ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Versar, Inc.	)	ASBCA Nos. 56857, 56950
	)	56962, 57386
Under Contract No. FA8903-04-D-8692	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Versar, Inc. appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) denial of its $2,916,461.20 claim and from the government's $633,558.38 claim under a task order (TO) for heating, ventilation, air conditioning (HVAC) and other work at a Department of Defense (DoD) elementary school. The Board held entitlement and quantum hearings.

FINDINGS OF FACT

Worldwide Environmental Restoration and Construction (WERC) Contract

1. The Air Force issued the captioned negotiated indefinite-delivery, indefinite-quantity contract, effective 5 December 2003, to Versar, as a small business, for work at Air Force Center for Engineering and the Environment (AFCEE) customer sites (R4, tab 2 at 25-28, tab 735 at 9821; tr. 1/11, 2/59-60, 229). The contract incorporates or contains the following clauses, quoted or mentioned in pertinent part:[1]

[1] The clauses are contained or cited at R4, tab 2 at 36-37, 46, 49-53, 55, and 66.

Federal Acquisition Regulation (FAR) 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984)—ALTERNATE I (APR 1984), which requires the contractor to prosecute the work diligently.

FAR 52.211-12, LIQUIDATED DAMAGES—CONSTRUCTION (SEP 2000)—ALTERNATE I (APR 1984), which provides that liquidated damages are to be determined at the TO level, but the TO did not set any (R4, tab 2 at 64; *see* ex. G-167 at 1).

FAR 52.216-18, ORDERING (OCT 1995), provides that all TOs are subject to the contract's terms and conditions and, in the event of a conflict, the contract controls.

FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002):

> (b) *Progress payments*. The Government shall make progress payments monthly as the work proceeds...on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the [CO].
>
> (1) The Contractor's request for progress payments shall include the following substantiation:
>
> (i) An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested.
>
> ....
>
> (v) Additional supporting data in a form and detail required by the [CO].
>
> ....
>
> (e) *Retainage*. If the [CO] finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the [CO] shall authorize payment to be made in full. However, if satisfactory progress has not been made, the [CO] may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the [CO] may retain

from previously withheld funds and future progress payments that amount the [CO] considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds....

The clause requires the contractor to substantiate and certify its requests for progress payments. FAR 52.232-5(b)(1), 52.232-5(c).

FAR 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (FEB 2002):

(a) Invoice payments—(1)...there are several types of invoice payments that may occur under this contract...:

(i) Progress payments...based on [CO] approval of the estimated amount and value of work or services performed....

(A) The [payment] due date is 14 days after the designated billing office [DBO] receives a proper payment request [or if the receipt date is not annotated] the 14th day after the [request date], *provided the [DBO] receives a proper payment request and there is no disagreement over quantity, quality, or Contractor [contract compliance].*

(B) *The due date for payment of any amounts retained by the [CO] in accordance with the [Payments clause] is as specified in the contract or, if not specified, 30 days after approval by the [CO] for release to the Contractor.*

(ii) *Final payments based on completion and acceptance of all work and...release of all claims against the Government arising by virtue of the contract....*

(A) *The due date for making such payments is the later of the following two events*:

(1) The 30th day after the [DBO] receives a proper invoice from the Contractor.

(2) *The 30th day after Government acceptance of the work...For a final invoice when the payment amount is subject to contract settlement actions (e.g., release of claims),*

acceptance is deemed to occur on the effective date of the contract settlement.

(B) [Same measurement of receipt date and lack of disagreement qualification as (a)(1)(i)(A) above]

(2) ...A proper invoice must include the items listed in...(a)(2)(i) through (a)(2)(xi).... If the invoice does not comply..., the [DBO] must return it within 7 days after receipt, with the reasons why it is not [proper]. When computing any interest penalty..., the Government will take into account if [it] notifies the Contractor of an improper invoice in an untimely manner.

....

(iv) Description of work or services performed.

....

(viii) For [progress payments], substantiation of the amounts requested and certification....

....

(3) *...The[DBO] will pay an interest penalty automatically, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(3)(i) through (a)(3)(iii)...are met....*

(i) The [DBO] received a proper invoice.

(ii) The Government processed a receiving report or other Government documentation authorizing payment *and there was no disagreement over quantity, quality, Contractor [contract compliance], or requested...amount.*

(iii) In the case of a final invoice for any [balance due, it] was not subject to further contract settlement actions between the Government and the Contractor.

(4) ...The Government will compute the interest penalty [per prompt payment] regulations at 5 CFR part 1315.

(i) *[In] computing an interest penalty that might be due...[for final payments], Government acceptance...is deemed to occur constructively on the 7th day after the Contractor has completed the work [per the contract.] If actual acceptance...occurs within the constructive acceptance...period, the...interest penalty [is based on the actual acceptance date]. Constructive acceptance...[does] not apply if there is a disagreement over quantity, quality, or Contractor [contract compliance]. These requirements...do not compel Government officials to accept work..., approve...estimates, perform...administration functions, or make payment prior to fulfilling their responsibilities.*

(ii) *The[regulations] do not require...interest penalties if payment delays are due to disagreement between the Government and the Contractor over the... amount or other issues involving contract compliance, or on amounts temporarily withheld or retained [per the] contract. The Government and the Contractor shall resolve claims involving disputes, and any interest that may be payable [per the FAR Disputes clause].* [Emphasis added[2]]

FAR 52.236-1, PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984) as specified for the WERC contract:

The Contractor shall perform at the site, and with its own organization, work equivalent to at least [12% of the total amount of work to be performed under the contract unless otherwise specified in the TO].

[2] An additional interest penalty can apply if the DBO does not pay any original penalty within 10 days after invoice payment and the contractor makes a written demand for the additional penalty not later than 40 days after invoice payment. FAR 52.232-27(a)(6). We have not been directed to any such demands here.

FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984):

> (c) All [contract work shall be skillful and workmanlike]. The [CO] may require, in writing, that the Contractor remove from the work any employee the [CO] deems incompetent, careless, or...objectionable.

FAR 52.236-6, SUPERINTENDENCE BY THE CONTRACTOR (APR 1984):

> At all times during [contract performance] until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the [CO] and has authority to act for the Contractor.

FAR 52.236-9, PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984) (Protection clause), which calls for the contractor to protect vegetation and existing improvements and utilities.

FAR 52.236-11, USE AND POSSESSION PRIOR TO COMPLETION (APR 1984):

> (a) The Government [can] take possession of or use any completed or partially completed part of the work. [Prior thereto], the [CO] shall furnish the Contractor a list of [work] remaining to be performed or corrected [there]. [The CO's failure] to list any item...shall not relieve the Contractor of responsibility for [contract compliance]. *The Government's possession or use shall not be deemed an acceptance of any [contract work].* [Emphasis added]

FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997):

> (d) Shop drawings means drawings, submitted to the Government by the Contractor [or subcontractor]...showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation...of materials [or] equipment. It includes drawings [and materials explaining] in detail specific portions of the [contract work]....

(e)...[T]he Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and [contract] compliance and...indicate its approval thereon.... Any work done [prior to CO approval] shall be at the Contractor's risk. *[CO approval] shall not relieve [it of] responsibility for any errors or omissions in such drawings, nor from [contract compliance], except [for] variations described and approved in accordance with (f) below.*

(f) *If shop drawings show variations from the contract requirements, the Contractor shall describe [them] in writing, separate from the drawings, at the time of submission.* If the [CO] approves any such variation, the [CO] shall [modify the contract, except for minor variations]. [Emphasis added]

FAR 52.242-14, SUSPENSION OF WORK (APR 1984):

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the [CO] in [contract administration], or (2) by the [CO's] failure to act within the [contract-specified time] (or within a reasonable time if not specified), an adjustment shall be made for any increase in the [contract's performance cost] (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption....*However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor*....[Emphasis added]

FAR 52.243-4, CHANGES (AUG 1987):

(a) The [CO] may, at any time...by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including[:]

(1) In the specifications (including drawings and designs);

(2) In the method or manner of [work] performance;

....

(4) Directing acceleration in [work] performance.

(b) Any other written or oral order (which...includes direction, instruction, interpretation, or determination) from the [CO] that causes a change shall be treated as a change order...; *provided*...the Contractor gives the [CO] written notice [of] (1) the date, circumstances, and source of the order and (2) that the Contractor regards [it] as a change order.

(c) Except as [herein provided], no order, statement, or conduct of the [CO] shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change [hereunder] causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the [contract work], whether or not changed by any such order, the [CO] shall make an equitable adjustment and modify the contract....

FAR 52.246-1, CONTRACTOR INSPECTION REQUIREMENTS (APR 1984):

The Contractor is responsible for performing or having performed all inspections and tests necessary to substantiate that the supplies or services furnished under this contract conform to contract requirements.... This clause takes precedence over any Government inspection and testing required in the contract's specifications....

FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996) (Inspection clause):

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements.... All work shall be conducted under the [CO's general direction] and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict [contract] compliance.

(c) Government inspections and tests are for the sole benefit of the Government and do not—

(1) Relieve the Contractor of responsibility for providing adequate quality control measures;

(2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;

(3) Constitute or imply acceptance; or

(4) Affect the [Government's continuing rights after acceptance of the completed work] under paragraph (i) below.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any...specification without the [CO's] written authorization.

(e) The Contractor shall promptly furnish, at no [contract price increase], all facilities, labor, and material reasonably needed [for such convenient inspections as the CO may require]. *The Government may charge to the Contractor any additional cost of inspection...when prior rejection makes reinspection...necessary.* The Government shall perform all inspections [so as not to unnecessarily delay the work]....

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements....[Emphasis added]

The contract also contains PKV-E001, INSPECTION OF CONSTRUCTION (AUG 1996) (DEVIATION) (MAR 2003) (Inspection Deviation clause). It follows the FAR Inspection clause, with exceptions such as the deviation changes "contract price" in paragraph (e) to TO "estimated cost and fee" and omits the portion that charges reinspection costs to the contractor.

FAR 52.246-21, WARRANTY OF CONSTRUCTION (MAR 1994):

(a) ...[T]he Contractor warrants...that work performed under this contract conforms to the contract

requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of-

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984):

(a) If the Contractor...fails to prosecute the work...[to] insure its completion within the [contract-specified] time including any extension, or fails to complete [it] within this time, the Government may...terminate the right to proceed with the [delayed] work.... *The Contractor...shall be liable for any [resulting damage to the Government] whether or not [its] right to proceed...is terminated....*

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

(1) The [work completion delay] arises from unforeseeable causes beyond the [Contractor's] control and without [its] fault or negligence [such as]-

....

(ii) [Government sovereign or contractual acts],

....

(xi) [Subcontractor or supplier delays due to] unforeseeable causes beyond the control and *without the fault or negligence of both the Contractor and the subcontractors or suppliers*; and

(2) The Contractor, within 10 days from the beginning of any delay..., notifies the [CO] in writing of [its] causes. The [CO] shall ascertain the facts and the extent of delay. *If, in the [CO's judgment], the findings of fact warrant [it], the time for completing the work shall be extended. The [CO's findings] shall be final and conclusive on the parties*, but subject to appeal under the Disputes clause.

....

(d) *The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.* [Emphasis added]

FAR 52.249-14, EXCUSABLE DELAYS (APR 1984):

(a) Except for defaults of subcontractors..., the Contractor shall not be in default because of any failure to perform this contract...*if the failure arises from causes beyond[its] control and without[its] fault or negligence [such as]...(2) [Government sovereign or contractual acts]....* "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor...to perform or make progress, *and if the cause...was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either*, the Contractor shall not be deemed to be in default [subject to listed exceptions].

(c) Upon request of the Contractor, the [CO] shall ascertain the facts and extent of the failure. *If the [CO] determines that any failure to perform results from one or more of the causes above, the completion time shall be revised, subject to the rights of the Government under the termination clause of this contract.* [Emphasis added]

PKV-H020, [TO] PROCEDURES (MAR 2003), which calls for the contractor to provide a completion schedule and, upon TO issuance, to begin all required preliminary work, including data items.

AFFARS 5352.223-9001, HEALTH AND SAFETY ON GOVERNMENT INSTALLATIONS (JUN 1997), under which the contractor is to comply with the contract's and the installation's health and safety requirements and is to take reasonable steps to preserve the health and safety of contractor and government personnel performing or coming into contact with contract performance. Any violation, unless promptly corrected as the CO directs, is grounds for termination under the Default clause.

Background, TO Award, Performance, Claims and Appeals

2. DoD's Domestic Dependent Elementary and Secondary Schools (DDESS), part of DoD's Education Activity (DoDEA), operated elementary schools at Fort Jackson, South Carolina, including Pinckney and Hood Street. It planned to return Hood Street to the U.S. Army in 2007. Parkhill, Smith & Cooper, Inc. (PSC) was to provide the construction documents for the subject Pinckney renovation project. In a December 2003 facility condition report PSC reported numerous roof leaks and life safety and fire protection issues, but children were allowed to occupy the school. By the end of June 2004 the school reported to DDESS serious concerns about massive leaks, health and safety issues, and that the roof might cave in. (App. supp. R4, tab 1, System Description and Observations: Pinckney Elementary School at 5, § 3.5.1, at 9-11, § 3.7; exs. A-2,-3,-6, -7, -109, attach. 1 at 15-17 of 344; tr. 1/46, 127, 6/84-86, 178-81, 8/76-77) However, Michael Chaney, DDESS's head engineer in charge of its U.S. schools renovation, responded that, while it was aware of the urgency, it would wait until fiscal year 2005 to solicit the project (exs. A-3, -4, -8 at 2-3 of 7; tr. 1/48-50, 77).

3. PSC prepared the drawings and specifications. Paul Presson, an architect, was its project manager. (R4, tab 2 at 85, ¶ JCK 5-01; ex. A-112 at 4 of 16, ex. G-180 at 6-7; tr. 6/82-84) AFCEE, located near San Antonio, Texas, contracted for the project and directed it to Versar, based upon its past good work history. (Tr. 1/52, 59, 121-24, 230, 2/59-60, 6/28, 30, 34) In August 2005 CO Cheryl Brown issued a request for proposal (RFP) to Versar for HVAC system and roof replacement, demolition and construction,

and flooring options and an Amendment No. 1. Versar responded to the RFP in September 2005. Due to funding problems, award was delayed to April 2006. (R4, tab 739 at 9929, 9935-9938, tabs 741-42, 745-47, 752, 753; tr. 1/231, 6/28, 30)

4. On 28 April 2006, the CO issued sole source, negotiated TO No. 16 to Versar, as a small business, at the firm fixed-price of $5,161,389 for HVAC replacement. AFCEE's Neyda Gutierrez, an engineer, was the CO's representative (COR). Versar's vice-president, Paul Stiles, a mechanical engineer, was its project executive, responsible for its proposal. J.J. Kirlin Company (JJK) was Versar's primary general HVAC subcontractor, with a subcontract completion date as later extended of about 31 August 2007. Lyman Johnson was JJK's project manager. Custom Mechanical (Custom) was JJK's primary subcontractor and managed several smaller subcontractors. (R4, tab 2 at 64-67, 77, 85, 87, tab 747 at 10074, 10077, tab 753 at 10394, 10396, tab 865 at 10918; tr. 1/228-30, 232-33, 247, 265, 2/58-62, 139, 194, 3/60, 94, 6/30, 34, 53, 57-58)

5. MACTEC had Title II construction oversight and inspection duties, but never visited the site and subcontracted the work to Parsons/3D International (Parsons), which subcontracted at least part to PSC, which thus served as project designer and inspector. PSC's Natalie Harvill, a structural engineer, was not involved in the design but was involved in the Title II work. (Tr. 1/47, 53-54, 58, 6/102-05, 7/203-05, 8/75, 14/33)

6. The TO contained Contract Data Requirements Lists (CDRLs). Data Item No. B002 called for project planning charts. (R4, tab 2 at 71-74)

7. The TO's Statement of Work (SOW), at § 1.0, required efficient management, including accurate, on-time submittals and timely identification and solution of impediments (R4, tab 2 at 77).

8. SOW § 4.0 required management, planning and reports from the contractor. Under § 4.1.1 it was to submit for approval a work breakdown structure (WBS) in specified format, reporting cost and schedule status, including all required tasks. Under § 4.2.1 it was to submit a project planning chart for approval, depicting the schedule, using the approved WBS, and project status, showing each task's completion percentage. Section 4.5 called for the contractor to create and maintain a master document list, with the list and all TO documents readily available for submittal to the government. (R4, tab 2 at 78-79) The parties used a Parsons document control website known as the "Impact Room." Versar uploaded submittals for Title II review and transmission to AFCEE for approval. Title II then returned them to the website for Versar's access. (Tr. 1/256, 3/8, 4/13, 9/221; *see* R4, tab 88 at 1846; ex. A-19 at 1)

9. Under SOW ¶¶ 9.1.1 and 9.1.2 the contractor was to conduct pre-final and final inspections and publish the findings (R4, tab 2 at 85).

10. Under SOW Division 01, Project Administration, Management and General Conditions, the contractor had to supply a full-time site superintendent (R4, tab 2 at 89).

11. TO § 01140, ¶ 1.1, noted that the school would be open during construction and the contractor was to cause the least possible interference, with special attention to phasing. There were eight phases. For phases 3-6, all work in each was to be complete and accepted by the CO before the next started. (R4, tab 6 at 265, tab 575 at 7163-64, tab 578 at 7181, tabs 579, 736 at 9831A, tab 742 at 9960-62; ex. G-118; tr. 3/67, 71-74, 81-84, 129, 4/21-27) Under the Use and Possession clause, government use or possession is not acceptance (finding 1). There is no documentary evidence that the CO formally accepted any phase prior to final project inspection and acceptance.

12. TO § 01330, ¶ 1.1.1, noted that the Specifications and Drawings for Construction clause, ¶¶ (d), (e) and (f) (finding 1), applied to all submittals. Under ¶ 1.1.2, "Construction Progress Schedule" and "Submittal register" were required preconstruction submittals. (R4, tab 7 at 270) Paragraph 1.4.3 provided:

> a. Coordinate scheduling, sequencing, preparing and processing of submittals with performance of work so that work will not be delayed by submittal processing. Allow for potential requirements to resubmit.
>
> b. Except as specified otherwise, allow review period, beginning with receipt by approving authority, that includes at least 15 working days for submittals for QC Manager approval and 20 working days for submittals for [CO] approval.... [Resubmittal review period is same.]
>
> ....
>
> d. No delay damages or time extensions will be allowed for time lost in late submittals.

e. [There is an additional 14 calendar days] for review and approval of [HVAC control systems submittals].

(*Id.* at 274-75) Under ¶ 1.8 CO approval was not to be construed as a complete check, but only that general construction method, materials, detailing and other information was satisfactory, and it would not relieve the contractor of responsibility for errors (*id.* at 282).

13. TO § 01451A, CONTRACTOR QUALITY CONTROL, at ¶ 3.8, provided:

> 3.8.1 Punch-Out Inspection
>
> Near [work's end]...the CQC Manager shall conduct an inspection.... A punch list of items which do not conform to the approved drawings and specifications shall be prepared.... The [manager] or staff shall make a second inspection to ascertain that all deficiencies have been corrected. [Then], the Contractor shall notify the Government that the facility is ready for the Government Pre-Final inspection.
>
> 3.8.2 Pre-Final Inspection
>
> The Government will perform the pre-final inspection to verify that the facility is complete and ready to be occupied. A Government Pre-Final Punch List may be developed.... The Contractor's CQC [Manager] shall ensure that all items...have been corrected before notifying the Government, so that a Final inspection with the customer can be scheduled.... These inspections and any deficiency corrections...shall be accomplished within the time slated for completion of the entire work....
>
> 3.8.3 Final Acceptance Inspection
>
> ...The final acceptance inspection will be...scheduled by the [CO] based upon results of the Pre-Final inspection. Notice shall be given to the [CO] at least 14 days prior to the final acceptance inspection and shall include the Contractor's assurance that all specific items previously identified...[as unacceptable], along with all remaining [contract work], will be complete and acceptable by the date scheduled for the final acceptance inspection. *Failure of the Contractor to have all*

contract work acceptably complete for this inspection will be cause for the [CO] to bill the Contractor for the Government's additional inspection cost in accordance with the contract clause titled "Inspection of Construction". [Emphasis added]

(R4, tab 9 at 357-58)

14. The CO issued the notice to proceed (NTP) on 22 May 2006, with the performance period ending on 3 April 2007. The contractor started demolition almost immediately and submitted a draft work breakdown and schedule dated 26 May 2006. At the 1 June 2006 preconstruction conference the CO stressed that only the CO could finalize changes. (R4, tab 65 at 1147, 1149, tab 66 at 1151, 1327-29, tab 68 at 1359-60, tab 70 at 1395-96, 1400-01; tr. 1/54-55, 6/44-47, 79)

15. On 20 June 2006, PSC advised Versar quality assurance/quality control (QA/QC) manager Klara Emelianova that Versar's schedule was not detailed enough or phased (R4, tab 759 at 10420-421; *see* R4, tab 70 at 1395; tr. 1/259). On 7 July 2006 the CO approved a schedule, which Versar updated thereafter (R4, tab 66 at 1151; tr. 2/18-20).

