

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Hedgecock Electric, Inc.) ASBCA No. 56307
)
Under Contract No. N69272-06-C-0003)

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON

This appeal arises from a contract awarded by the Navy to Hedgecock Electric, Inc. ("HECI") for the construction and repair of airfield taxiways and edgelights at the Naval Air Station, Jacksonville, Florida. HECI seeks an extension of the contract performance period and compensatory damages consisting of field office overhead plus mark-ups due to alleged government-caused delays as well as the resultant remission of liquidated damages assessed against it. The Navy ("Navy" or "government") disagrees with HECI's delay analysis and argues that some or all of HECI's claims are barred by accord and satisfaction. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Only entitlement is before us.

FINDINGS OF FACT

1. On 12 December 2005 the Navy issued a solicitation for the construction and repair of airfield taxiways and edgelights at the Naval Air Station, Jacksonville, Florida (supp. R4, tab 31). The solicitation contemplated a performance period of 380 days (supp. R4, tab 32); the specifications provided in several places that the work was to be performed Monday through Friday, 0600 to 1800 and that Saturdays, Sundays and all federal holidays were to be non-work days, unless otherwise specifically authorized as provided in the specifications (R4, tab 2, § 01140, ¶ 1.2.2, § 01321N, ¶ 1.6.2.1).

2. HECI's proposal offered to complete the contract within 290 days "to help get the job" (tr. 1/52, 68). Even though HECI acknowledges that it knew the specifications

said work was restricted to five days a week, except where otherwise authorized, it based its proposal on a seven-day work week that included Saturdays, Sundays and federal holidays as work days (tr. 1/53-54, 62-63, 68-69, 76-77, 223-24). HECI's assumption as to the number of days in its work week was not apparent on the face of its proposal and the record does not show that HECI gave notice to the government by any other means prior to contract award that its proposal was based upon working weekends and holidays (supp. R4, tab 32).

3. On 20 March 2006 the Navy awarded firm, fixed-price Contract No. N69272-06-C-0003 to HECI in the amount of \$4,197,000.00 (R4, tab 1A). The performance period of the contract as awarded was 290 days and the contract further specified that performance was to commence within 15 calendar days after the contractor received the notice to proceed (R4, tab 1A at 1-5, 8 (FAR 52.211-10)). The Navy's 20 March 2006 award letter to HECI advised that the letter "constitutes your notice to proceed" (R4, tab 4), making 4 April 2006 the latest date on which contract performance was to commence and 19 January 2007 the contract completion date (R4, tabs 3, 12).

4. The contract contained FAR 52.211-12, LIQUIDATED DAMAGES – CONSTRUCTION (SEP 2000), in full text which provided that:

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \$1700 for each calendar day of delay until the work is completed or accepted.

(R4, tab 1A at 8) The contract also incorporated the following clauses by reference: FAR 52.211-13, TIME EXTENSIONS (SEP 2000); FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); 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) which provided in pertinent part:

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor....

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer),

notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(R4, tab 1A at 6-8)

5. The contract specifications contained the following provisions pertinent to the issues before us:

SECTION 01110

SUMMARY OF WORK

....

1.3.1 Notification Prior to Excavation

Notify the Contracting Officer at least 15 days prior to starting excavation work.

....

SECTION 01140

WORK RESTRICTIONS

....

1.1 SPECIAL SCHEDULING REQUIREMENTS

a. Have materials, equipment, and personnel required to perform the work at the site prior to the commencement of the work. Specific items of work to which this requirement applies include:

b. The Airfield will remain in operation during the entire construction period. The Contractor shall conduct his operations so as to cause the least possible interference with normal operations of the activity.

c. Do runway 14-32 work followed by paving work.^[1]

d. Do the runway 32 threshold lights and work within 200 feet north of runway 27 on holidays, weekends or periods of low airfield use.^[2]

....

g. The work under this contract requires special attention to the scheduling and conduct of the work in connection with existing operations. Identify on the construction schedule each factor which constitutes a potential interruption to operations.

The following conditions apply:

(1) Closure of taxi-lanes.

(2) Closure of runways.

....

1.2.2 Working Hours

Regular working hours shall consist of an 8 ½ hour period 0600 – 1800, Monday through Friday, excluding Government holidays except as noted in this specification.

All personnel shall take the Airfield Vehicle Operators Indoctrination Course (AVOIC) it can be scheduled by the ROICC office.

¹ The solicitation was subsequently amended to permit HECI to choose which phase to perform first but still required that, whichever phase HECI chose to perform first, the work in the second phase was not to proceed until the work in the first phase was complete (R4, tab 1 at 4, supp. R4, tab 31). HECI elected to perform the Runway 14-32 electrical lighting work as the first phase and its schedules showed HECI performing the electrical lighting work first and, upon completion of the lighting work, performing the paving work (exs. A-15, G-26, tab 9).

² Work outside regular contractual working hours required special arrangements which were provided for in § 01140, ¶ 1.2.3 (quoted below) (*see also* tr. 2/161-66).

1.2.3 Work Outside Regular Hours

Work outside regular-working hours requires Contracting Officer approval. Make application 15 calendar days prior to such work to allow arrangements to be made by the Government for inspecting the work in progress. During periods of darkness, the different parts of the work shall be lighted in a manner approved by the Contracting Officer.

1.2.4 Utility Cutovers and Interruptions

- a. Make utility cutovers and interruptions after normal working hours or on Saturdays, Sundays, and Government holidays. Conform to procedures required in the paragraph "Work Outside Regular Hours."
- b. Ensure that new utility lines are complete, except for the connection, before interrupting existing service.
- c. Interruption to water, sanitary sewer, storm sewer, telephone service, electric service, heating, fire alarm, compressed air, and airfield lighting shall be considered utility cutovers pursuant to the paragraph entitled "Work Outside Regular Hours."

1.3 SECURITY REQUIREMENTS

Contract Clause "FAR 52.204-2, Security Requirements and Alternate II," "FAC 5252.236-9301, Special Working Conditions and Entry to Work Area," and the following apply:

Flight line badges are required for all employees working on the airfield.

....

SECTION 01150

SPECIAL PROJECT PROCEDURES

....

3.1.1 Work in Proximity to Runways

Accomplish all construction work on the runways, taxiways, and parking aprons and in the end zones of the runways and 75 feet to each side of the runways and taxiways with extreme care regarding the operation of aircraft. Cooperate closely, and coordinate with the Operations Officer and the Contracting Officer. Park equipment in an area designated by the Contracting Officer. Under no circumstances shall equipment be parked overnight or for any extended period of time in the proximity of the runways or taxiways. Leave no material in areas where extreme care is to be taken regarding the operation of aircraft.

3.1.2 Schedule of Work/Aircraft Operating Schedules

Schedule work to conform to aircraft operating schedules. The Government will exert every effort to schedule aircraft operations so as to permit the maximum amount of time for the Contractor's activities; however, in the event of emergency, intense operational demands, adverse wind conditions, and other such unforeseen difficulties, the Contractor shall discontinue operations at the specified locations in the aircraft operational area for the safety of the Contractor and military personnel and Government property....

....

3.1.5 Excavation

Open only those trenches for which material is on hand and ready for placing therein. As soon as possible after the material has been placed and work approved, backfill and compact the trenches as specified.

....

3.1.8 Foreign Object Damage (FOD)

Aircraft and aircraft engines are subject to FOD from debris and waste material lying on airfield pavements. Remove all such material that may appear on operational aircraft pavements due to the Contractor's operations. The Contractor shall install a temporary barricade at the Contractor's expense to control the spread of FOD potential debris. The barricade shall consist of a 6' fence covered with a 6' fabric designed to stop the spread of debris.... The fence shall be located around the whole paving project area....

....

3.3 RUNWAY CLOSURE MARKING

Runway 14-32 will need to be closed while working performing the edge light work....

....

SECTION 01320N

CONSTRUCTION PROGRESS DOCUMENTATION

....

1.2 CONSTRUCTION SCHEDULE

Prior to the start of work, prepare and submit to the Contracting Officer for acceptance a construction schedule in the form of a Critical Path Method (CPM), Network Schedule in accordance with the terms in Contract Clause "FAR 52.236-15, Schedules for Construction Contracts," except as modified in this contract.

