

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
M.E.S., Inc.) ASBCA Nos. 56149, 56348, 56349
) 56350, 57074
Under Contract No. DACA51-01-C-0039)

APPEARANCES FOR THE APPELLANT: Michael H. Payne, Esq.
Joseph A. Hackenbracht, Esq.
Cohen Seglias Pallas Greenhall
& Furman, PC
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lorraine C. Lee, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, New York

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

M.E.S., Inc. (MES) appeals the contracting officer's denial and deemed denial of five claims for equitable price adjustments totaling \$1,250,597.33 under the captioned contract. In its brief on appeal, the total amount claimed is \$1,593,949 (app. br. at 64). The government denies all liability on these claims. Pursuant to the Board's order of 16 March 2010, we decide both entitlement and quantum. We sustain the appeals in ASBCA Nos. 56149 and 56348 in part. We deny the appeals in ASBCA Nos. 56349, 56350 and 57074.

FINDINGS OF FACT

A. General Findings--All Appeals

1. On 29 September 2001, the captioned contract (hereinafter "Contract 0039") was awarded to MES at the firm fixed-price of \$10,272,000 for the design and construction of a physical fitness center at McGuire Air Force Base (AFB), New Jersey. The contract required MES to begin performance within 5 calendar days, prosecute the work diligently and complete performance within 720 calendar days from receipt of notice to proceed (NTP). (ASBCA No. 56149 (56149), R4, tab 3 at 1-2, 81; Bd. ex. 1) The contract included among other provisions the following clauses: FAR 52.222-8, PAYROLLS AND BASIC RECORDS (FEB 1988); FAR 52.242-14, SUSPENSION OF WORK (APR 1984); FAR 52.243-4, CHANGES (AUG 1987); and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (56149, R4, tab 3 at 75).

2. MES received the NTP on 14 November 2001 (56149, R4, tab 4; tr. 1/55). The receipt of NTP on 14 November 2001 set the required contract completion date at 4 November 2003. Although the contract required MES to begin work within five days, the government delayed the start of work for 23 days after the receipt of NTP by delaying approval of a structural column layout plan until a “kick-off” meeting on 7 December 2001. (Tr. 1/55-57)

3. The following modifications adjusted the price and required completion date of the contract:

Mod.	Subject Matter	Price Adjustment	Time Extension	
			Date	Days
A00001	Finishes	\$ 2,849		0
	Doors	13,983		0
	Asbestos	31,675	13 Nov 03	9
A00002	Weather		04 Dec 03	21
A00003	Weather		21 Dec 03	17
A00004	Fence	1,142		0
	Gas line	13,630	24 Dec 03	3
A00005	Weather		07 Jan 04	14
A00006	Gym access	-20,000		0
	Bldg. set	-710		0
	Bldg. class	133,900	14 Feb 04	38
A00007	Retaining wall	55,000	29 Feb 04	15
	Concrete at piers	15,000	10 Mar 04	10
	Concrete slabs	9,000	13 Mar 04	3
A00008	Parking lot delay	36,000	03 May 04	51
A00009	Weather		05 Jun 04	33
A00010	Slab elevation	78,000	23 Jun 04	18
	Weather		31 Jul 04	38
A00011	Parking expansion	43,000		0
P00001	HTHW	154,500	13 Aug 04	13
	NTP delay		05 Sep 04	23
	Floor adhesive	3,000		0
	Dry wall	10,000		0
	HTHW vault	11,000		0
	Ladder	3,000		0
	Glycol	25,000		0
	Concrete mix	7,500	12 Sep 04	7
	Security delays		14 Oct 04	32
	Total		\$626,469	

(Exs. A-108 at 1-3, A-109 at 1-3, A-110 at 9-12, A-111 at 1-3, A-112 at 1-3, A-113 at 1-2, A-114 at 5-7, 63-65, 72-74, 115-18, ex. A-115 at 10-11, ex. G-94 at 1-3)

4. Modification Nos. A00002, A00003 and P00001 were issued unilaterally by the contracting officer under the Changes clause. All of the other modifications were bilateral. Modification Nos. A00001, A00004 and A00011 included a general release by MES of all further claims on the subject matter of the modifications. (Exs. A-108 at 1-3, A-114 at 115-18, A-115 at 10-11). Bilateral Modification Nos. A00006, A00007, A00008, A00009 and A00010 included a reservation of rights by MES as to the agreed price adjustments, but not as to the time extensions. The reservation of rights clause stated:

This equitable adjustment in the contract price negotiated by the Contractor and the Corps does not include any Contractor or subcontractors costs for delay and impact due directly or indirectly to this change order. M.E.S., Inc. reserves its rights to request additional compensation for the delay and impact costs, as well as any adjustment to the Overhead charged once its audit is completed.