16. Unilateral Modification (Mod.) No. 01, effective 5 July 2006, added the roof and flooring work and increased the TO's price to $6,724,035. Citing the Excusable Delays clause, unilateral Mod. No. 03, effective 2 August 2006, extended the performance period to 30 September 2007. There were informal discussions about letting school personnel into the building by 13 August 2007, but the TO was not so modified. (R4, tab 2 at 100-01, 127-28, 132-33, 159-60, 186-87; tr. 2/191-92, 197-99, 213-14)

17. Versar's 11 July 2006 RFI No. 6 sought a change from fan coil hanger details on Drawing No. M-501. The contractor had determined, after the ceiling was removed, that had it installed FCU drains as shown, pipes would have hung below the ceiling. On 24 July 2006 PSC's Mr. Presson informed Parsons that Dave Nickel, Custom's on-site manager (tr. 2/13), wanted to set the overflow pan directly under the unit. Mr. Presson described this as an excellent idea to which PSC had agreed and sought an RFI, which Versar provided on 22 August 2006 (RFI No. 14). Neither RFI mentioned any price or time impact. Mr. Presson gave "verbal direction" to Mr. Nickel that the change was acceptable (tr. 6/163). The parties disagree whether the original drawing was constructible. The contractor began installing FCUs in August 2006. It contends that the contract-required 77 FCUs were all installed prior to a July 2007 inspection (below). PSC had observed their installation, had inspected them prior to each phase turnover, and the government had not challenged the installation method. (R4, tabs 88, 123, 736 at 9877, 9878, tab 764; ex. A-101, sketch 2; tr. 3/113-24, 134-35, 142, 4/8, 70-81, 83-84, 6/160-64)

The government disagrees, stating that few seismic restraints had been installed prior to the July inspection and, for those that were, the cable size was incorrect and the clips were not installed properly (finding 82; gov't br. at 54).

18. An HVAC control protocol is an information technology system by which a control in one building communicates with one or more in other buildings (tr. 2/35-38). Solicitation § 15951, ¶ 1.1, stated that listed publications were part of the specification to the extent referenced. LonMark SNVT Master List and LonMark guides were listed. Under the second paragraph of ¶ 1.3, as originally issued, Tour Andover Controls (Andover) was to provide a Direct Digital Control (DDC) system. (R4, tab 52 at 919-20, 923-24) Paragraph 1.3.1 stated:

> a. The control system shall be an open implementation of LonWorks technology using ANSI/EIA 709.1B as the communications protocol and using LonMark Standard Network Variable Types as defined in LonMark SNVT Master List for communication over the network.
>
> b. LonWorks Network Services...shall be used for all network management....

(*Id.* at 924) On 29 June 2005 DoDEA asked for a Siemens control system. PSC noted on 18 July 2005 that it would issue an addendum and "[e]ven though the system is specified to be an open protocol, each manufacturer maintains some proprietary components and interfaces, making it difficult to integrate with other manufacturers" (R4, tab 1 at 23).

19. RFP Amendment No. 1, dated 26 August 2005, at ¶ J, replaced the second paragraph of ¶ 1.3 with:

> The DDC system shall be as specified and shall interface and be completely compatible with Siemens Controls protocol, and software. System shall be installed to interface and communicate with an existing Siemens system at Ft Stewart. A Siemens Controls system is recommended.

(R4, tab 575 at 7165) Ft. Stewart's system was not described. Although Siemens was recommended, it was not stated to be required. Paragraph 1.3.1 concerning Lon technology remained as originally written. C/Tech Inc., Custom's controls subcontractor, had bid based upon Andover. Versar had proposed Andover and did not change because Andover had advised that its system would communicate with the Siemens system at

Ft. Stewart through the LonWorks protocol. Versar did not consult with Ft. Stewart. (R4, tab 1 at 22; tr. 2/38-42, 45, 65-66, 68, 178-79, 181, 6/101-02, 140)

20. PSC commented upon C/Tech's submittal that Andover did not interface, and was not completely compatible, with Ft. Stewart's system. Versar's 23 August 2006 RFI No. 15 responded that its system was compatible with Siemens and complied with specification requirements to use LonWorks technology as the communication protocol and LonMark standard network variable types and any specification deviation could have cost or schedule impacts. (R4, tab 124 at 2344-45; tr. 6/140)

21. On 23 August 2006, a Siemens senior sales engineer informed Mr. Nickel:

> Andover is correct...that our system can support Lon as specified. However specification item J, states the [Pinckney] system shall interface and communicate to the Siemens system at Fort Stewart. The engineer followed the [C]orps open protocol specification for your project. [H]owever the school system is not administered from the [C]orps specification. The school systems at Fort Stewart...are not LON as specified by school administration. [They] are Siemens BACnet for the front end and RS-485 for the building systems all on the campus network. LON cannot interface to any of our existing systems [without] Andover providing a BACnet panel at [Pinckney] and both companies providing labor to program and unbundled points which is costly[.]...Andover assumed the systems at Fort Stewart were LON based on this specification and they are not. To fully meet the specification Andover should have performed [an] analysis of the systems at Fort Stewart based on item J[.]

(R4, tab 200 at 3012) On 22 September 2006 Richard Habrukowich, Versar's project manager (tr. 1/259), asked the CO for a specification amendment or written direction that Versar use the Siemens control exclusively (R4, tab 200 at 3010, 3015). An AFCEE employee informed Mr. Habrukowich and the CO that Siemens could communicate with LonMark if an interface device were used but he suggested they "make sure that Siemens provides the interface to BacNet in lieu of the LonMark System and inform the engineer of your decision to clarify the specification" (R4, tab 150 at 2575).

22. On 25 October 2006, Robert Rollo, PSC's principal, wrote to CO Brown that a change directive should issue to engage Siemens and that "[t]he customer understands that this will be an additive cost contract mod and is fully prepared for this change" (R4,

tab 200 at 3021; tr. 1/65, 8/163). Custom hired Siemens (ex. G-62 at 1), but no change order or monetary adjustment occurred.

23. On 7 December 2006 Mr. Habrukowich submitted a $115,593 request for equitable adjustment (REA) on behalf of Versar (R4, tab 200 at 2995). Appellant does not contend that it paid for any consultant or professional services in connection with its preparation. The REA stated Andover could not supply software for a BACnet unit cost-effectively and DDESS had verbally directed Versar to use Siemens, knowing a cost adjustment was required. Custom was forced to terminate C/Tech and hire Siemens. Andover was not claiming costs. C/Tech's 9 March 2006 agreement with Custom was for $325,900. C/Tech was paid for its labor, material and supplies costs of $64,986.58. For lost work, C/Tech sought 7.5% overhead and 10% profit on the $260,913.42 difference between its contract amount and payment received, or $43,552. There is no evidence that Customs paid this amount to C/Tech or even that C/Tech would have made a profit had it completed the job. On 22 September 2006 Custom issued Siemens a $300,000 purchase order, which took into account a credit for $20,000 in equipment and material supplied to Siemens and $4,000 in labor. According to the REA, Custom claimed a net differential cost impact of $40,987 plus 10% overhead and 10% profit ($8,607), for a $49,594 total (R4, tab 200 at 2999). JJK sought overhead and profit on Custom's amounts at 11.5%, or $5,749. Versar did not claim profit but sought its WERC contract 4.24% handling fee, or $4,193, plus $12,505 in REA preparation costs, primarily effort by its project manager and off-site QA/QC manager, totaling $16,698. It did not receive a formal response. (*Id.* at 2997, 3000, 3024, 3027-29, 3033-34, 3036-40, 3042-43, tab 562 at 6877; tr. 2/46-47, 12/207, 209-10)

24. Seismic restraints are wire, rope or angle iron affixed to a hanger or equipment to limit movement during an earthquake. Specification § 13080 listed publications that were part of the specification "to the extent referenced," including Corps TI 809-04, which, per Ms. Harvill, is "essentially the government code for seismic design" (R4, tab 38 at 632; ex. A-109, tab 13; tr. 7/217). The government did not challenge appellant's expert's view that TI 809-04 "is the Army's version of FEMA 302" (ex. A-109 at 7 of 344). TI 809-04 states that "[s]eismic design of nonstructural components" is to be in accord with FEMA 302, Chapter 6 (*id.* at 168 of 344 (¶ 10-1(b.)). Although TI 809-04 does not mention Sheet Metal and Air Conditioning Contractors' National Association, Inc. (SMACNA) standards entitled "SEISMIC RESTRAINT MANUAL GUIDELINES FOR MECHANICAL SYSTEMS," (SMACNA manual) (ex. A-109 at 71 of 344), Versar contends that the manual was incorporated through FEMA 302, which is not of record. The government contends that the manual is not part of the contract, but Ms. Harvill deemed that the stricter of the SMACNA or specification provisions for the number of seismic supports would apply. (Tr. 4/45, 8/102, 165, 11/94)

25. The specifications called for seismic protection per TI 809-04 and data from the CO. Under § 15070A, ¶ 1.1, listed publications were part of the specifications to the extent referenced. The SMACNA manual was listed but not referenced further. Shop drawings required government approval and were to include detail drawings, catalog cuts, and numerous other details. Design calculations stamped by a registered engineer were required, including to verify the ability of structural members to which bracing was attached to carry the load. The TO did not specify the number of seismic restraints but transverse sway bracing for steel and copper pipe was to be per § 13080 and longitudinal sway bracing was to be at 40-foot intervals unless otherwise indicated. There were no contrary indications. (R4, tab 38 at 633 (§ 13080, ¶¶ 1.2.1, 1.3), at 636 (¶¶ 3.5, 3.5.1), tab 41 at 675-77 (§15070A, ¶¶ 1.1, 1.2.1, 1.2.4, 1.2.5.1, 1.4), at 679 (¶¶ 3.5.1, 3.5.2), tab 56 at 1018-21 (§ 16070A, ¶¶ 1.1, 1.2, 1.3.3, 2.2, 3.2.5))

26. The HVAC system was a four pipe chilled water, water boiler system. Section 13080 governed the seismic restraints on a loop of four 6 to 8-inch pipes running throughout the building's corridors from the mechanical room to feed the air handling units (AHUs) and FCUs. Drawing No. M-105 depicted the piping loop and FCUs. (R4, tab 736 at 9879, *see also* tab 773 at 10462; tr. 1/78-80, 3/61, 78, 80-81)

27. On 23 August 2006 the CO disapproved Versar's 19 July 2006 submittal No. 13, pertaining to vibration and seismic isolation under § 15070A, due to lack of bracing and stamped design calculations (R4, tab 96 at 1880, 1888). Tom Redmond of Parsons informed the COR on 23 August that, although Versar's submittal was not complete, its piping, ductwork and equipment support systems conformed to industry standards and specifications and looked like "good quality work" (*id.* at 1882).

28. On 25 September 2006 Custom fired its project manager (ex. G-33 at 1234).

29. On 3-4 October 2006 Ms. Harvill visited the site to verify the location of new pipes for the HVAC system, ductwork and existing domestic supply pipes. She did not issue her resulting memorandum on the basis it would be better to wait until PSC could coordinate with seismic requirements. (Ex. A-30 at 3, ex. A-39 at 1; tr. 8/114-15)

30. As of 11 October 2006 JJK was still processing the submittal register, outstanding for several weeks; Custom committed to bringing additional forces onsite during the Christmas break to maintain schedule; and JJK had delivered a seismic submittal but it was missing calculations for piping and only equipment data had been supplied. On 14 October 2006 Versar notified JJK that, after waiting a few months, it had received a seismic protection package that did not analyze all necessary equipment or include all required information, including calculations and design elements, and drawings were not clearly labeled and were incomplete. On 2 November 2006 Versar's

QA/QC manager Emelianova complained to JJK, among other things, about repeated extensions of submittal dates and that they were not checked against specifications before submission to Versar. (Exs. G-42,-44,-65; tr. 2/182, 3/191)

31. On 28 November 2006, after first appending concrete masonry unit (CMU) submittal No. 32 by mistake (R4, tab 191 at 2951, tab 780 at 10484-485), Mr. Habrukowich sent an email to Messrs. Redmond and Presson, the COR and the CO on the subject "Submittal 036 – Seismic Piping Support Analysis...corrected," attaching "Submittal 0036-seismic piping restraints.pdf; AF 3000 – Submittal 0036, Seismic Piping Analysi[s] – Resubmittal.doc" (R4, tab 781 at 10493). The submittal, dated 16 November 2006, directed to CO Brown, refers to prior submittal No. 13 and to § 15070A and is described as "Vibration and Seismic Piping Analysis" (*id.* at 10494). No. 36, intended as a re-submittal of No. 13 (tr. 8/84), contains Ms. Emelianova's name as QA/QC manager, by the date 16 November 2006, and bears her signature stamp. The email stated that the submittal included drawings detailing location and type of each piping support, but the submittal of record does not include them and it appears they were not transmitted. The submittal called for tangential, or transverse, restraints at about every 40 feet or less and longitudinal restraints at about every 80 feet or less. (R4, tab 781 at 10497; ex. A-12 at 4, ex. A-18; tr. 4/181, 11/88) Mr. Habrukowich also sent to Mr. Presson "Vibration and Seismic Equipment Analysis" submittal No. 35, dated 16 November 2006, referring to submittal No. 13 and to § 15070A (ex. A-46 at 2; *see* R4, tab 191 at 2950). On 28 November 2006 Mr. Presson responded that, among other problems, No. 35 incorrectly classified the building as a seismic Use Group III, rather than the actual Use Group II and it did not the contain the calculations required by the specifications. No. 36 did not include drawings, calculations, or an engineering stamp. Mr. Presson found both submittals to be "incorrect, incomplete and not reviewable." He asked Mr. Habrukowich to let PSC know if it should reject the submittals or wait for complete ones. (R4, tab 191 at 2950, 2952) There is no evidence that Mr. Habrukowich responded. Ms. Harvill saw No. 36 when it arrived and deemed it did not comply with the specifications, which required longitudinal restraints at every 40 feet or less and at least one per run, and for tangential restraints to be calculated (tr. 8/14-15, 17-18).

32. On 3 January 2007 Ms. Harvill advised Versar, JJK, the COR and others that she had talked with Frank Martin, the seismic engineer. PSC had received the piping layout drawings and the seismic equipment analysis. Mr. Martin would send the piping analysis upon completion of calculations and would attend a 16 January 2007 site meeting to ensure that piping supports were coordinated with adequate structural support. Custom had hired Mr. Martin, a professional engineer and vice president of RWP Engineering. (*See* R4, tab 328 at 3979-80; ex. A-19 at 1; *see also* ex. A-20 at 2-3; tr. 3/94)

33. By a 3 January 2007 email to Mr. Presson and Ms. Harvill, Mr. Habrukowich attached the "old" seismic piping submittal No. 36, dated 16 November 2006, "without calculations," and a file of "just the drawings," which contained Mr. Martin's markups (ex. A-16; tr. 3/92-94, 4/42-43). Later that day Mr. Habrukowich informed Mr. Martin, AFCEE, JJK, Versar and others that RWP's seismic engineer and Ms. Harvill had talked and each had a piping diagram with approximate locations of pipe brackets throughout the school, along with the prior equipment and piping support restraint submittals. The seismic engineer expected to have calculations soon for Ms. Harvill. Discussions would occur between him and PSC to arrive at a consensus, to make the 16 January 2007 meeting productive. This might include installation of additional steel supports. (R4, tab 211) Thus, through PSC and Versar's project manager, Mr. Habrukowich, Versar and JJK were aware, or should have been, that submittal No. 36 could be modified.

34. By 5 January 2007 email to Mr. Habrukowich and Ms. Harvill, Mr. Martin attached the results of RWP's calculations of "preliminary pipe support reactions." Analysis concerning lateral seismic loads and vertical and horizontal seismic reactions was still based upon "tangential seismic restraints located at 40 feet on center and longitudinal seismic restraints located at 80 feet on center." (R4, tab 328 at 3977, 3979)

35. On 8 January 2007 Mr. Chaney notified PSC, Parsons and AFCEE of his responses to concerns of Dr. Joe Guiendon, DDESS' school superintendent, about project completion by August 2007. Mr. Chaney stated that Versar was aware that:

> [W]e must be completely in that school by August and to date they have not given us any indication that they cannot meet that schedule. They will have to work evenings and weekends to meet schedule.

(R4, tab 218 at 3283) Mr. Chaney advised Dr. Guiendon that he did not have contracting authority (*id.* at 3284) and acknowledged at the hearing that he "knew darned-well" that DDESS could not contractually mandate an early contract finish date (tr. 1/150).[3]

36. Mr. Redmond had agreed about December 2006 to allow Versar to stock roof panel bundles on the school's roof but, on 8 January 2007, he noted CMU cracks in the administration area that he attributed to the panel loading. Roof joists were flexing under the load. PSC sought immediate panel removal. On 9 January a crane mobilized to remove the panels but could not do so due to high winds. An 11 January 2007 report by a structural engineer from Virginia A&E, hired by Versar, recommended that part of the roof be relieved of loading or that joists be shored; that all bundles be protected from

[3] Appellant has not claimed acceleration.

moisture, which adds to the load; and that further analysis be done. On 12 January 2007 a crane removed all panel bundles in the administration area from the roof. (R4, tab 677 at 8448-8449; ex. A-23 at 2-1, ex. G-33 at 1291, 1292, 1295) By April 2007 they still had not been entirely removed or redistributed to avoid overloading joists, despite PSC's repeated directions. The contractor had declined, stating panel use was imminent, but the work had not been accomplished. (R4, tab 245 at 3464, ¶ 7, tab 263 at 3604, ¶ 7, at 3607, ¶ 4, tab 854 at 10856) In the subcontractor cost portion of its claim and revised claim (below), Versar included $11,630.32 for crane rental by its subcontractor MGC Roofing and $3,019.31 for Virginia A&E's services (R4, tab 562 at 6922; ex. A-113 at 1).

37. Mr. Chaney acknowledged at the hearing that, by January 2007, he was adverse to Versar and was trying to get Mr. Habrukowich removed as project manager (tr. 1/95-96). On 9 January 2007 Mr. Chaney, in effect, suggested to Versar's president, Theodore Prociv (tr. 9/154), that Mr. Habrukowich be removed. Versar then removed him and replaced him with Brian Franklin, who was based in Oklahoma City, Oklahoma and made few site visits. While acknowledging that Mr. Habrukowich occasionally had a "rough edge" and that Mr. Chaney's concerns had some merit, Mr. Stiles stated that AFCEE did not request the removal and Versar would not have done so absent Mr. Chaney's insistence. (Ex. A-25 at 3-4; tr. 1/266-68, 2/68-69, 83-85, 166, 4/43, 8/34, 161, 181; *see* R4, tab 262, tab 801 at 10598; ex. A-33; ex. G-40)

38. During the week of 8-12 January 2007 Custom's superintendent quit and new field management was expected (R4, tab 225; ex. G-33 at 1294).

39. Ms. Harvill visited the site on 16 January 2007 with Mr. Franklin; Cherie Burton, who had replaced Ms. Emelianova as QA/QC; Mr. Martin; Russell Owen of Thermal Recovery Systems, Inc. (TRS), which was to supply location supports, coordinated with RWP; and others. Ms. Harvill and Messrs. Martin and Owen discussed possible areas for seismic restraints. Ms. Harvill stated that a report would follow for placement of required restraints, pipe hanger locations on joist and any joist reinforcement. Ms. Burton submitted to CO Linda Bryant and the COR Mr. Franklin's 22 January 2007 report for the week ending 19 January, which stated that Ms. Harvill had coordinated with the seismic engineers to resolve the seismic load issue; a complete package was expected with their combined resolution; and it would then be submitted for approval. (R4, tabs 230, 801 at 10598; ex. A-30 at 3, ex. A-109, attach. 21; tr. 1/148-49, 8/33-34) Thus, in addition to the fact that Mr. Martin of RWP was Versar's lower tier subcontractor, Versar was aware, or should have been, through its new project manager, Mr. Franklin, and its QA/QC, that submittal No. 36 could be modified.