1.3 NETWORK ANALYSIS SCHEDULE (NAS)

The Contractor shall use the critical path method (CPM) to schedule and control construction activities.... The schedule shall identify as a minimum:

- a. Construction time for all major systems and components;
- b. Each activity shall be assigned its appropriate Responsibility Code;
- c. Each activity shall be assigned its appropriate Phase Code;
- d. Major submittals and submittal processing time; and

1.3.1 CPM Submittals and Procedures

...The network analysis system shall be kept current, with changes made to reflect the actual progress and status of the construction.

1.4 UPDATED SCHEDULES

Update the construction schedule and equipment delivery schedule at monthly intervals or when the schedule has been revised. Reflect any changes occurring since the last update....

....

SECTION 01321N

NETWORK ANALYSIS SCHEDULES (NAS)

....

1.1 DESCRIPTION

The network analysis system shall consist of the network analysis schedule (diagram) and associated reports. The

scheduling of all procurement and construction shall be the responsibility of the Contractor. All construction increments will be interrelated on a single schedule that represents the entire project duration from Contract Award to the Contract Completion Date. Schedule updates will build upon each other and will include construction increments as they are detailed, submitted and accepted. Submission of progress and revision data will be used to measure work progress, aid in the evaluation for requests for time extensions, and to provide the basis of all progress payments. The Critical Path Method (CPM) of network calculation shall be used to generate the project schedule and will utilize the Precedence Diagram Method (PDM) to satisfy both time and cost applications. All progress payment amounts will be derived from and tied to the cost-loaded schedule activities.

....

1.3.2 Acceptance

a. When the Network Analysis Schedule is submitted and accepted by the Contracting Officer it will be considered the "Baseline Network Analysis Schedule".^{3]} The Network Analysis Schedule shall be updated at least monthly. When the Construction Network Analysis Schedule is submitted and accepted by the Contracting Officer, it will then be considered the "Baseline Network Analysis Schedule". The Baseline Network Analysis Schedule will then be used by the Contractor for planning, organizing, and directing the work; reporting progress; and requesting payment for work accomplished. The schedule will be updated monthly by the Contractor and submitted monthly with the progress pay request to reflect the current status of the work. Submittal and acceptance of the Baseline Network Analysis Schedule for

³ HECI's baseline schedule has a data date of 20 March 2006, the date of contract award (exs. A-15, G-26 at tab 9). The record does not indicate the date on which the baseline schedule was submitted to the government, but it is clear from the record that the schedule was approved and was used by the government to assess HECI's progress.

Baseline Network Analysis Schedule and accurate updated schedules accompanying the pay requests are both conditions precedent to processing pay requests....

....

1.6.1 Diagrams

...The diagram shall clearly show the activities of the critical path and must be red in color. Once an activity exists on the schedule it may not be deleted or renamed, and must remain in the logic.

....

1.6.2.1

e. ...Contractor activities will be driven by calendars that reflect Saturdays, Sundays and all Federal Holidays as non-work days.

....

1.8 CONTRACT MODIFICATION

When a contract modification to the work is required, submit proposed revisions to the network with a fragnet and a cost proposal for each proposed change. All modifications shall be incorporated into the network analysis system as separate identifiable activities broken down and inserted appropriately on the first update following issuance of a directive to proceed with the change.... Unless the Contracting Officer requests otherwise, only conformed contract modification fragnets will be added into the subsequent monthly updates. All revisions to the current baseline schedule activities that are necessary to further refine the schedule so that the changed work activities can be logically tied to the schedule shall be made....

1.8.1 Time Impact Analysis

The Time Impact Analysis method shall be used by the Contracting Officer and Contractor in determining if a time extension or reduction to the contract milestone date(s) is justified. The Contractor shall provide a Time Impact Analysis to the Contracting Officer for any proposed contract change or as support for a...Claim or Request for Equitable Adjustment by the Contractor. Submit the Time Impact Analysis schedule, reports, etc. on disk and as a printed/plotted hardcopy.

a. The Contractor shall submit a Time Impact Analysis (TIA) illustrating the influence of each change or delay on the Contract Completion Date or milestones. Unless the Contracting Officer requests an interim update to the schedule, the current monthly updated schedule accepted by the Government shall be used to display the impacts of the change. Unless requested by the Contracting Officer, no other conformed changes will be incorporated into the schedule being used to justify the change impact.

b. Each TIA shall include a Fragmentary Network (fragnet) demonstrating how the Contractor proposes to incorporate the impact into the project schedule. A fragnet is defined as the sequence of new activities and/or activity revisions, logic relationships and resource changes that are proposed to be added to the existing schedule to demonstrate the influence of impacts to the schedule. The fragnet shall identify the predecessors to the new activities and demonstrate the impacts to successor activities. The Contractor shall provide a hardcopy printout of the fragnet activities and relationships being added and also insert the fragnet into the most current, accepted Monthly Network Analysis Update, run the schedule calculations and submit the impacted schedule with the proposal, claim, etc. Include a narrative report describing the effects of new activities and relationships to interim and contract completion dates, with each TIA. Submit time extension requests with a Time Impact Analysis and three hardcopies of the fragnet (in a graphic format), impacted schedule (with

fragnet loaded), Total Float Report, Narrative Report and Log Report.

(R4, tab 2)

6. The contract work consisted of electrical lighting work and paving work and was to be performed in two main areas. The electrical lighting work was in the Runway 14-32 area indicated by a large oval in the upper right of the first contract drawing and the paving work was in a different area indicated in the drawing by a smaller oval in the lower middle of the first contract drawing. (Exs. A-1, G-26, tabs 6, 9; tr. 1/51, 107, 2/52-54, 71, 97) The work was also phased, meaning the paving work was not to begin until after the electrical lighting work was complete. The contract contained a diagram entitled "Haul Route, Laydown & Trailer Site" in which dark, dotted lines denoted haul routes to be taken by HECI while working in the two main worksite areas. The two gates identified in the contract drawings through which HECI could gain access to the base and its work site were Gate 106 (identified as either the commercial gate or the Security Gate) and Gate 101 (identified as either the Flightline Access Point or the Primary Access Gate). (Exs. A-1, A-7; tr. 1/91-92, 2/54-58)

7. A preconstruction conference was held on 19 April 2006. HECI was represented at the meeting by its president, project manager and project superintendent, as well as a representative of HECI's paving subcontractor, Head, Inc. ("Head"). LT Ross was identified as the government's Construction Manager and HECI's contact in the field. (Supp. R4, tab 35; ex. A-2; tr. 1/51, 111) The document memorializing the items discussed included liquidated damages and:

2. **Scope, Value and Dates:**

....

- f. Regular work hours in the contract are stated as 6:00 am to 6:00 pm Monday through Friday, excluding Federal holidays.

....

6. **Other**

- a. Excavation Notice and Permit

(Supp. R4, tab 35 at 2) There is no evidence that any HECI representative advised the government at this meeting that its proposal was based on work days to include weekends and holidays. With respect to passes and badges, the document stated:

7. **Matters Concerning Job Site Conditions:**

- a. *Personnel and Vehicle Passes:* All contractor personnel (all tiers) are required to wear a NASJAX issued badge....

(Supp. R4, tab 35 at 3) HECI's project superintendant testified that the Navy's airfield manager stated at this meeting that HECI needed to take the "airfield driving course" (tr. 1/112).

8. The parties have not directed us to, nor have we found, any identification or notification in the contract or its specifications and drawings of the Combat Aircraft Loading Area ("CALA") nor any special restrictions within the contractual work area associated with the CALA, other than generally stated aircraft operations and a possibility of "unforeseen difficulties" (finding 5, § 01140, ¶ 1.1.b and g, § 01150, ¶¶ 3.1.1, 3.1.2). There is also no mention of the CALA or restrictions on work in the area in the minutes of the preconstruction meeting (supp. R4, tab 35). At some unspecified time, but no later than 10 August 2006 (*see* finding 14), HECI was advised that it was not permitted to work within a 1,250 foot radius of the CALA when it was in use for loading munitions onto aircraft, referred to as being "hot" (ex. A-7; tr. 1/108, 120-21, 145-46). A red flag was raised near the CALA area when an aircraft was brought onto the CALA to be loaded with munitions.