(Exs. A-110 at 12, A-111 at 3, A-112 at 3, A-114 at 7)

5. The contract work was substantially completed and the government took beneficial occupancy on 14 October 2004. Work continued, however, on installation of the permanent bleachers in November 2004 and on correction of final punch list items into February 2005. (ASBCA No. 57074, compl. & answer ¶ 12; tr. 1/89)

6. The total delay in substantial completion of the contract from the original specified completion date (4 November 2003) to the beneficial occupancy by the government (14 October 2004) was 345 days.¹ The time extensions granted in the contract modifications covered the entire 345-day delay (*see* finding 3). No liquidated delay damages have been charged by the government to MES.

7. MES is not claiming in these appeals any monetary compensation for the 123 days of time extensions allowed for weather delays in Modification Nos. A00002, A00003, A00005, A00009 and A00010. Nor is it claiming any further monetary compensation for the 12 days of time extensions in Modification Nos. A00001 and A00004 which included general releases with no reservations of rights by MES. (Tr. 1/65-66, 108-09; app. br. at 4)

¹ Some of the documentation in the record states that the total delay was 344 days. The 344-day calculation ignores that 2004 was a “leap year” with 29 days in the month of February.

B. Findings – ASBCA No. 56149

8. On 20 September 2004, MES requested an equitable price adjustment in the amount of \$7,524.88 “to supply and place temporary folding bleachers [in] the new gymnasium, until the contract required bleachers arrive.” This request also included a request for a contracting officer’s final decision if the equitable adjustment was rejected. (56149, R4, tab 10 at 1-2)

9. It is not disputed that there was no contract requirement to provide temporary bleachers pending delivery and installation of the specified permanent bleachers. It is also not disputed that on 25 August 2004, the government directed MES to provide temporary bleachers until the required permanent bleachers were delivered and installed (ASBCA No. 56149, compl. & answer ¶ 15). MES procured and installed the temporary bleachers before 14 October 2004 (tr. 1/188). The permanent bleachers were delivered and installed at sometime in late November 2004 (tr. 2/215).

10. The claimed price adjustment for the temporary bleachers consists of \$4,007.98 for rental of the bleachers and \$2,040 for the labor to uncrate, install and remove them plus overhead (14%), profit (7%) and insurance/bonds (2%) (56149, R4, tab 10 at 2). The testimony at hearing as to the material and labor costs was not disputed by the government (tr. 1/189, 2/130-31, 143-45, 164, 210-15). The DCAA audit of a related claim under the same contract accepted the 14 percent overhead rate and questioned entirely the 2 percent rate for insurance/bonds because *inter alia* there was no proof as to what additional premium would be charged if any (ex. G-98 at 9-12). MES has offered no credible evidence contradicting the DCAA finding on the claimed insurance/bonds rate. On this evidence, we find the proven equitable price adjustment for providing the temporary bleachers to be \$7,377.33.²

C. Findings – ASBCA No. 56348

11. On 23 February 2005, MES submitted, as a certified claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, a previously submitted “Change Proposal” for 209 days of field office personnel and facility expenses allegedly caused by government delays. The total claimed amount including overhead, profit, insurance and bond was \$217,043.77. (56348, R4, tabs 10, 12, 13) On 10 March 2008, in the absence of a contracting officer’s final decision, MES appealed the deemed denial of the 23 February 2005 claim.

12. In its complaint on appeal, MES added a claim for a \$45,000 payment to a subcontractor (American Wrecking Corp.) allegedly caused by the government delays of the project. This subcontractor claim was not part of the REA/Claim submitted to the

² $[(\$4,007.98 + \$2,040) \times 1.14] \times 1.07 = \$7,377.33.$

contracting officer on which this appeal was taken. We give it no further consideration here.

13. In its post-hearing brief, MES states that the claim in this appeal “is simply seeking that [MES] be compensated for the daily field overhead costs it incurred for the 210 day period from March 19, 2004 to October 14, 2004.” The claimed 210 days is the total project delay of 345 days less the 123 days of non-compensable³ weather delays and the 12 days of delays for which further compensation is barred by general releases. (App. br. at 31-32) The claimed amount (\$303,331) is based on an alleged daily rate of field office expense consisting of personnel (\$965), facility (\$163), overhead/G&A (17.44%), profit (7%), insurance and bond (2%) (app. br. at 33).