40. On 26 January 2007 Ms. Harvill advised Messrs. Redmond, Chaney and Rollo that she had coordinated seismic restraint placement with Mr. Martin. Between the end of

November 2006 and February 2007 she replaced Mr. Presson as PSC's project manager. On 5 February 2007 Mr. Martin emailed to Ms. Harvill and TRS' Mr. Owen plan markups showing seismic pipe support locations and pipe support details. There is no evidence that he sent them to Versar, JJK or Custom. His first set of drawings had shown 33 tangential restraints and 9 longitudinal. The new set showed 51 tangential and 29 longitudinal. The 20 additional longitudinal restraints were due to a change from an 80-foot interval on his original submittal to the 40-foot interval in § 15070A. He also submitted complete calculations. Appellant still had not amended its seismic submittals accordingly. (R4, tabs 793-95; ex. A-30 at 3, ex. A-60; tr. 6/123-26, 8/21-24, 27-28, 31, 45, 92, 109, 124-25, 162)

41. By email to Mr. Redmond of 22 February 2007, Ms. Harvill attached her review of "AF 3000 – Submittal 0036, Seismic Piping Analysi[s] – Resubmittal.doc" (the title of No. 36 submitted on 28 November 2006 (finding 31)). She remarked that PSC and Mr. Martin had coordinated the seismic restraint locations on 16 January 2007 and he had submitted them on 5 February. (R4, tab 795 at 10585-86) In a separate email of 22 February 2007 to Mr. Redmond, copied to Versar's Mr. Franklin, Ms. Harvill inquired whether Mr. Martin's markups concerning restraint location were a submittal. She noted that she had assumed they were but they had not been added to the submittals in the Impact Room. Mr. Redmond responded on 23 February 2007 "I guess consider it part of the package." (Ex. A-59) There is no evidence that Mr. Franklin responded.

42. By email of 28 February 2007 to the COR, with attachments "AF 3000 – Submittal 0036, Seismic Piping Analysi[s]-Resubmittal.doc; AF 3000 – Submittal 0035, Seismic Equipment Analysis-Resubmittal.doc," which she had signed on 22 February, Ms. Harvill stated that she had first sent the submittal review to Mr. Redmond but he had not forwarded it to the COR. She also sent a second email to the COR, copied to the CO, with the same attachments. Those of record do not include manufacturer's cut sheets, calculations, Mr. Martin's markings for locations and numbers of seismic restraints, or any typical details for seismic restraints. Ms. Harvill was aware that these items had not been added to the Impact Room. Ms. Harvill noted in the second email that Versar sought confirmation of COR approval as soon as possible so that it could start installing the seismic restraints and help it stay on schedule. The COR responded that she would "send it right back." (R4, tab 799 at 10593; exs. A-46, -47, -48; tr. 8/118-21)

43. On 28 February 2007 COR Gutierrez signed as recommending approval of the submittal No. 36 sent by Ms. Harvill that day and CO Bryant signed it as approved (R4, tab 189 at 2918). On 1 March 2007 Ms. Harvill advised Messrs. Redmond and Franklin that approval had to come from AFCEE and stated:

> I did approve the submittal w/o comments but did state that the layout of the piping with seismic restraints located on the drawing was to be part of the submittal. The layouts were sent by Frank Martin[.] I will forward that information to you to make sure you have it.

(R4, tab 799 at 10592) There is no evidence of response by Mr. Franklin. The referenced layouts were to ones Mr. Martin sent to Ms. Harvill. She thinks she forwarded the information to Messrs. Redmond and Franklin but could not find any evidence. (Tr. 8/26)

44. By March 2007 Roy Shrove, working at AFCEE, replaced Ms. Gutierrez as COR. AFCEE hired Oracio Valenzuela, a GEITA (Global Engineering & Technical Assistance) contractor, to support Mr. Shrove. (Tr. 1/64, 88, 4/55-56, 9/108, 111, 180, 184) Mr. Shrove had prior experience with Versar, which had a "good reputation" and was "very well-known and well-respected" (tr. 9/111-12).

45. On 14 March 2007 Mr. Shrove recommended approval of what appears to be the same seismic piping submittal No. 36 that Ms. Harvill forwarded to COR Gutierrez and CO Bryant on 28 February 2007 and that the CO approved that day. On 15 March 2007 CO Bryant again signed the submittal as approved. (R4, tab 189 at 2916)

46. On 14 March 2007 Mr. Redmond addressed a concern about PSC's building design, evidenced by a sagging roof and unsafe structural condition in the mechanical room that required a change order to add structural supports. PSC countered that the problem was Versar's failure to meet its contract requirement to coordinate pipe placement with existing conditions and, while it might not have been provided with enough information to do that initially, it had not asked. (R4, tab 250 at 3486; tr. 8/82-83; *see also* R4, tab 237) Mr. Redmond's 12 February 2007 daily report had described a work stoppage in the mechanical room due to the structural problems, stating "[w]e are in a government caused delay situation" (ex. G-33 at 1327). The extent of the delay, and whether it was included in the government's extension of the contract period to 30 September 2007 (below), is not clear.

47. On 15 March 2007 Versar submitted invoice No. 8, for 2-28 February 2007, seeking $152,228. Its Certificate of Performance reflected that the project was 80.57% complete. Per Mr. Redmond's 19 March 2007 report for 12-16 March, the "turnover of Phase 5/Phase 2 was completed this week and all the classes moved back into these areas and vacated Phase 6" (R4, tab 253; ex. G-33 at 1345, 1347). On 20 March 2007 COR Shrove certified that the invoiced services accurately reflected the work accomplished and were satisfactory. On 21 March 2007 CO Bryant certified that the services had been

rendered in accordance with the contract and she authorized payment of the $152,228, apparently without retainage. (R4, tab 255 at 3552, 3553)

48. Versar's submittal No. 38, signed by Mr. Franklin on 22 March 2007 and directed to CO Bryant, conveyed electrical operation and maintenance (O&M) manuals. It was identified as "new," with the previous submission number marked "N/A." Mr. Redmond signed it on 23 March 2007, recommended approval, and CO Bryant signed it as approved that day. (R4, tab 256; tr. 4/51-52)

49. COR Shrove visited the site in about early April 2007. In a 1 May 2007 email to CO Bryant, he reported dissatisfaction with site conditions, progress, scheduling, superintendence and staffing. He had met on-site with Gerardo Bernal, a Parsons engineer who replaced Mr. Redmond after 5 April 2007. Mr. Bernal and the school principal informed him that the project must be complete by 13 August 2007, when teachers would return. He concluded that staffing was insufficient and no phase was complete but reported that, if Versar performed as it projected, it could complete by then. Mr. Bernal found that Mr. Franklin was rarely present and the project was poorly supervised and inadequately staffed. Mr. Chaney had expressed that Mr. Franklin was the right man for the job but was managing from Oklahoma City and was not onsite enough. (R4, tab 332 at 4002, tab 801 at 10598, tab 804 at 10606; *see* ex. G-33 at 1361; tr. 8/175-78, 180-84, 9/112, 114-20, 240-43)

50. In a 13 April 2007 teleconference among COs Bryant and Brown, the COR, Suzanne Bilbrey, his boss (tr. 9/110), Glenn Carter, Versar's Director of Construction (tr. 4/84), and Messrs. Stiles and Franklin, Mr. Stiles expressed concern about a "possible yellow rating" and presented Versar's position on, *inter alia*, schedule, superintendence, and difficulty of communicating with the government (ex. G-57 at 1). Ms. Bilbrey opined that the rating could be green and would be yellow if problems were not corrected.

51. On 25 April 2007, Mr. Franklin asked Mr. Bernal to review proposed invoice No. 9. At the time Mr. Bernal considered that the government had taken a form of beneficial occupancy of five of the eight phases but that "we haven't really taken it over" (tr. 8/195). He found the invoice insufficiently supported to make a proper evaluation; sought a schedule of values and updated project schedule; and questioned the invoice as greatly exceeding work completed. (R4, tab 269 at 3630-31; tr. 8/193-97)

52. On 1 May 2007 CO Bryant notified Versar that it was not in compliance with the Superintendence and the Commencement, Prosecution and Completion of Work clauses and that it must submit a revised schedule and comply by 7 May 2007, or it could be subject to default (R4, tab 273).

53. On 7 May 2007 Versar submitted invoice No. 9 for $184,963, for 1-31 March 2007, and a 2 May 2007 progress report showing 80.87% completion. The COR undertook to review Versar's invoices because he believed it was well behind that completion percentage. (R4, tabs 277, 280 at 3677-78, tab 592 at 7352, tab 593 at 7360)

54. On 21 May 2007, regarding DDESS concerns about its expected early project completion, Brenda Johnson, a contract specialist and CO at some point, asked the COR to remind the customer that the performance period ended on 30 September 2007. She stated that cure notices would be sent to Versar and its surety to stress "the seriousness of Versar's negligence" with the hope that the surety would get more involved to get the project back on track and finished. On 22 May 2007, without prior warning to Versar, CO Bryant issued five cure notices. Each advised that the particular condition was endangering contract performance and that, unless cured within 10 days, the government might pursue all of its contract remedies, including under the Default clause. The notices alleged that Versar had not complied with: (1) contract schedule requirements and was to provide a progress schedule with pre/final inspection, all final submittals, and final acceptance no later than 30 September 2007; (2) the Performance of Work by the Contractor clause and was to provide a labor force commensurate with the TO's stated level of effort to ensure completion in the contract period; (3) the Warranty clause, apparently concerning equipment storage and protection and some re-painting; (4) the Protection clause, due to a worker's urinating on school grounds; and (5) the Health and Safety clause, pertaining to barrier maintenance to preclude student access to construction areas and to contractor avoidance of areas occupied by students and staff during school hours. (R4, tabs 287-91; *see* tab 303 at 3839; ex. G-152 at 2; tr. 2/21, 213-14, 6/52)

55. On 23 May 2007 Versar delivered a schedule dated 21 May 2007 to the CO, Ms. Johnson and the COR as of about March 2007, but the government sought a "beginning to end schedule" (R4, tab 810 at 10637). It disapproved progress report No. 9 and stated Versar's invoice would not be paid; it was to verify completion percentages and submit a revised invoice. At the meeting or thereabout, CO Bryant and the COR instructed that all job communications were to go through them, with the CO being the ultimate decision maker. (R4, tabs 294, 301, 313; tr. 2/23, 26-29, 122-23, 9/141-42)

56. On 1 June 2007 Brenda Chube, Versar's director of contracts, sent to CO Bryant and others an iteration of the 21 May 2007 schedule and cure notice responses as follows: (1) Versar's schedule showed completion by 30 September 2007 and it would try for beneficial occupancy by 13 August 2007; (2) within site and school activity confines, it was expanding its labor force; (3) all cited deficiencies had been cured; (4) the worker had been terminated immediately, prior to receipt of the cure notice; Versar was unaware of any damages, but would replace any damaged vegetation; and

(5) Versar had taken specified actions to assure workplace safety and safeguard students and staff during school hours. (R4, tabs 301-05, 312; tr. 2/23, 25, 114, 191, 223, 225)

57. AFCEE did not inform the Small Business Administration (SBA) or any small business liaison about the cure notices or any project issues (tr. 2/229-30). CO Bryant acknowledged, in effect, that the fact that Versar was a small business was not a factor in her contract administration (*see* tr. 9/79). On the other hand, appellant has not directed us to evidence that it communicated with the SBA about any project issues.

58. Anthony Campbell replaced Mr. Franklin as project manager in June 2007. Hersel Myer was QA/QC manager. Versar contended that, under its accepted proposal, JJK had site superintendent responsibilities but, at the government's insistence that it provide a superintendent, Versar's Don Crume so served from June 2007 until he retired in August 2007 and was replaced by John Robinson. Mr. Campbell assumed Mr. Myer's duties in September 2007. (R4, tabs 180, 309 at 3874, tabs 316, 818 at 10667; tr. 2/73, 4/6-9, 16-18, 22-26, 219) Mr. Chaney acknowledged that Messrs. Campbell and Robinson previously had done "great work" for DDESS (tr. 1/189).

59. On 11 June 2007, Mr. Campbell listed "Critical Items" for his supervisors:

> 1. Superintendence in the building and organized work flow is a major factor in completing this project. This is improving but there seems to be a lot of people and not much organized work getting done. Don is working this and we have commitments from JJK and Custom that an additional superintendent will be provided.
>
> ....
>
> JJK has indicated they are going to get around 15 more skilled workers and 1 superintendent to supplement the crew.... Don and I pointed out that Phase 6 took 60 days with [half] the crew currently and the remaining work exceeds what was completed in phase 6. We need to seriously have pressure applied at the highest [JJK] levels. I think that JJK needs to consider adding a crew or two to help [Custom]. If not we need to consider advising the client that the schedule we submitted is not realistic. I would just rather deal with the reality than miss another promised date without warning.

(Ex. G-75) "Critical Items" work was done before the July 2007 inspection (tr. 4/85-86).

60. Based on a 14 June 2007 site visit, Mr. Valenzuela notified the COR and the CO on 14 June 2007 that work and staffing had improved and the overall project was about 60-65% complete. He estimated that the contractor should be out of the building by mid August with minor work remaining. (R4, tab 821; tr. 7/11-13, 23-24, 105, 108)

61. When Mr. Campbell arrived as project manager, the Impact Room was functional but no longer used; the last entry was in April 2007. Submittals were exchanged by email. The change occurred when Mr. Bernal replaced Mr. Redmond. COR Shrove had never seen the website. (Ex. A-81 at 1; tr. 1/202, 4/14)

62. In June 2007 the contractor started installing seismic restraints per submittal No. 36, which the CO had approved. When Mr. Bernal complained that there were not enough restraints, Mr. Campbell found No. 36 in the Impact Room and a submittal No. 38 pertaining to restraints, sometimes called the "phantom submittal" (tr. 1/256), or "alternate Submittal No. 38" (tr. 4/39) (hereafter alternate No. 38). (Versar had submitted O&M submittal No. 38 on 22 March 2007 (finding 48)). As it appeared in the Impact Room, No. 36 included PSC's contract drawings and Mr. Martin's original seismic restraint markings. On 19 June 2007 Mr. Campbell inquired of the COR about alternate No. 38, stating that he and Versar's subcontractor had found no record of submitting it. Mr. Bernal advised the COR on 21 June 2007 that Parsons was trying to piece the puzzle together; the situation was messy and would be costly for someone; this was a life-safety issue and the school could not be occupied without proper installation; and AFCEE might have to issue a stop work order while liability was being determined. Mr. Campbell did not view the number of restraints as a life-safety matter because the prior system did not have any and the likelihood of a seismic event in the area was low. On 22 June 2007 Versar notified CO Bryant that it had been working based on No. 36, it did not foresee problems in completing the work on schedule, but alternate No. 38, which had not been approved, contained significantly different drawings and specification requirements and would have a cost and schedule impact were Versar directed to follow it. At the time, Versar had installed about 75% of the work required under No. 36. Alternate No. 38 nearly doubled the seismic restraints to the piping, increasing the number by 40, from 43 to 83, and constituting a contract change in the contractor's view. (R4, tabs 326, 624, 833, 854 at 10859-62; ex. A-12 at 24-27 of 27, ex. A-58 at 1126; tr. 3/15-16, 21, 205, 4/38-41, 53-54, 57, 61, 64-65)

63. Alternate No. 38 was dated 8 February 2007, directed to CO Bryant, and marked as a "RESUBMITTAL," with the "PREVIOUS SUBMISSION NUMBER" designated as "N/A" (R4, tab 854 at 10851). It referred to specification § 15070A, with the description "Vibration and Seismic Isolation" (*id.*). The government has not disputed that Ms. Emelianova left the project before February 2007, but alternate No. 38 contained

her name as QA/QC manager and bore her signature stamp, with the date 19 July 2006, over six months prior to the submittal's date and over four months before Versar's 16 November 2006 submittal No. 36. Alternate No. 38 did not contain any entries, dates, or signatures by PSC, the COR or the CO. The Impact Room indicated that the last person to create or modify it was Mr. Redmond. (R4, tab 854; tr. 1/254, 256, 2/171, 4/46-48, 51, 8/124-25; *see also* ex. A-58 at 1125-26) According to Ms. Harvill, the seismic markups Mr. Martin sent to her "ended up being put in as" alternate No. 38, but neither she nor the government identified the submitter (tr. 8/30). She had assumed that Mr. Martin's information had also gone to JJK and Versar (ex. A-80 at 1). Versar alleges that it did not submit alternate No. 38. After seeming to suggest at the hearing that Mr. Redmond did so, appellant alleges in briefing that Ms. Harvill put it in the Impact Room (app. br. at 107), but she was not asked directly whether she did so. Mr. Habrukowich, who had submitted No. 36, had been replaced by Mr. Franklin as Versar's project manager by the time of alternate No. 38. Messrs. Habrukowich, Franklin, Martin and Redmond, and Ms. Emelianova, were not called to testify and appellant has not eliminated the possibility Mr. Franklin added alternate No. 38 to the Impact Room. We find that, regardless of who sent alternate No. 38 to the Impact Room, it was defective on its face; was not signed by PSC, the COR or the CO; and did not qualify as a government-approved submittal.

64. On 26 June 2007 Mr. Bernal advised the COR that no items had been accepted, there was no punch list and no final walkthrough, but Versar had allowed some beneficial occupancy. He opined that lack of seismic restraints was a life-safety violation, but phase 5 and other areas were occupied regardless. He agreed with the COR that this might compromise the government's position. (R4, tab 327 at 3973-74; tr. 8/187, 9/230) During the 2006-2007 school year students and teachers were in the building when construction was ongoing (tr. 1/80).

65. By 3 July 2007 email to Mr. Campbell, copied to the CO, the COR required seismic restraints per alternate No. 38 at no increased government cost. Mr. Campbell replied that, having been instructed that only the CO had authority to change the contract and resolve contract issues, Versar was awaiting her response to its 22 June 2007 letter. (R4, tab 851 at 10830-31) The CO did not respond in writing to the letter.

66. On 5 July 2007 Mr. Chaney inquired of the COR whether the school could be occupied in the fall without seismic work completed. He noted Versar was preparing to work around the clock but queried whether its work "or lack of it" would allow safe occupation. (R4, tab 338 at 4040) The COR replied that he felt the school would be ready by the "deadline" and added:

> As for the seismic issue specifically, I have to ask if the school was originally built to the current seismic standards. My guess is the answer is no. If that is the case, it would seem that if we allow occupancy while Versar is "fixing" the issue we are not exposing the kids and staff to any conditions they have not been exposed [to] all along. Further, I think we need to be clear that the seismic restraints required by the contract apply ONLY to new Versar installed work and not to anything that was preexisting. Assuming my guess is correct, I will venture a guess that there are other "structures" that need seismic restraints and will remain unrestrained even after Versar is done.

(*Id.* at 4038) The referenced "deadline" was the August 2007 date the school sought, not the 30 September 2007 contract completion date (tr. 1/102-03). Mr. Bernal opined that the school should not be occupied without the seismic restraints (R4, tab 337 at 4033).

67. On 6 July 2007 Mr. Chaney advised his boss that the project was on schedule for the school's fall start and Versar was implementing a 24/7 schedule but delay was possible. He broached the possibility of using the Hood Street or another school. (R4, tab 341 at 4056; tr. 1/74-76) About this time the government required Versar to replace textbooks damaged by leaks after a heavy rain and sought recovery for damaged furniture and equipment items. Versar accepted responsibility only for damages in an area covered by roof on which it had worked. Regarding textbooks, its claim included one-half the replacement costs. (R4, tabs 855, 907; tr. 12/116-18)

68. In a 9 July 2007 teleconference, the CO disputed that Versar had not submitted alternate No. 38. It sought an equitable adjustment if it were required to do 83 seismic restraints, rather than the 43 in approved submittal No. 36. She concluded "Maybe I can meet you half way on this issue," but there is no evidence of compromise. We find that the CO determined that Versar provide 83 restraints. (Ex. A-58 at 1126; tr. 3/20, 22-23)

69. In a 10 July 2007 email to Mr. Bernal, copied to David Rathmann, his boss (tr. 8/125), Ms. Harvill stated:

> Looking at this again, looks like Anthony was correct about the number of seismic restraints was doubled with the added info.
>
> From my conversations with Frank Martin, I thought I conveyed the thought that the additional lateral restraints (LR)

> were only really needed where there were joist[s] but it looks as if they provided throughout. It might be worth me calling Frank to discuss if all the additional LR are required. If that would cut down on the total number I think I need to do that. It may be due to the space involved in the hallways and angles involved that the number of LR went up also. Again, worth the call.

