

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
ECC, International ) ASBCA No. 55781  
 )  
Under Contract No. W916QW-05-D-0007 )  
Task Order No. 0003 )

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OPINION BY ADMINISTRATIVE JUDGE MELNICK

Appellant, ECC, International (ECCI) erected a prefabricated warehouse in Iraq for the United States Army Corps of Engineers (Corps). Performance was delayed and it appeals the contracting officer's denial of its claim for compensation. We deny the appeal.

FINDINGS OF FACT

I. The Contract and Task Order

1. On 15 November 2004, the Corps awarded to ECCI an indefinite-delivery-indefinite-quantity (IDIQ) contract, No. W916QW-05-D-0007, for construction and construction related requirements in Iraq. The contract required ECCI to provide all labor, management, and equipment necessary to perform services ordered in separate task orders. (R4, tab 2 at 12-14, 19) In accordance with that procedure, on 20 November 2004, ECCI submitted a proposal to the Corps to design and construct a pre-engineered, pre-fabricated warehouse in Kirkush, Iraq, as a delivery under the contract. ECCI proposed performing the work for a firm fixed-price of \$1,303,109. (R4,

tabs 1, 5) ECCI had responded to a Corps solicitation for these design and construction services that required completion of performance within 60 days of receipt of a notice to proceed (R4, tab 1). On 27 November 2004, the Corps awarded the warehouse work to ECCI as Task Order 0003 of the contract. As ECCI had proposed, the total price was \$1,303,109. (R4, tab 7)

2. The task order required completion within 180 days of the notice to proceed, rather than the 60 days specified by the Corps in its original solicitation (R4, tab 7 at 141). However, nothing in either the task order or the contract barred ECCI from performing in less time if it preferred to do so, and at the time the task order was awarded ECCI had no concerns or complaints about the increase in performance time (tr. 1/62). Indeed, ECCI's bid for the warehouse project was based upon the assumption that the job would take 90 days to complete (R4, tab 5 at 95).

A. The Contract

3. To address the interplay between the underlying contract and task orders, section 00700 of the contract contained the FAR 52.216-18, ORDERING (OCT 1995) clause. In addition to requiring all services under the contract be ordered through delivery or task orders, it dictated that, in the event of a conflict between a task order and the contract, "the contract shall control." (R4, tab 2 at 19)

4. Section 00800 of the contract also contained numerous "SPECIAL CONTRACT REQUIREMENTS" (R4, tab 2 at 26). Paragraph 5, "RESPONSIBILITY OF THE DESIGN BUILD CONTRACTOR DESIGN-MAR 2002," imposed upon the contractor responsibility for the quality, accuracy, and coordination of all of the designs, drawings, and specifications furnished under the contract. It also provided that:

(b) The standard of care for all design services performed under this agreement shall be the care and skill ordinarily used by members of the architectural or engineering professions practicing under similar conditions at the same time and locality. Notwithstanding the above, in the event that the contract specifies that portions of the Work be performed in accordance with a specific performance standard, the design services shall be performed so as to achieve such standards.

(R4, tab 2 at 28) Paragraph 13, "COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK," required the contractor to:

(2) [P]rosecute the work diligently, and (3) design (when included in a specific Task Order) and construct the entire

project, ready for use, not later than the time specified in each Task Order after receipt of notice to proceed.

(R4, tab 2 at 31)

5. Similarly, section 01000, provided more information about the nature of the work and duties of the contractor. It provided:

#### 1.0 DESCRIPTION

....

1.3 The Contractor shall complete all work under this contract in accordance with schedules that are established in each Task Order. Work will vary from site to site and will require extensive knowledge of construction and renovation projects. Submittal dates will be included in the individual Task Orders. These dates identify when information is due in the issuing Government office and other addresses identified in the individual Task Orders. The types and numbers of submittals and dates and places for review meetings shall be established by each Task Order under this contract.

2.0 OBJECTIVE. This contract is intended to provide for quick, cost effective responses to repairs, renovations, incidental demolition and construction situations relating to, but not limited to, sitework, geotechnical, landscaping,... architectural, structural, mechanical, electrical,...in Iraq. The work may involve... new construction. Additionally, the work may include the supply of equipment to support facility operation, and the commissioning and training associated with equipment installation. Facility repairs, renovations and construction shall conform to the requirements of the technical criteria listed in the Task Order. This objective shall be achieved through the implementation of Task Orders issued under the terms of this contract for all of the herein described tasks or additional tasks described in specific Task Orders....

#### 3.0 SCOPE OF WORK

3.1 Work to be Done: The Contractor shall furnish all plant, labor, materials and equipment to perform all work in strict accordance with these specifications and Task Orders.

....

3.1.2 The Contractor shall provide professional design or engineering services indicated above. This will NOT be the primary focus of this contract. If a Task Order is not fully designed, the Contractor shall complete the design and construct the work. The level of design effort required will be identified in the individual Task Order requirements.

....

3.1.7 Safety:

3.1.7.1 The Contractor shall comply with Corps of Engineers Manual EM-385-1-1, and other safety requirements as specified herein.

(R4, tab 2 at 38-40) The contract also placed upon the contractor full responsibility to complete the work, stating:

5.0 ITEM OF WORK TO BE PERFORMED. The Contractor shall, commencing upon issuance of a Task Order, supply all personnel, tools, equipment, transportation, materials, and supervision (except as otherwise noted or provided) to safely and efficiently perform the work....

(R4, tab 2 at 42)

6. Section 01012 of the contract applied to task orders that required design services, such as Task Order No. 0003. It permitted the contractor to apply the "Fast Track" method of design and construction. (R4, tab 2 at 50) Paragraph 25 of section 00800 explained that "Fast Track" required the contractor to:

[I]nitiate design, comply with all design submission and shop drawings submission requirements as covered under Section 01012 "DESIGN AFTER AWARD" and 013300 "SUBMITTAL PROCEDURES", and obtain Government review of each submission. The Contractor may begin

construction on portions of the work for which the Government has reviewed the final design submission and has determined satisfactory for purposes of beginning construction. The ACO or COR will notify the Contractor when the design is cleared for construction.

(R4, tab 2 at 36)

7. Section 01012 stated that individual task orders could designate the minimum number and composition of design submittal phases for the contractor to schedule. It contemplated preliminary and final design submittals. It then required the submission of a design schedule and listed the materials to be presented with each design submittal. (R4, tab 2 at 50-53) Section 01012 expressly barred the contractor from “perform[ing] any construction work until the 100% comments for each submittal have been incorporated into the design, unless specifically authorized by the COR” (R4, tab 2 at 50). A contractor could only “begin construction on portions of the work for which the Government...reviewed the Final Design Submission and...determined satisfactory for purposes of beginning construction.” It explained that “[t]he Administrative Contracting Officer or COR will notify the Contractor in writing when the design is cleared for construction.” (R4, tab 2 at 52)

8. Paragraph 8 of section 01012 required design and construction submittals to be delivered to the Corps via courier. Paragraph 10 provided, unless modified by task order, that the government would take 7 days to review each 50% design submittal and 14 days to review each 100% design submittal. (R4, tab 2 at 53-54) Paragraph 15.1 of section 01012 required the contractor to submit marked up and final specifications as required by the task order. The contractor was to use Corps Guide Specifications from the Corps’ Specsintact specification editing system, unless otherwise required by a task order. Coupled with that was paragraph 15.2’s requirement that, in association with each specification, the contractor develop submittal requirements and a submittal register identifying items such as “shop drawings, manufacturer’s literature, certificates of compliance, material samples, extensions to the design, guarantees, test results, etc. that the Contractor shall submit for review and/or approval action during the life of the construction contract.” Paragraph 17 of section 01012 required the contractor to “identify, for approval, the Designer of Record for each area of work.” (R4, tab 2 at 56-57) Finally, the government possessed the right to return design submittals for improvement that it determined were inadequate (R4, tab 2 at 55).

9. Section 01330 of the contract governed submittal procedures. Paragraph 1.1.1 stated that “submittals will be defined and described in the Technical Sections of each Task Order, and by CONTRACT CLAUSES and other nontechnical (administrative, etc.) parts of the Task Order and the contract.” Paragraph 1.1.2 required “Designer of Record approval” for, among other things, “any deviations,...and other items as designated by the

Contracting Officer's Representative." It permitted the government to review submittals for conformance "to the Task Order requirements Contractor furnished design." Paragraph 1.1.3 required contracting officer approval for "deviations from the Task Order or approved Government or Contractor Furnished design and other items as designated by the Contracting Officer's Representative." Paragraph 1.1.4 noted that "[a]ll submittals not requiring Designer of Record or Government approval will be for information only." (R4, tab 2 at 68) Paragraph 1.3 required the contractor to correct all submittals required by the contracting officer's representative, and promptly furnish corrected submittals. Any "information only" submittals found to contain unapproved deviations would be resubmitted for approval. It also warned that if the contractor considered any correction required by the government to constitute a change to the contract, a notice in accordance with the contract's "Changes" clause should be given promptly to the contracting officer's representative. (R4, tab 2 at 69)

10. Paragraphs 2.2.2-2.2.3 of section 01330 noted that, for task orders including design services, the Designer of Record was to identify required submittals and develop a register of those submittals for government approval. Paragraph 2.3 provided that "[a]dequate time (a minimum of 14 calendar days exclusive of delivery time) shall be allowed and shown on the register for Government review or approval" of submittals. Paragraph 2.4 required ENG Form 4025 to be used to transmit submittals to the government. (R4, tab 2 at 69-70)

11. Section 01312A of the contract addressed the Quality Control System. Under Paragraph 1.1, the government was to use the Resident Management System for Windows (RMS) to monitor and administer the contract. It dictated that the contractor use the Construction Contractor Module of RMS, called QCS, to "record, maintain, and submit various information throughout the contract period." (R4, tab 2 at 57) Paragraph 1.2 committed the government to making the QCS software available and the contractor to downloading it from the government's website (R4, tab 2 at 58). Paragraph 1.6 obligated the contractor to maintain the QCS database at its site office (R4, tab 2 at 59). Paragraph 1.1.1 required the parties "to the maximum extent feasible, exchange correspondence and other documents in electronic format." However, "[c]orrespondence, pay requests and other documents comprising the official contract record [were required to] also be provided in paper format." (R4, tab 2, at 57) Data was to be transferred from the QCS database to the government's RMS system by email, which was preferred, CD-ROM, or disks (R4, tab 2 at 59-60, 63).

12. Similarly, section 01451A, imposed contractor quality control (CQC) provisions upon the contractor (R4, tab 2 at 72). Paragraph 3.2 contained requirements for the submittal of a quality control plan (R4, tab 2 at 73). Paragraphs 3.4.1-2 provided for the designation of a CQC organization, headed by a system manager who was required to "be on the site at all times during construction and shall be employed by the prime Contractor" (R4, tab 2 at 76-77).