And to verify whether it's actually hot or not because they give you hours, they give you a range of times they were going to be there... -- the only way it could be determined whether it's actually hot or not...was to call the tower...
And that's the purpose of them having radios in contact with the tower, to verify whether it's hot or not.

(Tr. 2/51-52, 59-60; *see also* ex. G-3 at 6-7; gov't br. at 13-14, 33-34) The laydown, or storage, area assigned to HECI by the Navy was within 400 feet of the CALA and HECI argues that, when the CALA was "hot," it could not access its materials or proceed with its work (exs. A-7, G-3 at 6-7; tr. 1/108, 120-23). The government argues, although not until its 17 December 2007 final decision, eight months after contract completion and without citation to any documentation for support, that HECI's storage area was outside the airfield fence and access to it was, therefore, not restricted (R4, tab 1 at 3). We find that the weight of the contemporaneous evidence is to the contrary and shows that HECI was restricted from access to both the work site and its storage area when the CALA was "hot" until the government gave it an alternate storage area (findings 17, 18). The government also claims that there were times the red flag was up and, after contacting the tower, HECI was permitted to work in the CALA area, particularly for the purpose of

material delivery to their storage site; however, the government was unable to identify specific dates when this allegedly occurred (tr. 2/59).

9. HECI employees received IDs authorizing entry onto the Naval Air Station on 14 June 2006. Two weeks later, on 28 June 2006, HECI mobilized to the jobsite and its employees took a driving course to get flight line security badges, known as “blue ramp stamps.”⁴ The blue ramp stamps allowed HECI employees access to Gate 101 (the commercial gate or Security Gate) and the original storage and laydown area assigned by the government. However, on 29 June 2006 when they attempted to enter the Runway 14-32 jobsite to get radios from airfield management for the purpose of maintaining contact with the tower when working on the active runway, they were denied access and told they also needed “red ramp stamps.” (R4, tabs 18, 20; tr. 1/93, 109, 112-14, 2/57; ex. G-3 at 3-4) With respect to flight line badges, the contract specifications stated that:

Flight line badges are required for all employees working on the airfield.

(Finding 5, § 01140, ¶ 1.3) There was no indication of a requirement for more than one badge or ID per employee. Flight line badges or “blue ramp stamps” allowed general access to the airfield and driving on the ramp areas, but did not allow the operation of vehicles “around active runways, taxiways, or other aircraft operational areas.” “Red ramp stamps,” which allowed the operation of vehicles “around active runways, taxiways, or other aircraft operational areas” were only issued to individuals who completed the Navy’s one-day Airfield Vehicle Operators Indoctrination Course (AVOIC). (R4, tab 1 at 3; tr. 1/150) The AVOIC was required by the contract specifications:

All personnel shall take the Airfield Vehicle Operators Indoctrination course (AVOIC)[. I]t can be scheduled by the ROICC office.

(Finding 5, § 01140, ¶ 1.2.2) HECI understood that this meant its employees had to take the course but it did not realize that the AVOIC course was in addition to the flight line driving course they had already taken to get their blue ramp stamps (tr. 1/72-74, 146-50). HECI’s employees completed the AVOIC on 10 July 2006 and on the same day were “issued a license, which is colored red and is called a ‘JAX Airfield Veh. Operator Lic.’ (commonly referred to as the ‘Red Stamp’)” (exs. A-3, G-4; tr. 1/60-61, 71).

10. The contract specifications provided that HECI was to notify the CO “at least 15 days prior to starting excavation work” (finding 5, § 01110, ¶ 1.3.1). The need for the excavation notice and digging permit were also covered in the preconstruction conference

⁴ The flight line badge is blue (gov’t br. at 9; tr. 1/148-49).

(finding 7). There could be “[a]bsolutely no digging until they have a permit approval, not even a shovel, not even a teaspoon” (tr. 2/35).

11. On 29 June 2006, the day after HECI mobilized to the jobsite, it submitted a request for a digging permit for 4,000 feet of the north end of Runway 14-32 (ex. A-4; R4, tab 1 at 2; tr. 1/114-15). The next day HECI notified the government that it planned to begin onsite construction on 10 July 2006 at 0730 which included excavating and installing duct bank on Runway 14-32 (supp. R4, tab 37). On 10 July 2006 the Navy timely⁵ notified HECI that its request for a digging permit was denied because the Navy had discovered a previously undisclosed Installation Restoration (IR) site⁶ within HECI’s work area (R4, tab 3, Mod. No. P00001, tabs 14, 20). A revised digging permit was submitted by HECI on 18 July 2006 that proposed no digging in the IR area, which was the first 1000 feet of the runway, until HECI employees could receive HAZMAT training (exs. A-5, G-3 at 4; R4, tab 1 at 2; tr. 1/115-17, 171-74). The revised digging permit was approved by the government on 19 July 2006 (exs. A-4, -5). We find that the previously undisclosed IR site caused a nine-day nonconcurrent compensable delay (10-18 July) to the critical path for which the government was responsible.

12. According to HECI’s baseline schedule critical path, in the period from 19-25 July 2006, HECI planned to be working on Activity 1014, Install ¾" RGS Conduit, through 22 July 2006 followed by Activity 1022, Install New Runway Lights, through 11 August 2006 (exs. A-15, G-26 at tab 9). The contract specifications provided that Runway 14-32 was to be closed during edge light work (finding 5, § 01150, ¶ 3.3) however, HECI’s daily reports show that after approval of HECI’s revised digging permit on 19 July 2006, the Navy did not close the runway until 26 July 2006. HECI’s daily reports show that in the period from 19-25 July 2006 HECI had people and various equipment on site and was ready to start work. On 25 July 2006 a QC meeting took place at which HECI received notice that Runway 14-32 would be closed seven days a week for the next 90 days and that it was authorized to start work at 7:00 a.m. the next morning. The daily report for 26 July shows that HECI started work and was excavating in various locations to locate the existing conduit. (Ex. A-23, ##017-024; tr. 1/93) We find that HECI experienced seven days of compensable nonconcurrent delay (19-25 July)⁷ to its work on the critical path due to the government’s unexplained failure to make Runway 14-32 available after the amended digging permit was approved on 19 July 2012.

⁵ (Finding 5, § 01110, ¶ 1.3.1)

⁶ An area where possible contamination may have occurred in the past (gov’t br. at 10; tr. 1/115-16).

⁷ We include the weekend dates of 22-23 July because, had the government closed the runway and authorized HECI to start work when it approved the digging permit on 19 July (finding 11), it presumably would also have included the same authorization for work 7 days a week.

13. The IR HAZMAT training took place from 31 July–4 August 2006 (R4, tab 21). We find that the training caused HECI to experience five compensable calendar days (31 July–4 August) of government-caused nonconcurrent delay to work on the critical path and that it could have recommenced work on 5 August 2006 as weekend work was authorized during this period (finding 12). HECI sought a contract modification to compensate it for its costs associated with the unforeseen need to attend the course. The instructions for the cost proposal form directed HECI to “include a request for an extension of time, in calendar days, only if overall completion of contract is impacted by the proposed modification” and HECI did not include an estimated time extension and justification in its proposal. The weight of the evidence supports the testimony of HECI’s president that the CO told him that time extensions would be negotiated at the end of the contract (tr. 1/94-96, 2/12-14; 17; *see also* finding 25). The resulting bilateral Mod. No. P00001, dated 13 September 2006, compensated HECI in its full proposed amount of \$11,811.79 for the cost of its employees’ attendance at the training and, as none was requested, did not include an extension of time in the performance period. HECI’s cost proposal included field overhead costs. (Supp. R4, tab 39) The modification also contained the following clause:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

(R4, tab 3; supp. R4, tab 39; tr. 1/79-98, 2/7-8, 11-15) HECI signed the modification without noting any reservations (R4, tab 3 (Mod. No. P00001); tr. 1/94-96).

14. HECI began excavation on the IR portion of the contract work on Monday, 7 August 2006 (ex. G-3 at 5). On Thursday, 10 August 2006, at 11:00 a.m., the Navy directed HECI to stop work on Runway 14-32 within 1,250 feet of the CALA because it was in use for loading aircraft with munitions, or “hot.” The CALA remained “hot” until 8 p.m. that day. (Exs. A-23 at #041, G-3 at 6; tr. 1/154-55)

15. HECI’s project schedules show that the critical path of the work being performed in August and September 2006 was through various activities of the electrical lighting work that were being performed concurrently (exs. A-9, G-26 at tab 16). None of the paving work under the contract started until late November 2006 (finding 21).