(Ex. A-60 at 1) Ms. Harvill planned to go through Mr. Campbell. Mr. Rathmann suggested a conference call, but Ms. Harvill did not recall that it ever occurred and there is no evidence that it did. (*Id.*; tr. 8/125-26)

70. On 13 July 2007 Ms. Chube notified the CO that, as directed, per alternate No. 38, Versar would double the seismic restraints but would file a claim, and it sought feedback on its cure notice responses. The CO did not reply in writing but did not issue any show cause notice and Versar understood that the cure notices had been resolved. The CO did not respond further concerning the seismic restraint issue. (R4, tabs 345, 418 at 4714; ex. A-58; tr. 2/218-19, 3/23, 4/68-69, 9/74)

71. By email of 17 July 2007 to JJK's Mr. Johnson, Mr. Campbell exhorted that it was imperative that planned completion dates be met, including beneficial occupancy turnover on 1 August 2007, such that JJK and its subcontractors would be 100% complete and demobilized by 31 August 2007. The overall HVAC installation was about 90% complete. At this time JJK and SWF Mechanical (SWF), hired by JJK after Custom left the site, were performing the HVAC work and JJK had an additional full time project manager/superintendent on-site. (Ex. G-82; tr. 4/216-18, 5/31)

72. On 18 July 2007 AFCEE notified the COR and Mr. Valenzuela of an inquiry about invoice No. 9's status (R4, tabs 350, 593 at 7359). The COR responded:

> Per our repeated discussions with Versar, until they give us a fully complete schedule showing actual completion from the beginning of the project, I am not approving ANY invoices. According to their last invoice, they proclaimed that they were 81% completed, but the only thing that the 81% really meant is that they had invoiced 81% of the total. I have seen nothing from Versar that indicated they were [anywhere] near 81% complete and [CO Bryant] made it clear to them when they were here, we would not approve any further invoices until they got their schedule snafus straightened out.

> Unless [the CO] has changed her mind, this is where it still stands. Further, I still cannot verify the true % complete, so I am not comfortable signing their invoice.

(R4, tab 350 at 4098; *see* R4, tab 593 at 7358) Mr. Valenzuela responded that, as far as he knew, AFCEE had not yet received a requested updated schedule from which he could check project completion status (R4, tab 351). On about 23 July 2007 AFCEE notified Versar that its 5 May 2007 invoice No. 9 was rejected (R4, tab 279 at 3670-71).

73. As of 20 July 2007 Versar had directed JJK to proceed per alternate No. 38 at a $35,000 subcontract price increase (exs. G-1, -108; tr. 4/245-46).

74. About 19 July 2007 Custom declared bankruptcy. On 21 July 2007 Mr. Campbell notified the CO that the mechanical work was 95% complete; Versar and JJK would accomplish it; and Versar intended to finish the project and be ready for students in August. He provided an updated schedule. (Ex. G-89 at 1)

75. On 23 July 2007 Mr. Chaney advised the CO, other government personnel, Parsons and PSC, that "[t]his is close hold information and needs to be kept out of the hands of VERSAR please" (R4, tab 354 at 4115). He noted that he had visited the site on 12 July 2007 and had recommended delaying school opening from 20 August 2007 to 4 September 2007, but now was uncertain it was enough time. He inquired whether there was another facility that could be used. He also complained about Versar and AFCEE:

> [T]he two inspectors on site today have no direction on how to proceed given no one from AFCEE (not on site) has officially told VERSAR they are not substantially complete. They are still inspecting but if someone with KO connections could officially make a decision regarding substantial completion then maybe the money it is costing to have them inspecting right now (for no reason) could be saved and we could send them home.

(R4, tab 354 at 4112) He wanted to advise DDESS' director, Dr. Elaine Beraza, the next day about a realistic completion date or the need to move (*id.* at 4114; *see* tr. 1/103, 105). He referred to an inspection "for no reason" because he had completed his briefing and anticipated Dr. Beraza would decide to move to another school regardless of what happened in the inspection (tr. 1/110).

76. However, on 24 July 2007, the CO advised an AFCEE official who was concerned about Mr. Chaney's complaints that Versar had agreed to "do everything and

anything required to finish the project in time for the school to open on schedule;" it had been working two shifts, seven days a week; and the government expected the project to be substantially complete in time for the school to open on schedule (R4, tab 355 at 4122).

77. Teachers were to arrive at Pinckney on 13 August 2007 and students on 20 August. On 24 July 2007, after Mr. Chaney briefed Dr. Beraza, she decided to move Pinckney operations to Hood Street (tr. 1/105). She made her decision based upon Mr. Chaney's input; AFCEE was not involved; AFCEE and Versar had no say in the decision; and Versar's contract was not considered. According to Mr. Chaney, the decision was not particularly based upon seismic issues, but upon the amount of work remaining to be done in a short time. (Tr. 1/103-05, 183-84)

78. By email of 25 July 2007 to the COR, AFCEE, PSC, Parsons and others, excluding Versar, Mr. Chaney directed:

> Please tell anyone involved at the site or going to the site that we are to be occupying Pinckney as planned. It [i]s pretty apparent to all of us involved that the contractor is using gamesmanship to force us to accept crap as meeting contract requirements because they "think" we have no alternative plans and thus HAVE to get into Pinckney regardless of condition. They will eventually figure...out when teachers don't report on August 13th to Pinckney [that] something's amiss, but if asked while on site "***you know of no plans to operate a school elsewhere***". Make sure anyone involved in the government team is aware of this....

(Ex. A-62 at 1) Mr. Chaney acknowledged that the statement concerning occupying Pinckney as planned was untrue, but he stated that no one in his email chain objected to his instruction. In some contrast to his deposition testimony, he alleged that there were union issues and that CO Bryant had instructed him to keep the move quiet because of them. He opined the move would not affect Versar negatively because it would have the whole school at its work disposal. (Tr. 1/106-09)

79. Although it had worked around school operations from the outset, Versar was not asked to do anything differently, given an opportunity to develop a workaround, or advised that AFCEE was contemplating a claim against it (tr. 2/33, 35).

80. The "pre-final" inspection was on 23-24 and 27 July 2007. The COR was on leave and did not attend. Mr. Valenzuela assessed that not much progress had been made since his June 2007 visit; the school could not be ready for the fall semester; and the

move would allow Versar to complete the work much sooner. (R4, tab 355 at 4119-20, tab 384 at 4348, 4346; *see* R4, tab 354 at 4112; tr. 4/88, 121, 7/25-27, 122, 126, 9/277-78)

81. Ms. Harvill found that most seismic restraints were not in place; FCU structural support was incorrect; FCU pans were not draining properly; vibration isolators were upside down; and improper clips had been used to attach seismic restraints. She did not believe Versar could complete by 30 September 2007. (Ex. A-86 at 19, ¶ 51; tr. 8/42-46, 134-35, 147-48, 153, *see also* tr. 7/102, 8/207-09, 214-15 (Valenzuela and Bernal similar testimony)) One punch list item was that FCUs were not hung from the structure as shown in Drawing No. M-501 (R4, tab 384 at 4347, item 7; *see* tr. 4/124).

82. On 26 July 2007, Mr. Campbell submitted RFI No. 47 concerning punch list corrections related to the FCUs' drain pans and condensate pipe connection, noting high schedule impact and no cost impact. On 27 July 2007 he submitted RFI No. 48, appending an FCU mounting detail that he had drawn with Mr. Valenzuela, stating: more time was needed to rework 72 FCUs already installed, but it would be a no cost change if RFI No. 47 were approved; Versar had been advised verbally that the FCU issue might prevent school occupancy due to safety but students had occupied it the prior year with the current installation; reinstallation would start immediately upon approval and would occur after hours once school started; and, upon approval, Versar would generate an impact schedule. He sought a sample installation for government inspection to ensure compliance. Ms. Harvill found RFI No. 47 acceptable, with modifications. On 30 July 2007 Mr. Valenzuela sought approval of RFI No. 48, stating the design team could inspect an installation, make any final recommendations, and release Versar to complete the remainder, avoiding more delay. Ms. Harvill responded that, according to a table supplied by Kinetics Noise Control, which manufactured the seismic restraints, and forces provided by Mr. Martin, the minimum seismic cable size should be 3/16 inch but it had been installed at 1/8 inch. (R4, tab 356 at 4131-33, tab 357 at 4137-38, 4143-45, 4148-50, tab 781 at 10497-498; tr. 3/142, 144, 4/126, 129, 181, 240-41, 7/55-56, 147, 189, 194, 9/42-43) On 16 July 2007, before the inspection, Mr. Campbell had asked JJK for the seismic engineer's verification that the seismic cable currently installed on the fan coils was adequate in diameter to support the seismic load (ex. G-85). As of the inspection, few of the FCUs had been restrained; those that were had been restrained with the incorrect 1/8 inch cable and the clip orientation was incorrect (tr. 4/240-41, 9/42-43).

83. On 30 July 2007 Mr. Campbell submitted RFI No. 49 regarding FCU vibration isolator hanger installation. Versar acknowledged that the hangers had been incorrectly oriented and it was correcting the error but asserted that other complaints were not manufacturer's requirements. Ms. Harvill directed installation per the manufacturer. (R4, tab 358 at 4154, 4158-60; tr. 7/61)

84. On 30 July 2007 Mr. Valenzuela provided AFCEE's "official response" to the RFIs, which had been "APPROVED AS CORRECTED." Only Ms. Harvill had signed them. (R4, tab 356 at 4130-31, tab 357 at 4137, tab 358 at 4154) Mr. Campbell replied that the RFI No. 48 response did not address schedule or ability to move students into the building before all work was complete. Mr. Valenzuela replied that Versar now had an approved hanging system. He sought its completion schedule, stating time extensions would be addressed if warranted. Mr. Campbell replied that there was no approved RFI until the CO signed it, referring to RFIs Nos. 6 and 14 on FCU installation, approved by Mr. Presson but rejected by Mr. Valenzuela on the basis there had been no CO approval. (R4, tab 357 at 4139-42; tr. 4/126, 131)

85. CO Bryant emailed to Mr. Campbell on 31 July 2007 that:

> To my knowledge, the lines of authority of each individual player in this acquisition was previously made known at the Pre-Performance Conference and has been reiterated numerous times since. I have even myself articulated those lines of authority to you as the [CO].
>
> I fully concur with the above attached actions [RFIs Nos. 47-49] and do not anticipate that they or any similar type actions will be questioned by anyone from Versar in regards to this contract again.

(R4, tab 363 at 4199)

86. Versar notified Mr. Bernal that a sample FCU installation would be ready for inspection on 3 August 2007 and that acceptance was integral to scheduling. Mr. Bernal responded that it had been agreed that Versar was to perform all punch list work in one area before Parsons would perform "another cursory inspection" and all items would be revisited at final inspection. (R4, tab 875 at 10989; tr. 4/136-37)

87. On 1 August 2007 Pinckney placed a sign that classes would move to another school. Mr. Campbell inquired of Mr. Bernal who said official notice must come from the COR. Mr. Chaney sent an email to the CO and others questioning why the move was Versar's business but stating that, per the CO, DDESS would capture costs of operating an unplanned school for possible action against it. On 2 August 2007 a newspaper noted the move. Mr. Campbell inquired of the CO and others whether it was now safe to plan FCU rework during regular working hours. By email of 7 August 2007 to Messrs. Bernal and Valenzuela, copied to the CO and Mr. Chaney, the COR advised that school plans did not affect Versar's contract obligations and they should not entertain its questions about

the plans. (R4, tab 366 at 4215-16, tabs 370, 377 at 4301, tab 380 at 4319-20; tr. 1/109, 3/141, 4/91-92)

88. On 9 August 2007 Mr. Bernal sent the COR a punch list from the July inspection reflecting deficiencies mentioned above (finding 81). Versar considered that many of them were minor items that it could complete by 30 September 2007 and some were not contractually required or pertained to areas the school had re-occupied. (R4, tab 384 at 4346; ex. G-48 at 762, note 7; tr. 4/89, 94, 96, 99-101, 7/17, 45-46, 9/51-52, 54-55)

89. On 14 August 2007 Mr. Stiles emailed to Gerald Lemons, JJK's senior project manager and Lyman Johnson's supervisor (tr. 2/104, 3/59), that punch list items were not complete; the project had had its challenges but Versar must meet the final contract completion date; and "we have NOT met any phased completion milestones throughout this project. Lets meet the last one...PLEASE!" (ex. G-105).

90. On 20 August 2007 Mr. Johnson notified Mr. Campbell that JJK was seeking its FCU re-hanging costs and opined that Versar would be justified in recovering its costs from the government (ex. G-1 at 2 of 3). Mr. Campbell replied that Versar did not agree:

> At this point JJK is again proceeding on [their] own accord. We have an approved RFI that was developed jointly between JJK and Versar which is not being followed. JJK has taken it upon themselves to install what was on the drawings originally. This would beg the question why the FCUs were not installed this way from the start.
>
> Versar will entertain [an REA] for the re-hanging of the FCUs, but the request will be hinged on government approval.

(*Id.*) Dick Moore, Mr. Lemons' boss, replied that the government had not directed proceeding per the RFI and the CO had not approved it (*id.*; tr. 4/143, 5/113).

91. Mr. Campbell drafted a letter to Mr. Moore dated 21 August 2007 for review by Messrs. Stiles and Carter:

> If JJK had followed the prints like they are doing now we all would not be in this mess. I could write a list of submittal items that have not been submitted and there is no documentation to support why you haven't. Additionally the quality of work on site is horrific. I suggest if you want to talk about these matters you coordinate with Paul Stiles an on

site meeting and you review what is being passed for JJK work. I think you would be enlightened by a site visit.

Furthermore the seismic 38 Versar is going to mod your contract for $35,000. Considering this figure I am appalled by the original proposal of $350,000 to complete the work. JJK/Versar did not have enough proof that we objected to the seismic 38 with the government. We (presumably JJK/Versar) coordinated the meeting between the A&E and the Seismic engineer where the A&E and Seismic Engineer determined what was needed. The seismic engineer (a sub to a sub of JJK) submitted supplemental information directly to the A&E which bound JJK/Versar to the work. I have asked JJK for back up from the seismic engineer but have not received proof that we (JJK/Versar) are in the right and not required to add the additional seismic.

As for the re-hanging of the FCUs we tried to sell the installation that was done. If the installation had...looked good (quality work) we may have been able to sell it even though it was not according to the prints. Additionally Versar asked JJK for code/engineering backup to support what was installed...still waiting. Versar had an independent structural engineer on site to verify the installation was reasonable, needless to say I asked him not to send me a report.

The Punch list that was done by the A&E the week of July 27, 2007 is 29 pages long which is not indicative of the amount of work remaining. Because about 7 pages applies to every room.

JJK has provided letters and schedules with dates of completion and they all passed by with the blink of an eye. It is imperative that you address your continually slipping schedule. Your contract ends August 31, 2007. Versar is prepared to supplement your forces starting September 1, 2007 to help you meet your date.

(Ex. G-1 at 1) Before sending the letter, Mr. Stiles corrected inaccuracies in monetary amounts and adjusted its tone (tr. 2/163-65; 4/142-44).

92. In a 24 August 2007 email to Mr. Johnson of JJK concerning FCU installation Mr. Campbell stated:

> You will recall that this detail was worked out jointly between JJK and Versar to help JJK save rework on the [FCUs]. There was no talk of any additional cost when the RFI was generated. In fact the fan coil arrangement was tied to JJK being allowed to run PVC drains. Also JJK has had this approved RFI since July 31, 2007 and you have not mentioned there would be any cost associated with it.
>
> Versar does not consider this a cost or schedule impact to your contract.
>
> It is imperative that you gather the required materials and proceed in order to complete this project on time.

(Ex. G-109 at 1) Change to the FCUs required re-working PVC condensate drains. The contract drains were black iron screw pipe. Use of PVC instead for the reinstallation was for JJK's convenience and to expedite the time frame for the government. (Tr. 5/34)

93. Ultimately Versar developed sketches by which final FCU installation was accepted after corrections. This required hundreds of hours and many different trades. (Ex. A-101; tr. 3/147-48, 151, 154-58, 4/137-39, 169-70, 5/45, 111, 7/56, 58, 13/168-79)

94. On about 7 September 2007 Versar notified AFCEE that the school roof was ready for inspection. The CO advised the COR that the inspection request was denied and that the contract required the entire project to be complete prior to inspection. (R4, tab 912 at 11206; tr. 9/270-71) The COR replied:

> I carefully read [Versar's] letter and they state "...The roofing system is ready for the government Final Inspection...." [B]ut they do not REQUEST an inspection as required by CDRL A001a... Therefore, I do not intend to respond with a formal denial...

(R4, tab 912 at 11205) The CO supported his plan to "take [n]o action" (*id.*). The COR acknowledged that he planned to ignore Versar (tr. 9/272-73).

95. In the July 2007 punch list (finding 81) Ms. Harvill had called for more reinforcements on ceiling joists to FCUs and elsewhere, citing Drawing A-503, "WALL

& ROOF DETAILS," and its Detail A5, which depicted bracing requirements, without limitation concerning its application, except that additional bracing was not required for items under 50 pounds and, with additional bracing, items could be up to 250 pounds. (R4, tab 736 at 9872) Versar and JJK contended the detail was specific and pertained only to additional joint reinforcement for outside air units and AHUs, much larger and heavier than FCUs, although the detail did not so state. There is no evidence they inquired prior to FCU installation or that Versar relied upon this interpretation when it entered into the TO. The directive affected hundreds of locations, including 90% of the FCUs and pipe hanger supports. Ms. Harvill acknowledged that the drawings regarding FCU details did not refer to A5/A-503 and that in a 1 February 2007 memorandum to Mr. Redmond she had stated that the detail was referred to in one section of the drawings but not as a general requirement. On 10 September 2007 Versar submitted RFI No. 59 stating the installation had been inspected and approved previously, per February 2007 documentation by Mr. Redmond. It sought a change order if more reinforcement were required. (R4, tab 384 at 4347, tab 403 at 4592-93, *see* R4, tab 403 at 4592; ex. A-36 at 1; tr. 3/136-40, 4/35-36, 116-17, 8/79, 113-14) Mr. Bernal opined that the detail was industry standard and "typical" for items exceeding 50 pounds but acknowledged that it was not referenced in the FCU details (tr. 8/192, 9/35).

96. On 7 September 2007 Versar requested a 60-day extension and equitable adjustment, with costs to be provided, on FCU issues. The CO asked it to resubmit without a monetary element, to save time. (R4, tab 400; tr. 3/24-27)

97. On 18 September 2007 Versar reduced its extension request to 45 days, citing FCU issues and alleged government-caused delays. The COR recommended denial. On 27 September 2007 Versar reiterated its prior requests and sought two more weeks related to commissioning and pre-final inspection; AFCEE acceptance of a 14 September 2007 substantial completion date; a date for pre-final inspection; and confirmation that it would not be held in default. (R4, tabs 400, 412, 413, 418; tr. 3/27, 29-33)

98. On 28 September 2007 Versar submitted invoice No. 10, for 1 April 2007 to date. The COR rejected it, stating internally that he would not sign until Versar had met CDRL and project completion requirements, including submitting a schedule showing how it had arrived at the completion percentage. (R4, tab 423)

99. Also on 28 September 2007, CO Bryant issued a forbearance notice to Versar stating that its failure to comply with Mod. No. 3, under which the performance period would expire on 30 September 2007, breached the Commencement, Prosecution, and Completion of Work and the TO Procedures clauses. She concluded that, while allowing Versar to continue to perform, the government was not forbearing its contractual rights and remedies, including under the Default clause. (R4, tab 632 at 7857) The CO testified that

Versar had breached the TO Procedures clause by not complying with the NTP, but she had not seen the NTP and was unable to define the alleged breach (tr. 9/88-92). She said she sent the notice because: (1) when Versar was allowed to continue past the contract completion date, the government had to notify Versar that it was not sanctioning tardiness or relinquishing its contract rights and (2) unless the Defense Finance and Accounting Service had an open contract, Versar would not be able to invoice. Prior to the notice, the CO had decided that the contract administration record was incomplete, with considerable personnel turnover; Versar had already been paid most of the contract amount; the TO had no liquidated damages clause; and a default termination might not be in the government's best interests, although she had not taken it "off the table." She contemplated an unsatisfactory performance report and that the school might independently sue for damages. (Ex. G-167 at 1; tr. 9/74-75) The TO was never terminated for default.

