis because it did not acknowledge any responsibility for the fabrication defects related to the seal interface misalignment which created the need for the Gate No. 1 inspections. Nevertheless, we went on to conclude:

> We recognize, however, that the evidence did establish that it was more difficult to identify the cause of the problem using divers than it would have been if the gate bay had been dewatered. The government's expert estimated that five to ten days represented a reasonable amount of time for divers to take measurements and check the seal, and he allowed eight days for this work. We adopt his estimate.

Fru-Con, 05-1 BCA at 163,162.

We summarized the government's expert report on this issue as follows: "He . . . thought that a reasonable amount of time (five to ten days) should be allowed for Noell to take measurements and survey roller Gate No. 1 to the extent that this work was more difficult in the watered condition. He allowed eight calendar days in his analysis." *Fru-Con*, 05-1 BCA at 163,148 (citation omitted). His conclusion included the work of both divers and surveyors and, consequently, so does ours.

The Corps authorized appellant to proceed with installation of Gate No. 2 pending resolution of the problems with Gate No. 1, subject to temporary repairs which were completed on 20 or 21 September 1995. Permanent repairs were not made until the late summer and fall of 1999. *Fru-Con*, 05-1 BCA at 163,147. The upstream bulkhead for Gate No. 2 was installed on 24 September 1995. *Id*. at 163,148.

Appellant asserts that deletion of the poiree dam made it necessary for Noell to perform four separate gate installation activities identified on the Goldmann schedule in wet, rather than dry, conditions: 1.18, Adjusting of sill seal; 1.19, Install and adjust side seal; 1.20 Metalize, touchup and paint the installation joint; and 1.21, Gate testing. Through the testimony of Mr. David Nibert, Noell's general foreman on the project, appellant compared the differences between the planned performance in the dry with actual performance in the wet for all eight gates (tr. 1/23-64). (App. br. at 5-12) The testimony of Mr. Ockman was the same as it had been at the entitlement hearing: He

opined that deletion of the poiree dam made installation of the gates 2 through 8 more efficient. (Exs. G-14, -20 at 11; tr. 4/38, 62)

Preliminary Discussion

Appellant first quotes the following excerpt from the quotation provided above from our conclusions regarding Impact Period I: "[W]e accept, conceptually, the concept that the installation of the roller gates should be more difficult to perform in wet conditions than in dry conditions" (app. br. at 5). It reads this excerpted language to be a conclusion that it is entitled to all of the extra direct costs it claims it incurred as a result of the government's deletion of the poiree dam. Citing *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348-49 (Fed. Cir. 2000), it asserts that a contractor need not establish delay to succeed on claims for direct impact costs under the Changes clause.

The government responds that appellant has not shown that there is any causal connection between the eight days we awarded and the claimed direct costs. It repeats the argument it made during the entitlement hearing; namely, that deletion of the poiree dam had a positive impact because it resulted in the elimination of several construction activities and enabled the gates to be installed much faster than had been planned (gov't reply at 12).

We consider appellant's contentions as revisiting entitlement issues that have already been decided. The excerpt from our decision upon which it relies is taken out of context. We did not reach the conclusion it wishes we had reached. Rather, we simply stated that, conceptually, we thought it should have been more difficult to install the roller gates in wet conditions. This was not a broad finding that the work actually was more difficult, much less a finding of entitlement to direct cost impacts appellant alleges were the result of the deletion of the poiree dam. The excerpt is *dicta* that must be read in the context of our discussion and conclusions regarding appellant's Impact Periods I and II in which we attributed to appellant the responsibility for late installation of the upstream bulkheads, late delivery of Gate No. 1, delay in removing the old gate and, most significantly, the responsibility for the fabrication defects that caused the seal interface misalignment. Our conclusion was only that it was more difficult to *identify* the reason for the misaligned seal on Gate No. 1 in a watered condition and that appellant was "entitled to a contract time extension of eight days, together with an appropriate corresponding adjustment to the contract price." *Fru-Con*, 05-1 BCA at 163,164.

Appellant's reference to our discussion of Modification No. P00029 as recognizing the distinction between its direct and delay costs is also taken out of the context of our decision. We did not find entitlement to any direct costs apart from those associated with the eight-day contract time extension. Thus, appellant's contentions

relating to legal authority that permits recovery of the difference between the reasonable cost of its as-planned work and the reasonable cost of its as-built work are inapposite. The government's deletion of the poiree dam was the proximate cause of extra direct costs incurred by Noell during the eight days we awarded for identifying the problem with Gate No. 1. These are the only direct costs for which the government has liability. *See Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000).

In any event, we have no confidence that appellant's comparison of performance in the watered condition with the Goldmann as-planned schedule provides a reliable measure of the difference between what did occur and what should have occurred if the poiree dam had been installed. We considered the evidence relating to the Goldmann as-planned schedule at length in our entitlement decision in conjunction with appellant's contention that it was entitled to recover under Noell's early completion schedule. We concluded:

> In sum, the evidence simply does not support the conclusion that Noell's early completion schedule was reasonably feasible and attainable and that Noell had the capability of completing installation of the roller gates by 30 November 1996.

Fru-Con, 05-1 BCA at 163,161.

Findings of Fact for Diving and Survey Costs

(1) Divers

Divers were needed to measure the apron seal gap underwater after the poiree dam was deleted (tr. 4/85-86, 94). Based upon his belief that the deletion of the poiree dam caused Noell to hire divers to work on the sill seal, the side shields and gate testing, appellant's accounting expert, Mr. Lynch, concluded that all costs related to the divers were the "direct and proximate result of the deletion of the poiree dam" (tr. 2/234). He acknowledged that our award of eight days was based upon the testimony of the government's expert, but disregarded it because he disagreed with our conclusion and considered it to be only a reflection of schedule delay on Gate No. 1 (tr. 3/122-26). We find this testimony is not only beyond the scope of Mr. Lynch's accounting expertise, but also provides an opinion on the ultimate legal issue of proximate cause, the resolution of which is our responsibility. *See* FED. R. EVID. 702, 704.

The invoices from Commercial Diving Service, Inc./American Inland Marine, Inc. are included as exhibits to Mr. Lynch's report. The government stipulated that all of

Noell's claimed direct diver costs, a total of $71,166, were supported by invoices for incurred costs accurately recorded in Noell's job cost report, as verified by Mr. Lynch ($33,702 in 1995, $6,533 in 1996, $2,171 in 1997, $15,666 in 1998, and $13,095 in 1999). Appellant adds 5.87 percent home office overhead and 15 percent profit for Noell to bring the total amount claimed for divers to $86,645. (Ex. A-14, tab 12; tr. 2/214-15, 227, 233-34, 3/6-7)

The invoices establish costs for daily round trips, mobilization and demobilization, regular eight-hour shifts and overtime for a four-man and a five-man dive crews, and miscellaneous equipment costs. There are 7 invoices for 13 days of diving services during Impact Period II, including one day on which the crew was on standby, resulting in 12 days of actual diving. Not all of the invoices specifically identify diving relating to Gate No. 1; however, only Gate No. 1 work was being performed during Impact Period II. The total of these invoices is $30,121.94. There are three invoices relating to Gate No. 2 in 1995 and 1996, and ledger entries for 1997, 1998, and 1999. (Ex. A-14, tab 12; tr. 3/123-24)

In her 11 February 2002 final decision, the contracting officer tentatively recognized the cost of divers to test the seals in the wet, but found it to be off-set by other cost savings (R4, tab B at 46). Mr. Ockman thought the divers should have obtained all of the information they were going to get in the first few dives and computed a daily rate of $2,400 for four days to which he added home office overhead and 10 percent profit, for a total of $11,179.87 (ex. G-20 at 3-4; tr. 4/32-38).

(2) Surveyors

There were a number of different theories about what was causing the sill seal misalignment on Gate No. 1, one of which related to the gears. Noell contacted ImTEC Group, Ltd. (ImTEC), an industrial measurement technology engineering consultant, to perform survey measurements to determine whether the gears were in sequence. (Tr. 1/79-81)

The invoices from ImTEC are included as exhibits to Mr. Lynch's report. The government stipulated that all of Noell's claimed surveyor costs, a total of $56,727, were supported by invoices for incurred costs accurately recorded in Noell's job cost report, as verified by Mr. Lynch ($43,988.25 in 1995 and $12,739 in 1996). Appellant adds 5.87 percent home office overhead and 15 percent profit for Noell to bring the total amount claimed for surveyors to $69,066. (Ex. A-14, tab 13; tr. 2/215-17, 227-28, 3/10-13)

The invoices establish the costs for a two-man team and computerized measuring equipment, together with travel, lodging and meal expenses. Three of the invoices reflect

six days of actual surveying during Time Impact Period II, but do not specifically identify Gate No. 1, although this was the only work being performed at the time. The total of these three invoices is $27,820.77. There is also an invoice for a consultant who attended two days of meetings with Noell, Fru-Con and the government on 7 and 8 August 1995, about which there was no testimony. The remaining invoices are for surveying services for Gate No. 2. (Ex. A-14, tab 13) Mr. Lynch included all of these costs in the claim because of the unknown nature of the problem with Gate No. 1 (tr. 1/83-84, 3/11). Thereafter, Noell performed the survey quality control function and Mr. Nibert concluded from the measurements taken from Gate Nos. 2 and 3 that the apron section on Gate No. 1 had not been properly welded on the roller gate. *Fru-Con*, 05-1 BCA at 163,147, and 151.