16. From 1-5 September 2006 HECI completed the replacement of the threshold for Runway 14-32. On Saturday, 2 September 2006, it was discovered that a necessary conduit duct running under Runways 27 and 32 had collapsed and would have to be re-bored. HECI’s project narrative for September 2006 states that HECI was

waiting for direction from the government as to how to proceed with cable under Runway 27. (Ex. G-8; tr. 1/89-90, 141-44).

17. On 6 September 2006 HECI reported that the CALA was "hot" and it did not have access to the runway (*see* finding 18). On 7 September 2006 Rusty Dahms notified HECI that he had been assigned to the contract as HECI's field contact filling in for LT Ross while he was away for training for approximately three months (supp. R4, tab 40; tr. 2/67-68). He also advised HECI that:

Upon visiting the site yesterday, I was informed by your field personnel that they were being delayed due to not being able to access their designated site storage area. I have arranged for them to have another site storage area to utilize to stage the material/equipment they need to utilize to avoid delaying the work. They may still maintain their existing storage so they do not have to do a significant relocation. The ET, James Douglas is coordinating the above with them this date. If the above additional storage area does not resolve the problem it will become necessary to relocate the primary storage area. I also arranged for them to get site access from the south side which should allow them to proceed without impact up to the point the [sic] must do the remaining work in the hot pit area explosive arc zone. In the meantime I will work on possible solutions to avoid/minimize impacts in that area once I can determine where we are in the schedule.

(Supp. R4, tab 40; tr. 2/68) The response from HECI's Blum responded:

Thank you for your assistance with avoiding down time on the run way. Having just returned to work, I will be getting with our superintendent to get an update status and check on any concerns.

(*Id.*) The Navy immediately designated an alternate storage site which required HECI's employees to use a different gate, Gate 120, to access the alternate storage site (also referred to in the record as the Secondary Laydown Area) (exs. A-1, A-7, G-3 at 7-8; tr. 2/53, 68-70). The weight of the evidence shows that HECI did not have access to its original storage area to move its materials and tools to the alternate storage site except at night on 11-13 September 2006 (R4, tab 26 at 4; ex. G-8; tr. 1/130; *accord*, tr. 2/70). At a quality control meeting held on 11 September 2006, HECI advised it had been in a stop work condition because the CALA had been "hot" from after Labor Day (Monday, 4 September 2006) until that date (*see* finding 18). HECI acknowledged that the CALA had actually only been "hot" for half days during that period, however, even "[i]f the

CALA was hot for a half a day, it prevented [HECI] from working because of the requirement to close all excavations daily...it could not open and close an area in the same half day” (ex. G-3 at 8-9; tr. 1/129).

18. We find that HECI experienced a total of 22 compensable days of government-caused nonconcurrent delay in performing work on the critical path due to the CALA being “hot” (10-11, 14-15, 17-18, 21, 30 August 2006 and 5-16, 18, 21 September). (Exs. A-23 at ## 046, 048, 052, 067-68, 070-81, 0083, A-25; tr. 1/123-34, 154-65, 179-81, 2/122-23)

19. On 3 October 2006 Dahms requested the following information from HECI:

The current schedule identifies the contract is -63 calendar days behind schedule. At present, I have no request for time extension or documentation as to any Government caused delays. We will need to address what has/is causing the delays and who is responsible so we can make an effort to correct the situation. Any requests for time extensions or Government caused delays needs [sic] include a fragnet that shows the impact to the critical path.

(Supp. R4, tab 41)

20. By letter dated 18 September 2006, HECI’s paving subcontractor, Head, advised that it was behind schedule on an unrelated project in Norfolk, Virginia, due to a hurricane and requested that its work for HECI, originally scheduled to start 20 September 2006, be postponed until 30 October 2006 (ex. G-5). When Head arrived on site on 30 October 2006 the electrical lighting work was still underway and the contract phasing required it to be completed before paving began (findings 5, 6, 21). HECI has not claimed that Head’s delay in arriving at the jobsite caused any delay to the overall completion of the project (ex. G-3 at 12).

21. HECI submitted “two-week look-ahead’s” and thirty day look ahead schedules to the Navy (tr. 2/47, 49; *see, e.g.*, ex. G-1). In one of these reports HECI notified the Navy that it planned to install the Foreign Object Damage (FOD) fence⁸ adjacent to the runway on 30 October 2006 (tr. 2/71-72). HECI claims it was delayed in accomplishing this work from 30 October–20 November 2006 because of the alleged constructive change that occurred when the government directed it not to work in certain areas until Harry Pepper Construction had finished its performance under a separate contract (R4, tab 1 at 4, tab 26 at 5; ex. G-3 at 9; tr. 1/140-41; finding 29). On 1 November 2006 HECI advised that, unless Head was permitted to install a FOD fence

⁸ (Finding 5, § 01150, ¶ 3.1.8)

by the next day, HECI intended to “file a claim for both additional time and monetary compensation” (R4, tab 6; ex. A-8; tr. 1/136-37). The government determined that, as of 1 November 2006, HECI was still working on the electrical lighting phase of the contract work, that the contract required that electrical lighting work was to be completed before the FOD fence and paving work began, and that:

Your schedule called for the Phase 1 FOD Fence (Activity 1032) to commence on November 12, 2006. However, your email of November 2, 2006 forwarded a letter from your subcontractor stating that the FOD Fence installation would begin on November 6, 2006.^[9] The Navy’s Construction Manager in a November 3, 2006 email notified you that in accordance with the contract the lighting (Activity 1022) must be completed first, but the Government was not opposed to allowing the paving and FOD fence work to start early so long as it did not impact airfield mission requirements and was approved by Airfield Management [sic].^[10] In a follow-on email of November 16, 2006 to the Navy’s Construction Manager you acknowledge that you were verbally advised that your paving subcontractor could start work on [Monday,] November 20, 2006 but because of the holidays would not start until [Tuesday,] November 28, 2006.^[11]

(R4, tab 1 at 4-5; *see also* R4, tabs 7-9; ex. A-9, Sheet 2 of 3, ex. G-14; tr. 2/71-73) The government’s decision to allow HECI to proceed with the paving work under the contract, even though HECI’s own project schedule update at the time showed that HECI would not complete the electrical lighting work until 18 February 2007, permitted HECI to mitigate 83 days of delay in its project schedule (ex. G-26, tab 7; tr. 2/133-36).

22. In November 2006 HECI submitted a proposal to perform the extra work necessitated by the discovery that a necessary conduit duct running under Runways 27 and 32 had collapsed and would have to be re-bored (finding 16). In addition to its cost proposal, which included field overhead costs, HECI requested a 30-45 day extension of the contract performance period. (Supp. R4, tab 42; tr. 1/89-90, 141-44; gov’t br. at 17-18; app. reply br. at 13) The Navy did not modify the contract to include the additional work until 27 February 2007 (finding 25).

⁹ (R4, tab 7; ex. G-14)

¹⁰ (R4, tab 8)

¹¹ (R4, tab 9) The Thanksgiving holiday was on Thursday, 23 November 2006 (tr. 2/71-74, 76).

23. By letter dated 17 January 2007, two days before the contractual completion date, the CO issued a letter to HECI expressing concern over the amount of work yet to be performed and inviting HECI to explain its plan for completion of the contract:

A review of the NAS update schedule to date on the subject contract reveals that you are 100 days behind schedule. The current contract completion date is 19 January 2007, and considerable work remains. We fear that at the current pace of progress, you will not complete the project on time.

You are notified that the Government considers your failure to proceed according to your schedule a condition that is endangering performance of this contract. Therefore, we request that you provide us by 22 January 2007, an explanation of corrective action that you have taken or propose to take in order to complete the project on time. The Construction Manager instructed your organization to submit a written justification to justify the 79 days behind schedule at the meeting held on November 07, 2006.

If you believe you encountered problems that might entitle you to an extension of the contract time, you should inform us as to the nature of the problem and provide justification for an extension of contract time. Any justification relative to requests for time extension based upon unforeseeable causes beyond control and without fault or negligence by you, must be supported in accordance with requirements found in the "Default" clause of the contract.