100. On 24 October 2007 Mr. Campbell notified Mr. Johnson that there were several installations on the pipe loop where seismic cables were not installed in accordance with JJK's submittal and that this had been a punch list item. He sought relocation of the seismic restraints or documentation from the seismic engineer that the installation was acceptable. JJK then relocated the restraints. (Ex. G-124; tr. 3/185-86)

101. On 26 October 2007 Versar submitted invoice No. 11, for 29 September—26 October 2007, which AFCEE rejected (R4, tab 595).

102. On 30 October 2007 Mr. Stiles advised JJK: final inspection was the week of 12 November 2007; the final test and balance (TAB) report and other items were due; and it was 60 days past its performance period. Some items related to work in dispute with the government. On 2 November 2007 Mr. Campbell informed JJK that the TAB report was incomplete, with errors; it was imperative that it be corrected; and the matter had been dragging on for weeks. (Exs. G-144, -160; tr. 2/172)

103. On 5 November 2007 unilateral Mod. No. 8 extended the contract period to 30 November 2007. On 29 November 2007 Versar sought a 45-day extension to allow for completion of final inspection activities. On 30 November 2007 unilateral Mod. No. 9 extended the period to 15 January 2008. Each modification cited the Default clause as extension authority. (R4, tab 2 at 214-17, tab 961)

104. On 13 November 2007 Versar sent JJK an extensive deficiency list, stating it was in default as of 31 August 2007; the project was not ready for pre-final inspection; and JJK must make a drastic attitude change to complete it quickly (ex. G-43 at 1508).

105. In September-November 2007 the contractor addressed numerous leaks, most of which it attributed to FCU re-work, and it added structural bracing. The government

found pipe supports in corridor C-114 to be inadequate. On 10 October 2007 Mr. Campbell advised JJK that there was an arguable claim but the installation did not meet drawings and specifications; a third-party engineer reviewed it but would not stamp it; and it needed immediate correction. On 12 October 2007 Versar submitted RFI No. 64, which stated a prior inspection had found the supports to be contract compliant. The RFI proposed a solution, at potential cost and schedule impact. Ms. Harvill gave installation directions on 15 October 2007 and she and the COR signed the RFI that day. The government stated on the RFI that this was contract work and the contract was already in default as of 30 September 2007. Versar included JJK's C-114 work at $26,157.09 in its claim and $2,570.96 for SWF's materials for angle bracing in a corridor, presumably, but not clearly, C-114. (R4, tab 432 at 4822, 4825, tab 562 at 6922, item 8; exs. G-128, -132; tr. 3/158-59, 182-84, 198, 4/151, 153, 5/16-18)

106. On 14 November 2007 JJK gave an acceptable TAB report to Versar. On 15 November Mr. Campbell issued a revised pre-final report to the CO stating work was substantially complete as of 13 November. He sought final inspection starting 26 November, but the COR stated the team could not be assembled by then. The CO notified Versar that final inspection would be 3-5 December 2007, with commissioning starting on 12 December 2007. (R4, tabs 959, 960; exs. G-30, -116 at 3, ex. G-136)

107. At the December 2007 inspection there were still seismic restraints improperly installed; drain pans incorrectly sloped; FCUs hung incorrectly; no additional bracing on joists where required; some vibration isolators were upside down; some seismic cables had incorrect clips and attachments; there were an inadequate number of clips; and some were located incorrectly, backwards and in violation of the "don't saddle a dead horse" rule, which, as pertinent here, covers the orientation of saddle clips on the wire ropes constituting the seismic restraints (the Rule). On 13 December 2007 CO Brown sent a "final punchlist" to Versar calling for reinstallation of seismic cables per the Rule. The manufacturer in Versar's seismic submittal, which the government had approved, had not addressed the Rule. Versar's subsequent research found that several other manufacturers advised following it. It had to replace about 90% of its seismic cable. (R4, tabs 854, 962; ex. A-12; tr. 4/175-76, 184, 7/40-41, 171-72, 8/47-54, 67-68, 155-56, 11/119; *see* ex. G-48) Versar contends that the Rule pertains to applications like rigging, which involves over 100 times the loads that would be present in a seismic event with the lateral and transverse bracing as finally installed on the project (ex. G-93; tr. 4/183-84, 11/119, 134-35, 144). Ms. Harvill opined that the Rule is an industry standard or common knowledge and is not limited to rigging (tr. 8/156). The punch list also required Versar to replace school mini-blinds that the government claimed it had damaged. Versar disputed that it caused the damage but it has not directed the Board to an alternative explanation. (Tr. 12/104-05, 107)

108. Mr. Campbell's 16 December 2007 "MEMORANDUM OF RECORD" concerning seismic cable re-installation and a suggested backcharge stated:

> After investigation it does make a difference on which side the saddle of the clip contacts the rope. The rule is "never saddle a dead horse" in other words the saddle shall be on the load side of the cable.
>
> While correcting this deficiency...it has been very clear that the previous installation of seismic cables [was] inadequate. Installers, Versar's superintendent [and project manager] have noticed... missing cables, wrong cable clips, and loose cable clips. As well as restraints not installed per Seismic Submittal "38" that JJKSP was awarded a change order for.
>
> It is unclear how such poor quality of work passed our inspection other than we...did not inspect every nut and bolt as we have supposedly hired a competent contractor to manage [its] trade. Additionally several of these areas were previously inspected as satisfactory by Title II. Also JJKSP had the ceilings put in...ASAP after above ceiling work was complete whether or not the work had been inspected.

(Ex. G-5 at 1)

109. On 14 January 2008 Versar requested a 45-day extension to complete punch list items. Noting its small business status, it sought the CO's assistance with its three invoices, said to total $1,446,575, stating it had not received payment or an explanation. On 21 February 2008 Versar sought an extension to 31 March 2008, for commissioning and final inspection. Unilateral Mod. No. 10, effective 15 January 2008, extended the performance period to 31 March 2008. Unilateral Mod. No. 11 extended it to 30 June 2008. The modifications again cited the Default clause as authority. (R4, tab 2 at 218-19, 221-22, tabs 463, 470; tr. 3/39, 41)

110. Versar hired Reliatech as its commissioning agent. Its preliminary report, for 15-16 January 2008, reflects that its representative, Tom Donahue, found the school unready for commissioning; there was constant discovery of new leaks in the piping system; FCUs were incorrectly piped; and he was critical of JJK's job superintendence. Mr. Donahue recommended that the site be cleaned and finishes completed, because the project did not appear to be close to a completed and acceptable condition and was at

least a month from being functional and ready for commissioning. Versar did not agree. (Ex. G-73; tr. 4/192-95, 6/10-15, 20-22)

111. The government conducted its pre-final inspection/commissioning in March 2008. PSC's Gabriel Manriquez, the project's mechanical engineer of record, conducted the commissioning. Versar deemed that he had pertinent knowledge and treated it fairly. The Commissioning Report concluded that, in general, the main mechanical system components were functioning satisfactorily within the specified criteria. (R4, tabs 549, 983 at 11985, 11987; exs. A-116, G-49; tr. 2/52, 4/191, 197-201, 6/134, 7/68-82, 167) The government conducted its final inspection in May 2008. On 5 June 2008 the CO established 4 June 2008 as the project's beneficial occupancy date (BOD), contingent upon completion of a final punch list by 6 June 2008, which Versar accomplished, and verification by Mr. Valenzuela on 17 June 2008, which occurred. (R4, tabs 505, 514, 997, 1004 at 12357, ¶ 56; ex. G-50; tr. 3/43, 4/204-08) Citing the Warranty clause, the CO stated that the one-year warranty was effective from 4 June 2008 through 3 June 2009, in effect setting the 4 June 2008 BOD as the date of final acceptance (or government possession) (R4, tab 514).

112. In May-June 2008 the CO told Versar that its invoices had been rejected and AFCEE would withhold 10% retainage because the COR did not agree with the stated completion percentage. On 20 June 2008 Versar consolidated invoices Nos. 9-11 into No. 12, for $959,137, for 1 March 2007-13 March 2008, and advised it would submit an REA. On 25 June 2008 the CO notified Versar that the government would retain 10%, or $95,913.70, from invoice No. 12 to cover school relocation and other costs. She authorized payment of the $863,223.30 balance on 25 June 2008, but the government has not refuted Versar's allegation that it was not paid until 16 September 2008. Versar submitted invoice No. 13, dated 27 June 2008, for $491,291.69, for 14 March-27 June 2008, which was rejected, but the reason is not clear. On 8 July 2008 it asked the CO to clarify the basis for the No. 12 withholding and for a damages breakdown. (R4, tabs 517, 518, 519 at 6098, 521, 562 at 6904, tabs 598, 599 at 7391; tr. 2/209-11)

113. On 21 August 2008 CO Brown issued a demand to Versar for $660,721.00 (R4, tab 532). Her final decision of that date claimed damages from 30 September 2007 to date. She cited the Payments clause (due to lack of an approved schedule, the government was not able to establish completion percentages); the Inspection clause (because the project was not ready for inspection, Versar was responsible for all costs of two additional final inspections); the Default clause (Versar was liable for all government costs due to its failure to complete timely); and FAR 49.402-7, Other damages (if the government has suffered ascertainable damages, including administrative costs, due to the contractor's default, the CO must, per legal advice, take appropriate action to assert a damages demand). The decision identified damages as (1) those incurred by the

government and (2) costs related to Hood Street operation. The CO stated the decision to relocate Pinckney "was made by DoDEA and outside of AFCEE's purview," but AFCEE understood it was because the school was not finished, with life safety code issues, and there was then no completion schedule. (R4, tab 531 at 6176) She acknowledged that AFCEE had not informed Versar about the relocation, but said the government was assessing relocation damages from 30 September 2007 through the 4 June 2008 BOD. On 25 August 2008 Versar notified the CO that the decision, which did not include its appeal rights, did not comply with FAR 33.211 (decision rules) and it would file a claim (R4, tab 533). On 17 November 2008 the CO stated she was reconsidering the decision and one would re-issue later (R4, tab 650).

114. On 3 November 2008 the CO received Versar's certified $2,916,461.20 CDA claim dated 29 October 2008, which also contested the government's claim. Versar noted that BOD was 26 days before TO completion and contended that the government's alleged damages had no connection to its performance. It claimed that it was on budget and schedule from 1 August 2006-31 March 2007 and the Air Force had not raised any concern over completion or quality. It alleged that: CO and COR changes in early 2007 caused delays thereafter; the Air Force stopped making timely payments and failed to notify it of invoice rejections; the new CO issued five inappropriate cure notices; contract extensions supported its entitlement thereto; the school was to be open during construction; the government elected to phase work, with inspection and acceptance to occur as phases were completed; and, in the December 2007 final inspection, the Air Force identified over 800 punch list items and contended for the first time that seismic restraints on the piping loop and on the FCUs were not properly installed. Versar stated that it also learned at that time that the Air Force had issued it a negative "Red" performance rating, which is not of record. [4] Versar incorporated its HVAC controls REA and alleged that the Air Force changed the contract when it required alteration of installed FCUs; doubled seismic restraints; and imposed multiple unreasonable inspection and acceptance requirements, and that it was estopped from ordering FCU and seismic restraint changes after its inspection and acceptance. Versar also alleged that the Air Force did not cooperate with it when it failed to state definitively the approval level required for FCU changes, and it violated its

[4] Regarding the Red rating, appellant's complaint alleged only that it had learned of it at the time of the December 2007 inspection, AFCEE had inappropriately assigned it and it had otherwise acted inconsistently with its duty of good faith and fair dealing. The complaint asked us to order rescission of the rating and for such other relief as the Board deemed proper. (Compl. ¶¶75, 109, 114) The government moved to dismiss ASBCA No. 56857 in part, alleging that we lacked jurisdiction to consider rating relief. We struck the rescission request but otherwise denied the motion, noting that the nature of any relief we could grant remained to be determined. *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437.

duty of good faith and fair dealing by acting to frustrate, delay and harass Versar and by its FCU and seismic directives, which were inconsistent with its effective acceptance of the work. Versar did not allege any violation of any duty to it as a small business. (R4, tabs 561, 562, 1004 at 12359, ¶ 64; tr. 12/82-83) Although the claim essentially alleged compensable and excusable delay, and Versar and JJK calculated certain damages based upon daily labor costs (*e.g.*, tr. 13/11-14, 91-93, 97; app. br. at 72-73; gov't br. at 104-05), the claim, and Versar's hearing presentation, did not include any delay analysis, recognizing and segregating concurrent or other contractor delays, and showing how a particular alleged delay delayed project completion as a whole.

115. Versar's alleged damages included (1) $734,445.80—about $657,456.00 the Air Force withheld plus $76,999.80 interest penalty under the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907; (2) $1,402,715.40 in subcontractor costs, which included mold removal (said to be an undisputed change); AHU-1 work; corridor C-114 work; roof bundle removal costs; costs to replace mini-blinds, textbooks, equipment and cabinets damaged by the leaking roof or otherwise; extra work after the March 2008 inspection; and extra work largely related to FCU and seismic restraints, of which over $626,936.29 pertained to seismic work; (3) $651,501.43 for extra project management and oversight, including, *inter alia*, $84,976.89 for maintaining a dedicated Versar site superintendent from March-August 2007; (4) $115,593.00 per the controls REA; and (5) $12,195.66 in proposal preparation for changes converted into Versar's claim. (R4, tab 562 at 6922) Versar did not specify separate damages for the government's alleged breach of its duties of good faith and fair dealing and to cooperate.

116. In May 2009 Mr. Chaney sent Ms. Harvill a message from COR Shrove to keep a possible fraud investigation against Versar secret. Mr. Chaney stated:

> Just when you think there's no hope in this world.....
>
> Get rid of [a DDESS employee] and ruin Versar discussion all in one day!

(Ex. A-82 at 1; tr. 1/196) There has been no allegation of fraud in these appeals.

117. Appellant's allegation that the government breached its duty of good faith and fair dealing now focuses upon Mr. Chaney. As reflected to some extent above, although he acknowledged that he and the customer, DDESS, had no contracting authority, he assumed a very active role in the project on behalf of DDESS, which considered it critical and urgent. As he also acknowledged, he had become adverse to Versar as of January 2007. He was frustrated with what he perceived as its lack of project management and failure to submit timely, accurate schedules, and quality issues. He was also frustrated with the

government's contract management. He complained to and about AFCEE and about Mr. Habrukowich of Versar, Mr. Presson of PSC and Mr. Redmond of Parsons. He communicated directly with Versar's personnel without notice to management and with its subcontractors. He pressured Versar to remove Mr. Habrukowich as project manager; was instrumental in keeping the school move secret from it; referred to Versar and its personnel disdainfully in business and in personal emails; and was pleased by the prospect of its ruin due to a possible fraud investigation. (Findings 35, 37, 75, 76, 78, 116; *see also* R4, tabs 218, 767 at 10450, tab 801 at 10597, tab 782 at 10521-23, 10525, tab 801 at 10597; exs. A-15 at 1, A-17 at 4, A-21 at 1, A-23 at 3, A-24 at 1, A-25 at 3, A-29 at 2-3, A-107; tr. 1/57-59, 125-27, 130, 142-45, 151-52, 2/5-17, 85, 9/173-74)

118. The CO did not issue a decision on Versar's claim and it appealed from a deemed denial on 18 June 2009, which the Board docketed as ASBCA No. 56857. The Rule 4 file contained a 20 August 2009 final decision by CO Juan L. Martinez, affirming the government's claim to the extent of $633,558.38 and denying most of Versar's claim. Again the decision did not include appeal rights. Versar objected to it and contended that it had not received it previously. (R4, tab 734; Bd. corr. file, obj. dtd. 18 Sept. 2009) The Board treated the objection as a protective appeal, docketed as ASBCA No. 56950.

119. In July 2009 Mod. No. 12 increased the TO's price from $7,019,276 to $7,023,688.16 for work after project completion (R4, tab 2 at 224-25; tr. 3/43-44).

120. On 1 October 2009 CO Martinez issued a final decision containing appeal rights. He denied Versar's claim, except for $709,926.42, which included what he stated was the $657,456.70 contract balance, on the ground that the government had accepted the work. It also included $39,659 in interest, which we infer was based upon a Prompt Payment clause interest penalty associated with the unpaid balance and unpaid invoices Nos. 12 and 13. The CO concluded that invoices Nos. 9, 10 and 11 had been properly rejected because the schedules submitted with them had been insufficient and did not accurately reflect the percentage of work completed. The amount also included $2,494 for AHU-1 work and $9,124.50 for mold removal. These included amounts total $708,734.20. The derivation of the $1,192.22 balance of the amount the CO agreed was due Versar ($709,926.42-$708,734.20) is not clear. (R4, tab 1004 at 12349, 12360-362, 12368) The CO asserted a government claim for breach of contract and damages of $633,558.38, measured from 30 September 2007 through the 4 June 2008 BOD (R4, tab 1004 at 12386). The CO claimed that Versar did not complete work within the performance period, delayed DDESS' beneficial occupancy due to life safety issues, and forced DDESS to incur costs to reopen an alternate site. He did not specify AFCEE costs, but referred to the 21 August 2008 decision, which had set forth damages. The government's interrogatory responses state that its claim included $346,865.92 in Air Force damages and $286,692.46 for DDESS (ex. A-86 at 3-4). The government's claim

did not include a delay analysis and it did not present one at the hearing. The Board docketed Versar's protective 7 October 2009 appeal as ASBCA No. 56962.

121. With input from Stephanie Harr of Portage, Inc., an environmental engineering firm serving as a GEITA contractor, the COR prepared a 23 November 2009 Contract Performance Assessment Report, which is not of record (tr. 15/5-6, 92-96).

122. Pre-hearing, on 18 June 2010, the government moved to exclude Versar's expert's report and related testimony, alleging that it introduced new facts and legal theories on seismic restraint issues and was a new claim not submitted to the CO. Versar then filed a protective claim dated 8 July 2010, in effect alleging that the government's defective specifications omitted analysis of the building and roof structure; submittal No. 36 met specifications; and the government's direction to double seismic restraints on the piping loop was a compensable change. Versar incorporated the damages from its 29 October 2008 claim. On 5 August 2010 the government agreed that its motion was moot and the Board's order of that date stated that, if the issue of whether the expert's report contained a new claim became relevant for CDA interest purposes, the Board would address it in its merits decision. CO Sharon Mendez denied the 8 July 2010 claim on 24 September 2010. The Board docketed appellant's 27 September 2010 appeal as ASBCA No. 57386. The four appeals are consolidated for disposition.

Evidence on Seismic and Related Issues by Appellant's Expert

123. Allyn E. Kilsheimer, a registered professional structural engineer and chief executive officer of KCE Structural Engineers, P.C., with considerable experience in building structural design and emergency structural and related work, is accepted as an expert in seismic and structural engineering.[5] He submitted an expert report dated 7 June 2010. (Ex. A-109 at 2, 331 of 344; tr. 11/13-14, 23-24; Bd. corr. file, app. witness list at 5) Mr. Kilsheimer opined that PSC had not met its responsibility as structural engineer of record (SER), and under its design contract with the government, to perform calculations or analyze the Pinckney structure's ability to resist loads imposed by seismic lateral sway bracing, including new loads resulting from the project. The contract lacked adequate information and Versar was not required to perform the seismic design analysis the government imposed upon it. (Ex. A-109 at 4-13 of 344 and attachs. 1, 13, 14 at 180 of 344, ¶ 9-4c., attach. 20; tr. 11/26-28, 70, 141-42)

[5] At the hearing the Board accepted Mr. Kilsheimer as an expert in structural engineering (tr. 11/24). It appears from appellant's expert witness list and a close reading of the transcript that appellant meant to qualify him as an expert in both structural and seismic engineering and the Board accepts him as such.