14. A DCAA audit on a related claim under the same contract substantially accepted the claimed daily field office personnel rate, accepted the daily field office facility rate to the extent of \$117.77, and accepted the overhead/G&A rate to the extent of 14%. The audit report made no comment on the claimed profit rate and questioned entirely the claimed 2% for insurance and bonds. We do not allow the amount for insurance and bonds for the reason stated above. (Ex. G-98 at 9-12; finding 12) On this evidence, we find a proven daily field office rate for price adjustment purposes of \$1,320.77 consisting of \$965 for field office personnel and \$117.77 for facility expenses, plus 14% overhead/G&A and 7% profit.

15. In bilateral Modification Nos. A00006, A00007, A00008 and A00010, all executed in 2004, the parties agreed upon 135 days of compensable time extensions for various government changes and delays (finding 3). In unilateral Modification No. P00001, executed on 22 July 2009, the government granted an additional 20 days of compensable time extensions for a differing site condition and a delay in approving a concrete mix (*id.*). The unilateral extensions were not contested by the government on appeal. The Administrative Contracting Officer (ACO) testified that they were fair and reasonable (tr. 2/86-90).

16. Applying the \$1,320.77 daily field office rate found above to the 135 days of bilaterally agreed compensable time extensions, the field office direct cost plus overhead and profit for those 135 days was \$178,303.95. To the extent the evidence shows, the price adjustments in those modifications, all of which were executed in 2004, included \$93,637.05 for extended field office expense.⁴ Accordingly, we find an \$84,666.90

³ By “compensable delay” we mean delay for which both monetary relief and a time extension are due as distinct from “excusable delay,” for which only a time extension is due.

⁴ The daily field office direct cost plus overhead and profit rates in the price adjustments in Modification Nos. A00006, A00008 and A00010 were \$816.54, \$705.88 and \$453.61 respectively (ex. A-110 at 31-32, A-112 at 16, A-114 at 10). The daily

underpayment in the price adjustments for field office expense in those four bilateral modifications.

17. Applying the \$1,320.77 daily field office rate to the 20 days of compensable time extensions in unilateral Modification No. P00001, executed on 22 July 2009, the field office direct cost plus overhead and profit for those 20 days was \$26,415.40. The evidence does not indicate the amount for field office expense included in unilateral Modification No. P00001. However, applying the average rate in Modification Nos. A00006, A00008 and A00010 (\$658.68) to the 20 days of compensable time extensions in Modification No. P00001, we find an underpayment of \$13,241.80.

18. In unilateral Modification No. P00001, the government also granted a 23-day non-compensable time extension for the 23-day delay in the start of work after the NTP (*see* finding 2 above) and a 32-day non-compensable time extension for a change in installation entry procedures. The MES claim for 210 days of extended field office expense includes these two time extensions. Although MES now claims extended field office expense for the initial 23-day delay, a log of RFA (Request for Adjustment) settlements, prepared by MES and submitted to the government on 24 July 2006 stated that RFA No. 36 for “Delayed NTP & Design Start” requested no contract price adjustment and that it was settled by the parties for a “negotiated amount of 0 [dollars]” and a negotiated time extension of 23 days. (56349, R4, tab 25) We consider the compensability of the 32-day time extension for the installation entry procedure change in our findings and decision in ASBCA No. 56350 below.

D. Findings – ASBCA No. 56349

19. On 2 March 2005, MES submitted a certified request for equitable adjustment/claim in the total amount of \$520,617, for the difference between the “original cost” of 13 work activities (\$1,330,200) and their actual cost (\$1,748,637), plus 14% overhead, 7% profit, and 2% insurance and bonds. The “original cost” was explained in the claim as the “Original Cost before Overhead & Profit as disclosed in the [Corps of Engineers] approved Schedule of values after award and before construction start.” (56349, R4, tab 24) The Schedule of Values assigned a portion of the contract price for progress payment purposes to each agreed work activity.

20. The 13 work activities for which increased costs were claimed were (i) sheetrock & tapping, (ii) roofing, (iii) tile work, (iv) painting, (v) acoustical ceilings, (vi) resilient athletic floor, (vii) wood strip flooring, (viii) racquetball courts, (ix) carpets,

field office expense rate in the Modification No. A00007 price adjustment is not in evidence. We apply the average of the known rates (\$658.68) to the Modification No. A00007 time extensions (28 days) in determining the total amount for field office expense in all four bilateral modifications.