....

...Also, liquidated damages will be assessed for each day of delay beyond the completion date.

(R4, tabs 12, 18)

24. The next day, on 18 January 2007 the CO acknowledged receipt of HECI invoice number 1639 in the amount of \$573,988.31 and informed HECI:

The amount of \$189,245.00 is being retained for the following reasons and amount: 1. Behind Schedule 10% withheld = \$57,400.00. 2. Non Compliance Items: Item 1040 = \$68,860.00 for not submitting a solution on how to correct

the problems, and Item 1050 = \$62,985.00 in the case of a work reduction for not submitting a solution on how your organization intend [sic] to correct the problems. The amount of \$384,743.31 has been processed for payment.

(R4, tab 13) The total retained amount was 33% of the invoiced amount. Immediately, on the same date, HECI responded that, if the government was going to withhold “an excessive amount of retainage, we feel that we are also entitled to compensation for the Government caused delays of personnel and equipment” (R4, tab 14). In response to the CO’s invitation the previous day (finding 23), HECI recounted various alleged government-caused delays over the entire course of HECI’s performance of contract work and included alleged delays due to the digging permit, HAZMAT training, CALA restrictions and paving subcontractor start date:

We had an update meeting about six weeks ago that I attended and discussed several Government caused delays. A list of these items follows, and if you insist on holding this amount of retainage, we feel obligated to bill the Government for all Government caused delays.

(*Id.*) By letter dated 19 January 2007 the CO dismissed each of HECI’s allegations of delay, with two exceptions:

- 2.) For your paragraphs numbered two and three [regarding the digging permit and HAZMAT training] the Government feels you have entitlement to time for delays relating to the unforeseen requirement to obtain the necessary training to work in an identified hazardous area.

....

When Mr. Rusty Dahms assumed Contract Manager duties for this project in early September 2006 he immediately contacted Mr. Ron Blum to inform him of the change and requested additional information necessary to determine contract progress. As early as 3 October 2006 Mr. Blum was notified that the project was 63 days behind schedule (at that time) and if a time extension was required it would be required in writing and should be supported with specific written documentation. Your letter of 18 January 2007 is the first documentation addressing time delays since the Government’s request of 3 October 2006.

(R4, tab 16) By letter dated 2 February 2007, HECI responded, disagreeing with much of the CO's dismissal of its allegations of government-caused delay (R4, tab 17).

25. On 20 February 2007 the CO forwarded to HECI by email an electronic copy of contract Mod. No. P00004 dealing with the collapsed duct that needed to be re-bored. HECI was instructed to sign in block 15 and return the modification to the CO. On 27 February 2007 HECI's Ron Blum advised the CO by email:

Mr. Hedgecock has talked with the job site superintendent regarding this modification. They feel that a 31 day time extension is justified. We are waiting on the digging permit to be approved, and the subcontractor performing the boring is going to try to bore on the 10th of March; however, he is in the middle of another project and he may not be available before the 17th.

How do you want to handle this?

(R4, tab 18; tr. 1/144) The CO responded:

No time extension is going to be addressed in this modification. Time extension will be addressed after the completion of the whole project. During the last NAS update meeting held on February 15th, 2007, at 1000 A.M., your personnel were advised again to submit documentation of all the dates where you think the Government has caused any delay to this contract. For example, from February 02, 2007 to February 03, 2007, the actual amount of days delayed, the reason and what was the delay for. Upon receipt of these [sic] information it will be reviewed and we will make the determination whether the contractor warrants any time extension.

We will issue a unilateral modification no later than March 02, 2007, if the contractor decides not to sign the modification.

(R4, tab 18) Mr. Hedgecock signed the modification on 27 February 2007. Bilateral Mod. No. P00004 was signed by the CO and became effective on 28 February 2007. (R4, tab 3, Mod. No. P00004) The modification paid HECI \$38,553.98 for extra work due to an unforeseen site condition which required it to hire a subcontractor to perform directional boring to install two conduits and circuits under Runways 27 and 32 so

contract work could be completed but, as stated earlier by the CO, it did not include a time extension as the CO had advised that any time extension would be addressed after contract completion (R4, tab 3; finding 13). Even though the CO had expressly stated that any time extensions would be negotiated at a later time, the modification included the following:

D. Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

(*Id.*) By email dated 13 March 2007 the CO reminded HECI that “we need the letter from your organization listings [sic] all the specific dates/items you think your organization is entitled for any time extension and the Government has caused the delay” (R4, tab 19). We are persuaded by the weight of the evidence that the CO intended and consistently acted to negotiate any time extensions due to HECI at the end of the project (R4, tab 18; tr. 1/85-90, 94-96, 144-145, 2/17; finding 13) and we so find.

26. On 19 March 2007 HECI provided more detailed information to the CO by email detailing alleged government delays totaling 125 days, which included an allegation of delay associated with the collapsed ductwork (R4, tab 20; ex. G-11; tr. 1/64-65, 78-79). HECI hired a specialty subcontractor to perform the work which was accomplished 17-22 March 2007 (ex. A-23 at 260-65). At the time the conduit re-boring work was performed, HECI’s as-built schedule showed that the critical path was through the paving work (Activity 1068) which was completed on 5 April 2007 (exs. A-14, G-26 at tab 19), two weeks after completion of the re-boring of the duct. Following the completion of the paving work, the last critical path activity on the schedule was testing the cables for the entire project (Activity 1044), which was completed between 12-17 April and was dependent upon completion of the additional conduit duct boring (app. br. at 14, ¶ 76; ex. A-14)

27. The Navy took beneficial occupancy on 6 April 2007, 77 days past the contractual completion date (R4, tab 21). On 12 April 2007 the parties met to negotiate various outstanding issues between them, including HECI’s allegations of compensable government-caused delay. By letter of the same date, the CO responded to HECI’s 19 March 2007 list of specific alleged delays in which he identified and took responsibility for 16 days of government-caused delay (3 days associated with the digging permit, 5 days for the IR HAZMAT training and 8 days associated with the CALA being “hot”) and stated the government’s intention to issue a contract modification to assess 61 days of liquidated damages against HECI in the amount of \$103,700.00. (R4, tabs 16, 21; tr. 1/66-67) At HECI’s request, the CO did not

immediately issue a contract modification assessing liquidated damages so HECI could submit an updated CPM fragnet and the government could review it (R4, tabs 23-25).

28. By letter dated 16 April 2007 the CO notified HECI that its invoice 1663 was being processed for payment and had been reduced by amounts that included:

An additional deduction in the total amount of \$103,700.00 for 61 calendar days of Liquidated Damages is also retained.

(R4, tab 22)

29. On 5 May 2007 HECI submitted a formal claim seeking an extension of the contract performance period by 77 days plus \$51,393.65 for field overhead (77 days at the daily rate of \$667.45) and requesting a contracting officer's final decision (R4, tab 26 at 1, 16). The breakdown of specific alleged compensable government-caused delays in HECI's claim, as clarified in its posthearing brief (app. br. at 4, 6-7, 8, 12, 14), were as follows:

Red Ramp Stamp	28 June – 10 July 2006	12 days
Dig Permit/IR	6 July–6 August 2006 ¹²	15 days
CALA "Hot"	10-11, 14-15, 17-18, 21, 30 August 2006 and 5-16, 18, 21 September 2006	22 days
FOD Fence/Harry Pepper	30 October – 20 November 2006	22 days
Additional Conduit Bore	17-22 March 2007	6 days
	Total claim	<hr style="width: 100%; border: 0.5px solid black;"/> 77 days

(R4, tab 26 at 3-5; app. br. at 4-8, 12, 14) On 18 May 2007 the CO acknowledged receipt of HECI's claim and requested additional information by 25 May 2007 (R4, tab 27).

¹² HECI claimed compensable delay days for a total of 15 days in the period from 6 July-6 August 2006 as a result of: (a) the time taken by the government to review its digging permits past the contractual review period (3 days, 16-18 July); (b) HAZMAT training necessitated by the identification of the IR site in its work area (5 days, 31 July-4 August); and, (c) alleged government delay in closing the runway so HECI's work could start (7 days, 19-25 July) (app. br. at 5-7, 27; app. reply br. at 9-10).