13. Finally, the contract incorporated the FAR 52.243-4, CHANGES (AUG 1987) clause (R4, tab 2 at 18).

B. Task Order 0003

14. As noted previously, Task Order No. 0003 of the contract provided for ECCI to provide "design and construction services for...[a] pre-engineered metal, pre-fabricated warehouse facility," and it required "[t]he design and construction shall adhere to all International Code Standards" (R4, tab 7 at 131). More comprehensively, among the provisions of section 2 of the Task Order, entitled "REQUIREMENTS," is section 2.5's description stating:

The CONTRACTOR shall be responsible for the complete construction of the warehouse facility located on the complex described herein. All work will conform to the International Building Codes. The construction work shall generally include the following items:

Completely remove all debris, rubble, and trash in the designated warehouse area. Completely construct the pre-engineer, metal, pre-fabricated warehouse structure. Construction includes;[sic] the installation of two roll down garage doors on either end of the structure, one vehicle lane down the center of the warehouse, to allow for one direction of travel, caged in areas on both sides of the vehicle lane; windows as needed for ventilation

(R4, tab 7 at 132) Among section 2's more specific requirements is section 2.3, entitled "CONCRETE" requiring that:

[T]he concrete shall be free from excessive voids or cracks when placed and be whetted sufficiently as to avoid stress cracking due to excessive moisture loss. Soils beneath shall be compacted to 100% maximum density determined by the Standard Proctor Method, ASTM D 698 before concrete is poured. Expansion or control joints shall be placed in the concrete such that the maximum slab size is approximately 7 meters x 12.5 meters

(R4, tab 7 at 131-32)

15. Section 00800 of the Task Order also contained a lengthy additional description of submittal requirements. It included the following:

**1.0 SUBMITTALS:**

**1.1 GENERAL:** Design shall be submitted for review at two (2) stages of design. First submittal shall be required at the "Concept" stage of the design, and the Second (Final) submittal shall reflect the completed design. Submittal requirements for the concept and the final stages of the designs are noted below.

**1.2 CONCEPT SUBMITTAL:** Concept Submittal shall reflect 30-40% of the final design effort of all systems, and shall include drawings and design analysis. Submittal shall contain a narrative, calculations, drawings, specifications, and catalog cuts of material indicating its intended use.

**1.3 NARRATIVE:** Provide basis of design and brief narrative of proposed systems. Design or construction requirements by the local authorities, which are in total conflict with U.S. design standards, shall be discussed, and suggested acceptable solutions provided. Items of significant importance, which are missing from the Scope of Work, and may have a detrimental effect on the design, if not included, shall also be discussed and justification provided.

....

**1.5 SPECIFICATIONS:** CONTRACTOR shall provide outline specifications for each system to be provided under this contract. Specifications shall indicate applicable design standards and criteria followed, standards that the selected equipment and material shall comply with, method of equipment installation, and other construction requirements that the designer may see fit.

....

**1.7 FINAL SUBMITTAL:** Final submittal shall consist of the concept submittal requirements (design drawings and design analysis) updated to reflect final design development and incorporation of review comments.

**1.8 AS-BUILT DRAWINGS:** Upon completion of the contract work, CONTRACTOR shall provide five (5) sets of reproducible "As-Built" condition drawings. The drawings shall show the overall site, work completed under the contract.

....

**1.10 DESIGN SCHEDULE:** Before start of design the CONTRACTOR shall submit a design schedule for each utility system for approval by the PROJECT ENGINEER. The schedules shall clearly show design milestones.

....

**1.14 CONTRACTOR QUALITY ASSURANCE [sic]:** The CONTRACTOR shall establish and enforce a Quality Assurance program. The program will enforce standards on both materials and workmanship as established by the design engineers and architects. The CONTRACTOR shall have at least one employee assigned to Quality Assurance full time. Quality assurance shall be the only responsibility of this employee.

....

**1.17 DESIGN STANDARDS:** The CONTRACTOR shall adhere to the International Building Code, International Electrical Code, International Mechanical Code, International Plumbing Code, and International Fire Code. Construction shall not begin until approval by the PROJECT ENGINEER

## II. Performance

### A. QCS

16. There is no indication in the record that ECCI downloaded the QCS software upon commencing performance of the task order, or that the parties initially attempted to use QCS to electronically transfer information to the Corps' RMS system. ECCI simply carried submittals 100 meters to the appropriate government office, which was a practice it found acceptable. It also emailed daily reports and uploaded all project documents to its own web portal for the Corps to review. (R4, tab 13 at 544; supp. R4, Ruff, tab 3; tr. 1/75-80, 172, 226-27, 2/145, 3/34) That practice continued through most of the performance of the contract (tr. 1/133, 235-36). Submittals were also tracked on an Excel spreadsheet (tr. 1/214, 233-35).

17. On 6 March 2005, shortly after taking over as the contracting officer's representative (COR) on the warehouse project, CPT Jeffrey Hall wrote to James Margrave, ECCI's Project Engineer, about QCS. CPT Hall reminded Mr. Margrave that ECCI was required to use QCS to transfer information and provided the web address from which it could download the software. CPT Hall also noted that ECCI's quality control manager was required to attend a class about QCS. (Supp. R4, Ruff, tab 11 at 2645; tr. 2/172, 3/27)

18. Subsequent to CPT Hall's letter, ECCI's project engineer, Wayne Minehart, recorded in a 12 April 2005 daily log that he was "STILL TRYING TO LOAD QCS" (app. ex. A at 18). CPT Hall downloaded the QCS software for Mr. Minehart and loaded it on Mr. Minehart's computer (tr. 3/22-23, 30). He reviewed the QCS operating instructions with both Mr. Minehart and another ECCI employee, and showed them how to transmit data to the RMS system (R4, tab 10 at 368; tr. 3/23). From the time CPT Hall downloaded the QCS software onward, it was functional (tr. 3/30). The software was stand alone and did not require an internet connection to operate. Data was transferred between QCS and RMS on computer disks. (Tr. 3/29-30, 32, 64-65) Though the government had also established a secure electronic file interface for such transmissions, that method was not in use while CPT Hall was on the project (tr. 3/32, 207-08).

19. In late June or early July, 2005, Mr. Minehart departed Kirkush and took his computer with the QCS software loaded on it with him (tr. 1/237, 3/64-65). There is no indication that ECCI transferred the software from Mr. Minehart's computer to another before he left. ECCI did not understand that the software was stand alone, and that without the software it could not transfer QCS files to other computers (supp. R4, Vader, tab 17). In August, ECCI complained about lack of access to QCS (R4, tab 54 at 977, tabs 63-65; supp. R4, Ruff, tab 26). The government responded by noting that CPT Hall had already provided the software and trained ECCI in its use (R4, tab 60).

20. In late August of 2005, Mr. Stanley Toney of ECCI contacted a Corps program analyst named James Pollard. Mr. Pollard had converted the RMS/QCS system on other projects from disk or thumb drive data transfer to interface through the electronic secure file transfer point. Mr. Toney sought Mr. Pollard's assistance establishing that interface for the warehouse project. (Supp. R4, Toney, tab 20; tr. 2/76-81) Mr. Pollard explained to ECCI that the warehouse project was set up to transfer files to RMS through disks or memory sticks. He noted that it could be changed to use the file transfer point. On 30 August 2005, Mr. Pollard performed a successful QCS/RMS electronic file transfer for the warehouse project. From that point in time onward, ECCI could access the file transfer point to forward data to RMS, though it experienced some complications transferring or accessing data through that means. (Supp. R4, Toney, tab 20 at 2527-29; tr. 2/80-82)

B. Post-Award Construction Activities Through First Extension

a. Meeting and Schedule

21. On 6 December 2004, ECCI and the government held a post-award meeting (R4, tabs 8-9; tr. 1/62-63). Mr. Margrave presented a set of slides that summarized the contractual requirements, including the initial submittal containing a 30-40% design, a final submittal reflecting final design development and review comments, and the subsequent submittal of five sets of "As-built" drawings. The slides also showed that international building codes would be followed, all materials would be submitted for approval, a CQC would be put into place, the EM 385-1-1, Safety and Health Requirements Manual would apply, and the period of performance would be 180 days. The slides also identified ECCI's subcontractor, Al-Broog. (R4, tab 8 at 142-151)

22. In the minutes of the post-award meeting, Mr. Margrave also represented that ECCI was in the process of developing both a safety and health plan and a quality control plan for submittal in ten days. He explained that ECCI intended to use the contract's "Fast Track" methodology. Mr. Margrave stated that ECCI had completed a preliminary design schedule for which it was awaiting subcontractor input, and similarly was still working with the subcontractor on an initial, conceptual building design. Mr. Margrave forecasted that the schedule and initial design would be submitted in ten days. Mr. Margrave noted that ECCI would work with the government in the event materials necessary to meet international building standards were not available. Mr. Margrave also reported that the government had stated it would turn around all submittals in three days. He did not identify the individual from the Corps who made that statement. (R4, tab 9 at 158-59) In a subsequent meeting, the government noted that three days was insufficient for review of materials requiring technical specialists (R4, tab 13 at 543). Still later, the government simply noted that it would compress its review schedule when possible (R4, tab 28 at 753).

23. The day after the post-award meeting, 7 December 2004, ECCI ran a schedule showing performance of the project over 180 days, commencing 27 November 2004 and finishing 26 May 2005. Under its schedule, ECCI would submit a critical path construction schedule, a safety plan, a 30% concept design, specifications, and 100% design drawings, between 16 December 2004 and 1 January 2005. ECCI was to procure the major building components between 20 December and 3 January. It would prepare the foundation between 6 December and 8 March, erect the structure between 2 March and 17 April, perform rough-in work between 8 March and 29 April, finishing work between 30 March and 25 May, close-in work between 25 April and 21 May, and closeout work between 28 April and 26 May. (R4, tabs 6, 25)

b. Government Personnel

24. There were three CORs on the project at different times. The first was Mr. Harry Knight (R4, tab 15). CPT Hall replaced Mr. Knight in late February 2005 and served as COR until the beginning of August, though he was not physically present on the site during July (tr. 2/162-63, 235-36, 245). Mr. Harland Kroll became the COR on 13 September 2005 (tr. 3/188). During the time between CPT Hall's departure and Mr. Kroll's arrival, ECCI forwarded its submittals directly to the contracting officer (tr. 1/216-17).

25. Mr. Roy Ruff was the government's construction representative and project engineer. He performed quality assurance for the government, which included receiving submittals from the ECCI and checking them against the contractual requirements. (Tr. 3/40-41) Mr. Ruff was knowledgeable about construction methods (tr. 2/233). However, Mr. Ruff did not possess authority to officially approve or reject submittals for the government (tr. 2/265, 3/41). ECCI understood Mr. Ruff's role and the limits upon his authority (tr. 1/66). However, Mr. Ruff did purport to approve some submittals (supp. R4, Toney, tab 7 at 2226, 2259, 2271-72, 2274, 2281, Ruff, tab 4 at 2605, 2608). He also purported to reject some (supp. R4, Toney, tab 7 at 2273, 2282, Ruff, tab 4 at 2618). Mr. Ruff also purported to declare some submittals to be for the government's information only (supp. R4, Toney, tab 7 at 2224, 2258, 2276, 2294, Ruff, tab 4 at 2589-90, 2604). Some of Mr. Ruff's signatures included the letters "P.E.", which he intended to mean "Project Engineer" (tr. 3/40-41).

c. Initial Submittals

26. On 21 December 2004, ECCI submitted the concept design, which was approved on 26 December (tr. 3/90-92). However, it did not submit specifications or its 100% design as scheduled. On 30 December 2004, it submitted an initial health and safety plan, as well as a quality control plan (supp. R4, Toney, tab 17 at 2476). The government disapproved the health and safety plan on 8 January because it lacked an

accident prevention plan (R4, tabs 11-12). Mr. Ruff had also indicated that an onsite representative needed to write the health and safety plan (R4, tab 12). ECCI submitted a revised health and safety plan, which included accident prevention, on 29 January (supp. R4, Toney, tab 17 at 2476; app. ex. A at 6). After the government's area engineer, Michael Laurenceau, concurred with ECCI's position that the plans need not be written by an onsite representative, they were approved on 15 February (R4, tabs 14-16; supp. R4, Toney, tab 17 at 2477). ECCI submitted a revised quality control plan on 11 January, which was approved on 16 February (supp. R4, Toney, tab 17 at 2476-77; app. ex. A at 10).