The government's expert concluded that appellant should be reimbursed only for the surveys performed 30 June and 1 July 1995, because he thought these surveys should have identified the fabrication problem. This would be a total of $8,008.67, plus home office overhead and 10 percent profit. (Ex. G-20 at 4; tr. 4/84-85)

Discussion of Diving and Survey Costs

Appellant asserts that the contracting officer admitted in her final decision that Noell was entitled to diver costs. Inasmuch as appeals from contracting officer decisions to this Board are *de novo,* however, we are not bound by her findings. 41 U.S.C. §§ 605(a), 609(a)(3). *See Wilner v. United States*, 24 F.3d 1397, 1402-03 (Fed. Cir. 1994).

Appellant also asserts that the government's stipulations as to the diving and survey costs are binding as to the amount we must award. This is also incorrect. The government stipulated only that the costs reflected on Noell's job costs reports were incurred and supported by invoices. It did not stipulate to causation. Indeed, it has continually asserted that appellant's claims for the diving and survey costs are outside the scope of our entitlement decision. It even disagrees with its own expert on this issue because of the amounts he found due for these claim items.

We conclude that there is ample evidence in the record for us to make a fair and reasonable approximation of Noell's direct costs for diving and surveying for eight days using a jury verdict approach. We previously determined that eight days was a reasonable period of time to inspect Gate No. 1 and take measurements and there is no more reliable method of computing damages. *See Dawco Construction, Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991), *overruled on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (*en banc*); *Grumman Aerospace Corp. (on behalf of Rohr Corp.)*, ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,646; *Triple*

"A" South, ASBCA No. 46866, 94-3 BCA ¶ 27,194 at 135,543. Indeed, on this record, we consider ourselves to be under an obligation to award such damages. *See S. W. Electronics & Mfg. Corp. v. United States*, 655 F.2d 1078, 1088 (Ct. Cl. 1981). In this regard, we note that Mr. Ockman's computations appear to be his version of a jury verdict, but with inappropriate adjustments to our entitlement findings.

We compute our jury verdict for Noell's diving and surveying costs as follows. Noell incurred costs for 12 days of diving, $30,121.94, and 6 days of surveying, $27,820.77, during Impact Period II attributable to Gate No. 1. This is a total of $57,943 which we divide by the 18 days of work this amount represents to arrive at an average daily cost of $3,219 for both diving and surveying. We multiply this average daily cost by the eight days we found was a reasonable amount of time to identify the problem with Gate No. 1 in the watered condition to conclude that Noell is entitled to recover $25,752 in direct diving and surveying costs. We add home office overhead at 5.87 percent ($25,752 x 5.87% = $1,512 + $25,752 = $27,264) and 10% profit ($27,264 x 10% = $2,726 + $27,264 = $29,990) for a total of $29,990.

In sum, we award a total of $29,990 for eight days of diving and surveying costs incurred by Noell in its attempts to identify the problem with the sill seal on Gate No. 1.

Findings of Fact Relating to Remediation of Gate No. 1

Appellant seeks a total of $904,828 for remediation of Gate No. 1, including detaching, repairing and reattaching the end/side shields and seals, on grounds the deletion of the poiree dam made it more costly for Noell to perform this work. The costs included in this claim item include: (1) $699,788, described as representing the 1995 recorded costs of work in the watered condition; (2) $12,295 to repair end shields and rubber seals; and (3) $260,224, described as the recorded cost of the 1999 correction plan. The total of these three items is $972,307. (Ex. A-17, tab II-C) The government did not ask DCAA to audit these costs (tr. 1/108-09). An estimate of $229,125, representing the cost of performing the work in a dewatered condition, is then subtracted to produce an adjusted total of $743,182 in claimed direct costs for remediation of Gate No. 1. Appellant then adds 5.87 percent for home office overhead and 15 percent profit for Noell to bring the grand total claimed for Gate No. 1 remediation costs to $904,828. (Ex. A-17, tab II-C)

(1) 1995 Labor Costs

The $699,788 in recorded costs is comprised of Noell's 1995 labor costs. Installation of Gate No. 1 began on 4 December 1994 with the hanging of the roller gate and welding the installation joint on the three apron sections. By 12 February 1995,

Noell had welded and adjusted the end/side shields after which it lowered the partially completed gate into the water in order to place it into operation. *Fru-Con*, 05-1 BCA at 163,147. This work was performed during the winter shut-down period because Noell was behind schedule (tr. 1/141). The contract did not permit use of a poiree dam during the winter months. *Fru-Con*, 05-1 BCA at 163,139.

Unfortunately, because of the apron misalignment, the rubber seal on the end/side shield of the driven end of the roller gate was cut when the Gate No. 1 was lowered (tr. 1/90-91). Mr. Nibert thought that the shields had been installed as a temporary measure so that Noell could move on to Gate No. 2 (tr. 1/140-41). Noell's as-planned schedule shows installation and adjustment of the end/side shields as being performed after the gate bay had been dewatered; however, Fru-Con's approved schedule shows this work and welding of the gate sections would be performed before installation of the poiree dam and dewatering. *Fru-Con*, 05-1 BCA at 163,141 and 143.

When Noell encountered difficulties with Gate No. 1, Mr. Frank Hagen, then Noell's chief financial officer, instructed the accounting staff to capture the impacted labor costs (tr. 1/207, 219-20). Noell performed some remedial work on Gate No. 1 in 1995 before it was allowed to proceed to Gate No. 2 because the government wanted the gate operational in case of an open river condition. *Fru-Con*, 05-1 BCA at 163,147. The remedial work included welding the girth, the end/side shield that had been damaged, and a temporary steel plate to fill the sill gap (ex. G-20 at 8; tr. 1/93-94, 162-63). Noell kept idle welders who were government certified on the payroll to be available to make further welding repairs, if needed, on Gate No. 1 (tr. 1/120-23).

According to Mr. Lynch, the $699,788 claimed for labor consists largely of idle labor beginning in February 1995 and ending in September 1995 when the temporary repairs were made to Gate No. 1 and work commenced on Gate No. 2 (ex. A-14 at 9-10 and tab 14; tr. 3/33-39). The first entry in Noell's job cost report for these labor costs is $465,833 for April 1995, which includes labor costs beginning in February 1995, so that the entry actually represents two and one-half months (tr. 1/220-21, 3/36-37). Even so, the April entry is substantially higher than those for subsequent months (tr. 4/56-58). The job cost report shows entries of $36,900 for May, $94,367 for June, and $81,375 for July. There was no entry for August. The claimed September costs, $21,313, were captured in a different report. The job cost report entries identify the claimed costs as being incurred for idle "Carpenter[s]." (Ex. A-14, tab 14; tr. 1/221-23, 3/37-38) This is obviously an inaccurate description since the testimony indicated that most of the labor costs related to idle welders.

(2) End/Side Shield and Rubber Seal Repairs

Appellant seeks $12,295 for Noell's repairs to the end/side shield and rubber seal. The amount claimed is for replacement material and labor and is based upon an internal Noell memorandum dated 29 November 1995 (tr. 3/31-32). Although not explained, it appears to be an estimate. There is no invoice or other documentation to support either the memo or the costs claimed. (Ex. A-14, tab 14) Mr. Lynch included the cost because project personnel told him they would have seen that the cut was going to occur and would have avoided it if the bay had been dewatered (tr. 3/33).

(3) 1999 Correction Plan

Noell did not raise Gate No. 1 until 23 August 1999 (R4, tab C-2, append. 11). Mr. Nibert conceded that it could have been lifted in 1995. *Fru-Con*, 05-1 BCA at 163,147. At a meeting on 15 September 1999, Noell personnel discussed the 13 September 1999 survey results and considered the best way to correct the problem with Gate No. 1 was to remove the whole apron and reposition it (R4, tab Q). The apron modification plan submitted on 30 September 1999 states that, based upon the results of the 13 and 20 September 1999 surveys, the assumption that the rim gear was out of time was incorrect. Instead, the "apron over the full length [was] out of tolerance." The plan was "to correct apron over full length." (R4, tab S-170)

Appellant identified $260,224 for repairs to Gate No. 1, beginning 31 August 1999 and ending 24 November 1999. The costs were recorded in Noell's job cost reports for three work activities identified by cost code numbers 283, 284, and 285 (ex. A-14, tab 14; tr. 3/22). The first was "Clean & Sandblast Welds," work that was necessary and included because the gate had been in the water for four years (tr. 1/113-14). The second was "Weld Repairs & Snipes lab[or]." The welding repair work involved sandblasting and cutting the apron loose and re-welding of the side shields and the apron attachment. The welds had an adverse affect on the snipes areas inside the gate, resulting in the need for additional painting. (Tr. 1/114-16, 3/24-26, 28) The third was "Repair Rim Gear/Knife Ed[ge]," work that involved weld repairs to the gears and cleaning the temporary steel plate Noell had installed to fill the gap (tr. 1/116-17). Mr. Lynch found no reason to question the recorded costs and was satisfied when told that costs had been reviewed, evaluated and found to be accurate by Noell personnel (tr. 3/30-31).