HECI provided its response on 21 May 2007 which also included an updated cost proposal for field office overhead plus mark-ups in the total amount of \$62,932.55 (77 days at the daily rate of \$817.31) (R4, tab 28).

30. On 17 December 2007 a final decision was issued that granted HECI a four (4) day time extension associated with the initial digging permit and denied the balance of HECI's claim (R4, tab 1). Unilateral Mod. No. P00005, dated 19 December 2007, extended the contract completion date from 19 January 2007 to 23 January 2007 (R4, tab 3, Mod. No. P00005). HECI timely appealed the final decision to this Board.

31. Forward Engineering was the company employed by HECI to prepare and maintain its project schedules and updates. Mr. Samuel Moser, an employee of Forward Engineering, testified as a fact witness as the person who prepared and maintained HECI's project schedules for this project and was also accepted by the Board to testify as an expert witness in the field of critical path method (CPM) scheduling and time impact analysis. (Tr. 1/184-99; R4, tab 26 at 17-18) Mr. Moser testified that he was familiar with Contract Specification § 01321N, NETWORK ANALYSIS SCHEDULES (NAS) (finding 5), and used it together with input from HECI to prepare the baseline schedule for this project (tr. 1/199-05, 207-09; exs. A-15, G-26 at tab 9). The contract required that the baseline schedule be updated on a monthly basis to reflect actual work in the field and any delays or other impacts to the schedule (findings 4, 5 at § 01320N, ¶¶ 1.3.1, 1.4, § 01321N, ¶¶ 1.3.2-1.8.1). Mr. Moser did not prepare monthly updates as required by the contract; rather, he testified that he prepared updates to the schedule dated 30 September 2006, 31 December 2006, 14 February 2007, 5 March 2007, 6 April 2007 using information provided to him by HECI (Exs. A-9-A-13, G-26, tabs 16-18). The record also contains updates that Mr. Moser did not mention in his testimony, specifically 3 July 2006, 4 August 2006, 4 September 2006 (ex. G-26, tab 1 at ¶ 3, tabs 13-15). Mr. Moser also attended meetings with government personnel after the updates were submitted. (Tr. 1/205-07, 221-22, 226-28; exs. A-9, -13) He does not recall any discussions about changing the critical path on this project although activity durations, work percentage and dates "probably did change, based on work conditions" (tr. 1/207). The completed as-built schedule with all activities updated, shows an actual completion date of 16 April 2007 (tr. 1/211; ex. A-14). Mr. Moser prepared a summary of his time impact analysis for this project which determined there were 73 days of government-caused delay to the critical path (exclusive of the conduit boring issue) as well as fragnets¹³ based on input from HECI that assumed all delays were government-caused

¹³ "A fragnet is a snapshot of a set of activities that impacts the critical path on a schedule. And when we talk about fragnets, we are talking about depicting only the activities in a schedule that are impacted. So if there is, say you have a schedule that has zero float. You insert activities into the schedule. It generates a different float.... The fragnet will only show the activities that are...impacted on the specified schedule. It's a portion of a full schedule that shows an impact....

(R4, tab 26 at 17-18; tr. 1/237-38, 246, 2/146-47). After adding an additional six days of government-caused delay due to the collapsed duct boring issue, Mr. Moser concluded there were a total of 79 days of government-caused delays, however, the specific days he identified were different from the 77 days of delay argued by HECI before us (finding 29) and there has been no attempt by HECI to reconcile the differences (R4, tab 26 at 17-18; exs. A-16, A-22; tr. 1/213-20, 229-48). On the basis of the totality of the record before us, we agree with the CO's assessment of Mr. Moser's time impact analysis as inadequate to support HECI's claimed delays:

A review of your Time Impact Analysis reveals the following deficiencies:

1. The fragnet is not provided as specified in paragraph 1.8.1a. It does not identify the predecessors to the new activity or demonstrate the impacts to the successor activities.
2. No hard copy printout of the fragnet activities and relationships being added was provided.
3. The fragnet is not inserted into the most current, accepted Monthly Network Analysis Update. The preparer started with the new activity and gave it an arbitrary constraint date with the schedule starting on that date. This does not show how the new activity impacts the critical path but assumes it does from the arbitrary date selected and utilized. The result is the fragnet is useless for assessing impact to the current accepted Monthly Updated Schedule.
4. The schedule utilized by the Contractor for insertion of his fragnet was not the most current accepted Monthly Updated Schedule, but the Approved Base Schedule....

Time impact analysis is similar to the fragnet. Normally a time impact analysis would show the full schedule, and how the float has changed on every single individual activity, and it also incorporates the fragnet activities." (Tr. 1/191-92; *see also* finding 5, § 01321N, ¶ 1.8.1)

The presence of the above deficiencies in your fragnet documentation makes your TIA non-compliant with the contract and cannot be used to support your claim for a time extension.

(R4, tab 1 at 10; *see also* ex. G-26 at tab 8)

32. Without objection, the Board accepted Mr. Kurt Musser as the government's proffered expert witness in construction management and construction schedule analysis, including CPM analysis. Mr. Musser concluded, on the basis of the schedules and delay analysis submitted by HECI, the daily reports and the Rule 4 file, that HECI experienced 11 days of government-caused delay (14-19, 31 July 2006 – 4 August 2006) to work on the critical path associated with the digging permit/IR site identification. He concluded that no further claimed delays were supported. (Tr. 2/79-85; ex. G-26, tabs 1-21)

33. The testimony and reports of the parties' opposing experts regarding the formal CPM schedules and fragnets submitted by HECI during contract performance are of limited value to us as evidence of what work was actually done and when for two reasons:

a. First, HECI's schedules, which were not updated every month as required by the contract (finding 5, 01320N, ¶¶ 1.3.1, 1.4, § 01321N, ¶¶ 1.3.2, 1.8.1), did not reflect in real time any changes in the sequence of work and critical path shown by the record to have actually occurred in the field (finding 31). Mr. Moser prepared the schedules and fragnets based on input from HECI which assumed that all delays were government-caused delays and that there were no contractor-caused delays (tr. 1/237-38, 2/145-46). By virtue of the fact that the contractually-required monthly updates were not always submitted (finding 31) and due to the method by which Mr. Moser added new activities into the schedule by means of fragnets at the end of contract performance without tying them logically to the predecessor and successor activities in the existing schedule, it becomes more difficult to determine what, if any, impact the alleged delays had in real time on the overall project schedule or the critical path of work in that schedule (tr. 2/106-14, 117-20, 126-30, 136-39, 142-46). As a result of these factors, we have little confidence that the interim schedules between the baseline schedule and the final as-built schedule submitted by HECI accurately reflect the actual work and conditions at the jobsite for any specific date or period of time. However, HECI's final update, its as-built schedule, is of some value as it shows what HECI reported to Mr. Moser as the actual start and finish dates of each activity performed by the contract completion date of 16 April 2007 (exs. A-14, G-26 at tab 19). And, while they may not have accurately reflected how and when work was *actually performed* in real time, HECI's baseline schedule and interim updates are the only real evidence we have of HECI's *planned* work schedule and these were the schedules with which the Navy assessed HECI's progress.

We find them useful for the limited purpose of analyzing HECI's claimed delays in the context of its plan for achieving the work.

b. Further reducing the credibility of HECI's schedules and fragnets submitted during contract performance as reflective of how and when the actual work was performed is the testimony of HECI's project superintendent that the schedules prepared by Mr. Moser and admittedly not updated to show delays or changes to the work (finding 31) were not really reflective of what actually took place in the field:

Q Now when you are working on any part of the contract, you have to comply with what the schedule says, correct?

A Correct.

Q That is how you know when to start certain activities. You go by what the schedule and the updates say, correct? Is that right?

A Truthfully, no.

Q You don't follow the schedule?

A No.

Q Okay. How do you do it then?

A You do it by what the airfield manager allows you to do.

Q Right. But when the airfield manager says you can work, how do you know what to do?

A You work in areas that he allows you to. The schedule is really nice for looking at, but for doing actual airfield work the schedule is not a real good reflection of actually how a project is done.

Q Did you follow the schedule in this case?

A We followed it the best we could. You are only allowed to work where the airfield manager designates that you can work.