d. Initial Site Work

27. On 6 January 2005, ECCI mobilized its subcontractor to perform earthwork onsite. Between 8 and 15 January, it worked on fencing and subbase materials (supp. R4, Toney, tab 17 at 2476). From 16 to 17 January it worked on fence holes and posts (app. ex. A at 3-4). Between 18 January and 2 February ECCI's subcontractor employees were offsite for a holiday (supp. R4, Toney, tab 17 at 2476; app. ex. A at 4-7). ECCI engaged in proof rolling and subgrade compacting between 29 and 31 January (supp. R4, Toney, tab 17 at 2476; app. ex. A at 6). ECCI performed very little additional site work between 10 February and 15 April 2005 (supp. R4, Toney, tab 17 at 2476-77; app. ex. A at 8-21). ECCI's logs reported the project to be only 4% complete between 11 January and 30 April 2005 (R4, tab 10 at 184-462).

e. Harmonization of Contract and Task Order

28. During meetings in January, 2005, a disagreement arose between ECCI and Mr. Ruff about the harmonization of the contract and task order (R4, tabs 12-14). Around 8 February, Mr. Laurenceau addressed ECCI's inquiries about the matter and concluded that "all work" needed to be "in accordance with the IDIQ and Task order specifications." He found reasonable ECCI's statement that it would "follow the construction methodologies and specifications that will be provided by the manufacturers and those as outlined in the IDIQ and the Task Order." (R4, tab 15)

f. Rock Type

29. During a 25 January 2005 meeting, ECCI raised with the government the type of rock to be mixed with the concrete. ECCI sought to use washed river rock, as opposed to crushed stone, but Mr. Ruff indicated river rock was not acceptable. (R4, tab 13 at 547) Mr. Laurenceau's communication from around 8 February repeated the government's requirements, which were 28-day compressive strength of 28 MPa or greater, and that the concrete conform to the International Building Codes. He stated that ECCI was to provide laboratory test results showing its concrete met the required

compressive strength. He did not indicate that crushed stone was required. (R4, tab 15) Nevertheless, ECCI ultimately used crushed stone rather than river rock (tr. 3/99-101).

g. Initial Compaction Test Issues

30. On 14 February 2005, ECCI's testing laboratory, Andrea Labs, provided soil compaction test results (supp. R4, Toney, tab 17 at 2477). During a meeting on 16 February, Mr. Ruff stated that Andrea's results were unacceptable because it was not an approved laboratory. He maintained that the contract required the establishment of a government approved onsite laboratory. (Supp. R4, Ruff, tab 5)

h. Potential Location Change

31. On 23 February 2005, some inquiries took place within the government about changing the location of the warehouse. The subject was discussed with ECCI. ECCI voluntarily suspended its site work from 26 February through 2 March while the issue was considered. (R4, tabs 17, 19 at 560-61, tab 22; app. ex. A at 11-12; tr. 1/93, 261) Ultimately, the government decided not to move the warehouse, which was communicated to ECCI by 3 March (app. ex. A at 12).

i. Security Issues and Weather

32. Many construction projects performed by the government in Iraq presented security challenges (tr. 3/315). It was dangerous to transport materials and labor, also making labor retention difficult (tr. 1/222). ECCI's subcontractor was also threatened and attacked (app. ex. A at 9). During a meeting on 16 February 2005, ECCI informed Mr. Ruff that insurgent threats were affecting its subcontractor's performance. ECCI suggested some flexibility would be necessary due to the war time conditions, limited availability of services, and because of local building techniques. Mr. Ruff responded that all terms and conditions of the contract would be followed. (Supp. R4, Ruff, tab 5) Heavy rain also saturated the project site during early March, 2005, interfering with work on 6 through 7 March, and 10 through 14 March (app. ex. A at 13-15).

j. Building Procurement and Design Submittals

33. ECCI encountered major delays procuring the prefabricated building that was to be erected at the site between 2 March and 17 April 2005. ECCI's subcontractor began communicating with a building supplier in Turkey on 12 December 2004, and commenced the process of obtaining a visa to travel there the next day (supp. R4, Toney, tab 17 at 2476). Between 13 January and 3 February 2005, the subcontractor traveled to Turkey to discuss that purchase (R4, tab 10 at 184-254). Between 27 December 2004 and 4 February 2005, ECCI reported its subcontractor understood the need to expedite the procurement of the building (R4, tab 10 at 160-255). On 5 February, ECCI

communicated that it was seeking an updated report from its subcontractor about the building design (R4, tab 10 at 256). On 10 February, ECCI noted that it lacked confidence in the subcontractor regarding the building's procurement (app. ex. A at 8). On 16 February, ECCI admitted that the subcontractor had been unable to provide a building design (R4, tab 10 at 278). ECCI's logs expressed additional concerns on 18 through 20 February, 24 February, and 5 March (app. ex. A at 10-11, 13). Between 23 February and 2 March, ECCI stated that its subcontractor was evaluating other options for the building's procurement (R4, tab 10 at 293-304). On 3 March, ECCI disclosed that its subcontractor had encountered a 300% price increase for materials in Turkey, and that its expected final designs had not been delivered (R4, tab 10 at 310). Around 5 March, ECCI commenced its own efforts to procure a building from a vendor in Jordan (R4, tab 10 at 316-418; supp. R4, Toney, tab 17 at 2477; app. ex. A at 15).

34. Over two months after it had been scheduled to do so, on 4 March 2005, ECCI submitted a proposed 100% design, which was rejected by the COR as inadequate (R4, tab 23; tr. 2/177). On 14 March, ECCI reported that it had sent design specifications to its building vendor, which began its own preliminary design work (R4, tab 10 at 341). It explained that foundation work would be suspended until the government approved the building's design (R4, tab 10 at 345).

k. First Request for Extension, Discussions, and Additional Design Submittals

35. On 21 March 2005, ECCI requested that the time for performance of the task order be extended by 90 days, from 27 May 2005 to 25 August. It justified the request by citing to delays experienced by its subcontractor obtaining a visa to travel to Turkey for the building, government delays reviewing the quality control and safety plans, an allegedly unjustified requirement that ECCI produce an accident prevention plan, the absence of subcontractor personnel due to Iraqi holidays, security threats, and ECCI's suspension of work when consideration was given to moving the warehouse. (R4, tab 25)

36. On 28 March 2005, ECCI's new Jordanian building vendor provided a design and price quote for the building (R4, tab 10 at 377; supp. R4, Toney, tab 17 at 2477). On 31 March 2005, ECCI met with CPT Hall and represented that a soil bearing test and new concept design would be submitted by 1 April. It asserted that the government had one week to review them. It also stated that, after approval of the concept design, the building would be purchased from the Jordanian manufacturer, fabricated, and shipped to the site by 5 May at the earliest. (Supp. R4, Ruff, tab 12) CPT Hall considered the meeting productive (tr. 2/266). On 5 April, ECCI submitted the new vendor's revised 30% conceptual design (R4, tab 97 at 1132; supp. R4, Toney, tab 17 at 2477).

## 1. Cure Notice and Building Purchase

37. On 8 April 2005, CPT Hall prepared an internal memorandum analyzing whether ECCI's performance of the task order should be terminated for default. CPT Hall noted that design and construction specifications were not received until 5 April, though previously due under the schedule on 22 December. Similarly, the 100% design submittals were not received until 9 March, though they were due between 28 December and 1 January. No design calculations had been received, though due 18 December. Work did not commence until 7 January, though originally scheduled to begin earlier. No work was performed between 18 January and 3 February, and none had been performed between 10 February and the current date. CPT Hall also considered it inexcusable that ECCI had failed to provide a submittal register. He opined that ECCI was not entitled to an extension due to time lost revising unapproved submittals, and noted that no claim had been received for days lost due to security threats. Accordingly, CPT Hall concluded that ECCI had not demonstrated the ability to timely perform the contract, that its 90-day request for extension was baseless, and that performance should be terminated for default. (R4, tab 26)

38. On 11 April 2005, the contracting officer, MAJ Leigh Bandy, notified ECCI that its lack of progress was having a serious impact upon the government's mission, and that unless ECCI demonstrated certain progress, the government would consider terminating the task order for default. MAJ Bandy noted that ECCI was 135 days into the 180-day period of performance, yet the project was less than 10% complete. He repeated CPT Hall's observations about late submittals and observed that the project should be at the partial rough-in phase. Accordingly, MAJ Bandy provided a list of items to be cured by a meeting scheduled for 23 April. Among the items was that ECCI provide proof that the building had been ordered. (R4, tab 27)

39. During the 23 April 2005 meeting, ECCI reported that it had 60% confidence that it would complete the project by 31 July, and 80% confidence for 11 September. It stated that its subcontractor would perform "24 hour operations as needed to compress the period of performance to meet the presented timelines." It explained that "receiving materials and unsteady labor" were "the greatest risk in the schedule" and that "fabrication and delivery of the...building is the critical path of the project." ECCI repeated its belief that the government agreed to review submittals within three days. It was noted during the meeting that the contract provides for seven days and the government stated it would attempt to compress its review when possible. (R4, tab 28)

40. At the 23 April meeting, ECCI also provided proof that the building had been purchased, and stated it anticipated delivery by 1 June. After ECCI also presented the soil tests taken in February, the government told it that the government would not conduct a full certification of the testing laboratory and would relax its requirement that the testing facility be onsite. The government stated that it would defer deciding upon

ECCI's request for extension until after it reviewed additional promised submittals. (R4, tab 28)

m. Delivery Delay and 100% Design Submittal

41. On 26 April 2005, ECCI's Jordanian building vendor sought to renegotiate its sale with ECCI because shipping costs had increased, delaying the shipment of the building. It also sought all payment in advance of shipment. (R4, tab 51)

42. On 30 April 2005, ECCI provided another submittal purporting to be its 100% design, which contained shop drawings from the manufacturer of the building. This submittal was first rejected by the COR, but then approved with a resubmittal required. (Supp. R4, Toney, tab 7 at 2185-88; tr. 2/29-33) In response, ECCI stated it would obtain and provide some of the requested information, but later concluded under the "Fast Track" methodology it need only provide "as built" drawings after completion (supp. R4, Toney, tab 7 at 2186-87; tr. 2/100-02). During a meeting held on 7 May, ECCI communicated that it considered the project completion date to be 10 September (R4, tab 29).

n. First Task Order Extension

43. On 23 May 2005, the contracting officer granted 82 of the 90 additional days ECCI had requested for performance of the task order, to 17 August 2005. Task Order No. 0003 was modified to that effect on 30 May. Eight days were denied on the ground that the government had not suspended performance while it considered moving the warehouse. ECCI was given until 30 May to provide a revised completion schedule consistent with that extension. (R4, tabs 30-31)

C. Activities Through Grant of Second Extension

a. June 2005 Extension Discussion, Building Steel Shipment, and ECCI's Refusal To Provide A Revised Schedule

44. In an email from the contracting officer to ECCI, dated 14 June 2005, he stated he was "struggling" with an additional request by ECCI for an extension of performance (R4, tab 33). There is no indication that such a request for an extension was formally made. Nevertheless, the issue was discussed with the contracting officer. ECCI was concerned about whether it could complete the project by the extended deadline because of continued problems it was experiencing with its subcontractor. (Tr. 1/112-13) In the 14 June email, the contracting officer stated that ECCI had not complied with the promises made on 23 April. ECCI had not operated on a 24-hour basis, and very few workers had been on the site. The contracting officer concluded that an extension could not be granted unless ECCI would agree to the inclusion of a liquidated damages clause,

along with inclusion of a War Risks clause to apply to security related incidents. He stated that ECCI was late providing a revised schedule showing completion on 17 August, so unless it was willing to consider a liquidated damages clause it should submit a revised schedule by 20 June or risk adverse action. (R4, tab 33) There is no indication ECCI agreed to add a liquidated damages clause, or that an extension was granted at that time.