(4) Adjusted Total of Claimed Remediation Costs

Mr. Lynch computed a cost of $229,125 to repair Gate No. 1 in a dewatered condition (tr. 3/44). He first asked Mr. Doetleff Kasdorff to prepare an estimate for him (tr. 3/44-46). Mr. Kasdorff was a Noell construction engineer and scheduler who had

assisted with the Noell/Fru-Con subcontract negotiations in 1993. *Fru-Con*, 05-1 BCA at 163,141. Mr. Kasdorff did not testify at the quantum hearing. Mr. Lynch explained that in March 1999, Mr. Kasdorff prepared an estimate of the cost to repair Gate No. 1 in a dewatered condition that was entitled "Byrd Dam Repair of GATE 1 in Place Rimgear Modification." He understood that Mr. Kasdorff had identified the activities that would be impacted by Gate No. 1 repairs, applied schedule durations and then estimated that the repair work would take 32 days and cost $282,000, a daily rate of $8,812.50. (Ex. A-14, tab 14; tr. 3/46-48) The activities identified in the "Byrd Dam Repair of GATE 1 in Place Rimgear Modification" schedule, however, relate to removal and reinstallation of the rimgear, not the misaligned apron (ex. A-14, tab 14; tr. 4/55).

Mr. Lynch wanted to exclude costs for an unrelated claim. He subtracted six days from Mr. Kasdorff's estimate of 32 days and then multiplied the remaining 26 days by the $8,812.50 daily rate to conclude that the repair work should have cost $229,125 to repair in the dry in 1995. He then subtracted his repair estimate from the recorded costs of $972,307 to conclude that the additional cost to Noell to repair Gate No. 1 in a watered state, as opposed to having a poiree dam providing a dry state, was $734,182. According to Mr. Lynch, the "large driver here of those costs is the inability to identify what the problem was" (tr. 3/51).

Discussion of Gate No. 1 Remediation Costs

Appellant contends that the government's deletion of the poiree dam under the Changes clause made remediation of Gate No. 1 more costly because it was more difficult to see the apron misalignment and that it is entitled to recover the difference between what occurred as a recorded cost and what should have occurred.

The government first contends that this claim was abandoned because of the lack of evidence and argument presented during the entitlement phase of appellant's case. Given the nature of the claim items, however, and inasmuch as the case was bifurcated, we cannot agree with such a broad characterization.

The government next contends that the Gate No. 1 remediation claim items are outside the scope of our entitlement decision. It further asserts that Noell would not have been able to see the misalignment even with use of a poiree dam, but that it would not have had the use of the poiree dam in any event because the work was performed during the winter shut-down period when dewatering was not permitted. It also contends that the Fru-Con/Noell subcontract did not require Fru-Con to install a poiree dam so that Noell could perform this work in the dry, and that the installation and welding of the roller gate sections and end/side shields were scheduled to be performed without a poiree dam.

In our preliminary discussion of the costs sought under Claim Item II of appellant's Second Amended Statement of Costs, we observed that appellant's contentions regarding its entitlement to direct costs, other than those associated with the eight days we awarded, were based upon an incorrect reading of our entitlement decision. Thus, we agree with the government that the remediation costs claimed for Gate No. 1 are outside the scope of our entitlement decision. In short, there is no causal connection between the limited entitlement we found was the result of deletion of the poiree dam and the costs claimed for remediation of Gate No. 1.

Nevertheless, there are other reasons for denying the remediation costs claimed. First, these costs are the direct result of fabrication defects for which we concluded Noell was responsible. Second, we did not find Noell's schedule to be reasonable or reliable. Third, irrespective of whether the approved Fru-Con schedule or the Noell schedule is used, Noell installed Gate No. 1 during the winter shut-down period when use of a poiree dam was prohibited by the contract specifications. Noell made the decision to proceed with the work during that time period because it was behind schedule.

Fourth, it was Noell's decision to keep idle welders on the payroll in 1995, thus incurring $699,788 in labor costs. In this regard, we consider the labor costs for the two and one half months that were recorded in April to be suspect, even if not audited, because they were incurred during the winter shut-down and are so much higher than the other months in the same Time Impact period. Nor was the reason these costs were accumulated under a category described as "Carpenter[s]" explained.

Fifth, the record indicates that repairs to the end shield and rubber seals were made on Gate No. 1 both in 1995 before Noell began work on Gate No. 2 and then again in 1999. It also appears that the $12,295 claimed is an estimate for which there was no evidence supporting its reasonableness. To the extent it may be an actual cost, however, we cannot determine on this record whether the $12,295 was paid in 1995 or whether it was also included in the 1999 costs collected as part of cost code 284, "Weld Repairs & Snipes lab[or]."

Sixth, the costs for "Clean & Sandblast Welds" require the conclusion that it was reasonable for Noell to leave Gate No. 1 in the water for four years in the face of evidence that established the gate could have been lifted earlier. The costs for "Weld Repairs & Snipes lab[or]" also include painting work on the inside of the gate, stretching the limits of alleged causation even further. Nor is it apparent from the record how the "Repair Rim Gear/Knife Ed[ge]" costs related to the apron repair.

Finally, we have no confidence in the estimate of the cost to perform the repair work in a dewatered condition. Mr. Kasdorff's estimate was entitled "Byrd Dam Repair of GATE 1 in Place Rimgear Modification" and was prepared in March 1999. Irrespective of when Mr. Nibert may have concluded there were apron alignment problems on other gates, the apron modification plan for Gate No. 1 was not submitted to the government until 30 September 1999. The plan states that it is based upon the 13 and 20 September 1999 surveys and concludes that the assumption that the problem was with the rim gear is incorrect. Mr. Kasdorff did not testify at the quantum hearing and it appears to us that his estimate relates to the cost to make repairs to the rim gear, which was initially thought to be the cause of the problem, and not the misaligned apron. Moreover, his daily rate is almost twice Noell's stipulated rate. Nor was there adequate support for Mr. Lynch's six-day reduction of Mr. Kasdorff's estimate to account for an unrelated claim.

We conclude that, in addition to the lack of causation, appellant failed to come forward with reliable evidence to substantiate the costs claimed and to prove their reasonableness. Appellant's claim for remediation of Gate No. 1 is denied in its entirety.

Gate Openings before 30 November 1996

Findings of Fact

In Claim Item III of its Second Amended Statement of Costs, appellant seeks $250,000 for five gate opening work suspensions (ex. A-17, tab III). The claimed costs were included in the REA prepared by Navigant and also the complaint filed in ASBCA No. 53544 (R4, tab C-1 at 39, 51). As with Claim Item II, the government moved to dismiss Claim Item III and we denied the motion, allowing appellant the opportunity to come forward with hearing evidence of the causal connection and resultant injury associated with our entitlement decision.

Appellant alleged in paragraph 49 of its complaint that, under Paragraph 15.2 of Section 1C of the contract specifications, it was entitled to recover $50,000 each time the government suspended work due to high river flows. The government denied the allegation and averred the specifications were the best evidence of their contents. Appellant alleged in paragraph 50 of its complaint that the river rose to levels that caused the government to open the dam gates to the height that required Noell to suspend work under Paragraph 6.3 of Section 1I on five occasions prior to 30 November 1996. The government admitted the allegation, with the clarification that "such event occurred approximately 5 times." Appellant alleged in paragraph 51 of its complaint that it was entitled to an increase of $250,000 under Paragraph 15.2 of Section 1C. The government

denied the allegation. (ASBCA No. 53544, compl., answer ¶¶ 49-51)

Paragraph 15, "SUSPENSION OF WORK AND REWATERING AT DEWATERED WORK AREAS," of Section 1C, "CONSTRUCTION FACILITES AND TEMPORARY CONTROLS," was added by Amendment 0004. It provides as follows:

> 15.1 Seasonal Restriction. Attention is directed to the allowance of time and payment for suspension of work or for rewatering at a dewatered gate bay or lock provided for in Paragraph 15.2, which will be paid to the Contractor if the suspension or rewatering occurs during the months of June, July, August, September, October or November. Due to probable high river flows during the months of December, January, February, March, April and May, no work in dewatered gate bays will be permitted without written approval of the Contracting Officer. No payment or contract time extension will be allowed for the period between 1 December and 31 May for work suspension or rewatering.
>
> 15.2 Rewatering of Dewatered Work Area. In the event that a gate bay or lock is in an unwatered condition and a rise in the river occurs that adversely affects the poiree dam such that a suspension of work or rewatering is directed by the Contracting Officer, an allowance of $50,000 will be paid to the Contractor, subject to the following conditions:
>
> 15.2.1 This allowance only applies during 1 June through 30 November. Only one allowance will be made during any one rise. The term "one rise" shall be interpreted to mean the initial rise of the river which necessitates the suspension of work or rewatering. Dewatering shall be commenced promptly after notification by the Contracting Officer. Mud, silt, gravel, debris, logs, sand and similar materials shall be cleaned from all parts of the work, including the permanent work, within the work area, if required. The rewatering, and subsequent dewatering, including reinstalling poiree dam and bulkheads, if applicable, will be considered paid for by the allowance stated above except for damage to permanent work which will be covered by Contract Clause, PERMITS AND RESPONSIBILTIES.