(Tr. 1/165-66)

DECISION

A. Alleged Government-Caused Delays

HECI initially sought 125 days of compensable government-caused delays on 19 March 2007 (finding 26). On 12 April 2007 the CO identified 16 days of government-caused delay in his response to HECI's alleged delays and stated the government's intention to assess 61 days of liquidated damages (77 days after contractual completion date minus 16 days of government delay = 61 days) (finding 27). HECI then, on 5 May 2007, submitted a formal claim seeking an extension of the contract performance period for 77 days of compensable delay due to alleged government actions and inactions, as well as the remission of the 61 days of liquidated damages assessed (finding 29). In a final decision dated 17 December 2007, HECI was granted an extension of the contract performance period in the amount of 4 days associated with the initial digging permit and the balance of the claim was denied. HECI timely appealed that decision. HECI has the burden of proof with respect to its affirmative claims of compensable government-caused delays entitling it to an extension of the contract performance period and field office overhead plus mark-ups. *States Roofing Corp.*, ASBCA No. 54860 *et al.*, 10-1 BCA ¶ 34,356 at 169,661; *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc).

The assessment of liquidated damages is a government claim and the government has the initial burden of proving that a contractor failed to meet the contractual completion date and that the period of time for which it assessed liquidated damages was correct. Once the government establishes a prima facie case that its assessment of liquidated damages was correct, the burden of proof shifts to the contractor to show that its failure to meet the contractual completion date was excusable. *KEMRON Environmental Services Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,399. The government took beneficial occupancy on 6 April 2007 which was 77 days after the contractual completion date of 19 January 2007. On 12 April 2007 the government advised HECI of its intent and on 16 April 2007 it deducted 61 days of liquidated damages in the amount of \$103,700.00 from payment of one of HECI's invoices. Accordingly, we find that the government has established a prima facie case that contract performance continued after the 19 January 2007 contractual completion date and that liquidated damages were appropriate for the period of contract performance between the contractual completion date and the date of beneficial occupancy. The burden of proof then shifts to HECI to establish a valid defense to the assessment of liquidated damages.

HECI has asserted as its defense that 77 days of government-caused delays were the reason for the entirety of the 61 days of liquidated damages that were assessed. With respect to a contractor's burden of proof as to entitlement to remission of liquidated damages, we have held:

In general, liquidated damages will be excused if a contractor demonstrates that the Government caused the delay, even if the contractor also contributed to the delay during that same time period.... In making its case, "it is essential to [the contractor's] success that it prove that the [delaying] items complained of caused a delay to the completion of the project as a whole...."

KEMRON, 00-1 BCA ¶ 30,664 at 151,400 (case citations omitted). Normally, a delay that affects the overall completion of the contract work is a delay to work on the critical path. *States Roofing*, 10-1 BCA ¶ 34,356 at 169,661.

In order to assess whether there was a delay to HECI's contract work on the critical path we would normally first look to the project schedules, as of the dates on which delay is alleged, to determine whether the work alleged to have been delayed was planned to be under way on that date and whether that work was on the critical path. The contract had very specific requirements for monthly updates to the project work schedules to be prepared and submitted to the government by HECI. The contract also contemplated the use of time impact analysis as well as schedule and contract modifications throughout the contract performance period to address schedule impacts due to delays and changed work. (Finding 5, § 01320N, ¶¶ 1.3.1, 1.4, § 01321N, ¶¶ 1.1, 1.3.2, 1.8, 1.8.1) HECI hired Forward Engineering, and its employee Mr. Moser, to do its scheduling work. The record shows that HECI (through Mr. Moser) did not prepare or submit an update every month as required and its schedules during contract performance did not identify the delays it now alleges, either as to cause or party responsible as was required by the contract; the first time impact analysis it submitted was late in the contract performance period (findings 5, § 01321N, ¶¶ 1.3.2, 1.8, 1.8.1, 31). Further operating against the credibility of HECI's schedules is the testimony of its own project superintendent that there was not necessarily a correlation between the actual work performed and the work shown on the schedules. (Findings 31, 33) In *Robust Constr., L.L.C.*, ASBCA No. 54056, 05-2 BCA ¶ 33,019, we found a contractor's schedules to be inadequate as evidence of delays and impact to the critical path of the project:

([A] credible CPM time impact analysis should take into account and give appropriate credit for all of the impacts to the project); *Norair Engineering Corp.*, ENG BCA Nos. 3804 *et al.*, 90-1 BCA ¶ 22,327 at 112,205) "[a] contractor's initial network analysis...is constantly changing.... Activities

which were not critical prior to the new event may be rendered critical;... Whether the change or delay affects the critical path must be determined on the basis of conditions existing *immediately prior to its occurrence*; not on how it might have changed what someone planned (or should have planned) months or years previously”). [Emphasis added]

Id. at 163,649. The government also failed to timely address time impacts to the schedule during performance as required by the contract (findings 4, 5 at § 01321N, ¶¶ 1.1, 1.3.2, 1.8, 1.8.1), postponing all discussion of time to the end of the contract (findings 13, 19, 23-25, 27). Accordingly, we turn to other evidence in the record before us, including the daily reports, to determine whether there were compensable government-caused delays to work on the critical path.

1. Red Ramp Stamp

HECI seeks 12 days of compensable government-caused delay from the date of its mobilization on 28 June 2006 to 10 July 2006, the date its employees completed the AVOIC course and received “red ramp stamps” allowing them to operate vehicles on the airfield. HECI attributes this delay to “a lack of clarity in the specifications, coupled with the Navy’s failure to address the issue at the Preconstruction Conference.” (Tr. 1/36-37, 76; app. br. at 23-25; app. reply br. at 7-8) We find that the contract requirement for the specific AVOIC driving course was clear and unambiguous and it was incumbent upon HECI to be sure any driving courses it took met the AVOIC requirement. HECI’s claim for this delay is therefore denied.

2. Digging Permit/IR

HECI seeks a total of 15 days of compensable delay in the period from 6 July–6 August 2006 as a result of: (a) the time taken by the government to review its digging permits past the contractual review period (3 days); (b) HAZMAT training necessitated by the identification of the IR site in its work area (5 days); and, (c) alleged government delay in closing the runway so HECI’s work could start (7 days) (finding 29, n.12). In January 2007 the contracting officer acknowledged government responsibility for delay associated with the digging permit and the HAZMAT training and did not assess liquidated damages for eight days of alleged government-caused delay but there was no modification of the contract completion date (finding 24). In December 2007 a contracting officer’s final decision granted HECI four days associated with the digging permit and denied the balance of HECI’s claim. A contract modification was executed that extended the contract completion date from 19 January 2007 to 23 January 2007 (finding 30).

Our detailed analysis of the evidence before us relating to the claimed period from 6 July–6 August 2006 shows that there was no government delay in the review of HECI's 28 June 2006 digging permit request. The government responded timely on 10 July 2006 with a denial of the permit due to the identification of the IR site within the work area. While there was no delay associated with the review of the digging permit, we have found that HECI was delayed by the government due to the identification of an unforeseen IR site from 10-18 July 2006 (nine days). (Finding 11) We have also found that the government caused a seven day unexplained delay from 19-25 July 2006 in closing Runway 14-32 so HECI could begin critical path work (finding 12). In addition, we have found that the unforeseen identification of the IR site by the government caused HECI's workers to be required to complete HAZMAT training before being authorized by the government to continue work in the IR site which delayed critical path work for another five days from 31 July–4 August 2006 (finding 13). We have therefore found a total of 21 days of compensable government-caused delay in the period from 6 July–6 August 2006 due to the identification of the IR site. Since HECI was already compensated for field office overhead for the period of the HAZMAT training in Mod. No. P00001, it is not entitled to further monetary compensation in addition to a time extension for that period.