45. On 19 June 2005, ECCI resolved its dispute with its Jordanian building vendor. The first truckloads of steel left Jordan on 20 June, but were subsequently delayed due to security issues. (R4, tab 51)

46. In a meeting with CPT Hall held 21 June 2005, ECCI stated that it would not provide a revised schedule for completion on 17 August, as required by the government's grant of an extension. ECCI opted instead to remain with what it considered "a realistic schedule" for completion on 10 September. CPT Hall therefore recommended to MAJ Bandy that, if ECCI persisted in refusing to comply with the terms of the approved extension, then either a higher level directive should be issued to ECCI or the task order terminated for default. (R4, tab 34)

b. Second Soil Compaction Issue, Tie Beams, Slab, Welding, HVAC, and Request for Clarification Regarding Submittal Certification

i. Soil Compaction

47. During a meeting held 10 July 2005, Mr. Ruff raised the subject of the Andrea Labs soil compaction test results again, and suggested that they were falsified. He also agreed that the contractual requirement was for 100% compaction, despite prior statements that 95% would be accepted. (R4, tab 36) By letter to ECCI that same date, CPT Hall quoted the task order language requiring that "[s]oils beneath shall be compacted to 100% maximum density...before concrete is poured." He stressed that he never approved any change to this standard. Given that three test results previously submitted did not meet the requirement, he directed that the areas be compacted and tested again. (R4, tab 37) ECCI then submitted a request for change, dated 23 July 2005, conceding that the contractual requirement was for 100% compaction, but providing an analysis seeking acceptance of the compaction that had been achieved (R4, tab 42). By letter dated 28 July 2005, CPT Hall responded that ECCI's reduced compaction density request would be granted if it was certified with the stamp and signature of the registered engineer. CPT Hall did not require the engineer be registered in the United States. (R4, tab 46; tr. 2/228)

ii. Tie Beams

48. On 12 July 2005, Mr. Ruff was also shown a drawing of the building's tie beam form work, and agreed it would be acceptable (R4, tab 38 at 929). On 19 July, Mr. Ruff asked ECCI to submit slump samples and documentation for its concrete design for the tie beams. He also suggested that ECCI's subcontractor use additional concrete mixers to pour the tie beams. (R4, tab 39 at 931) After ECCI resubmitted its concrete mix design on 26 July, a discussion was held about testing the adequacy of the concrete's temperature, and it was noted that no thermometer was being used. Mr. Ruff stated that ECCI was pouring at its own risk. He also noted again that there were only two concrete mixers being used and he was concerned about whether that number was sufficient. (R4, tab 44 at 948)

49. On 3 August 2005, ECCI asked Mr. Ruff about the status of the concrete mix design submittal. Mr. Ruff replied that it was incomplete because it did not contain information about how the concrete's temperature would be measured while being poured. He also stated that ECCI would have to resubmit the design, along with the tie beam drawings, with the certification of a professional engineer. (R4, tab 48 at 963)

50. In early August, ECCI also drafted a memorandum memorializing a meeting with Ben Schiff, a government employee not assigned to the task order. The memorandum explained that ECCI inquired of Mr. Schiff as to why Mr. Ruff was requiring Styrofoam between tie beam joints. Mr. Schiff responded that he did not know why, but that it was not his project. (R4, tab 49)

### iii. Slab, Welding, and HVAC

51. In a 19 July 2005 meeting, Mr. Ruff informed ECCI that its slab control/expansion joint layout showed slabs that were too large. He stated that the joint layout should comply with specifications. ECCI stated that it would discuss the matter and resubmit its plan. (R4, tab 39 at 931) In a memorandum dated 22 July, ECCI's assistant project manager elaborated upon Mr. Ruff's comments, saying Mr. Ruff had returned ECCI's expansion joint submittal and that he considered the slabs too large, while ECCI believed that only four exceeded the maximum size specified. Mr. Ruff believed that, as currently shown, the slabs would crack. (R4, tab 40 at 932) During the 19 July meeting, Mr. Ruff also noted that ECCI's HVAC submittal only contained calculations, but no brands, splits, or catalog cuts. He asked for a complete package. (R4, tab 39)

52. Mr. Ruff repeated his position that some of the slabs were too large in a meeting held on 26 July 2005, noting also that the resubmitted plan would have to be stamped by a professional engineer (R4, tab 44 at 949). ECCI submitted a revised floor slab design on 2 August (R4, tab 51 at 970). Also during the 26 July meeting, Mr. Ruff repeated his request for a complete HVAC package. Finally, Mr. Ruff asked that a

submittal regarding welding be revised to include welding procedures. He asked for a preparatory meeting before any welding took place. (R4, tab 44)

iv. Clarification and Acceptance of Compaction Densities

53. By letter to the government dated 2 August 2005, ECCI sought clarification from the contracting officer about whether submittals had to be certified by a professional engineer registered in the United States, opining that the contract did not contain that requirement (R4, tab 47). In an email dated 5 August, ECCI reported that work was progressing well, but that it was “approaching a standstill situation” if it did not soon receive a response to its request for clarification (R4, tab 50).

54. By email dated 6 August 2005, ECCI stated that it was forwarding to the government materials complying with CPT Hall’s conditions for approving its compaction density variance (R4, tab 52 at 973). In a meeting held on 10 August, ECCI observed that all compaction densities were at 95% or above, and the government declared certification from an Iraqi engineer was acceptable (R4, tab 54). On that same date, the government accepted the compaction submittals from ECCI’s testing laboratory, stamped by an Iraqi engineer, and authorized ECCI to proceed with concrete placement (R4, tab 55). The government reiterated that a U.S. engineer’s certification was not required during a meeting held 29 August 2005 (R4, tab 64).

c. Arrival of Steel, Second Extension, and End of August Progress

55. By 7 August 2005, some, but not all, of the steel for the building had arrived at the site (R4, tab 51 at 968-69). On that date ECCI requested another extension of the task order completion date, seeking 62 days, until 18 October 2005. ECCI cited the delays it had experienced obtaining delivery of the building, which it estimated to be 62 days. It also gave other reasons, such as delays in obtaining equipment, remedying inadequate backfill compaction, obtaining government approval of the compaction variance and revised floor slab design, and obtaining clarification as to whether a designer of record need be identified for each submitted design. However, ECCI conceded that these additional grounds were concurrent with the delay obtaining the building, and the longest delay among them, approval of the compaction variance, had been 18 days. (R4, tab 51) By letter dated 17 August 2005, the contracting officer communicated to ECCI his belief that the grounds given for the request for extension were meritless, but nevertheless granted an extension of 45 days, to 1 October (R4, tab 59).

56. By late August 2005, the slab was poured, the prefabricated warehouse had been delivered, and the steel was being erected (tr. 1/241-42).

## D. Activities Through Grant of Third Extension

### a. Kroll's Arrival, Letters, and Stress Cracks

57. After arriving in September 2005 to take over as the COR, Mr. Harland Kroll participated in a meeting on 17 September that became the subject of a 19 September letter addressing several concerns. ECCI responded on 20 September, prompting some revised commentary by Mr. Kroll in a 25 September reply. (R4, tabs 72, 74-75; tr. 3/188) Among the matters discussed by Mr. Kroll during the 17 September meeting was his observation that there were numerous stress cracks in the building concrete, which he attributed to rapid evaporation (R4, tab 70 at 1018). The issue was raised again by Mr. Kroll in more detail in his 19 September letter, where he noted that ECCI said it would use an admixture and curing compound to address the problem (R4, tab 72 at 1024). During a 20 September meeting, ECCI sought clarification from Mr. Ruff about whether the cracking was excessive, suggesting a comparison should be made to other concrete work in the area. Mr. Ruff disagreed, saying the concrete looked "better than any on the base, but it is still not acceptable." (R4, tab 73 at 1027) Mr. Kroll's 25 September letter reiterated his view that "numerous stress cracks on early concrete work could have been avoided by proper concrete placement and curing," concluding that "[t]he evidence is in the results" (R4, tab 75 at 1034). Nevertheless, Mr. Kroll agreed that it was impossible to quantify the assessment, and no corrective action was required regarding the stress cracks (tr. 3/188-90, 247-48).

### b. Stairs

58. During the 20 September meeting, Mr. Ruff also observed that he believed the building stairs were supposed to be on the inside of the building and therefore had been installed in the wrong place (R4, tab 73 at 1027). On 27 September, ECCI agreed that the conceptual drawings had shown the stairs on the inside, but that placing them there would result in other undesirable changes. Thus, ECCI would seek a variance. Mr. Ruff noted that the current placement of the stairs could pose a fire hazard. ECCI agreed with that observation. It suggested adding doors in strategic locations. Mr. Kroll stated that the government would not require ECCI to move the stairs, but that the fire exit issue needed to be addressed. (R4, tab 77 at 1038)

### c. Submittal Register, Multitasking, Scaffolding

59. At the time Mr. Kroll came onto the project, there also was no up-to-date submittal register (tr. 3/194). During the 27 September meeting, ECCI and the government attempted to review the submittals, but neither party possessed complete records so it was agreed they should coordinate the development of matching files (R4, tab 77 at 1039). Mr. Toney of ECCI worked with Mr. Ruff and Mr. Kroll to correct deletions and inaccuracies in the Corps' RMS system (tr. 2/90-91). Also during that

meeting, Mr. Kroll asked ECCI if its subcontractor could be directed to do more than one thing at a time. Additionally, a discussion took place regarding safety, which included Mr. Ruff's comment that more scaffolding was needed. (R4, tab 77 at 1037; tr. 2/91-92) On 4 October he inquired as to whether more scaffolding would be obtained (R4, tab 79 at 1043).

d. Third Extension Request

60. On 28 September 2005, ECCI requested a third extension of the time to complete the task order, seeking an additional 60 days, from 1 October until 30 November. The reasons it gave were delays obtaining equipment, "delay due to entry during military convoy movement (entering or exiting)," as well as delays caused by terrorist threats and the observance of religious holidays. (Supp. R4, Ruff, tab 29)

e. Doors, Mezzanine, Multitasking, Epoxy, and Curing Compound

61. During a meeting held on 4 October 2005, Mr. Ruff inquired about the placement of personnel doors. He had identified an inconsistency between the concept design and their actual placement in the building. However, nothing was done about the matter. (R4, tab 79 at 1043; tr. 3/103-05) During that meeting, Mr. Ruff also inquired about ECCI's design for the mezzanine floor slab. ECCI responded that it intended to revise and resubmit that design. Additionally, Mr. Ruff followed up on Mr. Kroll's earlier request that the subcontractor multitask, asking about the subcontractor's progress. ECCI responded that it had met with the subcontractor about the matter, and gave examples of improvement. Mr. Ruff also stated that epoxy should be used on expansion bolts for the door frames. Finally, Mr. Ruff told ECCI that it should not forget to use the same curing compound on concrete cubes that it used on concrete slabs. (R4, tab 79 at 1042-44)

f. CQC Presence

62. On 12 July 2005, Mr. Ruff communicated to ECCI that it "should have someone on site to monitor subcontractor activities at all times," stating that it was for quality control purposes (R4, tab 38 at 929). During a meeting on 11 October, Mr. Kroll and Mr. Ruff stated that quality control and safety personnel, as well as a superintendent, had to be on the site at all times (R4, tab 81 at 1060). ECCI did not have its CQC manager onsite at all times during construction, and there were times when no quality control personnel were onsite (R4, tab 84 at 1074; tr. 2/12-13, 3/202-04).

g. Slab Approval

63. ECCI submitted its design for the slab on grade to the contracting officer during a period when there was no COR available. The slab was poured during August

of 2005. (R4, tab 51; tr. 1/241-42, 2/98-99) During an 11 October meeting, Mr. Ruff claimed that the slab design had never been approved. Mr. Kroll noted that some submittals had been given to the contracting officer and, notwithstanding the absence of a COR, told ECCI that the submittals “should have come to us.” (R4, tab 81 at 1060-61) Later, during a meeting on 25 October, Mr. Kroll asked whether the slab on grade had been approved. The submittal was retrieved and it was noted that ECCI had given it the wrong specification number and Mr. Ruff had marked it as being for information only. Mr. Kroll informed ECCI that it need only resubmit under the correct specification. (R4, tab 85 at 1087)

#### h. Roof Panels

64. After some roof panels were damaged, ECCI informed the government during the 11 October 2005 meeting that it would be using silicone to seal roof panels from leakage. Mr. Ruff opposed that practice. (R4, tab 81 at 1059-60) Nevertheless, Mr. Kroll approved the use of silicone (tr. 2/97).