(x) cabinets & countertops, (xi) saunas & steam rooms, (xii) toilet partitions and lockers, (xiii) raised floor system (*id.*). The stated basis of the claim was that “[s]ome of the consequences of the [government] delays and thereafter Directed acceleration were the additional cost MES incurred in the work performed due to inefficiencies in performance, having to redo certain items time and again, higher cost of material etc.” (*id.*).

21. On 25 April 2006, MES amended the 2 March 2005 REA/Claim by (i) reducing the total amount of the “Original Cost”⁵ of the 13 activities to \$1,225,900, and (ii) adding a claim item in the amount of \$102,664 for 123 days of field office personnel and facility costs at \$668 per day for the personnel and \$166.67 per day for the facility. With 14% overhead, 7% profit, and 2% insurance and bonds, the 2 March 2005 REA/claim as amended totaled \$778,121. (Ex. A-41) The added item is for the same extended field office expense claimed under ASBCA No. 56348, and we give it no further consideration here.

22. By final decision dated 16 January 2008, the contracting officer denied the 2 March 2005 REA/Claim in its entirety (56349, R4, tab 2). This decision was timely appealed on 10 March 2008 (56349, R4, tab 1).

23. On 17 December 2010, the DCAA issued an audit report on the “actual costs” in the 2 March 2005 REA/claim as amended. The “unquestioned” actual direct material, labor and subcontract costs of the 13 work activities per the DCAA audit, the “as-bid” costs of those activities per the MES amended claim letter, and the difference between the two are as follows:

Activity	As-Bid	Actual	Difference
Sheetrock & Tapping	\$ 64,500	\$210,446	\$145,946
Roofing	404,500	484,771	80,271
Tile Work	154,400	211,783	57,383
Painting	72,900	103,853	30,953
Acoustical Ceilings	56,800	58,931	2,131
Resilient Athletic Floor	56,800	80,750	23,950
Wood Strip Fl. & RB Courts ⁶	179,200	215,007	35,807
Carpets	20,800	29,459	8,659
Cabinets & Counter Tops	80,800	82,565	1,765

⁵ In its post-hearing brief, MES describes the “original cost” in the amended REA/Claim as the “as-bid direct cost” (app. br. at 22-23). We refer to it as such hereafter.

⁶ Wood Strip Flooring and Racquet Ball Courts were combined for purposes of the audit because the same subcontractor performed both and did not separately charge the work on its invoices.

Saunas & Steam Rooms	16,800	20,545	3,745
Toilet Partitions & Lockers	81,600	119,631	38,031
Raised Floor System	36,800	41,720	4,920
Totals	\$1,225,900	\$1,659,461	\$433,561

(Exs. A-41, G-98 at 6)

24. MES contends that the delays in the project “resulted in the acceleration of MES’s work and caused [labor] inefficiency due to interference between trades, increased durations of work activities, and increased costs relating to expedited fabrication and delivery” (app. br. at 48). With respect to the allegation of “inefficiency due to interference between trades,” we note that the MES original project schedule dated 11 July 2002 showing completion of the work on the contract completion date of 4 November 2003 also showed nine of the cited work activities all being performed in whole or in part in the month of October 2003 (ex. A-233 at 29-30). There is no persuasive and particularized evidence in the record establishing the nature and extent of specific interferences or inefficiencies and how they materially increased appellant’s cost of performing the allegedly impacted work.

25. In the MES post-hearing brief, the claimed increased direct cost of the 13 activities due to the project delays is \$575,113 (app. br. at 31). However, 84% (\$1,398,274) of the DCAA-verified total actual cost of the 13 cited work activities (\$1,659,460) was subcontract cost (ex. G-98 at 6), and there is no evidence of any subcontractor claims for delay-caused acceleration, labor inefficiency, interference between trades, etc. There is also no evidence that the DCAA-verified material cost of the 13 work activities (\$168,283) included any amounts for increases in material costs as a result of the project delays (*id.*). The claimed direct cost in the MES post-hearing brief for acceleration and labor inefficiency on the 13 activities (\$575,113) is more than five times the total DCAA-verified MES direct labor cost (\$92,903) incurred on those activities.

26. In a letter to the ACO dated 11 May 2004, MES stated that “the completion date for the [contract] must be extended to 24 December 2004” and that: “MES, at the request and direction of the COE [Corps of Engineers] has commenced acceleration of the work since March 1, 2004 and continues to do so” (ex. A-18). There is no credible evidence of any such request or direction by the government, and by letter dated 2 June 2004, the ACO told MES: “this office vehemently disputes the contention that the Government has ‘accelerated’ your schedule” (ex. G-41).