> 15.2.2 Should the Contractor rewater a gate bay or lock during a rise, prior to, and in anticipation of, notification by the Contracting Officer, and the Contracting Officer approves the action, such rewatering will be considered grounds for payment of the allowances specified in Paragraph 15.2 above. No allowance will be made under provisions of paragraph 15.2 for a rewatering not approved or directed by the Contracting Officer.
>
> . . . .
>
> 15.2.4 Should the Contracting Officer direct in writing, the removal of the poiree dam for any reason, the Contractor shall comply and there shall be no costs association with this action in addition to the $50,000 allowance provided for under this paragraph.

(R4, tab D, Amend. 0004 at 1C-8)

Paragraph 6.3, "Restrictions," of Section 1I, "SAFETY," provides as follows:

> (1) A Floating Plant will not be permitted within the restricted areas under the following flow conditions:
>
> (a) No operations will be allowed below the dam when total dam gate openings exceeds 25 feet.

(R4, tab D, § 1I at 1I-3)

Mr. Lynch identified 13 high-water work suspensions, five of which he thought would have involved activities that would have been performed in a dewatered condition under Noell's as-planned schedule if the poiree dam had not been deleted. His testimony was based upon the schedule analysis prepared by Navigant. (Ex. A-14 at 12 and tab 15; tr. 3/52-57)

The first of the five suspensions included in the REA occurred between 4 and 8 June 1995; the second occurred between 11 and 15 June 1995; and the third between 8 and 10 August 1995 (R4(b), tab 65; tr. 1/187-91, 197). Mr. Lynch used Noell's as-built schedule to explain that Noell would have been performing activity 1.18, "Install and Adjust Side Seal," during these three work suspensions and Noell's as-planned schedule

to conclude that it was work that would have been performed in the dry (R4, tab C-1, append 11; tr. 3/63, 66-67). The as-built schedule shows that "Install and Adjust Side Seal" work was performed from 26 December 1994 to 21 September 1995 (R4, tab C-1, append. 11).

As we found above, the end/side seal was installed before the gate was lowered on 12 February 1995, at which time the rubber seal was damaged. The misalignment of the apron seal was identified on 12 April 1995, following which Noell, Fru-Con and the government all spent a great deal of time and money investigating what was wrong with Gate No. 1. On 5 September 1995 the government authorized appellant to begin installation of Gate No. 2, subject to temporary repairs that were completed on 20 or 21 September 1995. *Fru-Con*, 05-1 BCA at 163,147.

The fourth suspension occurred from 1 to 30 June 1996 (R4(b), tab 66; tr. 1/191-94, 197). Mr. Lynch used Noell's as-built schedule to explain that Noell would have been performing activity 1.18 on Gate No. 2 during this suspension of work and its as-planned schedule to conclude that it was work that would have been performed in the dry (R4, tab C-1, append 11; tr. 3/67). The winter shut-down ended on 31 May 1996, so that 1 June was the first day that Fru-Con could have installed the poiree dam before Noell could begin work on the side seals.

The fifth and last suspension was from 30 July to 4 August 1996 (tr. 1/195-97). Mr. Lynch again used Noell's as-built schedule to explain that Noell would have been performing activity 1.21, "Metalize and Paint Installation Joint," on Gate No. 2 during this suspension and its as-planned schedule to conclude that it was work that would have been performed in the dry (R4, tab C-1, append 11; tr. 3/68-69). Noell performed remedial/rework painting at the same time that it performed the contractually required metalizing and painting of the installation joint on Gate No. 2. *Fru-Con*, 05-1 BCA at 163,149. Mr. Lynch acknowledged that remedial/rework painting was not work that Noell had planned to perform with a poiree dam, but he included "a few days" as a work suspension because activity 1.21 was the next work to be performed after the water level receded (tr. 3/68-69).

Discussion of Gate Openings

The government asserts that Claim Item III was abandoned because it was not addressed in appellant's post-hearing entitlement brief in ASBCA No. 52544. Appellant responds that this claim is properly before the Board because it was presented in its REA and complaint and that the government admitted the five suspensions, each of which entitles it to the $50,000 allowance provided by the contract. The government denies such an admission.

Appellant's contention regarding the government's supposed admission ignores the government's response to paragraph 51 of the complaint in which it specifically denies that appellant is entitled to $250,000 for five high water work suspensions. Clearly, there was no admission.

Our decision in ASBCA No. 52544 reflects our consideration of evidence relating to alleged excusable delay in Impact Periods II (7 September 1994 to 24 September 1995) and III (24 September 1995 to 7 October 1997) associated with gate opening restrictions due to high water prior to 30 November 1996 and our conclusion that there was no merit to the claims. *Fru-Con*, 05-1 BCA at 163,162. We did not make any findings or conclusions relating to the $250,000 in allowances appellant seeks in Claim Item III. Appellant did not address Claim Item III in its motion for reconsideration and has not now pointed to any evidence that was introduced at the entitlement hearing relating to these allowances. Appellant also has not pointed to any argument relating to this claim item in the extensive post-hearing entitlement briefs.

Unlike our view of Claim Item II, which relates to installation issues associated with Gate No. 1, we conclude that Claim Item III was abandoned in the entitlement phase of this case. *See Imperial Construction & Electric, Inc.*, ASBCA No. 54175, 06-1 BCA ¶ 33,276 at 164,949 (any claim not addressed in the post-hearing entitlement brief considered abandoned); *Craft Cooling, Inc.*, ASBCA Nos. 52494, 54127, 06-1 BCA ¶ 33,268 at 168,876 (ASBCA No. 54127 claim abandoned when not addressed by either party through the presentation of entitlement evidence or argument in post-hearing briefs).

Indeed, much of the evidence and argument relating to Claim Item III presented as part of the quantum hearing actually relates to matters of entitlement. In any event, on the basis of this evidence and argument, Claim Item III is without merit for a number of reasons.

First, as the government alternatively contends, Claim Item III is outside the scope of our entitlement decision. Second, appellant's interpretation of the relevant contract specifications is not reasonable. *See C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Appellant contends that the intent of the Paragraph 15.2 allowance was to contractually liquidate $50,000 per incident as compensation to defray costs of demobilizing from and remobilizing to a dewatered gate, if so directed by the contracting officer due to high water necessitating raising the gates to 25 feet or more. It further asserts that the rationale for the allowance did not change with the deletion of the poiree dam because Noell's costs were still the same and Paragraph 15.2 still provided the excusive means of cost recovery. (App. br. at 36) As is readily apparent, this reading

is based upon an inferred intent that extends to any work suspension due to a rise in the river necessitating gate openings in excess of 25 feet. It ignores key provisions of Paragraph 15 and incorrectly interprets the applicability of Paragraph 6.3.

In contrast, the government's interpretation considers all provisions of Paragraph 15. It contends that Paragraph 15 is applicable only if a poiree dam was being used, and only if the poiree dam was in an unwatered condition, and only if "a rise in the river occurs that adversely affects the poiree dam," and only if the contracting officer orders the contractor to suspend work or rewater the work area (gov't br. at 36). Further, we agree with the government that Paragraph 6.3 only restricts the use of a floating plant and does not address either use of a poiree dam or the $50,000 allowance. To the extent that Paragraph 6.3 may be applicable insofar as it refers to gate openings in excess of 25 feet, it does not change the Paragraph 15 requirement that a poiree dam be in use.

Third, we cannot find on this record that Noell would have been performing activity 1.18, "Install and Adjust Side Seal," during the first four work suspensions or that it would have been performing activity 1.21, "Metalize and Paint Installation Joint," during the fifth work suspension. These activities are based upon the Noell as-planned schedule that we previously concluded was not reasonably feasible and attainable. *Fru-Con*, 05-1 at 163,161. Further, the fact that work on the end/side seal is shown on the as-built as continuing from 26 December 1994 through 21 September 1995 is attributable to Noell's decision to work during the winter shut-down period and the fabrication defects on Gate No. 1, both of which resulted in the damage to the side seal and the delay in repairing it.