#### i. Third Extension

65. On 21 October 2005, the contracting officer granted ECCI’s request for a third extension, providing an additional month beyond what had been requested, to 30 December. He also forwarded an interim performance evaluation that was unsatisfactory. He explained that if the project was completed prior to 30 December he would issue a new evaluation with a revised rating. (R4, tab 84)

### E. Activities Through Acceptance

#### a. Road and Ramps

66. In an 8 November 2005 meeting, Mr. Ruff referred to prior discussions he had with ECCI about a paved road to the warehouse. ECCI responded that a paved road was not required and would be impractical. Mr. Ruff agreed. (R4, tab 89 at 1113) In a 15 November meeting, Mr. Ruff stated that ramps had to be concrete, but a subsequent review failed to show such a requirement, and there is no evidence the matter was pursued further (R4, tab 90 at 1115).

#### b. Statements About Mr. Ruff

67. On 15 November 2005, Mr. Keith Pushaw of ECCI sent to COL Richard Jenkins of the government an email attaching five signed statements from ECCI personnel describing comments by Mr. Ruff that Mr. Pushaw characterized as “pretty disturbing.” The first statement was signed by Mr. Toney. It represented that, during a discussion on 27 October 2005, Mr. Ruff had stated that Mr. Pushaw and other

ECCI management had lied. Also, Mr. Ruff had called Mr. Otto Williams of ECCI a liar in front of Mr. Kroll during an unidentified weekly meeting. The second statement was signed by Mr. Williams. It reported that, during a meeting on 11 October 2005, Mr. Ruff stated that Mr. Pushaw was a liar. The third statement was signed by Mr. Brent Tatum and also described the 27 October meeting. The fourth statement was signed by Mr. John Consentino of ECCI, and essentially repeated the description of Mr. Ruff's statements on 27 October. The fifth statement was also signed by Mr. Consentino. According to it, Mr. Ruff reported that he had told the contracting officer responsible for another contract that ECCI was of no worth. (R4, tab 91) Mr. Pushaw provided the statements in the hope that Mr. Ruff would learn he had to work with ECCI (tr. 1/178-79). Shortly after the statements were sent, Mr. Ruff was transferred off the project (tr. 3/279).

c. CDR Shepard Telephone Conversation

68. On 17 November 2005, CDR Morgan Shepard, who was with the command that would receive the building, held a telephone conversation with ECCI and Corps representatives. CDR Shepard addressed procedures the parties would follow to completion, and stressed the importance of the parties working together to meet the deadline. He emphasized that the parties needed to communicate better. He relayed that they should not let submittal issues delay the actual progress of construction, while recognizing the importance of ultimately addressing submittal requirements. He also expressed his expectation that they act professionally. (R4, tab 95; supp. R4, Toney, tab 28; tr. 1/150, 2/110-17, 3/262-63)

d. Inspection and Acceptance

69. The government held a final inspection of the warehouse on 9 December 2005. Mr. Kroll did not attend the inspection. On that date he did sign the transfer document that constituted the government's acceptance of the warehouse, with no construction deficiencies noted. (R4, tab 98; tr. 2/250)

III. Request for Equitable Adjustment and Claim

70. By letter dated 23 December 2005, ECCI submitted a "Request for Equitable Adjustment" (REA) to the contracting officer for Task Order No. 0003, seeking \$1,152,533. The request was based upon alleged directed changes and government interference in ECCI's performance. (R4, tab 100) A government contracting officer who had been asked to review the REA responded on 24 May 2006, seeking more information and certifications (R4, tab 110, attach. 2). ECCI submitted a supplement to its REA on 25 September 2006, providing additional information, a certification of the request under DFARS 252.243-7002, and a Certificate of Current Cost or Pricing Data (R4, tab 104). Under DFARS 252.243-7002, ECCI's Operations Director certified that

the request was made in good faith and that the supporting data were accurate and complete to the best of his knowledge (R4, tab 104 at 1212). ECCI's Certificate of Current Cost or Pricing Data, which was executed by its Senior Contracts Manager, Glenn Sweatt, certified that, to the best of his knowledge the submitted cost or pricing data were accurate, complete, and current (R4, tab 104 at 1213).

71. By letter to ECCI dated 22 October 2006, the contracting officer denied the REA. The letter advised ECCI that it could pursue its request under the contract's "Disputes" clause. (R4, tab 107) By an additional letter dated 28 October 2006, the contracting officer referred to his 22 October denial of the REA and added, "[t]his constitutes the Contracting Officer[']s Final Decision." It repeated the statement that ECCI could pursue its rights under the "Disputes" clause. (R4, tab 108)

72. ECCI filed a notice of appeal to this Board on 29 January 2007. In a letter to government counsel dated 19 March 2007, ECCI's counsel referred to discussions that had occurred between them and that "it was agreed that a formal Contract Disputes Act Certification was needed prior to the issuance of a final judgment by" this Board. It declared that "[t]his letter constitutes ECCI's updated and CDA certified claim." (R4, tab 110 at 1240-41) Accompanying the letter was a statement, signed by Mr. Sweatt, "certify[ing] that the claim [was] made in good faith; that the supporting data [were] accurate and complete to the best of [his] knowledge and belief; that the amount requested accurately reflect[ed] the contract adjustment for which [ECCI] believe[d] the Government [was] liable; and that [he was] duly authorized to certify the claim on behalf of the ECCI" (R4, tab 110 at 1263).<sup>1</sup>

### DECISION

ECCI claims various events that occurred during performance of the task order constitute a constructive change, entitling it to additional costs of performance. Under the contract's Changes clause, the government is liable for delay or increased costs when it demands work not required by the contract's plans and specifications. *Randall H. Sharpe*, ASBCA No. 22800, 79-1 BCA ¶ 13,869 at 68,052. A constructive change is work performed in response to an informal change order or due to the government's fault. *Int'l Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). For a contractor to recover for a change, the person acting for the government must possess authority to modify the contract. *Winter v. Cath-DrlBalti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007); *Northrop Grumman Systems Corp. Space Systems Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,242. ECCI bears the

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<sup>1</sup> The Certificate of Current Cost or Pricing Data that ECCI submitted with its REA was a defective, but correctible, CDA certification, which ECCI subsequently did correct after filing the appeal. *W. Plains Disposal*, ASBCA No. 56986, 11-1 BCA ¶ 34,617 at 170,613.

burden of proving the elements of a change, *Die-Matic Tool Co.*, ASBCA No. 31185, 89-1 BCA ¶ 21,342 at 107,603, *aff'd*, 889 F.2d 1100 (Fed. Cir. 1989) (table), which is driven by the contract's language. *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995).

ECCI premises its constructive change claim upon allegations that the government failed to provide government-furnished property, interfered with its means and methods of performance by directing actions that were not required, constructively accelerated performance, and breached its duty of cooperation. We address each contention separately.

## I. Government-Furnished Property

ECCI contends that the government breached its obligation to provide it with access to an operational QCS system, which it characterizes as property that the government was required to furnish under the contract (app. br. at 10-16). It seeks compensation for the delays it claims to have experienced because the government failed to recognize that the system no longer supported transferring data by disk or CD-ROM, but instead dictated use of the secure file transfer point. It also seeks compensation for the resources it expended working around the system, and obtaining its own assistance to gain access to the file transfer point. (App. br. at 13-16) As a threshold matter, the government argues that this claim was never submitted to a contracting officer for a decision and therefore we lack jurisdiction to consider it (gov't reply br. at 16).

The government is correct that a claim presented here that was not first submitted to the contracting officer cannot be considered. *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905. The central question is whether the action being advanced now arises from common or related facts supporting the claim that was submitted. If it does, then it constitutes the same claim. *Id.* ECCI's REA contended that the government imposed an incorrect standard of care upon it and actively interfered with performance. It also alleged that the government changed personnel, safety, and design requirements. (R4, tabs 100, 104) ECCI did not advance a claim of failure to provide government-furnished property and so it does not appear that its claim encompassed this contention.

Even if ECCI's more general claim of active interference with performance includes this contention, ECCI has not shown the government breached any obligations. Regarding access to QCS, the government's only contractual requirement was to make the QCS software available on its website. It was ECCI that was responsible for downloading the software prior to the pre-construction conference and using it. (Finding 11) ECCI has failed to demonstrate that, upon commencement of performance, it made any effort to download or use the QCS software. Instead, both ECCI and the government were initially satisfied to work without QCS, with ECCI providing hard copies of

submittals to the Corps by hand, emailing daily reports, and uploading all project documents to its own web portal. (Finding 16)

When CPT Hall ultimately began requiring ECCI's compliance with the contract's QCS requirements, he downloaded the software to Mr. Minehart's computer for him and trained Mr. Minehart and others in its use. From then until the time Mr. Minehart left Iraq, ECCI successfully transferred data from its QCS database to RMS by disk (findings 17-19). To the extent ECCI encountered difficulties continuing to provide data to the government that way after Mr. Minehart left Iraq with his computer, the most likely reason for that was ECCI's failure to transfer the software from his computer to another, and designate someone else to use it after his departure. ECCI has not shown that, after Mr. Minehart left, any other intervening event caused it to become unable to send data from QCS to RMS using either computer disks or email.

ECCI's frustration about QCS primarily focuses upon its inability to transfer data directly through the secure transfer point until Mr. Pollard explained to it that the warehouse project was not set up for such transfer, and then arranged for ECCI to do so in late August, 2005 (app. br. at 13-16). However, the contract did not entitle ECCI to transfer data through a secure transfer point. It only provided for transfer through email, CD-ROM, or disk. (Finding 9) ECCI suggests that use of the secure transfer point supplanted use of disks or email (app. br. at 15). However, it has not shown that the government ever prevented it from transferring data through those means. Mr. Pollard's eventual connection of ECCI to the secure transfer point was not the overdue contractual performance suggested by ECCI, but instead gave ECCI an additional option for transferring data that the government was not required to provide.