27. By letter dated 21 June 2004, the ACO told MES that its latest schedule and observed progress on site: “indicates to the Government that your manpower loading has been insufficient to complete the work in the allotted time shown on your schedule...it

appears that your company is delaying project completion due to failure to provide an adequate work force to the project” (ex. G-48).

28. On 7 July 2004, MES submitted a progress schedule up-date again stating, among other things, that it was working under an accelerated schedule. The ACO rejected the submittal in a letter dated 15 July 2004 stating in relevant part:

The definition of acceleration is the use of additional resources to complete a project prior to contract completion date. This would entail the use of second shifts, weekend and overtime work (above 40 hour work week) or additional crews to move the completion date earlier. Your schedule through period ending January 30, 2004, showed an on-schedule contract completion date of June 30, 2004. Since the completion date is now July 31, 2004, the Government is hard-pressed to see where there has been acceleration. Certified payroll reports for all contractors working on this contract, do not indicate any overtime work for the period you claim you have accelerated. Long before you made any claim of acceleration, your manpower loading has proven to be insufficient for the tasks at hand.

(Ex. G-58)

29. On 16 August 2004, the contracting office issued a cure notice to MES citing failure to maintain progress in accordance with the approved schedule, “marginal” implementation of its contractor quality control plan, and failure to make timely required submittals as conditions which if not cured within ten days would cause the government to consider termination for default. With respect to the failure to make progress, the cure notice stated, among other things, that: “You are constantly claiming that you are working on an accelerated schedule, however your certified payrolls show six-hour work days.” The cure notice did not cite the contract completion date of 31 July 2004 that was then in force. It did not require MES to cure the default in completion of the project by completing the project within ten days or within any other specific time. (Ex. G-65)

30. The certified weekly payrolls required by the Payrolls and Other Records clause of the contract are not in evidence. However, the statements in the 15 July 2004 letter and 16 August 2004 cure notice regarding a record of insufficient manpower loading and “six hour work days” are corroborated by the only weekday “Contractors Quality Control Report (QCR) Daily Log of Construction–Military” reports (hereinafter “QCRs”) in evidence. Those weekday QCRs cover the period 1 November 2003 through 29 February 2004 and show that on all days when weather conditions were not delaying

the work, the subcontractors were working eight-hour days and the MES workers (carpenters and laborers) were working only six-hour days. (56348, R4, tab 8)

31. If MES disagreed with the government's allegation of six-hour workdays, it could refute the allegation by submitting in evidence substantiating certified weekly payrolls and all QCRs for the entire relevant period of the contract. Since it has not done so, we find that the government's allegation is correct.

32. In response to still another MES allegation of a government "directive" to accelerate work, the ACO responded on 13 September 2004 as follows:

[T]he [government] never required MES, Inc. to accelerate this project. We merely pointed out to MES, Inc. that, judging by the relatively low average daily number of workers at the project site, that the work site could have sustained a larger manpower and that that could have had a more beneficial effect on a more timely project completion date. In addition, upon comparing the current average daily manpower roster of between 25 and 30 to that of several months ago during the colder winter time of between 20 and 25, there is only a very modest manpower increase. Also comparing the current average daily manpower roster to that of 2003 of between 25 and 30, there is essentially no increase in manpower.

(Ex. G-79)

33. MES has offered in evidence of acceleration its QCRs for the weekends and holidays from 12 June 2004 through and including 10 October 2004. These reports show 1200 hours of MES labor and 832 hours of subcontract labor on those days (ex. A-232). In the context of a project history of a weekday six-hour work schedule and inadequate manning of the project, the cited week-end and holiday work over the last four months of the project does not prove acceleration. The weekend and holiday work enabled MES to reach substantial completion of the project on 14 October 2004, but MES has not proven that it was entitled to any extension of the contract performance time beyond that date.

34. The record contains evidence that the increased costs of the 13 cited work activities were caused by factors other than government delay of the project. The record shows at least two such causes during the period of claimed "acceleration." On or about 25 June 2004, the government and MES agreed that MES would add an additional tile crew without additional compensation in exchange for a contractor-requested change in the tile specifications (ex. G-52). On 13 July 2004, the ACO provided MES with a list of

30 leaks in the roof for correction. The leaks and their repair continued through the end of September 2004 (exs. G-57, -60, -66, -72, -86).