Finally, Claim Item III is based entirely upon speculation. It first speculates that activities 1.18 and 1.21 would have been performed during the five identified work suspensions. It then speculates that this work would have been performed in a dewatered condition although Fru-Con, not Noell, was responsible for dewatering and the Fru-Con and Noell schedules differ as to whether this work actually would have been performed after Fru-Con installed the poiree dam. In this regard, we also have rejected the additional underlying assumption that Noell's schedule was reasonably feasible. Further, the claim assumes that Noell, not Fru-Con, is the party that would be entitled to the $50,000 allowance, even though Noell was not the party responsible for dewatering and reinstallation of the poiree dam.

Based upon the foregoing, appellant's claim for gate openings before 30 November 1996 is denied in its entirety.

Contract Administration

Findings of Fact

In Claim Item IV of the Second Amended Statement of Costs, appellant seeks $733,709 in contract administration costs, consisting of $612,008 in consulting fees for Navigant and $121,701.23 in legal fees for Seyfarth Shaw LLP (ex. A-14 at 13, ex. A-17 at 17). Seyfarth Shaw added $2,448.84 in disbursements at the quantum hearing, bringing its total to $124,150.07 (tr. 2/22), and the grand total to $736,158. Noell does not seek either home office overhead or profit on this amount (app. br. at 42).

(1) Consulting Fees

On 21 March 1995, Noell first presented to Fru-Con a proposal it had prepared for $1,167,800 and 120 days of impact to install the gates in a watered condition (R4, tab I-2). Fru-Con forwarded the proposal to the government, following which the government responded on 11 December 1995 with a request for a schedule analysis and further justification for the proposed direct costs (R4, tab F-21). Noell retained Revay to perform this work. An initial $20,000 purchase order contract with Revay was subsequently increased to $24,000. A full explanation of the scope of work and applicable terms and conditions, together with a completion date, were part of the initial purchase order. The hourly rates ranged from $80/90 to $150 per hour. (Ex. G-23, tab 4-E; tr. 2/168-75) The REA prepared by Revay sought a contract time extension of 192 days and $3,794,197.08 and was submitted to the government by Fru-Con on 29 October 1996 (R4, tab G-13). As amended on 19 November 1996, the amount requested was increased to $6,517,262.31 (R4, tab G-14). *Fru-Con*, 05-1 BCA at 163,145-46. The invoices for Revay's work and expenses total $25,772.93 (ex. G-23, tab C-10).

At appellant's request, the government, in October 1997, permitted Noell to use the rehabilitated set of bulkheads that had been reserved for the government's use, subject to an "appropriate credit." Negotiations on the proposal prepared by Revay and a credit for use of the second set of bulkheads took place on 4 December 1997. *Fru-Con*, 05-1 BCA at 163,151. Subjects discussed included Noell's use of managerial cost estimates and a projected completion date within the contract schedule. From the government's point of view, however, the most critical issues discussed were Noell's contention that deletion of the poiree dam impacted work activities beyond the installation of anchors and sill seal testing shown on the official (Fru-Con) contract schedule and the fact that work on Gate No. 2 had been completed in less time than shown on the official schedule. Additionally, Fru-Con did not want to give the government a credit for use of the second set of bulkheads. Negotiations were suspended

and Noell was asked to review its proposal and furnish the government with any additional supporting information it had. The record reflects repeated telephone requests and letters from the government concerning the resumption of negotiations, or the submission of a revised proposal. (R4, tabs F-45, S-132)

It does not appear that Revay performed any further work on the REA, but there is some evidence indicating that Rubino & McGeehin, cost accountants, provided accounting services to Noell in 1998 and 1999, at an estimated cost of $60,000 (R4, tab C-1 at 53-54).

In early 1999, Noell met with Navigant and retained Navigant as its new scheduling and cost consultant on 3 February 1999. The record contains a letter of engagement that was prepared after a meeting between Noell and Navigant. The letter states that Navigant will provide professional services and sets forth the applicable hourly rates, but it does not provide details regarding the nature of the work to be performed or reflect a budget or a performance deadline. (R4, tab S-150) At the time, there were only two employees in Noell's business office (tr. 2/177-78). The record contains some general testimony to the effect that Navigant had been asked to evaluate the project, that it was required to meet certain milestones within budgeted phases and that the cost was expected to range between $500,000 to $600,000 (tr. 2/157-60). However, there is no documentation of any budget or written scope of work (tr. 2/157-58). There was also testimony that Noell always intended to charge the Navigant costs to the government as contract administration costs. If true, Noell gave no consideration to any responsibility it might have to the interests of the government. (Tr. 2/186) It appears that Noell did not monitor Navigant's work very closely (tr. 2/187-89).

Navigant prepared a new time impact and cost analysis that was incorporated into a new REA submitted to the contracting officer nearly two years later, on 28 December 2000. The new REA sought a contract time extension of 733 days and a cost adjustment of $7,699,671 and gave the government a credit of 116 days for use of the second set of bulkheads. Although the REA prepared by Revay was withdrawn, the new REA included $85,000 for contract administration costs, consisting of $20,500 (not the $25,772.93 actually incurred) for Revay and $60,000 for the accountants. (R4, tabs C-1 through C-2) Both the Revay and accounting costs have been removed from the contract administration costs now requested. *Fru-Con*, 05-1 BCA at 163,154. (App. br. at 42-43)

By a letter dated 19 March 2001, the contracting officer's representative advised that, after a "cursory review" of the REA prepared by Navigant, he did not find any "revisions in accordance with previous discussions" and "nothing new" in appellant's position. He found no merit in the REA and advised appellant of its right to seek a contracting officer's final decision. (R4, tab F-49)

As a consultant, Navigant undertook an "exhaustive" methodology that included an extensive document review and meetings with Noell personnel (tr. 2/217-24). The Navigant monthly invoices for its consulting services are summary in nature. For most of the project, an abbreviated outline listed a skeletal work plan: "Schedule Analysis," "Develop Issue Files," "Summarize Findings/Develop Schedule REA," "Cost Review and Variance," "Finalize Detailed Cost Analysis," "Integrate Cost and Schedule Analysis," and "Finalize REA." The gross number of hours worked by assigned personnel were allocated to the appropriate work items. A cover sheet provided a list of the individuals for whom time was billed, the hourly rate and the number of hours worked, resulting in the total fees charged, and travel expenses, if applicable. A new skeletal work plan was substituted for the original one as the project neared completion, but the summary billing format did not change. The hourly rates charged range from $325 for senior personnel to $110 for staff employees. The hourly rate for Mr. John Byrne, who performed the schedule analysis, was $175; the rate for Mr. Lynch was $200. It is not possible to determine with any level of detail what work was actually being performed by any given person on any given day. The last billing period is 1 through 31 May 2001. (Exs. A-7, -14, tab 16) In all, a total of 3,586 hours of work was billed: 2,399 hours during 1999; 1,151 hours during 2000; and 36 hours in early 2001 (ex. A-7). Approximately 20 people worked on the project (tr. 3/105).

Two entries, 17 hours in April 2001 and 13 hours in May 2001, describe the work performed as "Conversation with Counsel" and are invoiced at $3,325 and $2,600, a total of $5,925 (ex. A-7 at 105, 109). DCAA took exception to these unverified telephone conversations, which were not reflected in the Seyfarth Shaw billings (ex. G-21 at 7; tr. 4/158-59).

Appellant called Mr. Charles Bolyard without objection by the government as an expert witness to testify as to the reasonableness of Navigant's work product and the rates it charged (tr. 3/207-15). He thought that Navigant's effort was commensurate with the complex nature of the case and that the rates are in the "mid to upper-mid level" of the range of rates charged in the industry at the time (ex. A-16; tr. 3/228-29). Noell also considered the fees to be slightly higher than other consultants in the Washington D.C. area, but worth the extra cost because of Navigant's background (tr. 2/161).

The government called Mr. Ockman to testify to the same matters. Given the nature of the government's request for additional information at the 4 December 1997 negotiations, he saw no reason for the exhaustive review performed by Navigant. He further opined, with some passion, that the REA was of no value because of the flawed approach taken in the time impact analysis and that the REA actually had a negative impact because the government had to incur costs to defend against it. (Ex. G-20 at

14-15; tr. 4/72-73, 76-78, 81, 131) He considered his view to be corroborated by the Board's entitlement decision (tr. 4/123-26). He highlighted examples of unnecessary effort dedicated to matters that were Noell's responsibility, such as the hundreds of hours associated with evaluating the painting issues (ex. G-20 at 13; tr. 4/78).

Mr. Ockman suggested that possible standards against which to measure the reasonableness of the consulting fees were the amount Noell paid for the Revay analysis and the amount the government paid him, as its consultant, to perform an analysis evaluating and responding to the Navigant REA (ex. G-20 at 14, 17). The analysis Mr. Ockman prepared cost the government approximately $100,000 and was based upon a detailed Scope of Work for a "Preliminary Schedule Review and Summary Time Impact Analysis," with trial preparation and testimony options. His hourly rate is $200. (Ex. G-20 at 14, 17, ex. G-23, tab 4-F) In Mr. Ockman's view, the $500,000 to $600,000 range Noell agreed to pay Navigant was too much (tr. 4/116-17)

(2) Legal Fees

Legal work on Noell's first REA was provided by another law firm until July 1996, at a total cost of $21,448 (ex. G-23, tabs 4-C, -10). Seyfarth Shaw began work on Noell's new REA in February 1999 and has included invoices and disbursements through 24 May 2001. The fees total $121,701.23, and the disbursements total $2,448.84. It appears that three attorneys performed most of the work, with hourly rates ranging from $185 for associates to $335 per hour for senior partners. (Ex. A-5; tr. 2/11-26) These rates are about average for similarly-situated law firms in the Washington D.C. area at that time (tr. 2/24-25, 118-20). The summaries of the amounts claimed from invoices submitted to Noell do not provide either a break-down of the number of hours billed by each attorney with the applicable hourly rate or the total number of hours billed (ex. A-5).

Seyfarth Shaw represented Noell on a number of matters during this time period (tr. 2/12). Some of the claimed costs were allocated to preparation of the REA by assigning a percentage of the amounts listed on billing sheets that are more than six years old (tr. 2/16-17, 71-72). The legal time descriptions indicate that the lawyers considered issues relating to the sponsorship obligations of Fru-Con and that the word "claim" was used until 7 February 2000, when an associate researched *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1999) (*en banc*) (ex. A-5; tr. 2/55-60). The legal time descriptions for 21 and 29 March 2001 reflect consideration and preparation of a complaint and appeal to the ASBCA (ex. A-5, tab 21). There are several time descriptions that do not appear to relate specifically to REA work (gov't br. at 75-76).

Discussion of Contract Administration Costs

In *Bill Strong, supra,* the Court considered the allowability of the fees of a consultant retained to develop a REA after the government requested additional information and cost data relating to alleged performance delay. The fees had been excluded from a negotiated settlement. The issue before the Court was whether the fees were "incurred in connection with the prosecution of a CDA claim or an appeal against the Government" and, therefore, were unallowable under FAR 31.205-33(d). 49 F.3d at 1549.

The Court first recognized the category of costs incidental to contract administration, finding such costs "presumptively allowable if they are also reasonable and allocable." It explained that contract administration costs "should ordinarily be recoverable because they normally 'benefit[ ] the contract purpose'" and that "reimbursement [was] in the best interest of the United States," concluding that "[b]enefit to the contract purpose" was a "prerequisite for allowability." *Bill Strong*, *supra*, 49 F.3d at 1549.

The Court next clarified that costs incidental to contract administration include costs associated with the contract negotiation process. It discussed the underlying policy benefits of the negotiation process to the government as reflected in FAR 33.204, "Policy," which states that it is the government's policy "to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level," even if the negotiation process did not produce a settlement, because the availability of the process increases the likelihood of settlement. It observed that contractors would have greater incentive to negotiate if these costs were recoverable. *Bill Strong*, *supra*, 49 F.3d at 1550. The Court concluded that there was a "strong legal presumption" that the costs at issue in *Bill Strong* were not incurred in connection with prosecution of a claim because the parties were in a negotiation posture and the costs were the result of the exchange of information to further that process. 49 F.3d at 1551.

Following the *Bill Strong* guidelines, we found that consulting and legal costs incurred by Noell in the preparation of the 28 December 2000 REA were for the purpose of seeking a "negotiated resolution and settlement of the pending issues with the government" and "may be allowable, if otherwise reasonable, under the FAR Part 31 cost principles." *Fru-Con*, 05-1 BCA at 163,164.

The "[a]llowabilty of a cost is governed by the FAR regulations, *i.e.*, the cost principles in Part 31 of the FAR and pertinent agency supplements." *Boeing North American, Inc. v. Roche*, 298 F.3d 1274, 1280 (Fed. Cir. 2002). As the *Boeing* Court explained, "[t]he concept of allowability is addressed to the question whether a particular item of cost should be recoverable as a matter of public 'policy.'" 298 F.3d at 1281. It

went on to say that "[t]he question whether a cost should be recoverable as a matter of policy is to be undertaken by applying the specific allowability regulations, which embody the government's view, as a matter of 'policy,' as to whether the contractor may permissibly charge particular costs to the government (if they are otherwise allocable)." 298 F.3d at 1284.

Under FAR 31.205-33, "Professional and consultant service costs," the costs of legal and consulting services are generally allowable (except in specified circumstances not present here) "when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government." FAR 31.205-33(b). Several factors are to be considered under FAR 31.205-33(d), although "no single factor or any special combination of factors is necessarily determinative." Factors of particular relevance in this case include: the nature and scope of the service rendered in relation to the service required, the necessity of contracting for the service and any past practice of acquiring such services and their cost, the qualifications of the consultant and the customary fee, and the adequacy of the agreement for the services, *e.g.*, description of the service, time required, compensation rates and termination provisions. FAR 31.205-33(d)(1), (2), (3), (7), (8).

Under FAR 31.201-3, "Determining reasonableness," "[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR 31.201-3(a). There is no presumption of reasonableness and appellant has the burden of proof to establish the reasonableness of the costs it has incurred. *Id. See Buck Industries, Inc.*, ASBCA No. 45321, 94-3 BCA ¶ 27,061 at 134,848. What is reasonable can depend upon a variety of considerations and circumstances, including the type of cost, application of sound business practices, the contractor's responsibility to the government and any significant deviations from established practices. FAR 31.201-3(b)(1)-(4).

(1) Consulting Fees

Appellant contends that the $612,008 charged by Navigant for the time impact and cost analysis it prepared is reasonable. It relies upon the testimony of Messrs. Lynch and Bolyard. (App. br. at 47-48)

The government asserts that the REA provided no benefit to the government, the board or appellant. It maintains that the schedule analysis was defective and of no value and characterizes each of the time impact period claim items as frivolous, standing no reasonable chance of success, or unreasonable. It addresses each of the impact periods analyzed in the REA, largely in the context of our entitlement findings and conclusions. It argues that we should apply the "results obtained" rule of *Hensley v. Eckerhart*, 461

U.S. 424, 434 (1983), in evaluating what constitutes a reasonable cost under FAR Part 31 and conclude that appellant is not entitled to recover any contract administration costs. (Gov't br. at 48-58)

Appellant's reply to these contentions reflects its disagreements with our entitlement findings and conclusions. It is not only too late to raise these disagreements, but the reasons offered to support them also do not withstand review. The first, relating to Fru-Con's use of the Goldmann schedule during performance, is only marginally relevant to our conclusion that the evidence did not support using the early completion schedule for a delay analysis under *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369 (Fed. Cir. 1999). The second, an isolated quote relating to Navigant's consideration of the fabrication and late delivery of Gate No. 1, is taken out of context. We found that Mr. Byrne did combine late delivery of Gate No. 1 with his computation of the increased time required to perform the work impacted by the deletion of the poiree dam and prorated the projected performance delay. *Fru-Con*, 05-1 BCA at 163,146 and 162. It was in Impact Period II that consideration was not given to the impact of the fabrication defects. *Id*. at 163,162. The third, that planned durations were compared to actual performed work, appears to be based upon superficial charts contained in the REA, not the substance of the REA itself, a detailed study of which is reflected in our entitlement decision (R4, tab C-1 at 8-9).

Appellant also responds that the government's argument for application of a "results obtained" rule such as that imposed by *Hensley v. Eckerhart*, *supra*, would violate the framework of recovery of contract administration costs established by *Bill Strong* and FAR part 31 because it would impose a "prevailing party" standard (app. reply at 37). We agree with this contention and consider the issue in the context of events at the time the contract administration costs were incurred.

FAR 33.204 establishes the government's policy of encouraging private resolution and settlement of contractual disputes at the contracting officer's level, without litigation. Thus, under FAR Part 31, consulting and legal services categorized as contract administration costs are generally allowable, to the extent reasonable and allocable, because they benefit the contract negotiation process, even if a settlement does not ensue. *Bill Strong*, *supra*, 49 F.3d at 1550. The FAR allowability and reasonableness principles and factors preclude recovery of costs that are not in accordance with this government policy.

Appellant contends the government refused to negotiate any of Noell's three REAs; however, the record does not support the contention. The government acted entirely within the contract negotiation process when it requested a schedule analysis and additional cost information after receiving the initial proposal prepared by Noell. This

led to Noell's decision to contract for the services of Revay, a scheduling consultant. The Revay REA and the government's desire for a credit relating to the second set of bulkheads were discussed during the negotiations held 4 December 1997 at which time the government expressed several concerns with the Revay REA and requested that Noell review it and furnish the government with any additional supporting documentation. Despite repeated requests, apart from retaining Rubino & McGeehin, cost accountants, Noell apparently took very little, if any, action on the schedule analysis until early 1999, when it replaced Revay with a new consultant, Navigant.

In the context of this factual background, application of *Bill Strong* and the FAR Part 31 allowability and reasonableness guidelines leads us to conclude that appellant is not entitled to recover the magnitude of the Navigant fees it has requested as contract administration costs.

We do not question Noell's decision to retain Navigant or its billing rates. However, when we consider the relevant FAR 31.205-33(d) allowability factors, we are troubled by the lack of specificity in the letter of agreement for Navigant's services, the summary nature of Navigant's bills and an apparent lack of oversight by Noell that resulted in an "exhaustive" evaluation of the entire project, consuming some 3,586 hours. Indeed, as characterized by the government, it was almost as if Noell gave Navigant a blank check. Moreover, in light of the concerns raised by the government with respect to the Revay analysis, in particular the failure to use the approved schedule, we are not persuaded that such a review was either necessary or reasonable. In this regard, we note that the contracting officer's representative found nothing reflecting the government's concerns and "nothing new" in the Navigant REA and advised appellant of its right to certify the REA as a claim. Accordingly, we cannot find that consulting costs in the amount of $612,008 are reasonable in nature and amount and would have been incurred by a prudent business person in the conduct of a competitive business responding to the concerns raised by the government during the 4 December 1997 negotiations. *See* FAR 31.201-3(a) and 31.205-33.

Under *Bill Strong*, however, we consider that appellant is entitled to recover some reasonable amount of its claimed consulting fees as contract administration costs as a matter of public policy because the parties were in a negotiation posture and the exchange of information was ongoing. The fees charged by Revay and Rubino & McGeehin and by the government's expert provide some evidence of reasonableness for our use in determining how much to award appellant for its claimed consultant fees. On the facts presented here, absent a more reliable method of computing the amount of reasonable consultant fees, we conclude in the nature of a jury verdict that $65,000 of the Navigant fees are allowable as reasonable contract administration costs. Our reduction of

the fees requested dispels the need to address the government's other, and more specific, challenges to the Navigant costs, such as the $5,925 for telephone discussions with counsel and other costs that it alleged should also be found unallowable.

Accordingly, we award appellant the reduced amount of $65,000 for its consulting services.

(2) Legal Fees

Appellant asserts that the $124,150 in legal fees and disbursements claimed as contract administration costs are reasonable. The government adopts a number of the arguments it made with respect to consulting fees for the claimed legal fees, in particular that, since the time impact analysis was of no value, the same is true of the associated legal work (gov't br. at 57). We declined to adopt this view with respect to consulting fees and are of the same mind with respect to legal fees.

However, inasmuch as the claim for legal fees is interwoven with the time impact and cost analysis, the government's arguments do raise the related question of the reasonableness of the nature and scope of the services rendered. And, as with the consulting fees, we cannot conclude on this record that the legal fees claimed are reasonable in nature and amount. Rather, application of the relevant FAR factors and principles again leads us to conclude that the legal costs claimed exceed those which would be incurred by a prudent business person in the conduct of competitive business responding to the concerns raised by the government during the 4 December 1997 negotiations. *See* FAR 31.201-3(a) and 31.205-33.

Nevertheless, under *Bill Strong*, we are of the view that appellant is entitled to recover reasonable legal fees as contract administration costs. The fees charged by Noell's prior law firm provide evidence of reasonableness for our use in determining how much to award appellant for its claimed legal fees. On the facts presented here and absent a more reliable method of computing the amount of reasonable legal fees, we again employ a jury verdict approach to conclude that $20,000 of Seyfarth Shaw's fees and disbursements are allowable as reasonable contract administration costs.

This reduced amount again dispels the need to address each of the government's more specific challenges to the billing costs claimed, including the allocation of time billed many years after the work was performed, time descriptions that do not appear to relate to preparation of the REA and the lack of a break-down by attorney or a summary of the total number of hours billed. However, we do find in this regard that the government's assertion that the lawyers were prosecuting a claim (prior to 28 December

2000) has no merit. The issue of Fru-Con's sponsorship was continuing and the word "claim" appears to have been used interchangeably with the word REA.

Accordingly, we award appellant the reduced amount of $20,000 in fees and disbursements for legal services.

Thus, we award the total amount of $85,000 as allowable and reasonable contract administration costs. Noell does not seek Noell's stipulated 5.87 percent home office overhead or profit on contract administration costs.

Fru-Con Mark-Ups

Findings of Fact

Appellant applies the following Fru-Con mark-ups in Claim Item VII of the Second Amended Statement of Costs: home office overhead at 4 percent; field office overhead at 13.56 percent; profit at 10 percent; and bond and insurance at 1.32 percent (ex. A-17 at 20). As we noted above, the government stipulated to the home office and the bond and insurance rates (tr. 1/8). Remaining for decision are Fru-Con's field office overhead and profit.

The DCAA audit report dated 8 March 1996 establishes an audited field office overhead rate of 13.56 percent. Fru-Con agreed with this rate. (Ex. A-19, tab A) The affidavit of Mr. Anderson states: "A review of representative contract modifications executed between Fru-Con and the [government] in every year of Fru-Con's performance shows that after the March 8, 1996 audit report Fru-Con applied, and the Government accepted, the 13.56% field overhead rate" (ex. A-19, ¶ 4). The affidavit further states that the daily rate computed by DCAA in the audit report dated 13 April 2006 (ex. G-26) is incorrect because it does not "recognize that part of the field office overheads are reimbursable by Noell, and therefore, not a field overhead cost to Fru-Con" (ex. A-19, ¶ 7). A field overhead rate of 13.56% was used in both the Revay and Navigant REAs (R4, tabs C-3, G-13).

Fru-Con Seeks 10 percent profit. It relies solely upon a statement made by the government's expert that 10 percent profit is reasonable. However, the statement was made with respect to Noell, not Fru-Con. (Tr. 4/82-83) A 6 percent profit rate was used for modifications to the contract work issued during contract performance (R4, tab E-6). A 6 percent profit also was requested for Fru-Con in the REA prepared by Revay in 1996 (R4, tab G-13).

Discussion

As we understand it, the government's only opposition to the 13.56 percent rate is that it believes the rate is outdated. The Fru-Con field office overhead rate was audited. Both the field office overhead rate of 13.56 percent and a profit rate of 6 percent were used for modifications during contract performance. We conclude a field office overhead rate of 13.56 percent and a profit of 6 percent are the correct rates to be applied as Fru-Con mark-ups.

CONCLUSON

The following is a summary of the amounts we have awarded appellant.

Noell Costs:

Contract Time Extension	$ 45,390
Diving and Survey Costs	29,990
Contract Administration Costs	
Consulting Services	65,000
Legal Services	20,000
	$160,380
Fru-Con Mark-ups:	
Home Office Overhead @ 4%	6,415
	166,795
Field Office Overhead @ 13.56%	22,617
	189,412
Profit @ 6%	11,365
	200,777
Bond & Insurance @ 1.32%	2,650
Total Award	$203,427

We make a monetary award to appellant in ASBCA No. 55197 in the amount of $203,427. Although appellant seeks CDA interest from 28 December 2000, it did not convert its REA into a CDA claim until 24 May 2001, when it requested a contracting officer's final decision. *Fru-Con*, 05-1 BCA at 163,164. Accordingly, CDA interest will run on $203,427 from 24 May 2001, until paid.

ASBCA No. 55248

The contracting officer's final decision denying Fru-Con's claim also asserted a government claim for "credits and savings" resulting from, among other things, its

waiver of the commissioning requirements. *Fru-Con*, 05-1 BCA at 163,155. We awarded the government 84 days of compensable credit associated with the waiver of the 14-day commissioning requirement on its claim in ASBCA No. 53794. *Fru-Con*, 05-1 BCA at 163,166 *as clarified by* 05-2 BCA at 163,986.

At the direction of the Board, the government submitted a Statement of Costs claimed in ASBCA No. 55248. The government seeks a total of $612,617, plus interest, and includes the following claim items:

I. Credits and Savings: Eighty-Four Days

A. Noell's Field Office Overhead Daily Rate. $5,307
(Revised in its post-hearing brief to $4,872)

B. Fru-Con's Field Office Overhead Daily Rate. . . . . $ 790
(Revised in ex. G-26 to $1,533)

II. Noell's Home Office Overhead Rate: 5.87 percent

III. Fru-Con's Home Office Overhead Rate: 4 percent

IV. Fru-Con's Profit Rate: 8 percent

V. Bond and Insurance Rate: 1.32 percent

Total. . . . . $ 612,617

VI. Interest (from 11 February 2002 until paid)

The total amount claimed is now increased to $669,203. This appears to be due to changes to both the Noell and Fru-Con daily field overhead rates and the use of a 6 percent profit rate for Noell. (Gov't br. at 82)

The government bears the burden of proof of the cost savings to appellant resulting from deductive changes. *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971). Any contract price reduction should be based upon the amount appellant reasonably would have spent to perform the deleted work. *See CTA Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,761. We are to determine "the difference between the reasonable cost of performing without the . . . deletion and the reasonable cost of performing with the . . . deletion." *Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683. Any credit to the government is to be measured by

appellant's net savings. *Fordel Films West*, ASBCA No. 23071, 79-2 BCA ¶ 13,913 at 68,298.

We are to leave appellant in the same financial position it would have been in had the deductive change not occurred. *Hensel Phelps Construction Co.*, ASBCA No. 15142, 71-1 BCA ¶ 8796 at 40,873. The contract price adjustment should not be used to reduce or increase profit or loss or convert a loss to a profit or vice versa, for reasons unrelated to the change. *Olympiareinigung, GmbH*, ASBCA No. 53643, 04-1 BCA ¶ 32,458 at 160,562. Finally, the cost savings include both the prime contractor and subcontractor, and the same principles used in pricing additive changes apply. *Santa Fe Engineers, Inc.*, ASBCA No. 31762, 91-1 BCA ¶ 23,571 at 118,187-88.

Contract Time Credit

Findings of Fact

Although the Statement of Costs seeks a daily rate of $5,307, the government changed its position after the quantum hearing and now applies a daily field overhead rate of $4,872 for Noell for each of the 84 days of schedule credit (gov't br. at 81). This is the same rate Noell used to measure its eight days of delay and is taken from appellant's Second Amended Statement of Costs. It was the stipulated rate in ASBCA No. 55197 (tr. 1/8). It was verified by DCAA (ex. G- 26; tr. 4/151-52). We find the daily rate of $4,872 to be correct.

The rate excludes the daily cost of paint barges and paint barge insurance because those costs are not related to the savings associated with waiver of the commissioning period (ex. A-17, tab I-F; tr. 4/209-10). It assumes that no productive work would have been performed during the 14-day commissioning periods because Noell did not have access to the next activity on the critical path (tr. 4/211-12). Noell experienced a substantial loss in the performance of the contract (tr. 2/156-57). There was no evidence that Fru-Con was also in a loss position on this contract.

Noell's as-planned schedule shows one day for removal of the maintenance bulkhead as activity 1.24, followed by 14 days for commissioning as activity 1.25, the last activity for each of the gates (R4, tab K-4). Based upon his review of this schedule, the testimony of Mr. Nibert and conversations he testified he had with Mr. Nibert, Mr. Lynch determined that Noell would have been performing remedial exterior painting work during the commissioning periods at issue (ex. A-14 at 18-19; tr. 4/237-40). Mr. Nibert was appellant's first witness at the quantum hearing and testified for almost a full day (tr. 1/17-206). Appellant did not cite us to any testimony from him on this point, nor have we located any.

Mr. Lynch explained the steps that would have been required to move the bulkheads to another gate and to ready the gates for remedial painting during the 14-day commissioning periods. He agreed with the government on cross-examination that it would not have been a very efficient way to accomplish the work, although it would have achieved some progress. (Tr. 4/252-56)

Mr. Lynch was of the view that the work performed after substantial completion would have been reduced by 84 days of remedial painting during the commissioning periods and that quantification of the savings experienced by Noell should be based upon an economic evaluation of what would have occurred, not a schedule analysis. He computed a daily rate of $3,423 during the remedial painting period after substantial completion. (Tr. 4/243-44) He concluded the government's recovery should be the difference between the gate installation daily rate and the remedial painting daily rate. This is a daily rate of $1,449 ($4,872- $3,423) and reduces the job site overhead from $409,248 ($4,872 x 84) to $121,716 ($1,449 x 84). (Ex. A-14 at 20; tr. 4/243-44)

The government permitted appellant to use its rehabilitated set of bulkheads in September 1997 and work on Gate No. 3 began on 7 October 1997 with the installation of this set of bulkheads. Thereafter, one set of bulkheads was used to install the roller gates and the other set for remedial painting. *Fru-Con*, 05-1 BCA at 163,150. The Navigant REA gave the government a contract time credit of 116 days for use of the second set of bulkheads at the established daily rate of $4,872 (R4, tab C-1 at 55). We concluded in our entitlement decision, however, that the government had not carried its burden of demonstrating entitlement to the time credits it was seeking for allowing appellant to use this second set of bulkheads. *Fru-Con*, 05-1 BCA at 163,163.

Mr. Ockman, the government's expert, agreed that there was a great need to perform repair painting (tr. 4/213). He thought that the second set of bulkheads offset any hypothetical painting mitigation because it was the only set of bulkheads that could be used for remedial painting until the gate installation had been complete. In his view, the maintenance set of bulkheads also offset any mitigation because it was available for remedial painting 84 days earlier than it otherwise would have been because gate installation was completed 84 days earlier. (Tr. 4/209, 213-16)

Discussion

Appellant contends that the government's claim is defective and overstated, the major omission being the government's alleged failure to evaluate mitigation opportunities. The argument is that the government did not present evidence of what would have occurred to mitigate costs if Noell had been required to commission the

gates, *i.e.*, what Noell would have been able to do to reduce its costs if it had worked the 84 days. According to appellant, the daily field overhead rate should be reduced by $3,423, to $1,449, to reflect remedial painting.

There are a number of problems with appellant's argument. First, it is based upon the unsupported assumption that Noell would have performed remedial painting during the commissioning periods. Although he testified for almost a full day, Mr. Nibert did not testify that Noell would have performed remedial painting during the 14-day commissioning periods and any conversations to this effect Mr. Lynch may have had with him are hearsay. It further assumes that remedial painting during the commissioning periods would have been performed with the same efficiency as the remedial painting after substantial completion. This is contrary to the acknowledgment that moving the bulkheads and readying the gates would have impeded efficiency, so that a reduction of some unknown magnitude would have to be made to the remedial painting daily rate. It is also based upon the Goldmann schedule, which we found in our entitlement decision was not reasonably feasible and attainable. *Fru-Con*, 05-1 BCA at 163,161.

Moreover, the argument does not take into consideration either the fact that Noell was already using one set of bulkheads to perform remedial painting or the fact that the government's waiver of 84 days of commissioning made another set available for use 84 days earlier than it otherwise would have been available. Both offset any hypothetical and speculative painting that might have been performed during the commissioning periods.

And, finally, appellant has incorrectly applied the net savings concept. We are to measure the difference between the reasonable cost of performance with commissioning against the reasonable cost of performance after commissioning was waived. *See Celesco Industries, supra*. We are not persuaded that the reasonable cost of performance with commissioning in this case would include a reduction for a cost that is based upon speculation as to what remedial work hypothetically could also have been performed at the same time.

We conclude that Noell's daily field overhead rate of $4,872 is recoverable for each of the 84 days we awarded the government. This is a total of $409,248.

The government also seeks credit savings for Noell's home office overhead at 5.87 percent and profit at 6 percent. The home office overhead rate of 5.87 percent was stipulated to for the purposes of ASBCA No. 55197 and we find it to be correct (tr. 1/8). Thus, as to Noell's home office overhead, the savings credit is $24,023 ($409,248 x 5.87 = $24,023).

As to profit, we applied a rate of 10 percent, not 6 percent, for Noell in ASBCA No. 55197. However, we are to leave Noell in an unchanged financial condition. *See Hensel Phelps, supra*. Because Noell was in a loss position on this contract, a contract price deduction to reflect a loss of profit would increase the loss over what it would have been without the change. We therefore eliminate Noell's profit from the contract price adjustment due the government. *See CRF, A Joint Venture of Cemco, Inc., and R .F. Communications, Inc*., ASBCA No. 17340, 76-1 BCA ¶ 11,857 at 56,805.

The total credit to the government for Noell's commissioning cost savings is $433,271 ($409,248 + $24,023).

The government also seeks a credit for Fru-Con's savings. In ASBCA No. 55197, the parties stipulated to a Fru-Con home office overhead rate of 4 percent and bond and insurance rate of 1.32 percent (tr. 1/8). These same rates are applied by the government for its credit and appellant has not contested them. In ASBCA No. 55197, we applied a field office overhead rate of 13.56 percent and a profit rate of 6 percent for Fru-Con. We apply each of these same Fru-Con rates in ASBCA No. 55248.

The credit to which the government is entitled for the cost savings to appellant resulting from the waiver of 84 days of commissioning is as follows:

Noell's Costs:		
84 Days of Field Overhead @ $4,872 per day	$409,248	
Home Office Overhead @ 5.87%	24,023	
	$433,271	
Fru-Con Mark-ups:		
Home Office Overhead @ 4 %	17,331	
	450,602	
Field Office Overhead @ 13.56 %	61,102	
	511,704	
Profit @ 6%	30,702	
	542,406	
Bond & Insurance @ 1.32%	7,160	
Total Savings		$ 549,566

We make a monetary award in ASBCA No. 55248 in the amount of $549,566, plus interest under FAR 52.232-17 to run from 11 February 2002 (the date of the final decision demanding payment of the government's claim) until paid.

CONCLUSION

We sustain ASBCA No. 55197 to the extent indicated and award appellant a total of $203,427, plus interest under the CDA to run from 24 May 2001 until paid. We sustain ASBCA No. 55248 to the extent indicated and award the government a total of $549,566, plus interest under FAR 52.232-17 to run from 11 February 2002 until paid.

Dated: 4 October 2007

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 55197, 55248, Appeals of Fru-Con Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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