## II. Interference and Wrongful Interpretation

### A. Actions of Mr. Ruff and the CORs

ECCI presents a lengthy list of alleged directives or positions taken by Mr. Ruff or the CORs that it claims constitute substitution of their preferred construction methodologies for those permitted by the contract, or wrongful interpretations of the contract. They include Mr. Ruff generally applying an incorrect standard of care to contract performance, improperly interpreting the interplay of the contract and task order, and improperly rejecting ECCI's submittals for failing to comply with Corps Guide Specifications. ECCI also contends that Mr. Ruff and Mr. Kroll incorrectly required ECCI's CQC Manager and safety officer to be onsite at all times, and that Mr. Ruff wrongfully required the site safety officer to write the health and safety plan. ECCI complains about Mr. Ruff's refusal to recognize Andrea Lab's soil compaction tests, refusal to permit the use of river rock in concrete, and demand for resubmittal of the expansion joint submittal. It cites Mr. Ruff's request that ECCI hold a preparatory meeting before welding, that it submit slump samples with documentation and

information about how temperature would be measured, that additional mixers be used, that ECCI move the building stairs, and install more scaffolding. It also points to Mr. Ruff's statements that it use epoxy on the expansion joints, that it move the doors, that it use silicon to stop roof leakage, that it install an asphalt road and concrete ramps, that its subcontractor engage in multi-tasking, that certain concrete curing procedures be used, and that Styrofoam be placed. ECCI contends that these acts constitute "prohibited micromanagement [that] significantly drove up the time, effort, and resources ECCI was forced to expend..." (app. br. at 23).

Assuming these events occurred as ECCI describes them, and that they could otherwise constitute constructive changes to the contract, ECCI is barred from recovering an equitable adjustment for them because neither Mr. Ruff nor the CORs were authorized to modify the contract. Mr. Ruff was the government's construction representative/project engineer. He provided quality assurance, which included receiving submittals and checking them against the contractual requirements. He did not possess authority to officially approve or reject the submittals or otherwise change the contract's requirements. ECCI understood those limits upon his authority. (Finding 25)

The Court of Appeals' decision in *Winter v. Cath-Dr/Balti* controls. There, the government entered into a contract for construction services containing the same Changes clause that is present here, FAR 52.243-4 (finding 13). A contracting officer executed the contract, but a Resident Officer in Charge of Contracts/Project Manager administered it. The contractor sought an equitable adjustment based upon the project manager's actions. The Court of Appeals denied entitlement. The Court recognized that, pursuant to FAR 43.102, "[o]nly contracting officers...are empowered to execute contract modifications." *Cath-Dr/Balti*, 497 F.3d at 1344. Additionally, the Court noted that the contract also contained DFARS 252.201-7000, which is also incorporated here (R4, tab 2 at 18). That clause authorizes the delegation of contracting officer administrative functions to a COR. As the Court noted, the clause expressly provides that "[t]he COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract." *Id.* at 1344-45. Accordingly, *Cath-Dr/Balti* held that only the contracting officer possessed authority to modify the contract. Given that mandate, we hold that neither Mr. Ruff nor the CORs possessed authority here to bind the government to the alleged constructive changes claimed by ECCI.

Evidently recognizing the limits upon Mr. Ruff's authority, ECCI suggests that all of his alleged acts were ratified (app. br. at 17-23). An unauthorized directive may be ratified if the ratifying official had authority, full knowledge of all of the material facts upon which the directive was taken, and demonstrated acceptance of the directive. Silence itself is not sufficient. *Cath-Dr/Balti*, 497 F.3d at 1347; *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433-34 (Fed. Cir. 1998); *Corners and Edges, Inc.*, ASBCA No. 55767, 09-1 BCA ¶ 34,019 at 168,294. ECCI claims that

all of the incidents it relies upon were documented in meeting minutes that were available for review by the CORs. It also stresses that the CORs were aware that Mr. Ruff acted upon some submittals himself, despite his lack of authority. (App. br. at 22-23) According to ECCI, “[t]he CORs were accordingly well aware of the additional work Mr. Ruff continuously requested of ECCI throughout its performance of the project and effectively ratified his request by failing to object to his general interference as well as his positions on specific issues” (app. br. at 22). However, as *Cath-Dr/Balti* makes clear, the CORs were no more authorized to bind the government to a constructive change than was Mr. Ruff, and therefore they could not ratify his purported directives. To recover under a ratification theory, ECCI was required to prove that the contracting officers were aware of Mr. Ruff’s orders and demonstrated acceptance of them. ECCI has not argued, much less proven, that they did.

Even if Mr. Ruff’s lack of authority was not an impediment to ECCI’s claim, it has not proven any actions by him that were inconsistent with the contract. ECCI contends that Mr. Ruff “completely ignored the standard of care provision set forth in the Contract and thereby failed to adjust [his] expectations as to the reasonable methods and means of performance that ECCI was entitled to employ in carrying out the project.” It contends that his “position proved costly to ECCI.” (App. br. at 40) ECCI relies upon section 5(b) of the contract’s “Clauses Incorporated By Full Text,” which provides that:

The standard of care for all design services performed under this agreement shall be the care and skill ordinarily used by members of the architectural or engineering professions practicing under similar conditions at the same time and locality. Notwithstanding the above, in the event that the contract specifies that portions of the Work be performed in accordance with a specific performance standard, the design services shall be performed so as to achieve such standards.

(Finding 4; app. br. at 37) ECCI generally argues that this language contractually required the government to afford it “some type of flexibility...to compensate for war time conditions, limited availability of required service industries and local building techniques” (app. br. at 38). It complains at length that Mr. Ruff ignored ECCI’s legitimate security challenges and difficulties obtaining necessary supplies and equipment (app. br. at 38-40).

ECCI’s argument about its standard of design and performance is incorrect. Under the contract, the standard of care for design services was to be “the care and skill ordinarily used by members of the architectural or engineering professions practicing under similar conditions at the same time and locality” unless the contract specified a portion of the “[w]ork be performed in accordance with a specific performance standard.” Then “the design services [were to be] performed so as to achieve such standards.”

(Finding 4) Indeed, Task Order 0003 required “[t]he design and construction to adhere to all International Code Standards” (finding 14). Thus, ECCI did not merely commit itself to perform under some adjustable standard that varied depending upon local conditions or building techniques. It agreed to design and construct this warehouse pursuant to International Code Standards. It confirmed that commitment at the post-award meeting (finding 21). ECCI has not proven that Mr. Ruff required it to exceed those standards.

ECCI also claims that its general disagreement with Mr. Ruff in January of 2005 about the proper interplay of the contract and the task order entitles it to compensation. It expresses satisfaction with Mr. Laurenceau’s subsequent recognition that “all work” needed to be “in accordance with the IDIQ and Task order specifications,” and suggests this statement confirmed its belief that it need not follow the Corps Guide Specifications. (Finding 28; app. br. at 33) ECCI also relies upon Section 1.0 of the task order, entitled “SUBMITTALS,” which contains the following:

**1.5 SPECIFICATIONS:** CONTRACTOR shall provide outline specifications for each system to be provided under this contract. Specifications shall indicate applicable design standards and criteria followed, standards that the selected equipment and material shall comply with, method of equipment installation, and other construction requirements that the designer may see fit.

**1.17 DESIGN STANDARDS:** The CONTRACTOR shall adhere to the International Building Code, International Electrical Code, International Mechanical Code, and International Fire Code. Construction shall not begin until approval by the PROJECT ENGINEER.

(Finding 15; app. prop. finding 16; app. br. at 33) According to ECCI, by establishing the “International Building Code as the applicable building standard,” the task order “empowered ECCI to select the specifications it would use to construct the warehouse...” (app. prop. finding 13). It contends that, nevertheless, “Mr. Ruff repeatedly rejected the content of ECCI’s submittals [because] they were not in conformance with the...Guide Specifications” (app. br. at 33).

Mr. Laurenceau did not declare that ECCI was free to ignore the Corps Guide Specifications, and the contract expressly required use of those specifications “unless otherwise required by the Task Order” (findings 8, 28). Nothing in the language relied upon by ECCI dictated it use anything other than the Corps Guide Specifications to achieve the International Building Code’s requirements. Read together, the contract and

task order required ECCI to use the Corps Guide Specifications to construct the warehouse in accordance with the International Building Code. ECCI does not cite to any specific incident where Mr. Ruff or anyone else rejected a submittal under circumstances that were inconsistent with either those requirements or with Mr. Laurenceau's clarification.

ECCI's more specific complaints also fail. It contends that Mr. Ruff's 16 February 2005 rejection of the Andrea Lab compaction test results, because the lab had not been approved by the government, disregarded the proper contractual standard (app. br. at 38; finding 30). Section 3.7.1, Testing Procedure, required "[t]he Contractor [to] procure the services of a Corps of Engineers approved testing laboratory or establish an approved testing laboratory at the project site" (R4, tab 2 at 81). Accordingly, Mr. Ruff's understanding of the contract was correct. ECCI did not demonstrate that the lab in fact had been approved. Instead, the government waived the requirement on 23 April (finding 40). Subsequent issues related to compaction arose when ECCI failed to achieve 100% compaction, which was also required by the task order, leading it to request and receive a variance (finding 47).

ECCI also cites to Mr. Ruff's rejection of its use of river rock in its concrete mixture (app. br. at 21). However, further clarification of the government's position did not reject river rock. Moreover, ECCI ultimately used crushed stone anyway. (Finding 29) It did not prove that it did so under government compulsion.

ECCI complains about comments by Mr. Ruff and Mr. Kroll that quality control and safety personnel had to be onsite at all times (app. br. at 30-32; finding 62). The contract expressly required the quality control manager to be onsite at all times (finding 12). The contract also required compliance with Corps of Engineers Manual EM-385-1-1, which ECCI also confirmed at the post-award meeting (findings 5, 21). That manual required that a site safety and health officer be on duty at all times when work was being performed (supp. R4, Toney, tab 3 at 1739). Even if ECCI was correct that the contract did not impose such requirements, it fails to demonstrate that it responded to the comments with any different performance.

ECCI also relies upon Mr. Ruff's statement from around 18 January 2005 that ECCI's onsite safety representative was required to write its health and safety plan. It admits that Mr. Laurenceau ultimately clarified that there was no such requirement, but that the issue "languished for nearly three weeks" and therefore ECCI should be compensated "for the additional costs it incurred as a result of its ongoing effort to comply with the Government's misinterpretation of the relevant requirements." (App. br. at 32) ECCI's initial efforts to submit a health and safety plan were rejected because of the absence of an accident prevention plan. That omission was not rectified until 29 January, and the final plan was approved on 15 February. (Finding 20) ECCI has not shown that it incurred any costs attempting to comply with Mr. Ruff's belief that the plan

be drafted by the onsite representative, or that it experienced any overall delays performing the task order because of those comments.

ECCI has also failed to prove its other claims. Contrary to ECCI's contention, Mr. Ruff did not require it to move the stairs, despite his accurate observation that they were installed in the wrong location. Instead, the government permitted the stairs to remain where ECCI had placed them. (Finding 58) Likewise, Mr. Ruff did not require a change in the location of personnel doors. All he did was inquire about them during a meeting and comment about whether they had been placed consistently with the concept design. Nothing was done about the matter. (Finding 61) Also, though Mr. Ruff raised the subject of constructing a paved road and concrete ramps, the matters were never pursued (finding 66). Mr. Ruff's opposition to ECCI's use of silicone to seal roof panels was overruled by Mr. Kroll (finding 64). Additionally, Mr. Ruff did not require ECCI's subcontractor to multitask. Mr. Kroll simply asked ECCI if its subcontractor could be directed to do more than one thing at a time, which Mr. Ruff then also subsequently asked about. (Findings 59, 61) Similarly, Mr. Ruff did not require that ECCI's subcontractor use additional concrete mixers to pour the tie beam; he only suggested it due to concerns about their sufficiency (finding 48).