35. On this record, MES has failed to prove that the claimed increased direct material, labor and subcontract cost of \$575,113 or any other amount, over and above the “as-bid” amounts for the 13 cited work activities, was caused by government-directed acceleration or otherwise by compensable government delays of the project.

E. Findings – ASBCA No. 56350

36. Paragraph (b) of the Commencement, Prosecution and Completion of Work clause of the Special Contract Requirements, stated in relevant part: “The site of the work is on a military reservation and all rules and regulations issued by the Commanding Officer covering general safety, security, and sanitary requirements, etc., shall be observed by the Contractor” (56149, R4, tab 3 at 81).

37. On 28 August 2002, the government advised MES that it was required to comply with “updated procedures for installation entry by contractors.” The updated procedures were set forth in the installation Security Forces Squadron Operating Instructions 31-201 and Air Force Instructions 31-101. The changed procedures were of a public and general nature applicable to all contractors and intended to improve the physical security of the installation. They were not intended to nullify any contract rights, and there is no evidence that the government gained any economic advantage from them. (Ex. G-17)

38. It is not disputed that the changed installation entry procedures required one hour of each working day for compliance by MES and its subcontractors (tr. 2/103-04). By letter dated 4 February 2004, MES requested a price adjustment of \$78,499 and time extension of 98 calendar days for compliance with the changed procedures (ex. A-1). The claimed price adjustment in MES’ post-hearing brief is \$87,048.98 (app. br. at 36). The claimed 98-day time extension is based on an estimated one hour on each of the 563 working days from 9 October 2002 to 14 October 2004 (ex. A-3).

39. By final decision dated 14 December 2007, the contracting officer denied the claim for monetary compensation on the ground that the change in entry procedures was a sovereign act of the government. The contracting officer also denied the claim for any time extension greater than the 32 days subsequently granted in unilateral Modification No. P00001 (56350, R4, tab 2). This decision was timely appealed and docketed as ASBCA No. 56350.

40. At hearing, the ACO explained that the 32 days granted in unilateral Modification No. P00001 were based on the number of working days from February 2004 through October 2004. The stated reason for using this time period was that the

MES January 2004 progress schedule included a statement that the security delays were still a cause of delay in completing the project. (Tr. 2/105-10)

41. We find that the changed installation entry procedure delay was concurrent with all other delays for which time extensions up to and including 12 September 2004 were granted by contract Modification Nos. A00001 through A00011 and P00001 (*see* finding 3). We further find that the additional 32-day time extension in Modification No. P00001 was more than sufficient allowance for the entry procedure delay in the remaining contract work up to the substantial completion of the contract on 14 October 2004.

F. Findings – ASBCA No. 57074

42. By letter dated 20 July 2009, MES submitted a certified “REA/Claim” in the amount of \$427,183.38 for “additional Home Office Overhead Costs for this project [Contract 0039] for the total number of delay days, from November 4, 2003 until October 14, 2004, caused by the Government actions....” The claim is based on the following calculation:

Year	Daily G&A Costs Allocable to [Contract]	No. of Days of Delay	Lost G&A Costs
2001	\$ 418.33	23	\$ 9,621.55
2002	273.95	130	36,614.06
2003	1,932.35	141	272,460.67
2004	2,189.74	50	109,487.09
Total		344	\$427,183.38

(57074, R4, tab 3)

43. The total G&A amounts claimed and contract revenues for the relevant years are set forth within the claim document and are not otherwise explained in the documentary record. There are no persuasive details of the components of G&A expense, in particular whether they are allowable fixed or variable costs. There is also no persuasive evidence that appellant was required to remain on standby and/or was unable to shift its resources to other un-impacted work.

44. The REA/Claim letter included a one-page letter by a CPA stating the daily G&A rates allocable to the contract for the years 2001-2004. The REA/Claim requested a contracting officer’s decision as prescribed by the Disputes clause of the contract. (57074, R4, tab 3) On 22 December 2009, MES appealed the deemed denial of the claim.

45. At the hearing and in its post-hearing brief, MES revised its increased home office overhead claim to \$459,845. The revised claim is 210 days times the alleged \$2,189.74 daily home office overhead expense allocable to Contract 0039 for the 2004 calendar year. (Tr. 1/114-17) The claimed daily rate of \$2,189.74 is based on alleged total Contract 0039 revenue of \$3,971,284 in 2004, total MES revenue of \$4,359,551 in 2004, and total MES G&A expenses of \$692,303 in 2004 (57074, R4, tab 3 at 4). None of these alleged dollar amounts, however, are supported in the evidentiary record by a DCAA audit report, or in the absence of such report, by testimony or affidavit of the accountant preparing the claim or copies of the pertinent financial statements of MES prepared contemporaneously in the regular course of business, or other persuasive substantiating accounting documents. Moreover, nowhere in the MES calculation is there any allowance for home office expense paid in the price adjustments previously granted in the modifications for compensable government delays.