124. Mr. Kilsheimer opined that certain drawing details conflicted or were otherwise defective. For example, A5/A-503, a specific structural detail, not noted as "typical," concerning downward load placement, contained inadequate information and was referenced only on detail D2/A-503, which referred to AHU supports. PSC wrongly attempted to force it to apply to seismic braces everywhere. He acknowledged, however, that drawing A-503 was labeled "WALL & ROOF DETAILS" and was not contained in the AHU details. (R4, tab 736 at 9872; ex. A-109 at 4, 13 of 344; tr. 11/52-53, 96)

125. Mr. Kilsheimer opined that the specifications, TI manuals and SMACNA manual, which he deemed incorporated into the contract, "[e]ach directed the Contractor to install under certain conditions lateral seismic bracing on pipes at 40 feet on center and longitudinal bracing at 80 feet on center," but that Ms. Harvill changed the spacing during contract performance from 80 feet longitudinally to +/- 10 feet on center and from 40 feet tangentially to +/- 10 feet on center (ex. A-109 at 5 of 344). He opined that Title II's direction to install more seismic bracing and to stiffen the joists and beams was solely to correct a design omission by PSC and was a contract change, and submittal No. 36 met the contract requirement for seismic sway bracing for chilled water piping given the contract limitations (ex. A-109 at 12 of 344).

Evidence on Seismic and Related Issues by Government's Expert

126. Harold O. Sprague Jr., a registered professional structural engineer, has considerable experience in seismic engineering. He was active in seismic code development and authored FEMA 302. He was accepted as an expert in seismic and structural engineering. He opined that SERs do not typically provide calculations in roof and HVAC projects unless there are significantly higher loads or the structural system is being modified. Here there was little load increase; the project caused only nominal changes to building elements; the contractor was required under § 13080 to do the calculations; and Mr. Kilsheimer's contrary contention was inconsistent with accepted practice. PSC developed performance specifications regarding seismic braces for pipe supports and Mr. Martin, as specialty structural engineer (SSE), was to do the design. SSEs often design structural seismic support for mechanical, electrical and plumbing components. They are purchased, and piping is routed, during construction and the SER does not know their characteristics or position in advance. (Ex. A-112 at 4 of 16, ex. G-180 at 5-7, 9-10, resume; tr. 11/97, 99-100, 105, 107-08, 114-18, 122, 125, 137-38)

127. Regarding detail A5/A-503, Mr. Sprague opined that:

> Even the most cursory of review would determine that this is a typical section that is to be applied in multiple locations.

> This is a very common method of reinforcing a bar joist and is employed by most structural engineers.

(Ex. G-180 at 9)

128. Mr. Sprague opined that submittal No. 36 did not comply with the specifications. Among other things, it indicated only one longitudinal brace, which "does not comply with any design standard for piping support including all those referenced in the contract specifications" (ex. G-180 at 9). Longitudinal sway bracing was not provided at 40-foot intervals and all runs, like the pipe and joints, did not have a minimum of one longitudinal brace, contrary to ¶ 3.5.2 (*id.*; tr. 11/109, 111-13, 126). He did not address whether he considered the SMACNA manual to be incorporated into the specifications. He stated that SMACNA allows longitudinal bracing of up to 80 feet, but there are many caveats, and the TO clearly placed a 40-foot limit. (Ex. G-180 at 7, 11)

129. Per Mr. Sprague, the Rule was the only acceptable method of installing saddle clips on wire rope; it has been well established for many years; is critical to proper performance; and is not limited to rigging (ex. G-180 at 14-16; tr. 11/119-20, 134-37).

130. Mr. Sprague concluded that PSC's drawings and specifications were typical for such projects; they were accepted practice for performance specifications for seismic bracing, which called for an SSE; and the solicitation had enough information for a contractor to bid the design work for seismic restraints (ex. G-180 at 16; tr. 11/136). Of the two experts, we find Mr. Sprague's report and testimony to be the more persuasive.

Quantum—Appellant's Claims

131. The Defense Contract Audit Agency (DCAA) issued an audit report dated 15 June 2010 on Versar's claims (ex. G-175). Of the $2,916,461.20 claimed, DCAA questioned $8,088 of $77,000 claimed in interest penalty on unpaid invoices (it did not address $657,456 in withholdings); $1,617 of $10,059 for mold removal; $648,399 of $685,720 for FCUs; $651,556 of $689,060 for seismic restraints; $4,937 of $17,879 for school cleanup; $379,028 of $651,501 for management and oversight; the entire $115,593 for HVAC controls; and $5,295 of $12,196 for proposal preparation, for a total questioned of $1,814,513. The questioned amount did not include profit, which Versar claimed at 6%. DCAA noted potential questioned profit of $82,942. DCAA's main reasons for questioning FCU and seismic restraint costs were lack of adequate documentation and that Versar had not performed a cost analysis of JJK's claimed costs under FAR 15.408. DCAA questioned management and oversight costs because, among other things, except those for Mr. Campbell and QA/QC manager Myer, Versar had already included them in its G&A expense pool. DCAA questioned the controls costs due

to alleged lack of adequate documentation. Of Versar's total claimed indirect costs of $98,027, DCAA questioned $73,443 because it did not use applicable rates. (Ex. G-175 at 3-5, 9-16, 18-30, 32-35, ex. G-177 at 47; *see* tr. 12/154)

132. DCAA also issued an audit report dated 28 July 2010 finding that JJK's cost data were not adequate and questioning all claimed costs. DCAA found that, except for general conditions and overhead, the costs were on behalf of JJK's subcontractors and JJK did not record its costs under a separate job cost number. (Ex. G-175 at 42 and at 28 July 2010 audit)

133. During the appeals Versar and JJK revised the quantum amounts in Versar's claim based upon DCAA's audits and their own assessments, including, *inter alia*, correcting for "double counting" of other direct costs (ODCs) (tr. 12/119, 138, 141, 151). Versar's total claim is now $2,778,553.53. It applies government-approved labor rates, mark-up for subcontractor handling fee of 4.24% and on ODCs of 14.6%, plus 6% profit and 1.5% bond. The revised claim is composed of: (1) $784,203.47—$657,458.70 contract balance plus $126,744.77 PPA interest penalty on invoices Nos. 9-13 ($10,344.21, $32,688.68, $8,171.94, $21,496.49, $54,043.45, respectively); (2) $1,161,780.79, subcontractor costs, which include, *inter alia*, $9,915.49 in undisputed mold removal costs[6]; $2,557.57 in undisputed AHU-1 costs; $370,702.41 in FCU costs; $379,740.43 in seismic, rework, and punch list items, in which appellant has included JJK's corridor C-114 work; the $11,630.32 for crane rental and $3,019.31 for Virginia A&E, related to the roof bundles; $2,285.36 for mini blind replacement; $4,619.06 for water damage to cabinets from the leaking roof; $7,147.41 for damaged school texts and miscellaneous equipment; $2,570.96 for SWF's materials for angle bracing in a corridor; and $35,129.90 for work related to the March 2008 inspection; (3) $663,718.24, Versar's oversight; (4) $115,593, controls REA, including $12,505 for REA preparation; (5) $12,195.66, preparation of REA proposal that was not filed and evolved into Versar's claim; and (6) $41,062.37, bond. (R4, tab 753 at 10374, 10380, 10382, tabs 855, 907; exs. A-98, -100, -113; tr. 12/83-84, 91, 93-159, 182, 13/139; app. br. at 113-14)

134. The government acknowledges merit in $243,236.52 of Versar's claims—AHU-1 ($2,557.57) and mold abatement ($9,915.49) costs, plus the $230,763.46 difference between the government's $633,558.38 claim, set off against payments due Versar, and its revised $402,794.92 claim (below) (*see* ex. A-114 at 2, 8; tr. 13/56-57,

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[6] The $9,915.49 mold cost total in appellant's brief omitted $143.36 in overhead and profit on a $1400.00 Servpro charge included in another of appellant's damage summaries, but it is unclear whether this was deliberate. Because the government has agreed to the $9,915.49 figure, we do not adjust it. (*See* ex. A-113 at 1; app. br. at 113; gov't br. at 106)

196; gov't br. at 106[7]). Versar alleges, and the government has not refuted, that, as of the hearing, it was withholding at least $657,458.70 (excluding interest) from Versar's invoices (ex. A-113 at 1-2; tr. 12/85-87).

Quantum—Government's Claim

135. Mr. Chaney prepared DDESS' portion of the government's claim with input from others, and was the only witness to testify in support of it. Prior to the quantum hearing, the government reduced this portion of its claim from $286,692.46 to $68,026.04, which included: $21,749.25 to move furniture, equipment and supplies from Pinckney to Hood Street; $4,953.85 to move them back; $13,226.28 for Hood Street repair; $5,400 in technology contract costs to test and report on data drops at Hood Street; $16,876.14 for Hood Street utility costs; $4,808.52 for furniture, equipment and supplies to operate Hood Street; and $1,012 for DDESS travel to prepare Hood Street. After Mr. Chaney admitted that some costs were unreasonable or unfairly billed to Versar, the government further reduced DDESS' claim to $61,589.04. (Ex. G-20.10; tr. 12/8, 10, 42, 44-45, 52-54, 56-59, 61-63; gov't br. at 89, ¶ 274; gov't 9/21/10 mot. to amend affirm. claim at damages chart)

136. DDESS' claim is based in part upon estimates. It did not credit costs it would have incurred to keep Pinckney operational nor costs of administrative personnel's site visits that would have been made regardless. The government still uses Hood Street (not for a school) and benefits from work done to return it to use and from items purchased or built that are still in use or could be. (Tr. 12/36-38, 40, 44, 52-56, 60-63) We conclude that the government has not proved any of DDESS' alleged damages with reasonable certainty.

137. Mr. Shrove prepared AFCEE's portion of the government's claim, an estimate, with input from others, and was the only witness to testify in support of it. AFCEE claimed $346,865.92, including $156,345 for MACTEC (Parsons/PSC) Title II services pursuant to a time and materials (T&M) contract modification No. 6 in the not-to-exceed amount of $156,345, effective 25 September 2007, which extended their Pinckney services from 30 September to 31 December 2007. AFCEE claimed MACTEC costs from 30 September through 14 December 2007 in the full modification amount and did not give the actual T&M figures or provide invoices (if any). AFCEE did not specify the number of inspectors involved and it is not clear what amount the government paid MACTEC. AFCEE also claimed burdened labor rates for 1 October 2007-4 June 2008 (BOD) totaling $52,297, as follows: $39,600 and $660 (Shrove); $8,160 and $136 (COs Bryant, Brown and supervisor); $3,680 and $61 (legal support). Mr. Shrove could not substantiate the claimed burdened labor rates or work hour estimates. Lastly, AFCEE

[7] The government stated that the undisputed amount is $242,445.49, but this appears to be a mathematical error.

claimed $138,223.92 for the GEITA contractor Portage, which included estimated time for Mr. Valenzuela, Ms. Sylvia Kirwin (said by Versar to be an administrative assistant to CO Bryant (tr. 2/50)), and Richard Magee (said in Portage's estimate to be an on-site project manager). In submitting its one-page estimate to government counsel, which was not supported by back-up documentation, Portage stated that its broad TO with the government did not require it to segregate its hours by project. The government has not established whether that TO, apparently not of record, was on a fixed-price or hourly basis, or what projects it covered in addition to Pinckney, and there was no testimony to support the Portage part of the government's claim. In post-hearing briefing, the government reduced the $52,297 labor rates portion of AFCEE's part of its claim by $5660 to $46,637, thereby reducing AFCEE's claim to $341,205.92, for a total revised claim of $402,794.96 ($61,589.04 DDESS + $341,205.92 AFCEE). (Ex. A-86 at 3 of 35, ¶ 1, exs. G-20.7, -20.8, -20.9 at 1, 2, 9, 13, ex. G-20.11; tr. 14/6-21, 23-34, 36-39, 41-42; gov't br. at 90-91, ¶ 277 (corrected for math error)) We conclude that the government has not proved any of AFCEE's alleged damages with reasonable certainty.

DISCUSSION

Preliminary Matter-Appellant's Motion to Strike

Appellant moves to strike attachment No. 1 to the government's post-hearing brief, said to be a comparison of certified payrolls to invoices, taken from appellant's exhibits. Appellant contends that it is not legal argument but a confusing out-of-time exhibit, unsupported by testimony; it lacks foundation, including as to its purport, who prepared it and how; it contains errors that conflict with hearing evidence; and it has no probative value. Appellant suggests that the document might be derived from one Ms. Harr created in preparation to testify but that the government declined to produce at the hearing based upon alleged privilege (tr. 15/96-98, 103, 106-07). The government states that its attachment is a compilation of record exhibits; a narrative would have lengthened its brief unduly; the information is easier to follow in tabular form; Ms. Harr's testimony supports the attachment, but anyone can refer to the source documents; and it establishes that payroll data does not support Versar's invoices.

Attachment No. 1 lists voluminous invoice and payroll documents and details allegedly derived therefrom. It identifies invoices by reference to record exhibits but does not clearly identify the location of payroll documents in the record. It purports to establish discrepancies in hours charged but does not cross reference testimony. The government did not identify who prepared the attachment or respond to appellant's reasonable suggestion that it was derived from Ms. Harr's withheld compilation. The Board's 10 December 2009 order required identification and exchange of exhibits by 21 May 2010 and warned that, absent compelling reason, exhibits not properly exchanged

would not be admitted. The government gave no reason why it could not have offered the attachment as an exhibit, subject to cross-examination. We decline its implied suggestion that we could verify the accuracy of the detailed exhibit and we grant appellant's motion to strike. *See United Technologies Corp.*, ASBCA No. 25501, 86-3 BCA ¶ 19,171.

The Parties' Contentions

Appellant alleges that it is entitled to recover its increased costs due to the government's defective FCU drawings and specifications, including the questionable application of detail A5/A-503; its multiple, inconsistent, changes to rectify the defects; its vacillation about required approval levels, which breached its duty to cooperate; its defective HVAC controls specification; its doubling of the seismic restraints on approved submittal No. 36; its imposition of a "don't saddle a dead horse" practice not specified in the contract; its breach of its duty under FAR 42.1601 to respond promptly to a small business' contract administration inquiries; its interference with appellant's performance, including imposing excess superintendence requirements; its failures to pay appellant; its abuse of the inspection process, including to justify its decision to move to Hood Street for reasons unrelated to TO No. 16; and its breach of its duty of good faith and fair dealing, epitomized by its unprofessional, hostile attitude towards appellant. Appellant contends that the government also breached the contract when it issued an unwarranted Red performance rating to punish it. It asserts that there is no valid basis for the government's claim, which is speculative, unreasonable, and unsupported.

The government contends that there was no extra or changed work regarding FCUs, HVAC controls, seismic bracing, seismic cable re-hanging, inspections, or other matters raised by appellant and that its HVAC controls system was noncompliant. It alleges that it did not breach any implied duties; the Red performance rating was justified; and, regardless of entitlement issues, appellant's damage evidence is unreliable. The government asserts that it has proved its claim, which is not invalidated by estimates.

Appellant's Claim

To recover, appellant must prove liability, causation and resultant injury. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991).

FCU Portion of Claim

Appellant alleges defective FCU specifications and drawings and that the government delayed it by waiting an unreasonably long period of time before pointing out FCU deficiencies. Regarding the first contention, appellant must prove that it complied with design specifications and drawings, but that a defect in either caused it extra costs.

White v. Edsall Construction Co., 296 F.3d 1081, 1084-85 (Fed. Cir. 2002); *American Ordnance LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,780.

Seventy-seven FCUs were to be installed. Appellant began in August 2006, per its no-cost/no time RFIs, which had suggested a change from the installation depicted in Drawing No. M-501. The parties disagree as to whether the drawing was constructible, but PSC's Mr. Presson verbally approved the change and acknowledged that it was an improvement. All FCUs were installed prior to the July 2007 inspection, when Ms. Harvill found that structural support was incorrect, FCUs were not hung from the structure as shown in the drawing, and pans were not draining properly. Appellant alleges that PSC had observed the FCUs' installation, had inspected them prior to turnover of each phase, and had not challenged the installation method. The government disputes this, noting that few seismic restraints had been installed prior to the July inspection and that, for those that were, cable size was incorrect and the clips were not installed properly. (Findings 17, 81, 82)

After the July 2007 inspection, appellant submitted RFIs concerning FCU punch list corrections and included a proposed FCU mounting detail. Eventually the RFIs were approved with corrections and the CO affirmed that she agreed. Appellant sought inspection of a sample installation to ensure compliance, coordinate scheduling and avoid further delay. Parsons declined on the basis that it had been agreed appellant would perform all punch list work in one area prior to another inspection and all items would be revisited upon final inspection. (Findings 82-86)

When JJK advised Versar on 20 August 2007 that it was seeking its costs of re-hanging the FCUs, appellant did not agree with its position and noted that there was an approved RFI developed by appellant and JJK that JJK was not following and that JJK was installing what was on the drawings originally. JJK contended that the RFIs had not been approved. (Finding 90) It is evident from Mr. Campbell's 22 August 2007 draft letter in response, which was sent with adjustments in monetary amounts and tone, that he deemed that "[i]f JJK had followed the prints like they are doing now we all would not be in this mess" and that the original installation had not been of good quality (finding 91). On 24 August 2007, Mr. Campbell further chastised JJK, noting that the revised FCU detail had been worked out jointly between JJK and Versar to help JJK save FCU rework. There had been no talk of additional cost when the RFI was generated and the fan coil arrangement had been tied to JJK's being allowed to run PVC drains, rather than the contract-required black iron screw pipe, which had been for JJK's convenience. Mr. Campbell noted that JJK had had an approved RFI for nearly a month and stated that it was imperative that it proceed in order to complete the project on time. (Finding 92)

Appellant contends that the government's inspection of the original FCU installation without complaint and its allegedly changing and differing requirements caused extra FCU costs. The Contractor Inspection clause provides that the contractor is to perform all inspections necessary to substantiate that work conforms to contract requirements and that the clause takes precedence over any government inspection required. Under the Inspection clause, the contractor is to inspect to ensure work conforms to requirements. It is subject to government inspection at all reasonable times before acceptance to ensure strict compliance, which is for the government's benefit and does not relieve the contractor from adequate quality control, or from any contract requirement, and does not constitute or imply acceptance. The contractor is to replace or correct nonconforming work without charge. The government is to perform inspections so as not to unnecessarily delay the work and is to accept the work, or any part the CO determines can be accepted separately, as promptly as practicable after completion and inspection. The Inspection Deviation clause is the same in these respects. (Finding 1)

Due to the cable size and clip orientation issues, FCU work was not complete or compliant prior to the July 2007 inspection and there is no documentary evidence that the CO formally accepted any work phase prior to the 4 June 2008 BOD (findings 11, 17, 82, 111). Parsons' refusal to inspect a sample FCU installation was not helpful, but under the various inspection clauses, appellant was responsible for ensuring that the FCUs complied with contract requirements, regardless of any government inspections, which were for the government's benefit. Appellant has not met its burden to prove the government liable for its extra FCU costs on the basis of defective specifications or government delay. Rather, the weight of the evidence, including appellant's own contemporaneous evaluation, is that, regardless of appellant's initial RFIs concerning an improvement, JJK did not install the FCUs in accordance with contract requirements. This portion of appellant's claim is denied.

HVAC Controls Portion of Claim

Appellant alleges that the HVAC controls specification was defective. The solicitation specified Andover controls and LON technology. Pre-award it was amended to provide that the controls system was to be completely compatible with Siemens controls protocol and software and was to interface and communicate with a Siemens system at Ft. Stewart, which it did not describe. A Siemens control system was recommended but not stated to be required. The LON provisions were not amended. C/Tech, Inc., Custom's subcontractor, had bid based upon an Andover controls system and Versar did not change. It was aware of the amendment but Andover had advised that its system would communicate with the Siemens system at Ft. Stewart through the LonWorks protocol. Versar did not consult with Ft. Stewart. (Findings 18-19)

Despite the specifications' inclusion of LonWorks and LonMark requirements, the school controls systems at Ft. Stewart were not Lon. BACnet panel and other adjustments were necessary to enable the Andover LON system to communicate with Ft. Stewart's Siemens system. Appellant sought a specification amendment or direction that it use Siemens exclusively, and Custom replaced C/Tech with Siemens. AFCEE, PSC, and apparently customer DDESS contemplated a specification clarification or change and a monetary adjustment, but this did not occur. (Findings 20-22)

The amended controls specification required that the controls system be completely compatible with Siemens controls protocol and software and interface and communicate with the Siemens system at Ft. Stewart. However, it did not describe Ft. Stewart's system; erroneously retained the LonWorks and LonMark requirements; and did not state that Siemens was, in practicality, the required, rather than only a recommended, system. Appellant did not consult with Ft. Stewart about its controls system because Andover had reported that its system was compatible through the LonWorks protocol, which the specifications indicated was in place. Regardless, the government is presumed to know its own systems and is responsible for its design specification. It is not reasonable under the circumstances to impose a duty of pre-proposal inquiry upon appellant, which has met its burden to prove that the government's HVAC controls specification was defective.

However, some of appellant's claimed HVAC controls costs are not recoverable. Customs' subcontractor C/Tech was paid for its labor, material and supplies costs of $64,986.58. It sought an additional $43,552 for lost overhead and profit on the difference between its contract amount and payment received. There is no evidence that Customs paid this additional amount, or even that C/Tech would have made a profit had it completed the work. (Findings 23, 114) Thus, there is no basis for recovery of the $43,552 claimed for work not performed.

Concerning the claimed $12,505 in REA preparation costs, costs of professional and consultant services incurred for the genuine purpose of materially furthering a negotiation process, and rendered by persons who are not officers or employees of the contractor, are normally contract administration costs allowable under FAR 31.205-33. *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (en banc). However, here, appellant's project manager Habrukowich submitted the REA, the preparation costs were primarily effort by him and appellant's off-site QA/QC manager, and there is no evidence that appellant paid for any consultant or professional services in connection with the REA's preparation (finding 23). Thus, the claimed $12,505 in controls REA preparation costs is not allowable.

As to claimed controls REA costs that are allowable, Customs paid Siemens $300,000, after Siemens credited $24,000 in equipment, material and labor supplied. Customs claimed a net differential cost impact of $40,987, plus 10% overhead and 10% profit ($8,607), for a total of $49,594. JJK sought overhead and profit on Custom's amounts at 11.5%, or $5,749. Appellant did not claim profit but sought its WERC contract 4.24% handling fee on each item, or $4,193. (Finding 23) We conclude that appellant is entitled to recover the claimed $59,536 ($49,594 + $5,749 + $4,193).

Unfiled REA Portion of Claim

Appellant claims $12,195.66 in costs to prepare an REA concerning alleged changes that was never filed and evolved into its claim (finding 115). Costs incurred in connection with the prosecution of a CDA claim or an appeal against the government are unallowable, FAR 31.205-47(f)(1). Thus, we deny this portion of appellant's claim.

Seismic Restraints and Seismic Design Portions of Claim

Appellant alleges that the government doubled the seismic restraints in approved submittal No. 36, resulting in a constructive contract change, which requires it to establish that it worked beyond contract requirements due to an informal order from an authorized government official or government fault. *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); *Northrop Grumman Systems Corp. Space Systems Division*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,242-43. Appellant also alleges that the specifications were defective because they lacked adequate information to enable appellant to meet the seismic design obligations the TO imposed upon it.

Appellant was responsible under TO No. 16 for certain seismic protection, which it was to design per TI 809-04. The contract did not specify the number of seismic restraints required but the specifications gave tangential sway bracing requirements and called for longitudinal sway bracing at 40-foot intervals unless otherwise indicated. Appellant's first seismic submittal, No. 13, lacked the contract-required registered engineer's design calculations and stamp and the CO disapproved it. (Findings 25, 27) In November 2006, Mr. Habrukowich submitted seismic piping submittal No. 36, calling for tangential restraints at 40 feet or less and longitudinal restraints at 80 feet or less. PSC found it inadequate because it still did not contain the required stamp and calculations and the specifications required longitudinal restraints at every 40 feet or less and at least one per run, and for tangential restraints to be calculated. PSC asked Mr. Habrukowich to let it know if it should reject No. 36 or await a complete submittal. There is no evidence that he responded to this particular inquiry. (Finding 31)

All on 3 January 2007, Ms. Harvill informed appellant and JJK that appellant's seismic engineer, Mr. Martin, would attend a 16 January site meeting to ensure that piping supports were coordinated with adequate structural support; Mr. Habrukowich sent original submittal No. 36, without calculations, to PSC with a separate file of drawings containing Mr. Martin's seismic markups; and Mr. Habrukowich notified other of appellant's personnel and JJK that Mr. Martin and Ms. Harvill had the prior submittals for equipment and piping restraints, planned to confer, and installation of more steel supports might be involved. Appellant and JJK were thus aware, or should have been, that submittal No. 36 could be modified. On 5 January 2007 Mr. Martin sent to Ms. Harvill and to Mr. Habrukowich calculations that still showed tangential seismic restraints at 40 feet on center and longitudinal restraints at 80 feet on center. (Findings 32-34)

Prior to the 16 January 2007 meeting, at Mr. Chaney's insistence, appellant replaced Mr. Habrukowich as its project manager with Brian Franklin. Ms. Harvill, Messrs. Martin and Franklin, and Mr. Owen of TRS (supplier of the supports), attended the meeting. Ms. Harvill and Messrs. Martin and Owen evaluated seismic restraint placement. Mr. Franklin's weekly report noted that Ms. Harvill had coordinated with the seismic engineers to resolve the seismic load issue and that a complete package with their combined resolution would be submitted for approval. Appellant was thus again aware, or should have been, that submittal No. 36 would be modified. (Findings 37, 39)

On 5 February 2007 Mr. Martin sent plan markups showing seismic pipe support locations and details to Ms. Harvill and Mr. Owen. There is no evidence that he sent them to appellant, JJK or Custom. His earlier drawings had 33 tangential restraints and 9 longitudinal. The new ones showed 51 tangential and 29 longitudinal. The 20 additional longitudinal restraints were due to a change from the 80-foot interval to the 40-foot interval in specification § 15070A. He also submitted complete calculations. On 22 February 2007 Ms. Harvill sent to Parsons' Mr. Redmond her review of submittal No. 36 and noted that seismic restraint locations had been coordinated with Mr. Martin. In a separate email that day to Mr. Redmond, copied to appellant's project manager Franklin, Ms. Harvill inquired whether Mr. Martin's markups were a submittal. She noted that she had assumed they were but they had not been added to the Impact Room. On 23 February Mr. Redmond "guessed" that they should be considered "part of the package." There is no evidence that Mr. Franklin responded. (Findings 40, 41)

On 28 February 2007, Ms. Harvill sent submittal No. 36, signed by her on 22 February, to the COR. The attachments did not include manufacturer's cut sheets, calculations, Mr. Martin's markings for locations and numbers of seismic restraints, or any typical details. Ms. Harvill knew these items had not been added to the Impact Room. On 28 February COR Gutierrez recommended approval and CO Bryant signed the submittal as approved. On 1 March 2007 Ms. Harvill confirmed to Messrs. Redmond and

Franklin that she had approved the submittal without comments but she said the piping layout with seismic restraints located on the drawing was to be part of the submittal. Mr. Martin had sent the layouts directly to her. She said she would forward the information and thinks she sent the layouts to Mr. Franklin, but there is no evidence that she did so. There is also no evidence that Mr. Franklin inquired about the matter. On 14 March 2007 new COR Shrove recommended approval of the same submittal No. 36 signed by Ms. Harvill on 22 February and, on 15 March, CO Bryant again signed it as approved. (Findings 42, 43, 45) On about 22 March 2007 appellant sent O&M manual submittal No. 38, which the CO approved on 23 March (finding 48).

In June 2007 appellant started installing seismic restraints per approved submittal No. 36. When Parsons complained that there were not enough restraints, Mr. Campbell found No. 36 in the Impact Room and alternate No. 38. As it appeared in the Impact Room, No. 36 included PSC's contract drawings and Mr. Martin's original seismic restraint markings. Appellant notified the CO that it had been working based on No. 36 and that alternate No. 38, which had not been approved, contained significantly different requirements and would have a cost and schedule impact. At the time, Versar had installed about 75% of the work required under No. 36. Alternate No. 38 doubled the seismic restraints to the piping. According to Ms. Harvill, the seismic markups Mr. Martin had sent to her were ultimately alternate No. 38, but she and the government did not identify the submitter. Although appellant now alleges that she added the submittal to the Impact Room, she was not asked directly whether she put it there and the CO disputed Versar's contention that it had not submitted alternate No. 38. Messrs. Habrukowich, Franklin, Martin and Redmond, and Ms. Emelianova, were not called to testify and appellant did not eliminate the possibility that Mr. Franklin added alternate No. 38 to the Impact Room, just as his predecessor, Mr. Habrukowich, had submitted No. 36. We found that, regardless of who sent alternate No. 38 to the Impact Room, it was defective on its face; was not signed by PSC, the COR or the CO; and did not qualify as a government-approved submittal. (Findings 25, 62, 63, 68)

Appellant disputed the CO's determination that it install seismic restraints per alternate No. 38 and sought an equitable adjustment. Ms. Harvill informed Parsons and Mr. Chaney that the restraints had been doubled; she thought she had conveyed to Mr. Martin that additional lateral restraints were only needed where there were joists but they had been provided throughout; and she needed to call him concerning whether all of them were required, but it appears that she did not do so. Versar increased JJK's subcontract by $35,000 to cover the alternate No. 38 work. Versar's claim, which included over $626,936.29 for seismic work, ensued. (Findings 65, 68-70, 73, 114, 115)

Of the conflicting expert evidence concerning seismic restraints and design issues, we found Mr. Sprague's to be the more persuasive. He opined that submittal No. 36 did

not comply with the specifications. For example, it indicated only one longitudinal brace, which did not comply with any design standard for piping support, including those referred to in the TO, and longitudinal sway bracing was not at 40-foot intervals. Even if the SMACNA manual were incorporated into the specifications, which appellant has not established and we need not decide, Mr. Sprague noted that, while SMACNA allows longitudinal bracing of up to 80 feet, there are many caveats, and the TO clearly placed a 40-foot limit. We also accept his opinion that the drawings and specifications were typical for such projects and they represented accepted practice in performance specifications for seismic bracing, which called for an SSE. (Findings 126, 128, 130)

The Specifications and Drawings for Construction clause requires the contractor to review all of its shop drawings for accuracy, completeness, and compliance with contract requirements. If they vary from contract requirements, the contractor is to describe the variations in a separate writing at the time of submission. Any approval by the CO does not relieve the contractor from responsibility for any errors or omissions in the drawings, nor from responsibility for complying with contract requirements, except with respect to described and approved variations. (Finding 1) Similarly, TO No. 16 requires the contractor to make accurate, timely, submittals and approval by the CO does not relieve it from responsibility for errors (findings 7, 12). *See, e.g., Ellis-Don Construction, Inc.*, ASBCA No. 51210, 99-1 BCA ¶ 30,346 at 150,072.

The TO's seismic protection provisions required detailed shop drawings and design calculations stamped by a registered engineer, to include the longitudinal sway bracing at 40-foot intervals. Appellant's seismic submittals, which commenced on 23 August 2006, were non-compliant with the specifications, inadequate and incomplete. As of 26 January 2007, five months later, although Mr. Martin had then agreed to the requisite 40-foot intervals, appellant still had not amended its seismic submittals accordingly. (Findings 25, 27, 30, 31, 33, 34, 40)

Moreover, appellant bears responsibility for its stated ignorance about the additional seismic restraints shown in alternate No. 38. Mr. Martin was its lower tier subcontractor. Its project managers Habrukowich and Franklin, and its QA/QC manager Burton, were aware that Mr. Martin was conferring with Ms. Harvill and that No. 36 could be modified. Appellant also had full access to the Impact Room and, in fact, found alternate No. 38 there when Mr. Campbell looked.

We conclude that appellant has not met its burden to prove a constructive contract change concerning the number of seismic restraints installed on the project and we deny this portion of its claim.

We also conclude that appellant has not met its burden to prove its allegation, made through its expert Kilsheimer, that TO No. 16's specifications were defective because they required it to perform calculations and analyze the Pinckney structure's ability to resist loads imposed by seismic lateral sway bracing, including new loads resulting from the project, but the TO lacked adequate information for it to do so (*see* finding 123). Rather, we are persuaded by expert Sprague's conclusion that the drawings and specifications were typical for such projects; they were accepted practice for performance specifications for seismic bracing, which called for an SSE; and the solicitation had enough information for a contractor to bid the design work for seismic restraints (finding 130).

We deny this part of appellant's claim. Thus, it is irrelevant whether Mr. Kilsheimer's contentions constituted a new claim for CDA purposes, including interest measurement, should appellant have prevailed on this issue (*see* finding 122). We dismiss the balance of ASBCA No. 57386 as duplicative of appellant's other appeals.

Detail A5/A-503 Portion of Claim

Appellant claims defective specifications and disputes the government's requirement for additional seismic brace joist reinforcements at FCUs, stating the FCU drawings did not contain detail A5/A-503 and PSC inspected FCUs initially without noting the requirement. However, drawing A-503 pertained to wall and roof details, and detail A5, a structural detail, did not specify any limitation as to its application. Per the detail, additional bracing was not required for items under 50 pounds and, with additional bracing, items could be up to 250 pounds. Parsons' engineer Bernal opined that the detail was industry standard and "typical" for items of more than 50 pounds. Expert Sprague opined that even the most cursory review rendered it obvious that it was a typical section to be applied in multiple locations and it was a very common method of reinforcing a bar joist, employed by most structural engineers. Expert Kilsheimer opined that the detail applied only to heavy AHUs, but he acknowledged that drawing A-503 was not referred to in the AHU details. (Findings 95, 124, 127) We interpret the contract as would a reasonably intelligent person acquainted with the contemporaneous circumstances, and evidence of trade practice and custom can be relevant. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999). The weight of the persuasive evidence is that detail A5/A-503 is industry standard for the applications required by the government.

At best, even if the drawings were considered to be ambiguous, any ambiguity was obvious. There is no evidence that appellant or JJK inquired about the matter during contract negotiations or even before FCU installation began and no evidence that appellant relied upon the interpretation it advances when it entered into the contract (finding 95). The government's implied warranty of its design specifications and

drawings does not relieve a contractor of its duty to inquire about a patent ambiguity, inconsistency or mistake when it recognized or should have recognized an error in the specifications or drawings. Absent such an inquiry, a patent ambiguity is resolved against the contractor. *Edsall Construction*, 296 F.3d at 1085 (Fed. Cir. 2002); *Dick Pacific/GHEMM, JV*, ASBCA Nos. 54743, 55255, 09-2 BCA ¶ 34,178 at 168,965.

Appellant has not met its burden to prove defective specifications and we deny this portion of its claim.

Don't Saddle a Dead Horse Rule Portion of Claim

Appellant also contends that the government's requirement that seismic restraint installation be corrected to comply with the "don't saddle a dead horse" rule was a constructive change. However, appellant's research confirmed that several manufacturers advised following the Rule and that it made a difference in seismic clip application. Ms. Harvill described it as industry standard or common knowledge and not limited to rigging as appellant contends. In Mr. Sprague's expert opinion, the Rule was the only acceptable method of installing saddle clips on wire rope; it had been well established for many years, was critical to proper performance, and was not limited to rigging. (Findings 107, 108, 129) Under the Material and Workmanship clause the work was to be skillful and workmanlike. Under the Inspection and Inspection Deviation clauses the contractor is, without charge, to replace or correct work found by the government not to conform to contract requirements. (Finding 1) Appellant has not met its burden to prove a constructive contract change and we deny this portion of its claim.

Government's Alleged Excess Superintendence Requirement Portion of Claim

Appellant alleges that the government imposed excess superintendence requirements upon it and constructively changed the contract. The Superintendence clause required the contractor at all times until the work was completed and accepted to directly supervise the work or to assign and have on site a competent superintendent satisfactory to the CO with authority to act for the contractor (finding 1). TO No. 16 called for the contractor to supply a full-time site superintendent. Appellant contended that, under its accepted proposal, its subcontractor JJK was to have the site superintendent responsibilities. However, during performance, the government required appellant to supply its own additional superintendent. (Findings 10, 58) Appellant bore management responsibility for the contract. It is apparent that there were superintendence problems on the job (*e.g.* findings 49, 59, 110). The CO was entitled to require a competent superintendent on site. This aspect of appellant's claim is not meritorious and we deny it.

Government's Alleged Abuse of Inspection Process Portion of Claim

Appellant claims that the government abused the inspection process. Under the Inspection and Inspection Deviation clauses the contractor was to maintain an adequate inspection system and to perform inspections to ensure that the work conformed to contract requirements. All work was to be conducted under the CO's general direction and was subject to government inspection at all reasonable times before acceptance to ensure compliance. The TO also required the contractor to conduct its own punch-out, pre-final and final inspections and to report its findings and it called for government pre-final, and final acceptance inspections. (Findings 1, 9, 13) Thus the government was entitled to a reasonable number of reasonable inspections. We find no abuse of the inspection process and deny this portion of appellant's claim.

Miscellaneous Claimed Subcontractor Costs Portion of Claim

As part of its claimed subcontractor costs, appellant seeks $11,630.32 for crane rental and $3,019.31 for Virginia A&E, related to the roof bundles; apparently about $28,728.05 ($26,157.09 + $2,570.96) for C-114 work; $2,285.36 for mini blind replacement; $4,619.06 for water damage to cabinets from the leaking roof; and $7,147.41 for damaged school texts and miscellaneous equipment (findings 105, 133).

Although Mr. Redmond of Parsons had initially allowed appellant to stock roof panel bundles on the roof, the roof loading was causing CMU cracks and roof joist flexing. The Virginia A&E structural engineer hired by appellant recommended that one portion of the roof be relieved of any loading or that the joists be shored; that all bundles be protected from taking on moisture; and that further analysis be done. Appellant removed some, but not all, of the panels despite PSC's repeated directions to do so. (Finding 36) Safety and construction concerns, rather than any constructive contract change, were responsible for appellant's costs.

Appellant first advised JJK that the corridor C-114 installation did not meet the drawings and specifications; a third-party engineer reviewed it but would not stamp it; and it needed immediate correction. Its subsequent RFI stated that there was a potential cost and schedule impact. The government considered the work to be contract work. (Finding 105) Textbooks, some furniture and some equipment were damaged by leaks after a major rain. Appellant accepted responsibility for damage in areas covered by roof upon which it had worked and disputed responsibility for other damage. (Finding 67) Additionally, appellant contends that it was not responsible for mini-blind damage, but it has not directed the Board to an alternative explanation (finding 107). Appellant had the obligation to protect the school work site.

Appellant has not met its burden to prove that any of the foregoing costs are properly chargeable to the government and we deny these portions of its claim.

PPA Interest Penalty Portion of Claim

Appellant seeks a $126,744.77 interest penalty on invoices Nos. 9-13 ($10,344.21, $32,688.68, $8,171.94, $21,496.49, $54,043.45, respectively) (finding 133). The Payments clause calls for progress payments at least monthly on estimates of work accomplished that meets the contract's quality standards, as approved by the CO. The contractor must substantiate its payment requests by itemizing the amounts in relation to work covered and by providing additional support if the CO requires it. If progress is unsatisfactory, the CO can retain 10 percent of the payment until satisfactory progress is achieved. When the work is substantially complete, the CO can retain from previously withheld funds and future progress payments the amount the CO considers adequate for the government's protection and is to release all remaining funds. (Finding 1)

The Prompt Payment clause provides that, when the CO approves the estimated amount and value of work performed, progress payments are due 14 days after the DBO receives a proper payment request. If, as here, the contract does not otherwise specify, the due date for payment of amounts retained by the CO under the Payments clause is 30 days after the CO's approval of release. An interest penalty is due automatically if payment is not made by the due date, the government has authorized payment, and there is no disagreement over quantity, quality, the contractor's contract compliance, or the requested amount. If there is such a disagreement, no interest is due. The due date for final payments based on completion and acceptance of all work and release of all claims under the contract is the later of the 30th day after the DBO receives a proper invoice or the 30th day after government acceptance of the contractor's completed work. For a final invoice when the payment amount is subject to contract settlement actions, such as release of claims, acceptance is deemed to occur on the effective date of settlement. (Finding 1)

On 25 June 2008 the CO notified appellant that the government would retain 10%, or $95,913.70, from consolidated invoice No. 12 to cover its costs to relocate to Hood Street and other costs. She authorized payment of the $863,223.30 balance but appellant was not paid until 16 September 2008, nearly three months later, despite the fact that the Prompt Payment clause calls for payment within 30 days after the CO's approval of release of retained amounts. Invoice No. 13, dated 27 June 2008, for $491,291.69, was rejected at the time but the reason is not clear. (Finding 112)

In his 1 October 2009 final decision CO Martinez sustained Versar's claim to the extent of $709,926.42, which included, *inter alia*, what he stated was the $657,456.70 contract balance, and $39,659 in PPA interest penalty, said to be associated with the

unpaid balance and invoices Nos. 12 and 13. The CO concluded that invoices Nos. 9, 10 and 11 had been properly rejected because the schedules submitted with them had been insufficient and did not accurately reflect the percentage of work accomplished. (Finding 120) As of the hearing, the government was withholding at least $657,458.70 (excluding interest) from appellant's invoiced amounts (Finding 134).[8]

The Payments clause does not mandate progress payments. Payment is subject to such things as contract compliance, substantiation of work done, and the CO's exercise of discretion in certain respects. (Finding 1) *Lan-Cay, Inc.*, ASBCA No. 56140, 12-1 BCA ¶ 34,935. When matters affecting progress payments are in dispute, the CO is entitled to give the government the benefit of the doubt in exercising his or her discretion. *Davis Group, Inc.*, ASBCA No. 48431, 95-2 BCA ¶ 27,702 at 138,093.