ECCI has not shown that Mr. Ruff was wrong when he observed that some of the slabs on the expansion joint submittal exceeded the specifications (findings 51-52). Nor has ECCI shown it to be a constructive change for Mr. Ruff to seek a preparatory meeting before welding commenced, ask ECCI to submit slump samples and documentation for its concrete design, seek use of epoxy on expansion bolts for the door frames, or observe that more scaffolding should be used to increase safety (findings 48, 52, 59, 61). Also, there was nothing unreasonable about Mr. Ruff inquiring how the temperature of poured concrete would be measured, given that there was no thermometer, leading to his warning that ECCI poured at its own risk (findings 48-49).

ECCI cryptically refers to a requirement by Mr. Ruff that it "employ concrete setting techniques that were virtually impossible to achieve in Iraq" (app. br. at 40). To the extent ECCI is referring to comments that the concrete contained numerous stress cracks, the government did not require that any corrective action be taken (finding 57). ECCI further contends that Mr. Ruff required it to "place Styrofoam between the tie beam joints even though they did not have that material available and it was not contractually required" (app. br. at 40). The only evidence in the record about this is ECCI's internal memorandum describing a meeting with a government employee, not assigned to the project, during which it inquired about Mr. Ruff requiring that Styrofoam be placed (finding 50). ECCI did not prove that it actually placed the Styrofoam.

## B. Review Delays

ECCI makes several contentions arising from alleged government delays reviewing its submittals. It contends the government delayed reviewing the quality control, health and safety, and accident prevention plans. It also complains about the government waiting to approve its 21 March 2005 extension request until 23 May, never acting upon its alleged 14 June 2005 extension request, and taking “well over a month and arguably as long as seven months to completely resolve whether ECCI would be held to a 95% or 100% compaction standard.” More generally, ECCI maintains that “it could take upwards of 35 to 40 days after ECCI made the initial submission before it received notice regarding the formal action take [sic] on a submittal.” It argues the government’s “untimely disposition of...submittals and other requests for action significantly delayed progress on the project.” It also says the government did not provide it with “timely feedback” about submittals that needed to be resubmitted for government approval. (App. br. at 28-29)

The contract incorporated FAR 52.242-14, SUSPENSION OF WORK (APR 1984) (R4, tab 2 at 18). It provides that when performance is delayed by an act of the contracting officer, or the contracting officer’s failure to timely act, an adjustment shall be made for any increased cost of performance, except to the extent performance would have been delayed anyway by another cause. To recover, ECCI had to show that the government was responsible for specific delays, overall project completion was therefore delayed, and the government caused delays were not concurrent with delays within ECCI’s control. *Versar, Inc.*, ASBCA No. 56857 *et al.*, 12-1 BCA ¶ 35,025 at 172,128; *see also Donohoe Constr. Co.*, ASBCA Nos. 47310, 47312, 99-1 BCA ¶ 30,387 at 150,190.

ECCI contends that the contract initially required submittals to be acted upon in 7 to 14 days, was modified to 3 days, and then further modified to 7 days (app. br. at 28). Actually, the contract provided 7 days to review 50% design submittals and 14 days for 100% design submittals (finding 8). The government was given a minimum of 14 days to review all other submittals (finding 10). ECCI has not shown that the contracting officer ever approved a modification to these time periods. At most, other government personnel, lacking authority to modify the contract, expressed a willingness to attempt to perform their review in less time (finding 22).

ECCI submitted its initial health and safety and quality control plans on 30 December 2004. It submitted a revised health and safety plan that included the required accident prevention plan on 29 January. That was approved 17 days later. It submitted a revised quality control plan on 11 January, which was approved 36 days later. (Finding 26) ECCI has not shown that any government delay approving these plans had any impact upon its performance of the task order. Indeed, it performed work on the site during the intervening period of time (finding 27). Thus, it has not shown that overall project completion was delayed for these reasons.

ECCI's 21 March 2005 request for time extension was not a submittal subject to their review limitations. Instead, it sought a contract modification. (Findings 35, 43) Additionally, though that request was not granted until 13 May, ECCI has not shown that overall project completion was delayed for that reason. ECCI's alleged 14 June 2005 request for a time extension is only evidenced by an email of that date from the contracting officer referring to discussions of that nature. To the extent a formal request was made that date, it was not subject to the review limits upon submittals either. Moreover, it was acted upon that very day, with the contracting officer notifying ECCI that no extension would be granted unless ECCI agreed to additional contract terms. (Finding 44) There is no evidence ECCI accepted that condition.

Similarly, ECCI's request for a variance to a 95% soil compaction standard was also a request for a contract modification. Additionally, ECCI submitted that request on 23 July 2005 and CPT Hall responded to it five days later, on 28 July. He notified ECCI that the request would be accepted if it was certified with a stamp and signature of the registered engineer. ECCI complied with those conditions on 6 August, and on 10 August the government accepted ECCI's compaction submittals. (Findings 47, 54) Thus, even if the time limits upon submittal review applied, there was no delay. Finally, ECCI's additional assertions about the government taking "upwards of 35 to 40 days" to act on submittals, and about a lack of "timely feedback," are too vague to show entitlement to recovery for delays.

ECCI also maintains that addressing submittals directly to the contracting officer during the period there was no assigned COR caused "several negative ramifications" (app. br. at 25). ECCI has not demonstrated that the contract entitled it to deal with a COR, and indeed it was not. DFARS 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991), which was incorporated into the contract, defines the COR, followed by the declaration that "[i]f the Contracting Officer designates a [COR], the Contractor will receive a copy of the written designation" (R4, tab 2 at 18). Thus, designation of a COR was at the contracting officer's discretion.

ECCI also fails to demonstrate any compensable "ramifications" from dealing with the contracting officer. According to ECCI, the contracting officer waited three weeks to approve its request for a soil compaction variance, respond to its inquiry about the designer of record certification, and respond to its 7 August 2005 request for an extension of performance (app. br. at 25). As already noted, ECCI did deal with the COR regarding its request for a soil compaction variance, and received a response five days after it was made (finding 47). Similarly, ECCI sought clarification about the designer of record certification on 2 August. On 5 August it reported that work was still progressing well, and on 10 August, eight days after ECCI made its inquiry, the government communicated that certification from an Iraqi engineer was acceptable. (Findings 53-54)

Finally, ECCI requested a 62-day extension of performance on 7 August, 2005. A 45-day extension was granted 10 days later on 17 August. (Finding 55)

ECCI's argument that all of these alleged delays also affected performance because they interfered with its subcontractor's recruitment of labor is also unproven. In addition to the fact that the government's response times were far shorter than ECCI suggests, the testimony ECCI relies upon merely states generally that recruitment of labor was difficult and delays made retention harder. (App. br. at 25-26) It says nothing about the particular impact of these events.

### C. Turnover in CORs

ECCI also contends that it suffered unreasonable obstruction and delay due to confusion arising from the turnover in CORs. In fact, all of the events it relies upon occurred during Mr. Kroll's tenure. First, ECCI refers to the fact that, after it poured the slab on grade in August, Mr. Ruff accused it during a meeting in October of doing so without an approval (app. br. at 26). Mr. Kroll commented that the problem might have arisen from ECCI making submittals to the contracting officer. Eventually, the government determined that it did have the submittal but that it had been provided with the wrong specification number. The government simply requested ECCI to resubmit it with the right number. (Finding 63) This event neither obstructed nor delayed ECCI.

Next, ECCI refers to the fact that, initially, Mr. Kroll believed that ECCI's 100% design had not been approved, but then later testified that ECCI must have provided some specifications prior to his arrival. From this, ECCI suggests that "Mr. Kroll did not have a clear sense of what had or had not been submitted and approved in the first eight months of the performance period." (App. br. at 26-27) Whether that belief by Mr. Kroll suggests that conclusion or not, it does not constitute an obstruction or delay.

ECCI contends that "[t]he most poignant example of the difficulties [it] faced as a result of the turnover...is illustrated" in Mr. Kroll's 19 September 2005 letter, sent shortly after he became the COR. ECCI characterizes the letter as "focused on largely outdated issues." (App. br. at 27) ECCI responded to that letter with its own, dated 20 September, where it purported to correct Mr. Kroll's alleged misconceptions, leading to a reply by Mr. Kroll (finding 57). It should hardly be surprising that a new COR might be mistaken about some facts upon initial assignment to a project. Whether or not Mr. Kroll's observations were correct is not relevant if ECCI does not demonstrate that his beliefs actually led to obstructions or delays in its performance. ECCI does not show that Mr. Kroll took any action that had such a result. It simply complains that he was incorrect. (App. br. at 27) Accordingly, we conclude that ECCI has failed to prove that the turnover in CORs caused it to suffer "unreasonable obstruction and delay" (app. br. at 27).

#### D. Fast Track

ECCI claims the government refused to permit it to follow the "Fast Track" methodology permitted by the contract (app. br. at 35). The contract did allow fast track, which permitted a contractor to "begin construction on portions of the work for which the Government has reviewed the final design submission and has determined satisfactory for purposes of beginning construction" (finding 6).

ECCI's communications about its intentions in this regard were inconsistent. At the post-award meeting, ECCI presented slides expressing an intention to provide one final submittal reflecting final design (finding 21). However, the minutes of that meeting state that ECCI intended to use the "Fast Track" methodology, which would contemplate staggered final designs for different portions of the project (findings 6-7, 22). Then, ECCI's 7 December 2004 schedule showed it returning to a conventional approach and submitting a single set of 100% design drawings by 28 December (finding 23). On 4 March 2005, ECCI submitted a proposed 100% design, which was rejected by the COR as inadequate (finding 34). On 30 April, ECCI provided another purported 100% design that was first rejected and then approved by the COR, with a resubmittal required. ECCI responded that it would provide some of the requested information, but later declared that under the "Fast Track" methodology it need only provide "as built" drawings after completion. (Finding 42) Thus, ECCI did not consistently demonstrate an intent to proceed under the Fast Track.

Additionally, ECCI does not follow through on its complaint that the government refused to permit it to fast track. It has not shown that attempts to submit incremental designs at different stages of construction were wrongfully rejected, causing increased costs, which is what the "Fast Track" methodology entailed under the contract (findings 6-7). Instead, it simply focuses upon its single 100% design submission and complains that, in September of 2005, Mr. Ruff and Mr. Kroll did not acknowledge that the submission had been approved. Consequentially, it contends, they demanded that ECCI move the stairs and personnel doors. (App. br. at 35-36) We have already found those allegations to be unsupported. Accordingly, ECCI has not shown that it consistently communicated a clear desire to "Fast Track," that any efforts to follow that methodology were prohibited, or that it suffered compensable damage from any such denial.

#### III. Acceleration

ECCI contends that it is entitled to compensation on the basis of constructive acceleration (app. br. at 40). An acceleration claim seeks increased costs resulting from a government requirement that a contractor complete performance in less time than what is permitted by the contract. "[C]onstructive acceleration ordinarily arises when the government requires the contractor to adhere to the original performance deadline...even though the contract provides...periods of excusable delay that entitle the contractor to a

longer performance period.” *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004). To recover upon such a claim, a contractor must prove that it encountered an excusable delay, that it timely requested an extension of the contract, and that the government denied the request or failed to timely act upon it. It must then prove that the government insisted that the contractor complete in less time than would be permitted by the contract given the excusable delay, the contractor notified the government that it considered the order to be a constructive change, and the contractor was required to expend extra resources to compensate for the lost time and remain on schedule. *Id.* ECCI claims that each of its requests for time extensions was met with a constructive acceleration.