46. On this record, the alleged increased home office expense incurred for compensable government delays is not proven in any amount.

DECISION

A. ASBCA No. 56149

The claim in this appeal is for a price adjustment of \$7,524.88 for providing temporary bleachers pending the delivery of the permanent bleachers (finding 8). There was no such requirement in the contract and the ACO's direction to do so was a change entitling MES to an equitable adjustment under the Changes clause (finding 9). We have found above that the proven equitable price adjustment for providing the temporary bleachers is \$7,377.33 (finding 10). Accordingly, we sustain the appeal in that amount with interest from 20 September 2004 pursuant to the CDA, 41 U.S.C. § 7109.

B. ASBCA No. 56348

The claim in this appeal as amended in the MES post-hearing brief is for the extended field office expenses for an alleged 210 days of compensable government delay of the work. For 32 of the claimed days, there is no compensation due because the delay was caused by a sovereign act of the government. *See* the decision in ASBCA No. 56350 below. For another 23 of the claimed days, no compensation is due because the claim for that delay did not request a price adjustment and was settled for the time extension and a "negotiated amount of 0" (finding 18).

The remaining 155 days in the claim consist of (i) 135 days for which the government has provided monetary compensation in bilateral Modification Nos. A00006, A00007, A00008 and A00010, but subject to the MES reservation of rights in those modifications, and (ii) 20 days for which the government provided monetary

compensation by unilateral Modification No. P00001 to which MES is not bound. For the 135 days compensated in the bilateral modifications we have found an underpayment of the field office expense in the amount of \$84,666.90 (finding 16). For the 20 days compensated in unilateral Modification No. P00001, the underpayment of field office expense was \$13,241.80 (finding 17).

Accordingly, the appeal is sustained in the amounts of \$84,666.90 for the underpayment of field office expense in the bilateral modifications and \$13,241.80 for the underpayment of field office expense in Modification No. P00001. Interest pursuant to the CDA, 41 U.S.C § 7109 will run as follows: (i) on the \$84,666.90 underpayment in the bilateral modifications from 23 February 2005 until paid; (ii) on the full field office expense of \$26,415.40 in Modification No. P00001 from 23 February 2005 until the date of payment of that modification; and (iii) on the \$13,241.80 underpayment in Modification No. P00001 from the date of payment of that modification until paid.

ASBCA No. 56349

The claim in this appeal as amended in the MES post-hearing brief is in the total amount of \$575,113, plus overhead, profit, insurance and bond, for the difference between the as-bid and actually incurred direct material, labor and subcontract costs of 13 work activities. This difference is alleged by MES to have been caused by the compensable government delays of the contract work. (App. br. at 31) We have found above that MES has failed to prove that the claimed difference between the as-bid and actually incurred costs of the 13 activities was caused by government-directed acceleration or otherwise by compensable government delays of the contract work (findings 19-35). As a consequence of our conclusion that appellant has failed to establish a causative connection between the delays and the alleged increased costs claimed, we need not further address the methodology used by MES to compute the alleged equitable adjustment.

Appellant's contention that its increased direct costs were caused by "acceleration" is without merit. Compensable acceleration requires, among other things, a government direction to the contractor to complete the work before the contract completion date, including any extensions to which the contractor is entitled, and the expenditure of extra resources by the contractor to meet the government requirement. *Fraser Construction Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004).

There is no credible evidence that the government gave any order for acceleration. MES' repeated allegations to the contrary in its correspondence with the government over the last six months of the contract were met by repeated denials by the ACO (findings 26, 28, 32). The 16 August 2004 cure notice required cure of various deficiencies in MES performance but did not cite the default on the existing contract completion date of 31 July 2004, nor did it demand cure of that default by completing the contract within ten

days or any other specific time (finding 29). As such the cure notice was not a constructive order for acceleration but a demand to cure other deficiencies in the prosecution of the work.

MES substantially completed the project on 14 October 2004, the government subsequently extended the contract completion date to 14 October 2004, and MES has failed to prove that it was entitled to any extensions of time beyond that date. On this record, we find no acceleration of the work.

The appeal is denied.