3. CALA "Hot"

The contract put HECI on notice that the airfield would remain in operation throughout the period of contract performance and that HECI was required to conduct its work so that it caused as little disruption to the normal operation of the airfield as possible (finding 5, § 01140, ¶ 1.1, § 01150, ¶¶ 3.1.1, 3.1.2). However, nothing in the contract notified HECI that the work area included something called the CALA and that work in the CALA was subject to being stopped often and for hours or days at a time (findings 8, 14, 17-18). HECI seeks compensable government-caused delay due to the CALA being "hot" on 22 days between 10 August and 21 September 2006. We have found that the record supports HECI's allegation of no meaningful contract work on the 22 identified days (findings 18; *see also* finding 29). The government argues that HECI was not really delayed because it could have worked on the rest of the runway when the CALA was "hot" (R4, tab 1 at 6, tab 16; gov't br. at 33). We are not persuaded by the government's argument for two reasons: the contract required that HECI was to conduct its work in an orderly fashion and not have multiple sections of the runway under construction at once (finding 5, § 01140, ¶ 1.1, § 01150, ¶¶ 3.1.1, 3.1.2, 3.1.5, 3.1.8); and, even if HECI had moved to work on other parts of the runway, sooner or later HECI was going to have to work in the CALA area. The government has offered no evidence or argument that HECI would have encountered fewer work stoppages by working in the CALA in a different time frame. We are persuaded by the weight of the evidence that HECI is entitled to an extension of the contract performance period in the amount of 22 days due to government delay caused by work restrictions in the CALA which were not contained in the contract, were unforeseeable at the time of HECI's proposal and

work plan and impacted HECI's ability to perform meaningful contract work on the critical path.

4. FOD Fence

HECI seeks 22 days of compensable government-caused delay in the period from 30 October-20 November 2006 (finding 29). HECI alleges the delay was caused when its paving subcontractor arrived on site and was not permitted to start work by installing the required FOD fence adjacent to the runway on 30 October 2006 because another contractor was still working in the area to be paved (findings 20, 21).

The government responds that HECI's paving subcontractor was not permitted to start work on 30 October 2006 because HECI's own schedule showed that the paving work was not to start until after electrical lighting Activity 1022 (Install New Runway Lights) was complete and it was not complete as of 1 November 2006. According to HECI's as-built schedule, Activity 1022 was not completed until 4 January 2007 (exs. A-14, G-26, tab 19). The government also pointed out that, even if HECI had been on schedule and not 83 days behind schedule as it actually was, HECI's schedule showed Activity 1032 (installation of the FOD fence) not starting until 12 November 2006 at the earliest. Nevertheless, the government advised HECI that it was not opposed to HECI starting the FOD fence installation and paving work early so long as it did not interfere with airfield mission requirements and was approved by the airfield manager. On Thursday, 16 November 2006, the government authorized HECI to start paving on Monday, 20 November 2006. However, HECI's subcontractor elected not to begin the paving work until after Thanksgiving on Tuesday, 28 November 2006. (Finding 21)

Under the express terms of the contract, the government would have been within its rights to require that HECI not start any paving work until the electrical/lighting work was complete. Nevertheless, after assessing HECI's request for an early start on the paving work and the potential impact on airfield operations, the government's authorization for HECI to start paving work on 20 November, allowed HECI to mitigate at least 45 days (20 November 2006 – 4 January 2007) of further delay it would have experienced if it had been held to the contract requirements and had not started paving until after Activity 1022 was complete on 4 January 2007. We find that any delays to the start of its paving work experienced by HECI in the claimed period from 30 October-20 November 2006 were not government-caused and we deny this portion of HECI's claim.

5. Additional Bore

It is undisputed that the occurrence of the collapsed duct under the runway was a condition unforeseen by either party and the government has reimbursed HECI for the full amount of its cost proposal for performance of the additional work required, but has

not granted a time extension to the contract completion date. All that remains to be determined is whether there is government-caused delay associated with the additional work. The collapsed duct was identified on 2 September 2006, HECI submitted a cost proposal in November 2006 to re-bore the duct and the government authorized the additional work in Mod. No. P00004 dated 27 February 2007. The work was actually accomplished by a specialty subcontractor on 17-22 March 2007. (Findings 16, 22, 25, 26) HECI's claim is for six days of compensable delay for the time it took to perform the additional work required to correct the collapsed duct.

The government argues that the critical path of the work at the time the duct was re-bored was through the paving work and not the electrical work, and since the additional work was not on the critical path, HECI's overall performance of the contract was not delayed (gov't br. at 35-36). We have found that the additional conduit boring work done on 17-22 March 2007 was not on the critical path (which was paving work at the time) and that it was complete well before the critical path shifted to the cable testing work (completed 12-17 April 2007) which was dependent upon the completion of the collapsed duct work (finding 26). The additional collapsed duct work, therefore, did not delay completion of the project and we deny HECI's claim for six days of compensable government-caused delay associated with that work.

B. Accord and Satisfaction

The government argues that HECI's claims for both time and money associated with matters addressed in two bilateral contract modifications are foreclosed by the doctrine of accord and satisfaction (gov't br. at 11-12, 19-20, 31-32). Specifically, under Mod. No. P00001 the government paid HECI \$11,811.79, including field overhead costs, for five days of HAZMAT training; HECI did not request a time extension in its cost proposal and Mod. No. P00001 did not include an extension of time (finding 13). Under Mod. No. P00004 the government paid HECI \$38,553.98, including field overhead costs, for reboring the collapsed duct; HECI did not request a time extension in its cost proposal and Mod. No. P00004 did not include an extension of time (finding 25). Both modifications contained the following language:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

We have found that, despite its inclusion of release language in the modifications and the contract's requirement that delays and changed work be addressed throughout contract performance (findings 4, 5 at § 01321N, ¶¶ 1.1, 1.3.2, 1.8, 1.8.1), it was the CO's intention, and HECI was advised, that time extensions were going to be considered at the

end of the contract. Requests by HECI for time extensions due to government-caused delays during the entirety of the contract performance period were specifically invited, discussed, negotiated and acknowledged by the government in the waning days of the contract performance period (findings 13, 19, 23-25, 27). Where the conduct of the parties after the execution of an agreement manifests an intention to continue to negotiate the matter, there is no bar to future claims. *England v. Smoot Corp.*, 388 F.3d 844, 849-50 (Fed. Cir. 2004) (no bar to future claims where the Navy continued to consider claims subsequent to modifications that included the identical language now before us).

The government argues that the CO only intended to invite documentation of any delays associated with Mod. 00004 and the collapsed duct when he wrote:

No time extension is going to be addressed in this modification. Time extension will be addressed after the completion of the whole project. During the last NAS update meeting held on February 15th, 2007, at 1000 A.M., your personnel were advised again to submit documentation of **all the dates where you think the Government has caused any delay to this contract.** For example, from February 02, 2007 to February 03, 2007, the actual amount of days delayed, the reason and what was the delay for. Upon receipt of these [sic] information it will be reviewed and we will make the determination whether the contractor warrants any time extension.

(Finding 25) (Emphasis added) We cannot agree as we believe his language is quite clear and unambiguous that he was again inviting HECI to identify and provide documentation as to all the dates where HECI thought the government had caused delays and did not limit his invitation at all. Confirming our belief, on 13 March 2007 the CO again invited HECI to advise of any government-caused delays (finding 25). On 19 March 2007 HECI submitted a detailed list totaling 125 days of alleged government-caused delay (finding 26). On 12 April 2007 the CO and HECI met to negotiate various issues; in his letter of the same date the CO took responsibility for 16 days of government-caused delay and stated his intention to assess liquidated damages for 61 days (finding 27). On 16 April 2007 the CO confirmed his position when he deducted \$103,700.00 for 61 days of liquidated damages from payment of HECI's invoice 1663 (finding 28). In so doing, he manifested his intention to continue negotiations as to time extensions including those associated with the subject matters addressed in Mod. Nos. P00001 and P00004. On that basis, we reject the government's asserted defense that some or all of HECI's claims for government-caused delay were barred by accord and satisfaction.

C. Appellant's Additional Arguments

HECI raised several other legal theories of recovery relating to the validity of the liquidated damages in its post-hearing brief and reply brief (app. br. at 16-21; app. reply br. at 6-7). We have considered them and, finding them unpersuasive, they will not be addressed further.

CONCLUSION

HECI is entitled to recover for 43 days of compensable government-caused delay (subject to the fact it has already recovered for field office overhead for the HAZMAT training). The contract completion date should have been extended to 3 March 2007. HECI is liable for 34 days of liquidated damages, the time period from 4 March 2007 to 6 April 2007. The appeal is sustained to that extent and otherwise denied. We remand the appeal to the parties for negotiation of quantum in accordance with the above.

Dated: 20 June 2012



DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56307, Appeal of Hedgecock Electric, Inc., rendered in conformance with the Board's Charter.

Dated:

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