We conclude that invoices 9 through 11 were properly rejected at the time. On 21 March 2007 CO Bryant authorized payment of invoice No. 8, in the amount of $152,228, apparently without retainage, based upon an alleged 80.57% project completion (finding 47). On 7 May 2007 Versar submitted invoice No. 9 for $184,963, showing 80.87% completion (finding 53). However, over a month later, on 14 June 2007 Mr. Valenzuela evaluated the project as only about 60-65% complete (finding 60). In fact, appellant did not complete the project until about a year later (finding 111). No PPA interest penalty is due on those invoices because the government had not authorized payment, and there was disagreement over the quantity and quality of completion, the contractor's contract compliance and the requested amounts.

The composition of the $39,659 in PPA interest penalty CO Martinez found to be due is not clear. An interest penalty is due in connection with the retained contract balance, apparently captured in invoices Nos. 12 and 13, computed at the appropriate regulatory rates commencing 30 days after the government accepted the work as of 4 June 2008 (finding 111), except to the extent that the final payment was subject to contract settlement actions, such as release of claims, which the parties have not addressed. When appellant filed its CDA claim, the PPA interest penalty ceased to accrue and computation of CDA interest began, based upon the total PPA interest penalty due at the time the claim was filed. 31 U.S.C. § 3907(b)(1)(A), (b)(2); *see Ingenieurgesellschaft Fuer Technische Dienste,* ASBCA Nos. 42029, 42030, 94-1 BCA ¶ 26,569 at 132,212; *Toombs & Co., Inc.*, ASBCA No. 34590 *et al.*, 91-1 BCA ¶ 23,403 at 117,428-29 (computing CDA interest on the penalty). Here, CDA interest began to run on 3 November 2008, the date the CO received the claim, 41 U.S.C. § 7109(a)(1) (finding 114). We remand this aspect of the claim to the parties to compute the PPA interest penalty and CDA interest due.

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[8] The $2 difference between this amount and that the CO described as the unpaid contract balance is unexplained.

Thus, we grant the PPA interest penalty portion of appellant's claim to the extent stated and otherwise deny it.

Contract Balance and Other Undisputed Amounts Portion of Claim

The government acknowledges merit in the contract balance (subject to its claim), AHU-1 ($2,557.57), and mold abatement ($9,915.49) portions of appellant's claim (finding 134). We are uncertain whether any of these items have been paid and are unable to determine the precise contract balance due appellant. We remand this determination for resolution by the parties.

Breach of Duties of Good Faith and Fair Dealing and to Cooperate Portion of Claim

Each contract party is subject to the implied duties of good faith and fair dealing. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). A failure to cooperate with the other may violate the duty of good faith. When the government is accused of failing to cooperate, we examine the reasonableness of its actions, considering all of the circumstances. *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742. However, clear and convincing evidence is needed to overcome the presumption that government officials act in good faith. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1236, 1239 (Fed. Cir. 2002). Indeed, the court of appeals has noted that "not all misbehavior" breaches the implied duty of good faith and fair dealing and, in the context of the timber harvesting contracts before it, and savings and loan contracts, discussed governmental breach of the duty in terms of "bait and switch" actions or those specifically targeted at a party's contract rights. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010).

Appellant's claim alleged that the government violated its duty of good faith and fair dealing; acted to frustrate, delay and harass it; and failed to cooperate with it by failing to state definitively the approval level required for FCU changes (finding 114). In briefing, appellant elaborates that the project was marked by animus and unprofessional conduct by the government toward Versar and that Mr. Chaney led the effort to undermine and frustrate its project completion, enlisting the tacit and active assistance of AFCEE, including its COs, COR Shrove and support contractors (app. br. at 104).

Mr. Chaney acknowledged that he and customer DDESS had no contracting authority, but he assumed a very active role. He had become adverse to Versar as of January 2007. He also complained to and about AFCEE and about Mr. Habrukowich of Versar, Mr. Presson of PSC and Mr. Redmond of Parsons and he communicated directly with Versar's personnel without notice to management and with its subcontractors. He prevailed upon Versar to remove Mr. Habrukowich as project manager; was instrumental

in keeping the school move secret from Versar; and expressed pleasure that Versar could be ruined by a possible fraud investigation. He repeatedly referred to Versar and its personnel disdainfully in business and personal emails. (Findings 116, 117)

However, we conclude that appellant has not provided clear and convincing evidence that Mr. Chaney's unfortunate conduct was tantamount to bad faith attributable to the government or that any government contracting personnel acted in bad faith towards it. Moreover, apart from its claim's linkage of governmental bad faith to extra FCU and seismic costs, appellant did not specify separate damages or delay attributable to the government's alleged breach of its duties of good faith and fair dealing (findings 114, 115). Accordingly, we deny this portion of appellant's claim.

Appellant also alleged in its claim that the government did not cooperate with it when it failed to state definitively the approval level required for FCU changes, but it did not link this to any specific delay or damages. The claim did not allege that the government had violated any duty owed to it as a small business but, in briefing, appellant adds this to its contention that the government breached its duty to cooperate (app. br. at 102-03). Even assuming without deciding that the small business issue is properly before us, appellant's allegations are unsubstantiated. While AFCEE did not inform the SBA about project issues, and appellant's small business status did not factor into CO Bryant's contract administration, appellant itself took no initiative to involve the SBA. In any event, again, appellant has not tied any SBA issue, including the government's alleged breach of its duty under FAR 42.1601 to respond promptly to a small business' contract administration inquiries, to any specific delay or damage to it. (Findings 57, 114, 115) We deny this portion of appellant's claim.

Compensable Delay Portion of Claim

Appellant in effect alleges government-caused delays for which it is entitled to compensation (finding 114). The Suspension of Work clause provides for cost adjustments attributable to unreasonable suspensions, delays or interruptions by the CO in contract administration, except to the extent performance would have been so suspended, delayed, or interrupted by any other cause, including the contractor's fault or negligence (finding 1). To prove compensable delay, appellant must show that the government was responsible for specific delays; overall project completion was delayed as a result; and any government-caused delays were not concurrent with delays within appellant's control. *Fox Construction, Inc.*, ASBCA No. 55265 *et al.*, 08-1 BCA ¶ 33,810 at 167,379.

In September 2007, citing extra work and government-caused delays, appellant sought an equitable adjustment and extensions of the then 30 September 2007 contract completion date and confirmation that it would not be held in default. After a

28 September 2007 forbearance notice reserving the government's contractual rights and remedies, including under the Default clause, the CO extended the contract period to 30 November 2007, then to 15 January 2008. Versar requested further extensions and the CO ultimately extended the period to 30 June 2008. Each modification cited the Default clause as extension authority. (Findings 96, 97, 99, 103, 109)

The Default clause provides that, if the contractor refuses or fails to prosecute the work to insure completion within the contract period, the government may terminate its right to proceed. That right is not to be terminated nor the contractor charged with damages under the clause if the delay arises from causes beyond its control and without its fault or negligence, such as government actions in its contractual capacity. Upon the contractor's notification of delay, the CO is to ascertain the facts and extent of delay. If, in the CO's judgment, the findings of fact warrant it, the time for completing the work "shall" be extended and, subject to appeal under the Disputes clause, the CO's findings "shall be final and conclusive on the parties." (Finding 1) Appellant contends that the only basis for extension under the Default clause is when delay is not the contractor's fault; therefore, the extensions evidence that the project delays were compensable and excusable. However, prior to the extensions, the CO's forbearance notice made it clear that the government was not relinquishing its contract rights by extending the due date (finding 99) and no presumption of government responsibility for delay arises from the CO's mere grant of an extension. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 857 (Fed. Cir. 2004).

It is obvious that appellant was responsible for several project delays, including, for example, through late and inadequate submittals; inadequate job supervision; and some faulty construction or installations (*e.g.*, findings 15, 17, 27, 30, 31, 49, 51-53, 55, 59, 72, 81-83, 89, 93, 98, 100, 102, 104, 105, 107, 108, 110). Regardless of any government-caused delays, appellant did not present any delay analysis that recognized and segregated concurrent or other contractor delays and showed how a particular alleged delay delayed project completion as a whole (finding 114). Without such an analysis and clear apportionment of delay and expense attributable to each party, appellant cannot recover monetary compensation on the delay portion of its claim. *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); *Lovering-Johnson, Inc.*, ASBCA No. 53902, 06-1 BCA ¶ 33,126 at 164,173, *aff'd*, 221 Fed. Appx. 992 (Fed. Cir. 2007); *G. Bliudzius Contractors, Inc.*, ASBCA No. 42366 *et al.*, 93-3 BCA ¶ 26,074 at 129,593. Accordingly, we deny this portion of appellant's claim.

Performance Rating Portion of Claim

Appellant's claim makes only the briefest mention of its Red performance rating, which is not of record, and its complaint did not elaborate (finding 114 and n.4). The specifics of the Red rating, ratings process, categories and details are not before the Board

and appellant has not stated what the rating should be in its view. Bare or insufficient allegations cannot sustain a claim that the government issued an unjustified performance rating. *See Todd Construction v. United States*, 656 F.3d 1306 (Fed. Cir. 2011) (complaint alleging ratings procedural violations that did not allege prejudice by indicating substantial delays were excusable, thereby giving rise to plausible inference that ratings were arbitrary and capricious, was properly dismissed under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted).

Here, although appellant spent very little time directly on point at the hearing, we infer that it is contending that the performance rating was unjustified due to the government's alleged defective specifications, constructive changes, and breach of its duties of good faith and fair dealing and to cooperate. However, except in connection with the HVAC controls REA, we have concluded that appellant's allegations are not meritorious and that appellant was indeed responsible for performance problems, including, for example, late and deficient seismic submittals and some inferior workmanship that led to rework. Thus, appellant has not shown that its performance rating was arbitrary and capricious and we deny this portion of its claim.

Conclusion as to Appellant's Claim

In sum, appellant is entitled to PPA interest computed in accordance with our decision; $9,915.49 in mold removal costs and $2,557.57 in AHU-1 costs if not already paid; $59,536 for HVAC controls; the contract balance as determined by the parties; and CDA interest on the foregoing computed as of the CO's 3 November 2008 receipt of appellant's claim.

Government Claim

The government's claim is delay-based (*e.g.*, gov't br. at 86, ¶ 267, 89, ¶ 275, 105). To recover on its claim, the government, like the contractor, must show liability, causation and resulting injury. *Mitchell Enterprises, Inc.*, ASBCA No. 53202 *et al.*, 06-1 BCA ¶ 33,277 at 164,962, *modified on recon. on other grounds*, 06-2 BCA ¶ 33,296. Damages for contract breach are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty. RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981); *see Southwest Marine, Inc.*, ASBCA No. 54550, 11-2 BCA ¶ 34,871 at 171,525, *appeal docketed*, Case No. 12CV0526 IEG WMC (S.D. Cal. March 2, 2012).

The government seeks damages for contract breach from 30 September 2007 through the 4 June 2008 BOD (finding 120). It initially contended in briefing that appellant is liable because it had agreed to have the school ready for occupation by mid-August 2007 and did not do so (gov't br. at 105). In its reply the government

reasserts that appellant breached the contract when it did not complete it by 30 September 2007 (gov't reply at 6). The government contends that appellant delayed DDESS' beneficial occupancy due to life safety issues and forced DDESS to reopen an alternate site. It also claims AFCEE damages due to appellant's delay in completing the contract. The government's current $402,794.96 claim consists of $61,589.04 for DDESS and $341,205.92 for AFCEE. (Findings 135, 137)

Under the Default clause, as noted, if the contractor fails to prosecute the work to ensure completion within the contract period, including any extension, or fails to complete it within this time, the government may terminate its right to proceed. Even if, as here, the government does not terminate, the contractor is liable for any damage to the government due to its failure to complete the work on time. The rights and remedies in the clause are in addition to any others at law or under other provisions of the contract. The contractor is not to be charged with damages under the clause if the delay arises from causes for which it is not responsible, such as government contractual acts. Under the Excusable Delays clause the contractor shall not be in default, including for failure to make progress so as to endanger performance, if its failure is beyond its control and without its fault or negligence. Upon its request, the CO is to ascertain the facts and if the CO determines that any performance failure results from a listed excusable cause, including government contractual acts, the contract completion time is to be revised, subject to the government's rights under the Default clause. (Finding 1)

With regard to other government remedies under the contract, the Liquidated Damages clause provides that they are to be determined at the TO level, but TO No. 16 did not set any. The Inspection clause provides that the government may charge the contractor with any additional inspection cost when prior rejection makes reinspection necessary. The Inspection Deviation clause, specifically applicable to TOs, omits the portions of the Inspection clause that charge reinspection and other costs to the contractor, but the TO's Contractor Quality Control clause states that the contractor's failure to have all contract work acceptably complete for inspection is cause for the CO to bill it for the government's additional inspection costs per the Inspection clause. (Findings 1, 13)

Regarding delay and common law breach damages, while many government contract delay cases involve issues of liquidated damages, pertinent principles apply even if liquidated damages are not involved. For example, if the government has established delay *prima facie*, appellant must show that the government prevented performance or contributed to the delay or that the delay was excusable. *Insulation Specialties, Inc.*, ASBCA No. 52090, 03-2 BCA ¶ 32,361 at 160,101. If responsibility for delay is unclear, or if both parties contribute to the delay, the government cannot recover on its delay claim unless it carries its burden to prove by a preponderance of the evidence that the delay assessment period is correct and that there is a clear apportionment of the delay and the

expense attributable to each party. *Klingensmith,* 731 F.2d at 809; *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568 at 161,152-153. Under these circumstances, where the government seeks damages, the government must establish that appellant was solely responsible for the delay; the government did not contribute to or concurrently cause it; and the delay was not otherwise excusable. *Insulation Specialties,* 03-2 BCA ¶ 32,361 at 160,101.

DDESS Portion of Government Claim

When Dr. Beraza decided on 24 July 2007 to move Pinckney to Hood Street, the then 30 September 2007 contract completion date was over two months away. Mr. Chaney, who was demonstrably adverse to appellant, was primarily responsible for the decision and was instrumental in attempting to keep the move secret from appellant. DDESS alleged that life safety issues, and likelihood that the school would not be ready by the desired early August 2007 completion date (which was not contractual), required the move. However, there is no persuasive evidence that life safety issues were of imminent concern. As the COR pointed out in July 2007, the children and staff were not being exposed to any new seismic issues. Moreover, inconsistently, in 2004, when school officials had reported to DDESS that they were very concerned about massive leaks, health and safety issues, and that the school's roof might cave in, Mr. Chaney not only did not direct a school move but he determined that the renovation project should be delayed. Significantly, prior to DDESS' move decision appellant was not asked to alter its operations, or given any opportunity to develop a workaround. AFCEE, with whom appellant had contracted, was not involved in the decision; AFCEE and appellant had no say in it; and appellant's contract was not considered. Indeed, in September 2007, the CO's view was that DDESS might pursue alleged damages independently. (Findings 2, 66, 77, 79, 99, 117)

Mr. Chaney prepared DDESS' portion of the government's claim, originally $286,692.46. Even after the government reduced it by $218,666.42, to $68,026.04, which itself undermines the reasonableness of Mr. Chaney's effort, he admitted that some claimed costs were unreasonable or unfairly charged to appellant, and the government further reduced the claim to $61,589.04. The claim did not credit costs DDESS would have incurred to keep Pinckney operational nor costs of administrative personnel's site visits that would have been made regardless. The government still uses Hood Street and benefits from work done to return it to use and from items purchased or built that are in use or could be. (Findings 135, 136)

Thus, the government has not proved appellant's responsibility for DDESS' alleged damages and it has not proved any of them with reasonable certainty (finding 136). We deny this portion of the government's claim.

AFCEE Portion of Government Claim

AFCEE now claims $341,205.92: $156,345 for extra MACTEC (Parsons/PSC) inspection services; $46,637 in burdened labor rates for COR Shrove, COs Bryant and Brown, a supervisor, and legal support; plus $138,223.92 for Portage (finding 137). It alleges that by January 2007 it was concerned about appellant's failure to make progress. However, the cited concern pertains to the August 2007 early completion date that the government pressed appellant to achieve, DDESS focused upon in considering whether to move from the Pinckney school and the government focused upon at the hearing and in briefing, despite the fact that early completion was not a contract requirement. (*E.g.*, finding 35; gov't reply at 9) Commencing on 7 September 2007, appellant requested extensions, alleging government delays. The CO extended the 30 September 2007 contract period, ultimately to 28 June 2008. BOD occurred 24 days prior thereto. Before the first such extension, the CO issued a forbearance notice reserving the government's contract rights and remedies, including under the Default clause. She had not taken default "off the table," but noted potential deficiencies in the government's contract administration, among other things, and the TO never was terminated for default. (Findings 96, 97, 99)

As established, there were numerous project delays that the government attributed to the contractor. However, there were also delays for which the government bore at least some responsibility, such as the work stoppage in the mechanical room due to structural problems that commenced in February 2007 and the government's decision to ignore appellant when it sought a roof inspection in September 2007 (findings 46, 94). In briefing, among other alleged government-caused delays, appellant alleges 264 days of delay to JJK (15 September 2007 through 4 June 2008) and over six months' delay pertaining to Mr. Campbell's project work from 12 October 2007 to 27 June 2008 (app. br. at 72, 75).

Like appellant, the government did not present any delay analysis that recognized and segregated concurrent or other government delays (finding 120). Without such an analysis and clear apportionment of delay and expense attributable to each party, the government cannot recover monetary compensation for delay.

Moreover, COR Shrove could not substantiate the claimed burdened labor rates portion of AFCEE's claim. Regarding claimed Portage costs, in submitting its one-page estimate to government counsel, which was not supported by back-up documentation, Portage stated that its broad TO with the government did not require it to segregate its hours by project. The government has not established whether that TO, apparently not of record, was on a fixed-price or hourly basis, or what projects it covered in addition to Pinckney, and there was no testimony to support the Portage part of the government's claim. (Finding 137)

The government also claims extra MACTEC inspection services pursuant to a T&M contract modification No. 6 in the not-to-exceed amount of $156,345, effective 25 September 2007, which extended MACTEC's (Parsons'/PSC's) Pinckney services from 30 September to 31 December 2007. Costs are claimed from 30 September through 14 December 2007 in the full not-to-exceed $156,345 amount of the modification. The government did not provide any T&M figures or provide any invoices and no one from MACTEC testified. AFCEE did not specify the number of inspectors involved and it is not clear what amount the government paid MACTEC.

The government has not established damages with respect to the AFCEE portion of its claim with reasonable certainty and we deny it. (Finding 137)

In sum, we deny the government's claim.

DECISION

ASBCA No. 56857, appellant's appeal from the government's denial of its claims, is sustained to the extent stated and otherwise denied. ASBCA No. 57386 is denied to the extent stated and the remaining portion is dismissed as duplicative. ASBCA Nos. 56950 and 56962, appellant's appeals from the government's claim, are sustained.

Dated: 23 April 2012

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56857, 56950, 56962, 57386, Appeals of Versar, Inc., rendered in conformance with the Board's Charter.

Dated:

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