D. ASBCA No. 56350

In this appeal, MES claims a 98-day time extension and an \$87,048.98 price adjustment for complying with a change in installation entry procedures. We have found above that the claimed 98-calendar days of project delay were concurrent with the other delays for which time extensions were granted through 12 September 2004, and that the additional 32-day time extension in Modification No. P00001 specifically for the installation entry procedures delay was more than sufficient to cover that delay in the remaining contract work up to the substantial completion of the contract on 14 October 2004. (Findings 38, 40-41)

With respect to the claimed price adjustment for the delay, we have found above that the changed entry procedures were required by the installation Security Forces Squadron and Air Force Instructions. They were of a public and general nature applicable to all contractors at the installation. They were intended to improve the physical security of the installation, were not intended specifically to nullify contract rights, and they provided no economic advantage to the government. (Finding 37) We conclude that the changed entry procedures were a sovereign act of the government for which no monetary compensation is due. *See Connor Bros. Construction Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008).

In *Connor*, the Court affirmed our decision that an order barring a single contractor from an installation where others were allowed entry, was in the circumstances,⁷ a sovereign act. The Court stated that: “governmental actions affecting a single contractor can be shielded by the sovereign acts doctrine as long as the effect on the contractor’s contract rights is incidental to a broader governmental objective.” *Connor*, 550 F.3d at 1376. In the present appeal, any effect of the change in installation

⁷ The circumstances were that the excluded contractor’s work was so pervasive in the installation that it could not practically be kept away from the highly sensitive military activities in progress.

entry procedures on the performance of the MES contract was incidental to the broader government objective of improving the physical security of the installation.

MES argues that the “sovereign act defense is limited...to general exercises of the Government’s legislative and war-making powers” (app. br. at 56). Not so. In *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1287-88 (Fed. Cir. 2008), the Court applied the sovereign act defense to an administrative agency order to construct a fish ladder. In *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262-63 (Fed. Cir. 1995), the Court applied the sovereign act defense to a criminal investigation of the contractor. Both *Casitas* and *Orlando* were cited with approval in *Connor*. *Connor*, 550 F.3d at 1376-77. Neither *Casitas* nor *Orlando* involved general exercises of the government’s legislative and war-making powers.

MES also cites three pre-*Connor* Board cases as supporting its claim for monetary compensation for its security related site access delays. The sovereign act defense was not raised or discussed in any of these cases. In *Ben M. White Co.*, ASBCA Nos. 36057, 37950, 90-2 BCA ¶ 22,656 at 113,828-29, the government treated the issue as a matter of contract interpretation. In *American International Contractors, Inc./Capitol Industrial Construction Groups, Inc., A Joint Venture*, ASBCA No. 39544 *et al.*, 95-2 BCA ¶ 27,920 at 139,370-71, the Board allowed an extension of time only for base security delays and no monetary compensation. In *Beyley Construction Group Corp.*, ASBCA No. 55692, 08-2 BCA ¶ 33,999, the Board denied for lack of proof the claim for monetary compensation for security-related delays.

The appeal is denied.

E. ASBCA No. 57074

In this appeal, MES claims \$459,845 for home office overhead for 210 days of project delay in 2004 at a daily rate of \$2,189.74 (findings 40, 43). We have found above that, in the absence of *inter alia* an audit, sworn testimony or affidavit of the accountant preparing the claim, or financial statements of MES contemporaneously prepared in the regular course of business, the claimed home office daily rate is not proven in any amount (findings 43-44).

The appeal is denied.

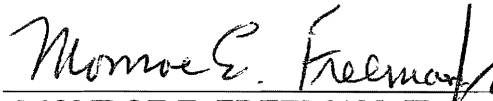
F. Summary Conclusion

The appeal in ASBCA No. 56149 is sustained in the amount of \$7,377.33 with interest from 20 September 2004 pursuant to the CDA, 41 U.S.C. § 7109.

The appeal in ASBCA No. 56348 is sustained in the amounts with interest pursuant to the CDA, 41 U.S.C. § 7109, as follows: (i) \$84,666.90 with interest from 23 February 2005 until paid, (ii) interest only on the principal amount of \$26,415.40 from 23 February 2005 until the date of payment of Modification No. P00001, and (iii) \$13,241.80 with interest from the date of payment of Modification No. P00001 until paid.

The appeals in ASBCA Nos. 56349, 56350 and 57074 are denied.

Dated: 22 February 2012



MONROE E. FREEMAN, JR.

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



ROBERT T. PEACOCK

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 Nos. 56149, 56348, 56349, 56350, and 57074, Appeals of M.E.S., Inc., rendered in conformance with the Board's Charter.

Dated:

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