#### A. 21 March Request

ECCI contends that its 21 March 2005 request for an extension notified the government of an excusable delay. It complains that instead of timely granting the request, the government issued a cure notice and permitted the time for performance to expire. ECCI then allegedly attempted to accelerate by “committing to around-the-clock staffing..., procuring the warehouse itself instead of relying on its subcontractor, and responding to every Government request listed in the...cure notice – all of which resulted in additional costs.” (App. br. at 42-44)

An excusable delay is one due to causes that are unforeseeable, beyond the contractor’s control, and not resulting from its fault or negligence. *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000). The delay must be to overall contract completion, meaning “it must affect the critical path of performance.” *Id.*; see also *R.J. Lanthier Co.*, ASBCA No. 51636, 04-1 BCA ¶ 32,481 at 160,668. Significantly, the mere fact that the government ultimately granted 82 of the 90 days requested by ECCI in its 21 March 2005 request for an extension did not constitute an admission that the grounds given established excusable delays. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844 (Fed. Cir. 2004). Contrary to ECCI’s contention, it has not proven that its request demonstrated an excusable delay.

The first ground given in the request was that ECCI’s subcontractor was delayed obtaining visas to travel to Turkey, where it was allegedly “required...to meet with the pre-fabricated building manufacturer on design and procurement issues” (R4, tab 25). Given that the task order’s central purpose was the erection of a prefabricated building, the need to choose a manufacturer and meet with it would hardly be unforeseeable. Neither would the need to obtain a visa to the extent the manufacturer was outside of Iraq. Additionally, the request fails to explain why the time it took to obtain the visa would have been unforeseeable.

The second ground given was the alleged government delays reviewing the quality control and health and safety plans (R4, tab 25). As already held, ECCI has not shown

that any delays approving those plans was on the critical path or had any effect on overall project completion. Accordingly, they did not constitute excusable delays.

The third reason given by ECCI was that its subcontractor's manager was required to leave for 18 days to secure his family from insurgent threats, security threats caused subcontractor workers to leave the job between 18 January 2005 and 30 January, and they were unwilling to work during holidays (R4, tab 35). ECCI failed to prove how long its subcontractor's manager was absent, or that his absence delayed overall progress. Also, the subcontractor's workers were absent between 18 and 30 January because of a holiday, not a security threat (finding 27). ECCI did not show that this absence was either beyond its control or unforeseeable.

Finally, the request contends that ECCI suspended performance at the government's request while the government considered moving the location of the warehouse (R4, tab 35). ECCI voluntarily suspended its site work while the government considered moving the building (finding 31). It did not prove this suspension was involuntary or beyond its control.

In addition to the fact that ECCI did not demonstrate that its 21 March request for more time reflected excusable delays, ECCI's acceleration claim fails because ECCI has not shown that it expended extra resources to accelerate performance after the government issued a cure notice and deferred ruling on the request. ECCI claims that its acceleration is demonstrated by its commitment during the 23 April cure notice meeting to staff the project around the clock (app. br. at 44). However, it failed to prove the government required that commitment, or that ECCI carried it out, much less that ECCI carried it out to achieve any accelerated performance.

ECCI also cites its act of procuring the warehouse on its own in April 2005, which it claims was on an expedited basis (app. br. at 44). ECCI decided to procure the warehouse on its own at least as early as 5 March, after it lost confidence in its subcontractor and before the government's cure notice (finding 33). Moreover, there was nothing expedited about it. By the time ECCI purchased the warehouse in April, it was over three months behind its original schedule for purchasing it, over a month behind its schedule for commencement of the building's erection at the site, and it was reporting that the building would not be available until after expiration of the task order's deadline for performance (findings 23, 40). This was a major, unexcused delay, considering ECCI's admission that "fabrication and delivery of the...building [was] the critical path of the project" (finding 39). Thus, ECCI's purchase of the warehouse in mid-April merely established some possibility that ECCI might comply with the three-month extension of performance it was seeking; there was nothing accelerated about it.

ECCI also suggests that, as a result of the cure notice, it was required to purchase a building that exceeded specifications (app. br. at 44; app. prop. finding 171). However,

nothing in the cure notice required ECCI to exceed specifications. It simply required ECCI to present proof that it had purchased the building required by the task order. (Finding 38; R4, tab 27) Moreover, ECCI did not demonstrate how the building exceeded specifications.

Finally, ECCI claims that responding to the items in the government's cure notice "resulted in additional costs" (app. br. at 44). Even if costs were incurred responding to the cure notice, ECCI failed to prove that they had anything to do with accelerating its performance.

#### B. 14 June Request

ECCI next refers to its alleged request from around 14 June 2005, after its first request for an extension was granted, for another extension based upon excusable delays occurring after 21 March 2005. It contends that the government's response to that request also accelerated ECCI's performance because the government considered terminating ECCI for default and requested ECCI to agree to the inclusion of a liquidated damages clause in the contract. (App. br. at 44-46) As already noted, some discussion occurred at that time about an extension, with the contracting officer commenting that an extension could not be granted unless ECCI would agree to the inclusion of a liquidated damages clause (finding 44). However, ECCI has not proven that it made a formal request that was supported by any excusable delays experienced after 21 March. Additionally, it has not shown that it accelerated performance in response to the government's position.

#### C. 7 August Request

ECCI also claims acceleration due to the government's allegedly "untimely and insufficient...response" to its 7 August 2005 request for an extension until 18 October 2005 (app. br. at 46). On 17 August, 10 days after the request was made, the government granted 45 days of the extension, to 1 October. The request was primarily justified on the ground that ECCI had experienced 62 days of delay, until 15 August, obtaining delivery of the building. The request conceded that its other grounds, such as obtaining equipment, and pursuing the compaction variance and designer of record issues, were concurrent with the delay obtaining the building. It reported that the longest of those alleged concurrent delays, which was approval of the compaction variance, was 18 days at that time. (Finding 55) That matter was resolved three days later, on 10 August (finding 54). ECCI has not shown that the government's response to its 7 August request required ECCI to accelerate performance. Assuming for the sake of argument that all of the concurrent reasons given for that request constituted excusable delays, it has not shown that the 45 days granted in response to the request failed to account for them.

#### D. 28 September Request

Finally, ECCI suggests that the government's issuance of an interim unsatisfactory performance evaluation in response to its 28 September 2005 request for an extension also constituted acceleration (app. br. at 52). ECCI's 28 September request sought an additional 60 days to perform on the ground that it had encountered delay acquiring equipment, as well as dealing with military convoy movements, terrorist threats, and labor absences due to religious observances. On 21 October, the government granted the extension, plus an additional month beyond what was requested. On that date the government also issued an interim unsatisfactory performance evaluation, stating that if the project was completed prior to the extended deadline it would issue a revised report. (Findings 60, 65) ECCI has failed to show that these events constitute acceleration.

#### IV. Good Faith and Fair Dealing

ECCI also maintains that a constructive change is justified because the government breached its duty of good faith and fair dealing (app. br. at 54). The duty of good faith, fair dealing, and cooperation requires each party to refrain from interfering with the others performance or destroy its reasonable expectations. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). The duty is breached by "action...specifically designed to reappropriate the benefits the other party expected to obtain from the transaction." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 997 (2011). The duty "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Id.* at 831. Government officials are presumed to act in good faith, and we consider allegations that it breached this implied obligation based upon the reasonableness of its actions given all the circumstances. *Versar*, 12-1 BCA ¶ 35,025 at 172,127.

For the reasons already given, because none of the grounds presented by ECCI to directly support its constructive change claim dictate such liability, they also fail to destroy its reasonable expectations. However, ECCI also contends that the government breached its duty to cooperate by permitting Mr. Ruff to overzealously inspect, by refusing to cooperate in the completion of the contract until compelled to do so, and by remaining obstructive after accepting the building (app. br. at 55).

ECCI relies upon its argument that Mr. Ruff imposed his own construction methodologies and mishandled submittals to support its claim that he overzealously inspected (app. br. at 56-57). We have rejected those contentions. It also claims that Mr. Ruff's derogatory comments about ECCI prove that he actively interfered with ECCI's performance (app. br. at 57). The evidence in the record of derogatory comments are the five unsworn statements provided by Mr. Pushaw to COL Jenkins in November 2005. Mr. Pushaw's email forwarding the statements merely characterized

them as “disturbing.” He did not indicate that they had interfered with ECCI’s performance of the task order or impaired ECCI’s contractual expectations. (Finding 67) Nor did ECCI present any testimony to that effect. Given the absence of evidence that such comments interfered with performance, regardless of how offensive they might otherwise be, they do not constitute a breach of the duty to cooperate.

ECCI also contends that comments made at CDR Shepard’s 17 November 2005 meeting with the parties show the frustration of other government personnel with the contract’s administration, demonstrating overzealous inspection (app. br. at 60). Our findings about that meeting reflect a desire for progress to continue, that submittal requirements not impede construction progress, and that the parties communicate and act professionally (finding 68). They do not support the conclusion that inspection was overzealous, or that it violated the government’s duty to cooperate.

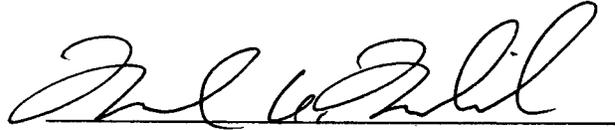
ECCI claims that Mr. Kroll’s failure to attend the final inspection on 9 December 2005, and belief that the building lacked load calculations demonstrating its soundness, demonstrate a lack of cooperation that also violated the duty to cooperate (app. br. at 61). ECCI has not shown that Mr. Kroll’s absence and beliefs impaired its contractual benefits. Indeed, he signed the government’s acceptance on 9 December, noting no deficiencies (finding 69).

Finally, ECCI claims that the government’s reaction to its 23 December 2005 REA also supports a conclusion that the government breached the duty to cooperate. It bases its argument upon the length of time taken to address the request and the fact the government’s denial did not provide reasons. (App. br. at 63) The government responded to ECCI’s request on 24 May 2006, seeking more information and certifications. ECCI submitted a supplement to its REA on 25 September 2006, and the government then denied the request approximately one month later, on 22 October 2006. (Findings 70-71) ECCI has failed to show that the government’s response to its REA provides any more support for its contention that the government “reappropriate[d] a benefit guaranteed by [the] contract.” *Scott Timber Co. v. United States*, 692 F.3d 1365, 1375 (Fed. Cir. 2012).

CONCLUSION

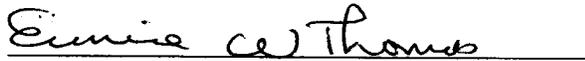
For the reasons stated, the appeal is denied.

Dated: 28 December 2012



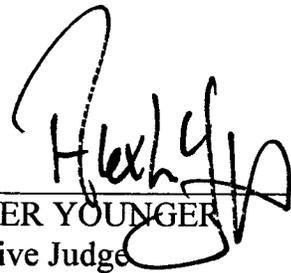
MARK A. MELNICK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



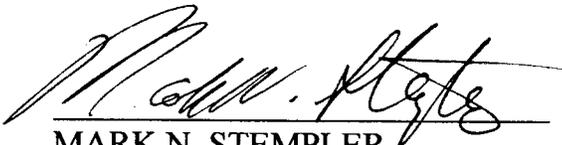
EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I concur



ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55781, Appeal of ECCI, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals