ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Strand Hunt Construction, Inc. | ) | ASBCA No. 55905 |
| | ) | |
| Under Contract No. W911KB-04-C-0008 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE THOMAS

The U.S. Army Corps of Engineers (the Corps or government) awarded Strand Hunt Construction, Inc. (SHC) a contract to design and build a Joint Security Forces Complex (JSFC) for the Air Force at Eielson Air Force Base (AFB), Alaska. SHC claims that the government delayed contract completion by 105 days and is responsible for delay costs of $491,722. It also claims that the government erroneously imposed liquidated damages since any delay was either concurrent or government caused. (R4, tab 10) The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, is applicable. A hearing was held in Seattle, Washington. Only entitlement is before us for decision (tr. 1/183).

INTRODUCTION

The Corps awarded the captioned contract on 27 February 2004. It took beneficial occupancy of the JSFC on 20 January 2006. The Corps' position at that time was that the contract completion date was 31 August 2005, based on a contract completion date of 1 July 2005 at time of award plus 60 days of time extensions granted by modification.[1] It asserted a right to liquidated damages on that basis. SHC's position, set forth in its 14 February 2006 request for equitable adjustment (REA) and subsequent claim, was that the contract completion date was 23 November 2005, based on a contract completion date of 23 September at time of award plus the 60 days reflected in modifications.

[1] Sixty days would be 30 August 2005. The parties generally refer, however, to a completion date of 31 August 2005 and we use that date for convenience.

Furthermore, it contended that there was a concurrent delay period from 1 September 2005 through 7 October 2005, and that it would have achieved substantial completion on 7 October 2005 but for Corps delays. It claimed that it was entitled to compensatory damages of $491,722 for the 105-day period from 7 October 2005 to 20 January 2006.

Prior to the hearing in the appeal, the parties entered into stipulations which resolved some of the issues. The parties continued to disagree about whether the contractual completion date at award was 1 July 2005 or 23 September 2005. They stipulated, however, that the government "was concurrently responsible for delays relating to training extended through September 30, 2005" and for delays in the parking bay resulting from a stop work order (which we find *infra* was lifted on or about 19 September 2005). They also stipulated that "[t]he substantial completion date was November 1, 2005, and the liquidated damages and Government provided utility costs withheld from the contractor for the period of November 1, 2005 through January 20, 2006 should be and were partially released to the contractor." They also stipulated that the 60 days of time extensions granted by the modifications "should be in addition to whatever the contract completion date is determined to be," whether 1 July 2005 or 23 September 2005 or some other date. (Stipulations dated 2 February 2009) We refer only to liquidated damages rather than liquidated damages and utility costs hereafter for simplicity.

Remaining for decision, therefore, is (1) what the original contract completion date was, (2) if the original contract completion date was 1 July 2005, whether the government is entitled to withhold liquidated damages for the period from 30 September 2005 to 1 November 2005, (3) whether appellant has established government-responsible delay such that but for the delay it would have substantially completed the work on 7 October 2005 rather than 1 November 2005, and (4) whether appellant has established further government-responsible delay such that but for the delay it would have completed the remaining work as of 1 November 2005 (other than landscaping and other warm weather work) rather than on 20 January 2006. We do not agree with appellant's proffered interpretation that by stipulating to a substantial completion date of 1 November 2005, the government recognized that the days of delay from 1 November 2005 to 20 January 2006 were compensable (app. br. at 5). On delay, appellant points, in addition to the training and parking bay delays referred to in the stipulation, to alleged delays relating to the excavation permit, steam heat, the redesign of a manhole, the use of muriatic acid, and pre-final and final inspection (app. br. at 31-58).

## FINDINGS OF FACT

### Contract Provisions in General

1. On 27 February 2004, the Corps, Alaska District awarded firm fixed-price Contract No. W911KB-04-C-0008 to SHC for design and build of the JSFC at Eielson Air Force Base, Alaska. The amount of the contract was $14,139,500. The contract included Federal Acquisition Regulation (FAR) 52.211-12, LIQUIDATED DAMAGES—CONSTRUCTION (SEP 2000), providing for liquidated damages of $1,167 for each calendar day of delay; FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.242-14, SUSPENSION OF WORK (APR 1984); FAR 52.243-4, CHANGES (AUG 1987); FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996); and FAR 52.246-21, WARRANTY OF CONSTRUCTION (MAR 1994), which provides for a one-year warranty that work performed under the 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. The Suspension of Work clause provides:

> (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 Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. 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, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(R4, tabs 92, 96, 98, 106, 108, 109)

### The Contract Completion Date at Time of Award

2. Under date of November, 2003, the Corps issued the solicitation which led to the award of the contract. Section 00800, clause SCR-1, Commencement, Prosecution,

and Completion of Work, required that the contractor complete the work not later than 630 days after receipt of the Notice to Proceed (NTP) (R4, tab 95).

3. SHC submitted its proposal in response to the solicitation on 23 January 2004. Its Technical Proposal, Volume II, Tab C stated that SHC was "providing the government with a 'Baseline' Schedule, developed to meet all the requirements of this RFP." (R4, tab 94 at 381) SHC described the Baseline Schedule as follows:

> Please note that as a betterment to the government, our goal is to finish the project by July 1, 2005, approximately 6 months early. This will allow the user to move in to the facility in the summer.... Strand Hunt Construction hereby acknowledges that a total contract duration of 570 calendar days for the project schedule will become contractually binding as it is within a number of days stated in SCR-1. However, our goal is to complete the work by July 1, 2005.

(R4, tab 94 at 383-84)

4. SHC described the various phases of the work including the Building Construction Phase and Close Out & Commissioning. SHC stated that "Due to our accelerated schedule, standardization of building components and early procurement, SHC is able to complete the building construction by May 27, 2005." It continued that "Government inspection and commissioning and training will occur in June 2005 as well as punch out. Building turnover occurs on July 1, 2005 – 6 months ahead of schedule." (R4, tab 94 at 384-85)

5. The proposal included a Primavera schedule showing a "Start Date" of 1 March 2004 ("PROJECT AWARD") and "Finish Date" of 1 July 2005 ("PROJECT COMPLETION" and "TURNOVER PROJECT"). The schedule showed an early finish date for "CONSTRUCTION COMPLETE" of 3 June 2005. (R4, tab 94 at 377)

6. As we found above, the Corps accepted SHC's proposal on 27 February 2004. The third page of the award document was a sheet entitled "Changes/Alterations." It stated:

> The following items are hereby **deleted**:
>
> - Section 00800, page 1: SCR-1, Commencement, Prosecution, and Completion of Work

The following items are hereby **accepted and becomes binding**:

- Contractor's proposed schedule as depicted on his technical proposal, Volume II, Tab C, Proposed Schedule

(R4, tab 92 at 366)

7. The proposed schedule referred to in the award document was the baseline schedule with a goal of 1 July 2005 and a contractually binding duration of 570 days from receipt of NTP. In essence, as a result of the proposal, the period of performance was reduced from 630 days to 570 days from receipt of NTP.

The Parties' Communications on the Contract Completion Date from NTP Forward

8. On 2 March 2004, the contracting officer (CO) issued the NTP and Mr. Rollie Hunt, SRC's president acknowledged receipt. The NTP stated "[i]n accordance with your offer, the entire work is to be complete and ready for use by July 1, 2005." Based on the 2 March 2004 date, a contract duration of 570 days results in a contract completion date of 23 September 2005. Mr. Hunt did not take exception to the date of 1 July 2005 in the NTP at the time and, indeed, did not notify the government that SHC took exception to the 1 July 2005 date until 5 April 2005, at a point in time when SHC was falling behind its planned schedule. (R4, tabs 90, 79) In the next few findings, we note some of the instances in which SHC apparently accepted the 1 July 2005 date or used it for scheduling.

9. On 19 April 2004, the Corps held a pre-construction conference. On 10 June 2004, the Corps distributed the minutes of the conference. The minutes stated that the "Contract Completion date" was 1 July 2005. On 18 June 2004, SHC signed the minutes, without taking any exception. (Supp. R4, tab 144 at 13, 14, 40)

10. In July 2004, SHC submitted its Baseline Schedule for the construction, dated 26 July 2004, which the Corps approved (R4, tab 84; *see* gov't br. at 9, ¶ 16). The Baseline Schedule showed "Finish Date" of 1 July 2005 ("PROJECT COMPLETION," "TURNOVER PROJECT," and "CONSTRUCTION COMPLETE") (R4, tab 84 at 339).

11. On 7 September 2004, Mr. Philip T. A. Dearing, SHC's senior project manager, signed Modification No. P00007 effective 14 September 2004. This modification extended the contract completion date by 7 days because of forest fires. The modification stated: "The contract completion date has been changed from

07/01/2005 to 07/08/2005." (R4, tab 128; app. supp. R4, tab 1254, ex. 301, tab D at 3027) The modification did not change the contract price.

12. On 8 November 2004, the Corps sent SHC proposed Modification No. P00010 which granted a 4-day extension because of over-excavation of building pad. The proposed modification stated that "The contract completion date has been changed from 03/02/2004 to 03/06/2004." Mr. Dearing returned the proposed modification unsigned on 23 November 2004, stating: "Please note that the contract time completion date is wrong and it should be July 8, 2005 to July 12, 2005." (Supp. R4, tab 145, *see also* supp. R4, tab 144 at 83, Mr. Dearing's 23 September 2004 letter on the same subject referring to a July 2005 completion date)

13. On 20 December 2004 and 7 January 2005 respectively, Mr. Dearing and the CO signed the final of Modification No. P00010. It increased the contract price by $52,000 for over excavation of building pad and changed the contract completion date from 8 July 2005 to 12 July 2005. (App. supp. R4, tab 1254, ex. 301, tab B at 3023-24)

14. Mr. Dearing testified that at the time he signed these modifications SHC was thinking that 1 July 2005 was the initial contract completion date. He also testified, and we find, that there was no consideration for changing the goal of 1 July 2005 to a contractually required date. (Tr. 2/32-33)

15. On 5 April 2005, Mr. Hunt wrote the administrative contracting officer (ACO), requesting that the Corps revise the contract completion date to 630 calendar days from NTP (plus the 11 days of time extensions), "as this is what the RFP calls for," or, "if the Government accepted our accelerated schedule submitted as an option in our original RFP response," to 570 calendar days from NTP plus the 11 days. Mr. Hunt quoted the language in the proposal in which SHC stated that it acknowledged "that a total contract duration of 570 calendar days for the project will become contractually binding as it is within a number of days stated in SCR-1. However, our goal is to complete the work by July 1, 2005." (R4, tab 79)

16. What triggered the 5 April 2005 letter was the government's threat at some point earlier, perhaps as early as February 2005, to withhold liquidated damages if SHC did not meet the 1 July 2005 date as extended. As Mr. Hunt recounted:

> [I] can recall, Philip [Dearing] and I sitting here at a conference table in Seattle, scratching our heads trying to figure out we knew we had a plan where we had...enough time to do this project, how can we be in a position where the government is now threatening liquidated damages on July— if we don't complete by July 1st plus some modifcations....

> It's at that point that we went back and looked at our original proposal, saw that it was the 570 days, did the math and for the first time realized that didn't take it to July 1st, that took it to September 23rd and that was the correct one.

(Tr. 1/28) Mr. Hunt wrote his letter, "and we honestly thought at that point, the government was going to simply agree, oh yes, I can see the mistake" (tr. 1/29).

Additional Modifications Extending the Contract Completion Date

17. As we found above, Modification Nos. P00007 and P00010 extended the 1 July 2005 date to 12 July 2005. Before considering appellant's delay allegations, we make note here of the other modifications extending the contract completion date (as calculated by the government). On 20 July 2005, the ACO issued unilateral Modification No. P00016 extending the contract completion date by 19 days from 12 July to 1 August 2005 because of hurricane delay. (The extension should have been to 31 July 2005.) Also on 20 July 2005, the ACO issued unilateral Modification No. P00018 extending the contract completion date by 30 days from 1 August to 31 August 2005. This modification directed SHC to design, provide and install a larger manhole in lieu of a manhole it had installed. Neither of these modifications changed the contract price. (R4, tabs 126, 129)

Alleged Delays: Excavation Permit

18. Appellant argues that it was delayed 8 days because the government did not approve its excavation permit until 8 June 2004. It cites its expert's report dated 28 November 2008 (app. supp. R4, tab 1255). The contemporaneous evidence does not, however, support this argument. (App. br. at 31)

19. According to Mr. Dearing's 23 September 2004 letter to the ACO, which ultimately led to Modification No. P00010, *supra*, SHC broke ground and began clearing and grubbing on 24 May 2004. It excavated "unsuitables" from 28 May through 11 June 2004, which "was in line with our original anticipated duration." There was, however, "over excavation," which, in turn, extended the time for fill. The fill activity took 17 work days (from 11 June to 30 June 2004) when it should have taken 11 work days, according to Mr. Dearing. SHC proposed to settle this delay for 4 calendar days, which was accepted by the government in Modification No. P00010. (Supp. R4, tab 144 at 82-84) We conclude that in view of the fact that appellant broke ground on 24 May 2004 and continued thereafter until 30 June 2004 working on clearing and grubbing, excavating and fill activities, there was no 8-day delay because of issuance of the excavation permit on 8 June 2004.

Alleged Delays: Steam Heat

20. Eielson AFB has steam heat throughout the base. The contract required SHC to extend the steam heat from the main utilidor to the JSFC. It planned to construct a utilidor for that purpose. A utilidor is a tunnel or corridor used to carry utility lines such as electricity and water. In this case it was "a big concrete box and the utilities are running inside." (Tr. 1/65-66)

21. SHC planned to complete the utilidor in time to provide temporary heat during the winter of 2004/2005. It argues that it encountered an "unforeseen and concealed condition of [a] shallow hazardous contaminated water table, coupled with a [government] change in the mechanical system," which, together, delayed completion of the utilidor and hence the project for 8 calendar days. (App. br. at 32; *see also* tr. 1/65, 67)

22. SHC redesigned the utilidor in the summer of 2004 because of hazardous materials. The redesign had no effect on the critical path. (App. supp. R4, tab 1255 at 3720)

23. On 6 August 2004, SHC requested permission to proceed with construction of the utilidor (app. supp. R4, tab 551).

24. On 18 August 2004, SHC got clearance to proceed with the concrete structure, but not the mechanical utilities because SHC had not yet received 100% mechanical design approval (tr. 1/65-66).

25. SHC encountered unsuitable soils under the utilidor. On 14 and 24 September 2004 respectively, Mr. Dearing and the ACO signed Modification No. P00009 increasing the contract price for excavating unsuitable soils below the new utilidor. Mr. Dearing added a note that SHC reserves the right to review the schedule for any possible impacts. Appellant's expert analyzed this activity, and concluded that "this modification had no effect on critical path of this project." (App. supp. R4, tabs 575, 1255 at 3723)

26. By 30 August 2004, SHC was placing concrete for the utilidor (supp. R4, tab 132, contractor QC report).

27. On 25 October 2004, the Corps cleared the remainder of the project for construction except for the fire sprinkler system. At that point SHC could proceed with the mechanical utilities. (App. supp. R4, tab 589; tr. 1/66)

28. In the first half of November, 2004 SHC attempted to join the new utilidor corridor from the JSFC project to the main utilidor. SHC damaged one of the steam

anchors on the 12-inch steam main, such that the steam main was pulling loose from the utilidor wall. This created a very dangerous situation. (Tr. 3/291-93)

29. The Base was not willing to let SHC work on the steam line or perform a shut down until the anchor was repaired. The power plant could not simply shut down the main utilidor without shutting down heat for numerous buildings connected to the steam line. (Tr. 3/291-92)

30. SHC completed the steam anchor repair on 23 December 2004. At that point, SHC still did not have the necessary piping system for temporary heat in place. (Tr. 3/293-94)

31. SHC completed the utilidor in mid-February 2005. Appellant's expert considered that the lack of temporary heat from the new utilidor appeared to have been a significant factor in SHC's inability to maintain progress on the critical path from September 2004 to February 2005. (App. supp. R4, tab 1255 at 3722-29) He noted that "The Contractor asserts that this delay is excusable because it arises from changes to the utilidor for which the Government is responsible" (e.g., *id.* at 3724). He testified that he did not have enough time with the detail of the project to reach his own conclusion about causation (tr. 3/31).

32. Based on the foregoing, appellant has not proved that the government was responsible for an 8-day delay to the critical path related to the utilidor. Appellant has not provided the detail necessary to establish such a period. Clearly SHC's damage to the anchor of the 12-inch steam main contributed significantly to any delay, and SHC has not explained why it did not proceed promptly with the mechanical work after 25 October 2004 (assuming that it could have done so given the damage to the anchor, which was its responsibility).

Alleged Delays: Redesign of the Manhole

33. Unilateral Modification No. P00018 directed SHC to design, provide and install a larger manhole in lieu of a manhole it had installed and granted SHC a 30-day extension of the contract completion date without any change in price (finding 17).

34. The manhole in question tied the new utilidor to the main utilidor. After the manhole was constructed, and the new utilidor was up and running (mid-February 2005), the Base determined that the manhole was too small. As recounted by Mr. Hunt:

> There was quite a bit of time that went back and forth where they [the Base] were alleging that it was not for [in accordance with] the RFP and we had to increase the size at

> our cost. They eventually gave us a change for it, but they only gave us time, but we had to tear out those walls, increase the size of the manhole, rebuild it basically, to a larger size.

(Tr. 1/69)

35. Other than this generalized testimony, appellant did not explain how it came about that the manhole was the wrong size.

36. On this record, appellant has not proved that redesign of the manhole was the government's responsibility as opposed to its responsibility, as the designer.

Alleged Delays: Muriatic Acid

37. There were three delays in late August and September 2005. First, there was a government delay to training extending through 30 September 2005, evidently because of hunting season. Second, on 25 August 2005, the government issued a stop work order relating to the use of muriatic acid which was lifted on 27 September 2005. Third, on 31 August 2005, the government issued a stop work order relating to the Neogard epoxy coating in the parking bay which was lifted on or about 19 September 2005. The government stipulated that it was responsible for the training delay and the parking bay delay, leaving only the muriatic acid stop work order in question. For purposes of release of liquidated damages, it does not matter what we decide on the muriatic acid stop work order because the government has already stipulated that it was responsible for delay through 30 September 2005. It has not stipulated, however, that it was responsible for the muriatic acid stop work order delay. Since appellant claims compensable delay to substantial completion, we address that delay here.

38. Muriatic acid is a cleaning product used to prepare concrete floors for an epoxy coating (tr. 1/71). This process is sometimes referred to in the record as acid etching.

39. The JSFC had three rooms which were to receive Neogard epoxy, in the following order: the ANG (168th Air National Guard) mobility bay (room 59), the AD (354th Active Duty) parking bay (room 30), and the AD mobility bay (room 13). The two mobility bays had evaporative dry trench drains to catch any run-off. The parking bay had a trench drain to an oil/water separator. The separator connected through a sewer line to the mechanical room (room 73) where there was a lift station (not yet functional at the relevant time) and a connection to the Base sewer system. (Tr. 1/71-72; supp. R4, tab 136, architectural floor plans, tab 144 at 14)

40. Appellant's subcontractor Dynamic Painting, Inc. (Dynamic) was responsible for preparing the floors with muriatic acid and applying the epoxy. Dynamic prepared the floor in the first room, the ANG mobility room, without incident. It used a 10% to 15% solution in that room. (Tr. 1/71, 73)

41. On 22 August 2005, Dynamic informed SHC that it was going to use full strength muriatic acid in the parking bay because of the conditions there. SHC forwarded Dynamic's letter to the ACO. (Tr. 1/73-74)

42. On Wednesday 24 August 2005, Dynamic prepared the parking bay floor with full strength muriatic acid. Dynamic attempted to protect the oil/water separator by placing visqueen over the top of it and duct tape around the perimeter to seal it off. This was ineffective, and the acid drained into the oil/water separator and thence to the lift station in the mechanical room. (Tr. 1/74)

43. Mr. Hunt was on site that day. Denali Mechanical, Inc. was the subcontractor for the mechanical work. According to Mr. Hunt, a Denali Mechanical employee called SHC. He was working in the mechanical room where the lift station was (across the building from the parking bay) and he smelled the acid and reported it to SHC. Mr. Hunt and others went over, and "you could smell that it was the acid smell." SHC called Shannon & Wilson, SHC's local environmental expert, and they were on site within two hours of this occurrence. Ultimately they recommended neutralizing the acid with baking powder. (Tr. 1/74-76, 82)

44. Mr. Michael D. Volsky, the government quality assurance representative (QAR), was also on site on 24 August 2005. After lunch he walked over to the parking bay "and immediately got hit in the face with...the acid vapors, from what they were doing in there" (tr. 3/203). The two or three people working in the bay were not wearing adequate protective gear and he directed them to stop work and get out of there, which, after a little prodding, they did. Mr. Volsky called the Eielson spill response people, and Ms. Nancy Powley came down. She instructed SHC's superintendent (Mr. Timothy Jauhola) and Contractor Quality Control (CQC) manager (Mr. Doug Hamilton) not to do anything else, "Don't continue to work. Don't clean it up. Stop what you're doing." Mr. Volsky repeated the instruction himself. (Tr. 3/203-07)

45. That same afternoon, Mr. Volsky got a phone call from one of Denali Mechanical's employees, who asked him to go over to the mechanical room. According to Mr. Volsky, the employee locked the door and told him that someone from SHC (Mr. Volsky did not know who), had asked him to start the lift station so that the acid would be pumped into the Base sewer system. The employee refused to do so and locked

the station so that no one else could turn it on. (Tr. 3/207-08) Neither party called the mechanical employee as a witness.

46. On 25 August 2005, the ACO directed SHC in writing "to cease your acid-etching operations immediately. Any costs associated with the treatment and disposal of the waste stream your operations have caused will be solely your responsibility." (App. supp. R4, tab 735)

47. SHC replied the same afternoon: "As this is a critical path activity and floor prep acid wash in the AD Mobility Bay was to start today, we now reserve our rights to claim for additional costs and time from this stop work notice" (app. supp. R4, tab 735).

48. On 25 and 26 August 2005, SHC pumped out the lift station and the oil/water separator and stored the contents in 275-gallon containers outside the mechanical room and parking bay (app. supp. R4, tab 737).

49. On 26 August 2005, at 6:52 pm, the ACO directed SHC: "DO NOT remove any material from the jobsite and DO NOT remove any of the material from the oil water separator" (app. supp. R4, tab 745).

50. On 31 August 2005, the ACO issued a stop work order against proceeding with installation of the Neogard epoxy in the parking bay (R4, tab 60). This is the stop work order which the government has now stipulated caused government-responsible delay. The stop work order was lifted on or about 19 September 2005 (app. supp. R4, tab 781).

51. It was in this same time period, when the government was withholding $118,226 for SHC "Falling behind schedule," that the ACO informed SHC's president that: "I don't give a damn about your schedule" (R4, tab 55 at 272; app. supp. R4, tab 1433).

52. Since delay to the parking bay itself is no longer an issue as a result of the government's stipulation, we turn to the delay to work on the third room, the AD mobility room (room 13). Dynamic planned to use a 10% to 15% muriatic acid solution in that room, as it had in the ANG mobility bay, and the drain was an evaporative dry trench which did not connect to the sewer system (tr. 1/77). Mr. Hunt endeavored to find out what SHC needed to do in order for the ACO to lift the stop work order as to that room. Based on a conversation with the ACO, he understood that SHC would need a letter confirming that the epoxy system would be warranted, that MSDS (Material Safety Data Sheets) would be on site, a Job Hazard Analysis regarding use of acid floor preparation, and the type of personal protection equipment. On 31 August 2005, SHC provided all of those items and confirmed that a preparatory meeting would be held prior

to beginning work on room 13. It asked that the ACO review the information promptly since the Corps' direction to stop using the acid etching was delaying project completion. (Tr. 1/78; R4, tabs 59, 63)

53. On 12 September 2005, the ACO sent SHC approval to proceed with room 13 subject to an extensive single spaced page and a half of additional requirements (R4, tab 49). The government has not adequately explained why these additional requirements, which may have been perfectly appropriate in other contexts, were needed for acid etching with a 10% to 15% solution in the AD mobility room when there was no problem with Dynamic's work in the ANG mobility room and there was no connection to the sewer system (*see* gov't br. at 35).

54. On 21 September 2005, SHC provided the ACO with the additional information, stating that it intended to begin work immediately and requesting a written release of the stop work order for the muriatic acid floor preparation. On 23 September 2005, the government raised further questions, which SHC responded to on 26 September 2005. (R4, tab 45; app. supp. R4, tab 784)

55. On 27 September 2005, the ACO verbally lifted the muriatic acid stop work order (app. supp. R4, tab 788).

56. We conclude that it was reasonable for the Corps to issue a stop work order with respect to the muriatic acid on 25 August 2005 when the problem first arose, pending consultation with the Base environmental office and obtaining assurances from SHC. It was unreasonable for the Corps to continue that stop work order in effect as it related to the AD mobility bay once the Corps had time to consider the difference in the work and the locale from the parking bay, and once it had SHC's 31 August 2005 letter providing the assurances which the ACO originally requested. The stop work order should have been lifted no later than 1 September 2005, rather than 27 September 2005.

57. Appellant's expert analyzed the delay relating to the muriatic acid stop work order and concluded that there was a 19 calendar day delay (16 workdays) to the critical path.[2] Mr. Hunt relied on that analysis in his testimony. We conclude that there was a 19 calendar day delay to the critical path on the project as a result of the stop work order. (App. supp. R4, tab 1255 at 3734; tr. 1/85)

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[2] The expert did not identify any other government-caused delay to the critical path in September 2005 (app. supp. R4, tab 1255 at 3734).

Alleged Delays: Pre-Final and Final Acceptance Inspections

58. The contract required three completion inspections: punch-out, pre-final, and final acceptance inspection (R4, tab 122 at 474-75).

59. Appellant argues:

> [L]ate and multiple inspections caused SHC's onsite staff and home office staff to continue working on the project 105 calendar days (October 7, 2005 – January 20, 2006) beyond what would otherwise be required. SHC remained on site after January 20, 2006 and slowly demobilized. This same activity and staff would have begun this same demobilization beginning October 8, 2005, but for the government's inadequate and multiple inspections.

(App. br. at 51)

60. Mr. Hunt testified that SHC calculated that there was a delay from 7 October to 31 October 2005 (24 days) because of the alleged 8-day delay to the excavation permit and the 16-day delay from the muriatic acid stop work order (tr. 1/140). This mixes workdays and calendar days. In any event, appellant did not prove there was an 8-day delay related to the excavation permit. It did prove there was a 19-calendar day delay attributable to the muriatic acid stop work order as of 27 September 2005.

61. In October 2005, SHC was completing the work and addressing pre-final inspection punchlist items. Its expert's report states that there were no workdays in October of either government-caused or contractor-caused gain or lost time on the project (app. supp. R4, tab 1255 at 3735). Appellant also has not proved non-concurrent delay for the period from 27 September to 30 September 2005. That leaves for consideration the period from 1 November 2005 to 20 January 2006. Appellant's expert report ends as of 31 October 2005 and therefore is not of assistance in analyzing this later period (*id.* at 3735-36).

62. On 18 October 2005, SHC gave the Corps the required 14-day notice for final inspection on 1 November 2005 (R4, tab 35).

63. On Friday 28 October 2005, SHC and the ACO agreed upon the requirements for final inspection and beneficial occupancy. SHC sent an email in which it acknowledged that valves and the security system needed to be installed before final inspection. SHC stated that its understanding was that beneficial occupancy would come with final inspection (the same day) once these items were completed and SHC would

continue to push through the pre-final punchlist. The ACO confirmed that the email "sums up our conversation; the security system needs to be operational before the user can move into the facility. As heat will be taken down in the building in order to install the required steel valves, they need to be installed prior to moving the user in as well." (R4, tab 32)

64. With respect to the valves, because of chemicals in the steam heat condensate, the Base requires steel rather than brass valves in the mechanical systems (tr. 3/91). As part of the pre-final punchlist process, Denali Mechanical installed steel valves on the steam and condensate piping in September 2005. Later it was interpreted that steel valves were required for the wye strainers. Denali Mechanical installed those steel valves on 31 October 2005. Heat was taken down for approximately one hour, with no noticeable change in the temperature in the building. The remaining mechanical punchlist items were minor. (App. supp. R4, tab 845)

65. SHC completed the work on the security system as outlined in an exchange between the parties in letters of 3 October and 21 October 2005. It was not possible to test the security system because the user (Air Force) had more work to do when they moved in. (Supp. R4, tab 144 at 140; app. supp. R4, tabs 828, 843 at 1334; tr. 4/46-48)

66. The final inspection was held on 1 November 2005. The government did not take beneficial occupancy. There was work that was incomplete. There was one area which was cordoned off because SHC was completing floor tile, cleaning and waxing the floor, and painting. SHC had not completed the pre-final punchlist items. There were still tools and debris in some areas, and the building had not been finally cleaned. The ACO estimated that there were approximately 150 deficiencies, which he did not consider a reasonable amount. Evidently the inspection party, which included an Air Force colonel, was particularly upset that SHC had not removed snow and ice around a side entrance adjacent to the mechanical room. (Tr. 3/215, 254-55, 4/14-16)

67. On 8 November 2005, the ACO sent SHC a "master deficiency list" of 208 items (app. supp. R4, tab 1434). Some of the items were carried over from prior pre-final inspection punchlists. The ACO stated that the items highlighted in red required correction before the user could occupy the facility. There were 89 red items. Of the red items, 24 were the failure of various rooms to have 2-voice and 2-data per outlet vice 1-voice and 1-data (*id.* at 4735-36).[3] One item stated that many brass valves installed on the steam and condensate system had been replaced, but that there were still brass valves

[3] SHC considered these items a change. The government eventually dropped them from the punchlist, reserving the right to seek a credit. (App. supp. R4, tab 971 at 1852)

installed for use on pressure gauges and the vent outlet on the moisture separator.[4] One item stated that a security camera must be relocated.[5] The remaining 63 red items included such items as "significant amount of ice buildup" outside the mechanical room due to steam venting, a door which rubbed against the jam, the user's desire to witness the functional operation of the air conditioning unit before building occupancy (SHC to coordinate), a loose floor tile near a window, and burnt-out light bulbs. (*Id.* at 4724 (items 2, 3, 13), at 4725 (item 7), at 4726 (item 3), at 4730 (room 10, item 3), at 4734 (item 11)) Clearly the government had made no serious effort to determine whether the particular items actually precluded beneficial occupancy.

68. On 16 November 2005, SHC responded that none of the items on the master deficiency list affected beneficial occupancy and that, therefore, it continued to believe that the building was substantially complete. As we found above, the Corps has now stipulated that SHC was correct, and that the building was substantially complete at the time of the final inspection. In its 16 November letter, SHC provided a database list sorted in the same order as the master deficiency list with the status and schedule for completion of each item. Generally, the items had either already been completed as of 16 November 2005, were scheduled for completion in November 2005, or were exterior items (warm weather items) scheduled for completion by 1 July 2006 (none of these items was a "red" item). That left 17 items including 8 red items for completion on dates from 2 December to 16 December 2005. (App. supp. R4, tab 911)

69. SHC considered that some of the items on the master deficiency list were not required by the contract and had questions about others. Over the period from 7 November to 18 November 2005, it sent the ACO serial letters H-347 to H-391 explaining its position or asking questions. Some of these letters referred to pre-final punchlist items which had been carried over to the master deficiency list. (App. supp. R4, tabs 854-926, *passim*)

70. On 23 November 2005, the ACO informed SHC that "I have considered the information provided in your serial letters numbered (currently H-347 through H-391) and disagree with your position." The ACO's response was not helpful in moving the punchlist process forward. The ACO added two items to the red list: checking doors for

---

[4] These valves were on order. The government has not established that steel valves at those locations were required for beneficial occupancy given that taking down the heat for a brief period of time did not affect the temperature in the building. (App. supp. R4, tab 911 at 1574, item 2)

[5] The security camera was installed as confirmed in the 95% design review meeting. SHC and the ACO eventually agreed that SHC would move the camera in return for the government accepting a shutter cover "as is." (App. supp. R4, tab 1120 at 2404-05, item 31, #159)

latching and plumbness/reveal and repairing as necessary and correcting walls in all rooms to provide required sound transmission coefficient (STC) ratings. These items were added to the master deficiency list as items 209 and 210. The ACO requested a detailed schedule with milestones for completing the work within 60 days and stated that if SHC failed to provide the schedule, the ACO "will recommend to the Contracting Officer that default procedures" be considered. The ACO also reminded SHC that liquidated damages continued to accrue. (R4, tab 24, *see* tab 22 at 153)

71. On 2 December 2005, under date of 28 November 2005, the ACO provided responses to some of SHC's pending serial letters. Contrary to the statement in the 23 November 2005 letter, the ACO now found some of SHC's responses acceptable. (App. supp. R4, tab 969)

72. On 5 December 2005, there was a meeting with the CO in Anchorage. The two ACOs who had been assigned to the contract and Mr. Hunt and Mr. Dearing for SHC among others were present. The government was holding $867,000 for alleged deficiencies, including $300,000 for the STC issue, in addition to liquidated damages, and SHC was more than anxious to obtain the release of some of those funds. Prior to the meeting, SHC provided three "packages" on the status of the 210 items on the master deficiency list. Package A consisted of items that had been completed and signed off or were awaiting Corps sign off. Package B consisted of 35 items in progress and 10 items that required warm weather prior to completion. Package C consisted of 44 items that needed further discussion and review. SHC contended that some of these items, such as the STC, were not deficiencies at all, rather, the government was making changes. It contended that it needed guidance for others. Package C was to be used as the agenda for the meeting. (R4, tab 22 at 153; app. supp. R4, tabs 927, 963-65, 967, 973; tr. 1/57, 3/260)

73. At the 5 December 2005 meeting, the CO established a general deadline of 9 December 2005 for the government personnel to respond to most of SHC's contentions or requests for guidance. The government was to re-evaluate the STC issue, among others, and respond to SHC by 9 December 2005. Some of the items were signed off on at the meeting. For example, the government agreed that another one of the red items, manual chain for overhead doors, was not a contract requirement. The government added ten new items. The meeting established a completion date of 23 January 2006 for all work other than warm weather work. (App. supp. R4, tabs 972, 973, tab 974 at 1874, item 164, at 1875, item 210, and *passim*)

74. Both the government and SHC worked hard to clear various items the week of 5 December 2005. The government did not, however, meet most of the 9 December 2005 deadlines. On 8 December 2005, the ACO stated that they would need until 15 December 2005 for 16 items. As of 15 December 2005, SHC was still waiting for the

results of the government review on some of these items. Had the Corps promptly investigated questions previously raised in SHC's letters, emails, and packages on these 16 items, it would not have been necessary to take more time in December, and, finally in January. (App. supp. R4, tab 998; R4, tab 20)

75. No later than 22 December 2005, SHC had completed all required items except a few items which were in progress or for which it was waiting for parts or warm weather. The government was still reviewing whether other items such as STC were required and added new items. (App. supp. R4, tab 1120).

76. On 23 December 2005, the CO advised that SHC must request a new final inspection with 14-days advance notice before the government would take beneficial occupancy. On 24 December 2005, SHC provided that notice under protest, specifying a date of 9 January 2006. (R4, tabs 16, 17)

77. On 5 January 2006, the CO confirmed that SHC had constructed the corridor walls in accordance with the required STC. She concluded that any changes required will be submitted as a user-requested change and the contract revised accordingly. (App. supp. R4, tab 1254-A, ex. 301, tab 22)

78. Apparently the government thought better of a new final inspection on 9 January 2006, although a teleconference was held on that date. There were four pending construction questions: a dripping relief valve in the mechanical room; a request just made by the government to change the lock cylinders in room 57; testing and balancing, where SHC had been waiting for a response to its letter for over 4 weeks; and minor drywall cracks which were typical of new construction. In addition, further work was required on Operation & Maintenance (O&M) information. The government still declined to take beneficial occupancy. (R4, tab 14)

79. On 20 January 2006, the CO confirmed beneficial occupancy (R4, tab 12).

80. Mr. Hunt agreed that the punchlist corrections SHC made were required by the contract. SHC's complaint is about the timing of the listing of the deficiencies. According to Mr. Hunt, the various deficiencies should have been raised by the government prior to final inspection. (Tr. 1/151, *see also* tr. 4/36)

81. We conclude that there was unreasonable delay during the period from 1 November 2005 to 20 January 2006. Prior to the final inspection, the ACO agreed that beneficial occupancy would come with final inspection (the same day) once the valves and security system were completed and SHC would continue to push through the pre-final punchlist. Even though the valves were completed except for those on pressure gauges and the moisture separator (which were on order and which the government has

not established were required for beneficial occupancy), and the security system was completed, the ACO did not take beneficial occupancy. Rather, one week later he belatedly came up with a list of 208 deficiencies including 89 items which supposedly precluded occupancy. The government eventually dropped many of the items. Meanwhile, the government added to the list from time to time. The government was not prompt about responding to SHC's questions about the list. Indeed, it took the government until 5 January 2006 to determine that the STC was not required, even though it had held $300,000 from the contractor because of the alleged deficiency. (Findings 63-65, 67, 69-71, 73-75, 77, 78) It is not possible to have complete precision in a delay case such as this, and balancing is called for. We conclude on that basis that but for the government's administrative delays identified above, SHC would have been able to complete the punchlist work other than a few minor items and the warm weather items by no later than 2 December 2005. We find that SHC has proven a 49-day delay to completion of the work (2 December 2005 to 20 January 2006).

Claim, Contracting Officer's Final Decision, and Appeal

82. On 14 February 2006, SHC submitted its REA for a delay of 105 calendar days from 7 October 2005 to 20 January 2006 and delay costs in the amount of $491,722. It also demanded release of liquidated damages. The REA was premised on an original contract completion date of 1 July 2005. Damages consisted of daily rates for the field office and home office for 105 days, proposal preparation cost, settlement travel expenses, profit and bond for a total of $491,722. The REA stated that it superseded a prior request for acceleration costs submitted in August 2005 and, accordingly, acceleration issues are not before us. (R4, tab 10; app. supp. R4, tab 1254-A, ex. 301, tab 10) On 30 June 2006, SHC converted the REA to a claim and provided a certification in accordance with the CDA (R4, tab 6).

83. On 30 April 2007, the CO issued her final decision on the claim. She determined that the 1 July 2005 completion date was only a goal and that the 570 days was contractually binding. She directed that all liquidated damages withheld between 31 August and 23 September 2005 be returned to the contractor. (R4, tab 1 at 56) She determined that substantial completion occurred on 1 November 2005 and that liquidated damages withheld for the period of 1 November 2005 through 20 January 2006 should be released (*id.* at 58). She found that the contractor did not substantiate that any of the asserted government delays impacted its ability to complete the work any sooner than it would have absent the asserted government delays. She denied the claim for compensable delay and $491,722.00. (*Id.* at 59)

84. Under date of 15 May 2007, SHC timely appealed from the final decision and the appeal was docketed as ASBCA No. 55905.

## DECISION

The Corps awarded SHC a contract to design and build a Joint Security Forces Complex (JSFC) for the Air Force at Eielson AFB, Alaska. The project was substantially complete on 1 November 2005. The contract completion date had been extended to 31 August 2005, resulting in liquidated damages. At the time, the Corps did not acknowledge substantial completion. Rather it compiled an extensive list of alleged deficiencies and did not take beneficial occupancy until 20 January 2006.

SHC contends that the Corps was operating from the wrong contract completion date, in that the date should have been 23 September 2005 rather than 1 July 2005, and the extended date should have been 23 November 2005, thus eliminating any liquidated damages (given that substantial completion occurred on 1 November 2005). SHC also contends that the Corps was responsible for 105 days of non-concurrent, compensable delay. The government contends that the contract completion date was 1 July 2005 and, allowing for stipulated concurrent delays to 30 September 2005, it is entitled to liquidated damages for the period from 30 September 2005 to 1 November 2005. It denies that there are any non-concurrent, compensable delays.

Our findings above largely dispose of these issues. With respect to the contract completion date, the government accepted the contractor's proposed schedule. The contractor stated in its proposal that "our goal is to finish the project by July 1, 2005.... Strand Hunt Construction hereby acknowledges that a total contract duration of 570 calendar days for the project schedule will become contractually binding as it is within a number of days stated in SCR-1." In accepting the contractor's proposed schedule, the government in fact shortened the time period of performance in the solicitation, which had been 630 days. The government deleted SCR-1, which had specified the 630 days. The quoted language from the proposal is clear and we interpret it in accordance with its plain meaning. (Findings 2, 3, 6) As a result, the extended contract completion date should have been 23 November 2005, eliminating any liquidated damages.

SHC would have saved itself, and the Corps' administrators, a lot of grief if it had paid attention and pointed out after award, starting with receipt of the NTP, that 1 July 2005 was a goal and 23 September 2005 was the contractually binding date. SHC compounded the error by signing two modifications which calculated extensions based on a 1 July 2005 completion date. It woke up to the problem when the Corps started threatening to withhold liquidated damages based on the 1 July 2005 date as modified. (Findings 8, 11, 12, 16)

Appellant argues that the modifications are not binding as to the 1 July 2005 completion date in the absence of consideration (app. br. at 11-14). Our precedent supports that argument. *See, e.g., Yardney Technical Products, Inc.*, ASBCA No. 53866,

09-2 BCA ¶ 34,277 at 169,334 (government could not hold contractor to revised test plan even though both parties had signed off on it); *Institutional and Environmental Management, Inc.*, ASBCA Nos. 32924, 34948, 90-3 BCA ¶ 23,118 at 116,071 (government not bound to a modification for which it received no consideration); *Shipco General, Inc.*, ASBCA Nos. 29206, 29942, 86-2 BCA ¶ 18,973 at 95,823 (government could not hold contractor to revised delivery schedule established by bilateral modification in absence of consideration). The government's brief does not address this argument and it stands unrebutted.

We turn now to the alleged compensable delay. In order to recover under the Suspension of Work clause in these circumstances, the contractor must prove that the work was suspended or delayed for an unreasonable period of time by an act of the CO in administration of the contract, or by the CO's failure to act within a reasonable time, and that the work would not have been so suspended or delayed by any other cause, including the fault or negligence of the contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of the contract. With respect to the last phrase of the clause, we have considered whether the Changes clause might be applicable to the period from 1 November 2005 to 20 January 2006, and have concluded that it is not, because SHC concedes that the various items of work which it performed during that period were required and only seeks delay damages (findings 80, 82).

We found above that the muriatic acid stop work order delayed the work for an unreasonable period of time. We had no quarrel with issuance of the stop work order, but found that it should have been lifted earlier than it was. This resulted in a 19 calendar day delay to the critical path, which was non-concurrent, since the other delays in this period (the parking bay stop work order and the training delay) were also government-responsible. (Findings 56, 57)

We also found that the CO's failure to act within a reasonable period of time to resolve the various punchlist issues delayed completion of the work for an unreasonable period of time, which we calculated as 49 days (finding 81). The government has conceded substantial completion on 1 November 2005 but appears to be reluctant to concede that beneficial occupancy should have been taken before 20 January 2006. In construction cases, as a matter of terminology, "substantial completion" and "beneficial occupancy" are used interchangeably, and signify whether the government can continue to hold liquidated damages:

> Substantial completion of a contract occurs on the date the work is completed satisfactorily to the extent that the facilities in question may be occupied or used by the Government for the purpose for which intended. In making this determination, consideration must be given to (1) the

> quantity of work remaining to be done, and (2) the extent to which the project was capable of serving adequately its intended purpose. This interim usage which occurs prior to the completion of a contract is known as beneficial occupancy. *Pathman Construction Co.*, ASBCA No. 16781, 74-2 BCA ¶ 10,785.

*Lindwall Construction Co.*, ASBCA No. 23148, 79-1 BCA ¶ 13,822 at 67,795.

The purport of our decision, therefore, is that the government should have taken beneficial occupancy on 1 November 2005, but SHC was still required to complete the work. It has only shown 49 days delay to completion of the work over the period from 1 November 2005 to 20 January 2006. The fact that the government should have taken beneficial occupancy does not mean that the Air Force was required to occupy the JSFC. The Air Force was perfectly entitled to delay occupancy until whatever time it chose, but it could not properly charge the delay to the account of the contractor.

## CONCLUSION

The appeal is sustained to the extent that the government shall release any remaining liquidated damages (and utility costs) and that SCH is entitled to recover for 68 days of delay pursuant to the Suspension of Work clause. The appeal is otherwise denied.

Dated: 11 April 2013

Eunice W. Thomas

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

I concur

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

Craig Clarke

CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent
(See separate opinion)

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent
(See separate opinion)

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

DISSENTING OPINION BY ADMINISTRATIVE JUDGE PAUL

As matters now stand in this appeal, we are faced with, what I believe is, an unprecedented situation. The Administrative Judge who presided over the earlier stages of this appeal, including discovery, the resolution of a summary judgment motion, and a prolonged trial in Seattle, Washington, finds himself in a minority of a divided panel, along with the undersigned Administrative Judge who, over a period of many months, carefully examined the voluminous record and drafted a thorough, 156-page opinion.

As a result of my extended research, analysis, and reflection, I developed an objective factual record which, in my opinion, more accurately depicts the facts of this appeal than the majority's relatively truncated version of events. Hence, at the risk of inducing tedium, I respectfully present the factual background of the appeal as follows:

In November 2003, the U.S. Army Engineer District, Alaska, issued Solicitation No. DACA85-03-R-0033 for the design and construction of a Joint Security Forces Complex (JSFC) at Eielson Air Force Base, Alaska. Included in section 00800, "SPECIAL CONTRACT REQUIREMENTS," was SCR-1, "COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK" (APR 1984) (FAR 52.211-10) which provided:

> The Contractor will be required to (a) commence work under this contract within 10 calendar days after the date the Contractor receives the Notice to Proceed (NTP), (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than 630 calendar days after receive [sic] NTP. The completion date is based on the assumption that the successful offeror will receive the Notice to Proceed not later than 15 FEB 2004. The completion date will be extended by the number of calendar days after the above date that the Contractor receives the Notice to Proceed, except to the extent that the delay in issuance of the Notice to Proceed results from the failure of the Contractor to execute the contract and give the required performance and payment bonds within the time specified in the offer. The time stated for completion shall include final cleanup of the premises.

(R4, tab 95 at 387)

Also included in section 00800 of the solicitation was SCR-42, "PROPOSED BETTERMENTS." It stated:

> (a) The minimum requirements of the contract are identified in the Request for Proposal. All betterments offered in the proposal become a requirement of the awarded contract.
>
> (b) "Betterment" is defined as any component or system which exceeds the minimum requirements stated in the Request for Proposal. This includes all proposed betterments listed in accordance with the "Proposed Submission Requirements" of the Solicitation, and all Government identified betterments.
>
> (c) "Government identified betterments" include the betterments identified on the "List of Accepted Project Betterments" prepared by the Proposal Evaluation Board and made part of the contract by alteration, and all other betterments identified in the accepted Proposal after award.

(R4, tab 114)

On 23 January 2004, Mr. Rollie E. Hunt, SHCI's president, forwarded to the Corps' CO, Ms. June Wohlbach, his firm's "qualification, technical, and price proposal" for the JSFC project. Included in SHCI's proposal were its "Contractor Provided Betterments & Innovations." Among the betterments was a subsection described as "Innovative construction methods and use of schedule time." It provided, in part, the following schedule as a "betterment:"

> 3/15/04 NTP
>
> The project has an anticipated NTP of 3/15/04 and a Fairbanks winter will be upon us in mid to late September (usually!)
>
> 5/1/04 Start Construction
>
> Try to stuff in all the requirements required prior to really moving the construction, such as final design drawings prior to start of construction of that element of work, all of the plans, such as: CQC Plan, Safety Plan, The Sampling and Analysis Plan, The Erosion Control Plan, Schedule approval

> and more, to allow a 5/1/04 start of field construction (approximately 45 days from NTP). In addition, you have dozens of on going preparatory meetings required.
>
> 11/1/04 Building Close-in
>
> Six months from start of clear and grub (if weather & ground thaw permits) to building close-in with exposure to cold weather for the last 30-45 days.
>
> 7/1/05 Building Completion
>
> To be able to accomplish the winter close-in which is required to make this a cost effective and viable project, is therefore going to be very difficult to achieve for any Contractor/Designer/Corps of Engineers team.

(R4, tab 94 at 375)

SHCI also stated in its proposal:

> Strand Hunt is providing the government with a "Baseline" Schedule, developed to meet all the requirements of this RFP. The narrative for this schedule follows the description of Strand Hunt's Schedule Management Approach and capabilities. In addition, to demonstrate our complete understanding of the project scope balanced with our knowledge of the needs of the government, we are also submitting an "Accelerated" Schedule for your review. Further discussion of the accelerated schedule is included at the end of this narrative.

(R4, tab 94 at 381)

The detailed "baseline" schedule included by SHCI in its proposal showed 15 March 2004 as the NTP date and 1 July 2005 as the contractual completion date (R4, tab 94 at 377-80). Regarding the "BASELINE SCHEDULE," SHCI asserted:

> Please note that as a betterment to the government, our goal is to finish the project by July 1, 2005, approximately 6 months early. This will allow the user to move in to the facility in the summer. However, should the Owner move in occur in such

> a manner as to push demolition work (if the Government takes the option) into winter, we reserve the right to demo the old buildings in the summer of 2006. SHC would not be subject to liquidated damages for this work and the new construction work would be finalized on July 1, 2005. Strand Hunt Construction hereby acknowledges that a total contract duration of 570 calendar days for the project schedule will become contractually binding as it is within a number of days stated in SCR-1. However, our goal is to complete the work by July 1, 2005.

(*Id.* at 383-84)

SHCI also included in its proposal an "ACCELERATED SCHEDULE" which envisioned completion of the JSFC by 27 May 2005, it stated: "As a betterment to the Government, Strand Hunt is offering an Accelerated Schedule that is very realistic and completes this critical project several months early" (R4, tab 94 at 384-85).

The Source Selection Evaluation Board (SSEB) found SHCI's discussion of the contractual completion date in its proposal to be confusing (tr. 3/152-54). In its memorandum dated 18 February 2004, the SSEB evaluated SHCI's schedule and concluded that "[s]chedule and narrative clearly indicated moderate to high risk for the government should any delays occur" (app. supp. R4, tab 1257 at 4108). In its post-award debriefing of SHCI's proposal, conducted on 19 March 2004, the Corps discussed "Betterments and Innovations." It concluded that SHCI's schedule was a weakness. (R4, tab 89 at 357)

The Corps accepted SHCI's proposal and awarded it Contract No. W911KB-04-C-0008 on 27 February 2004. The total face amount of the contract, including optional work, was $14,569,500. As part of the award, SCR-1, which set the contractual completion date at 630 days after NTP, was deleted. The "[c]ontractor's proposed schedule as depicted on his technical proposal, Volume II, Tab C, Proposed Schedule," was "hereby accepted and becomes binding." (R4, tabs 91, 92) Thus, the "baseline schedule" incorporated into the contract stated a completion date of 1 July 2005 (R4, tab 94 at 377, 383-84).

The CO issued the NTP on 2 March 2004. It was acknowledged by SHCI on that same date. (R4, tab 90) This was 13 days earlier than the NTP date contained in SHCI's "baseline schedule" (R4, tab 94 at 375). In her letter, the CO stated, in part: "In accordance with your offer, the entire work is to be complete and ready for use by July 1, 2005." In its acknowledgement of the NTP, SHCI did not object to this recitation of the contractual completion date as 1 July 2005. (R4, tab 90)

As awarded, the contract contained a host of clauses from the Federal Acquisition Regulation (FAR) which are pertinent to this appeal. Included were: FAR 52.211-12, LIQUIDATED DAMAGES-CONSTRUCTION (SEP 2000); FAR 52.211-13, TIME EXTENSIONS (SEP 2000); FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984); FAR 52.236-6, SUPERINTENDENCE BY THE CONTRACTOR (APR 1984); FAR 52.236-9, PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984); FAR 52.236-12, CLEANING UP (APR 1984); FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); FAR 52.242-14, SUSPENSION OF WORK (APR 1984); FAR 52-243-4, CHANGES (AUG 1987); and FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996).

In addition, the contract included several SCR's which have some bearing on this appeal. For example, SCR-8, "SUBMITTALS," provided:

> Within 30 days after receipt of Notice to Proceed, the Contractor shall complete and submit to the Contracting Officer, in triplicate, submittal register ENG Form 4288 listing all submittals and dates. In addition to those items listed on ENG Form 4288, the Contractor shall furnish submittals for any deviation from the plans or specifications. The scheduled need dates must be recorded on the document for each item for control purposes. In preparing the document, adequate time (minimum of 30 days) shall be allowed for review and, only when stipulated, approval and possible resubmittal. Scheduling shall be coordinated with the approved progress schedule. The Contractor's Quality Control representative shall review the listing at least every 30 days and take appropriate action to maintain an effective system. Copies of updated or corrected listing shall be submitted to the Contracting Officer at least every 60 days in the quantity specified. Payment will not be made for any material or equipment which does not comply with contract requirements.
>
> Section 01330 includes an ENG Form 4288 listing technical items the Contractor shall submit to the Contracting Officer, as indicated in the contract requirements.

(R4, tab 111 at 414)

SCR-41, "DESIGN-BUILD CONTRACT – ORDER OF PRECEDENCE," stated:

> (a) The contract includes the standard contract clauses and schedules current at the time of the contract award. It entails (1) the solicitation in its entirety, including all drawings, cuts, illustrations, and any amendments, and (2) the successful offeror's accepted proposal. The contract constitutes and defines the entire agreement between the Contractor and the Government. No documentation shall be omitted which in any way bears upon the terms of that agreement.
>
> (b) In the event of conflict or inconsistency between any of the provisions of this contract, precedence shall be given in the following order:
>
> > 1) Betterments: Any portions of the accepted proposal which both conform to and exceed the provisions of the solicitation.
> >
> > 2) The provisions of the solicitation. (See also Contract Clause: SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION.)
> >
> > 3) All other provisions of the accepted proposal.
> >
> > 4) Any design products including, but not limited to, plans, specification, engineering studies and analyses, shop drawings, equipment installation drawings, etc. These are "deliverables" under the contract and are not part of the contract itself. Design products must conform with all provisions of the contract, in the order of precedence herein.

(R4, tab 112 at 417)[6]

SCR-43, "SEQUENCE OF DESIGN-CONSTRUCTION," asserted:

> (a) After receipt of Notice to Proceed (NTP), the Contractor shall initiate design, comply with all design submission requirements as covered under Division 01

[6] We have already reviewed SCR-42, "PROPOSED BETTERMENTS."

> General Requirements, and obtain Government review of each submission. The Contractor may initiate site clearing, etc. with the permission of the Contracting Officer and begin construction on portions of the work for which the Government has reviewed the Final Design submission and determined it satisfactory for purposes of beginning construction. The Contracting Officer will notify the Contractor when the design is cleared for construction. The Government will not grant any time extension for any design resubmittal required when, in the opinion of the Contracting Officer, the initial submission failed to meet the minimum quality requirements as set forth in the contract.
>
> (b) If the Government allows the Contractor to proceed with limited construction based on pending minor revisions to the reviewed Final Design submission, no payment will be made for any in-place construction related to the pending revisions until they are completed, resubmitted and are satisfactory to the Government.

(R4, tab 115 at 419-20)

Finally, SCR-44, "RESPONSIBILITY OF THE CONTRACTOR FOR DESIGN," provided:

> (a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and any other non-construction services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other non-construction services.
>
> (b) Neither the Government's review, approval or acceptance of, nor payment for, the service required under this contract shall be construed to operate as a waiver of any rights under this contract, or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the Contractor's negligent performance of any of the services described in paragraph (a) furnished under this contract.

> (c) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

(R4, tab 115 at 420)

On 15 March 2004, Mr. Norman D. Sams, the Corps' administrative contracting officer (ACO) and a professional engineer (P.E.) forwarded to Mr. Hunt a 12-page document which described the Corps' "office policies and procedures for various contract administration items." In this document, Mr. Sams emphasized the need, *inter alia*, to make timely submittal and shop drawing submissions. (Supp. R4, tab 144 at 1, 7-8)

On 19 April 2004, the Corps held a pre-construction conference with SHCI. Principal attendees for the Corps were Mr. Sams and Mr. Carlton H. Haenel, the Corps' quality assurance representative (QAR); those for the contractor were Mr. Hunt, Mr. Philip Dearing, the project manager, and Mr. Tim Jauhola, the construction superintendent (supp. R4, tab 144 at 44). Both Mr. Hunt and Mr. Dearing had contractual authority to bind SHCI (tr. 2/36). The extensive minutes of the meeting were forwarded to SHCI on 14 June 2004 and were acknowledged by the contractor on 18 June 2004 (supp. R4, tab 144 at 13, 40). The first page of the minutes clearly identified the contractual completion date as "July 1, 2005"; there is no record evidence demonstrating that SHCI objected to this date (*id.* at 14). Section 6 of the minutes placed special emphasis on quality control (*id.* at 27-32). In addition, that section discussed submittal procedures in great detail (*id.* at 33-36).

The first major effort under the contract was the design phase. The minutes of the pre-construction meeting described this work in great detail as follows:

> 8) **Design After Award (TS 01012 and Design Requirements (TS 01010):** The Government will conduct reviews at 65% and 95% of design. The government will also check the 100% design for incorporation of all review comments (100% backcheck). Design reviews will be accomplished using Dr Checks web based review system at https://www.projnet.org. Government review will be for conformance with the technical requirements of the RFP and the contractor's final accepted proposal. Design deviations from the requirements of the RFP or the contractor's final accepted proposal require written government approval. TS 01012 covers what must be contained in each design submittal and the design submission and review process in

> detail. All design submittals must include an independent reviewer certification for each discipline. The final comprehensive, detailed government review takes place at the 95% review. At this time the draft DD Form 1354 Transfer and Acceptance of Real Property is required (the government will provide a sample). After this review the contractor incorporates all comments and produces final stamped drawings for the 100% design. The contractor provides the 100% design to the government and requests approval to construct. After the government verifies incorporation/resolution of all design comments at the 100% backcheck, the Contracting officer will issue an approval to construct letter. **No construction may begin until final design has been reviewed and determined to be satisfactory**. If the contractor makes changes to the 100% or final stamped drawings other than changes required to address 95% review comments or back check comments, the contractor must identify those changes to the government so the government may review the details. Any change to the final accepted design requires written approval of the Designer of Record (DOR). If the change to the final accepted design is also a change to the RFP or the contractor's final accepted proposal, it will also require government approval. If not, it will require government review.

(Supp. R4, tab 144 at 22-23) (Emphasis in original)[7]

On or about 25 May 2004, the Corps gave SHCI permission to break ground on the project; however, as of that date, the Corps had not approved all of the plans identified at the preconstruction meeting. Mr. Sams explained that he gave SHCI "partial permission to construct" in "order to keep the work progressing" (tr. 3/70). This allowed the contractor to "catch up with the paperwork" (*id.*).

Through serial letter (SL) H-0027, which was dated 16 June 2004 and was received by the Corps on 21 June 2004, SHCI requested "concurrence to proceed with the foundation and related under slab work for the...project." It also stated:

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[7] "Dr Checks" is an abbreviation for "design review checks." This was "an electronic online web-based system" through which the Corps could "interact realtime with" the contractor through "realtime" comments. (Tr. 3/45)

> To assure compliance with the RFP we have incorporated all of the Dr. Checks' comments related to the foundation and underslab that was part of the 95% design package, as confirmed in the attached letter from the "Designer of Record."
>
> Three (3) sets of 'Foundation Drawings' will be hand-delivered to you shortly for you information. These will be the documents we will be constructing the foundation to.

(Supp. R4, tab 144 at 51)

On 17 June 2004, SHCI's designer, Design Alaska, forwarded the following letter to the contractor:

> This submittal contains final Civil Drawings and the Structural and Mechanical Drawings necessary to completely describe the foundation and structural walls for the Security Forces Complex. These drawings are being issued in advance of the final Architectural, Mechanical, and Electrical drawings and have been coordinated with the Designer of Record for each of those disciplines with the intention of allowing the construction of the building foundation to begin. These documents incorporate the Dr. Checks comments available at the time the documents were prepared. The Civil Engineer was not available to sign the documents prior to reproduction. The signed Civil drawings will follow shortly.

(Supp. R4, tab 144 at 52)

On 22 June 2004, representatives of the parties, including Mr. Haenel and Mr. Jauhola, conducted a "Coordination Meeting" to "review and discuss the contractor's quality control system." Among the items discussed were SHCI's initially scheduled work hours. The meeting minutes stated in part: "Work hours for the project are set at 0700-1730, Monday through Saturday – '6/10s'." In other words, SHCI's baseline schedule projected that its crews would work six days a week, ten hours a day. (Supp. R4, tab 144 at 65)

The Corps' response to SHCI's SLH-0027, dated 16 June 2004, was two-fold: Firstly, Mr. Sams gave the contractor only partial permission to begin the foundation work. In a letter of 28 June 2004, he stated that "you have clearance to construct the foundation and related under-slab work only in area 1 of the attached drawing with the

exception of the oil-water separator." Mr. Sams also asserted: "We understand that you are blocking out this area and will not begin its construction until cleared by the Government." (Supp. R4, tab 144 at 47) Secondly, on 2 July 2004, Mr. Sams forwarded another response to SHCI in which he discussed "open items in Dr. Checks from the 95% civil/structural and 65% architectural/mechanical/electrical reviews." Mr. Sams then went on to discuss 40 "open items" from the contract's design phase. (*Id.* at 48-50) It is axiomatic that a "design/build" contract's design phase must be completed before construction can begin.

SHCI revised its schedule; and, on 8 July 2004, Mr. Dearing forwarded an email to the Corps in which he requested expedited review of the schedule. In a lengthy memorandum of 13 July 2004, Mr. Sams responded to Mr. Dearing's request.[8] He stated, in part: "We cannot accept this schedule because it lacks critical activities and as a whole reflects an unrealistic plan to complete the work." Mr. Sams went on to discuss three pages of negative comments regarding SHCI's revised schedule. (Supp. R4, tab 144 at 53-55) He concluded his letter by stating:

> Please revise your schedule to reflect a realistic plan of action that meets the requirements of the contract, particularly TS 01320. We remind you that a lack of an approved schedule will result in our inability to evaluate your progress and subsequent payment. Since the schedule will also impact the effectiveness of the submittal and three-phase inspection processes within the QCS module, it is imperative that the schedule be accurate and realistic. The lack of an approved schedule also exacerbates your current delinquency in implementing the CS requirements of the contract.

(*Id.* at 55)

On 24 July 2004, SHCI forwarded to the Corps a baseline schedule which was eventually approved. It listed 1 July 2005 as the contractual completion date. (R4, tab 84; app. supp. R4, tab 556; tr. 3/8-9)

SHCI also had difficulties with the Corps' approval process for both design and construction submittals and shop drawings. The history of the submittal process is illustrated in SHCI's 21-page "SUBMITTAL REGISTER," and the various codes contained therein were defined by Mr. Sams in his direct testimony. Of particular interest are codes "C" and "E." According to Mr. Sams, code "C" meant "approved but you still need to resubmit" the submittal for final approval; whereas, code "E" meant "disapproved." A

[8] The letter is dated incorrectly as "July 13, 2003" (*id.* at 53).

review of the "SUBMITTAL REGISTER" demonstrates that 19 submittals received a code "C." These submittals included the accident prevention plan, the radioactive materials permit, the quality control plan, the as-built drawings, the welding certificates, the epoxy floor covering product data, the product data for the valves, the product data for the site/water distribution system, the shop drawings for the sewage lift station pump, the product data for the sewage lift station sump cover, the product data for the sewage lift station pumps and controls, the product data for the oil water separators, the shop drawings for the fire protection system, the product data for the fixed discharge unit heaters, the product data for the cabinet fans, the product data for the ceiling fans, the operation and maintenance manuals for the direct digital control systems, the product data for the switches for these systems, the product data for the control relays for these systems, the operation and maintenance manuals for the completed electrical systems, and the operational and maintenance manual for the power generation. In addition, 57 items received a code "E," meaning "disapproved." Upon resubmittal, these items had to, once again, proceed through the entire approval process. Included among these submittals were the accident prevention plan, the submittal register itself, the environmental protection plan, the site plan for temporary construction facilities, the as-built drawings, the welding certificate for the structural steel, the welding certificates for the steel joists, the welding certificates for the steel deck, the product data for the membrane roofing, the product data for the substrate boards for this roofing, the product data for the vapor retarders for this roofing, the product data for the roof insulation, the shop drawings for the roof insulation, the operation and maintenance manuals for the fire detection and alarm system, the operation and maintenance manuals for the electrical motors and starters, the product data for the steam and condensate systems for the utilidor insulation, the product data for the water piping for the utilidor insulation, the product data for the valves for the site water distribution system, the product data for the pipes, fittings and joints for the site sanitary sewer collection system, the product data for the pipe seals for the site sanitary sewer collection system, the product data for the pipes and fittings for the site steam distribution system, the product data for the isolation valves for this system,[9] the product data for the accessories for this system, the test reports for the welding certification for this system, the product data for the expansion joints for this system,[10] the test reports for the visual butt weld inspection for this system, the test reports for the butt weld RT inspection for this system, the test reports for the visual inspection condensate pipe welds for this system, the product data for the pumps and controls for the sewage lift station, the product data for the piping, fittings and joints for the domestic water system, the product data for the pipes and fittings for the compressed air system, two sets of operation and maintenance data for the fire protection system, the product data for the condensate meter for the steam heating system, the product data for the condensate pump and receiver set, the product data for the fan coil units, the shop

[9] This submittal was disapproved twice by the Corps.
[10] This submittal was disapproved twice by the Corps.

drawings for the ductwork, two sets of product data for the direct digital controllers, two sets of product data for the building management system for these control systems, two sets of product data for the sensors for these systems, product data for the switches for these systems, two sets of product data for the transmitters for these systems, product data for the control relays for these systems, product data for the motorized control dampers for these systems, two sets of product data for the control valves for these systems, two sets of product data for the dampers and valve actuators for these systems, records for the functional checklist for the commissioning HVAC systems, and the product data for the automatic transfer switches. (Supp. R4, tab 134 at 1-21; tr. 3/49-57)

As of 18 August 2004, SHCI still had not completed the design work for the project. On that date, Mr. Sams informed the contractor in writing:

> Per SCR-43, Sequence of Design-Construction, this letter provides a second partial clearance for construction for certain features of work. Although 100% design acceptance has not yet occurred for any discipline, the design for the portions of work below has progressed sufficiently to allow construction under the condition that any pertinent comments in Dr. Checks are specifically addressed and resolved by the designer of record prior to the start of work. This partial and conditional clearance for construction is granted for the following work:
>
> - Civil/Structural: Work associated with the placement of the concrete slab in area 4 and the elevated fan room slab in area 5 may commence. CMU wall construction may continue in area 4. The concrete work associated with the utilidor may begin; however, mechanical work inside the utilidor may NOT commence until the Government accepts 100% mechanical design. Light gauge roof trusses, roof joists, and decking may also be installed in those areas that are complete. Backfill and compaction of structural fill in areas of pavement may begin. Paving may NOT commence under this clearance.
> - Electrical: Only that electrical work associated with the floor and walls in area 4 and the fan room of area 5 may commence. Conduit installation for the fiber optic cable to building 3180 may also begin (communications conductors and associated equipment

may not be installed until the Government accepts 100% electrical design).

- Mechanical/Plumbing: Only that work necessary for installation of the concrete building slab in area 4 may commence.

Construction on remaining portions of work (not included above) may NOT commence until the Government has reviewed and approved the final Design submission and notified the Contractor of its clearance for construction.

(Supp. R4, tab 144 at 74-75)

Even though the design phase was not yet complete, SHCI began to encounter early problems with its limited construction effort. On 18 August 2004, Mr. Sams wrote, in pertinent part:

> Reference Federal Acquisition Regulation (FAR) 52.236-6, "Superintendence by the Contractor", Technical Specification (TS) Section 01451, "Contractor Quality Control", Strand Hunt Quality Management Plan, and Contractor Quality Control (CQC) Report No. SH-056, July 30, 2004.
>
> On Friday, July 30, 2004, during the concrete placement in Area 2, certain events occurred (as described in the CQC Report SH-0056) that demonstrates [sic] ineffective superintendence and contractor quality control. Approximately 30 minutes after the placement began, rain began to fall and did not stop until the placement was complete. Despite Mr. Jauhola's and Mr. Hamilton's urgings to the subcontractor to halt the operation and take measures to protect the concrete from the rain, the subcontractor continued the placement and allowed excessive water to accumulate on the surface of the unfinished slab, thereby violating industry standard practices and jeopardizing the ultimate quality of the concrete slab. Scott Lane, US Army Corps of Engineer Quality Control Representative visited the site and also recommended to the CQC to stop the operation and protect the concrete during the rain – his recommendations were ignored. CQC report No. SH-0056 also indicates Mr. Hamilton and Mr. Jauhola placed the burden of responsibility for quality of the concrete

slab onto the subcontractor and allowed him to complete the majority of the slab in the rain using non-industry standard methods of finishing (these methods and their results are the subject of forthcoming separate correspondence).

It is evident that, during the above events, your on-site superintendent and quality control system manager did not control the actions of the subcontractor and did not assume the responsibilities of their positions. FAR 52.236-6, "Superintendence by the Contractor," states that the contractor shall directly superintend the work or assign a competent superintendent who has authority to act for the contractor. Technical Specification (TS) 01451, "Contractor Quality Control," requires that the superintendent be held responsible for quality of work on the job. TS 01451 also requires that the CQC System Manager shall have authority to stop work that is not in compliance with the contract. This authority is reiterated in the approved Strand Hunt Quality Management Plan and its appointment letter to Mr. Hamilton.

We remind you that the superintendent and CQC System Manager are subject to removal from the project by the contracting officer. We also remind you that Mr. Jauhola's approval as project superintendent was contingent upon his sustained satisfactory performance under FAR 52.236-6 (reference Government Serial Letter C-0026). We caution you, that, should another situation develop in which the superintendent and/or CQC System Manager fail to assume and exercise their respective responsibilities, the Government will require corrective actions which could involve removal of one or both individuals from the project.

(Supp. R4, tab 144 at 72-73)

On 7 September 2004, Mr. Dearing of SHCI executed bilateral Modification No. P00007 which extended the "contract by 7 days due to smoke from forest fires." There was no change in contract price. The modification stated: "The contract completion date has been changed from 07/01/2005 to 07/08/2005." (App. supp. R4, tab 125, ex. 301 at 03028) There is no record evidence demonstrating that SHCI objected to the completion dates set forth in this modification.

On 20 December 2004, Mr. Dearing of SHCI executed bilateral Modification No. P00010 (app. supp. R4, tab 1254-A, ex. 3016b at 03023). The subject matter of the modification was a differing site condition relating to the excavation and hauling of "unsuitable soils" encountered below the building pad. SHCI had first brought this issue to the Corps' attention when it forwarded a change order proposal on 15 July 2004. In a letter of 24 August 2004, Mr. Sams responded to SHCI's proposal. He stated, in part:

> We received your change proposal summary and will negotiate an equitable contract adjustment in the near future.
>
> We do[,] however, consider your management of this issue unsatisfactory in several respects. First, despite numerous repeated warnings not to proceed with any changes without a contract modification, in this instance you did so, second, you failed to give the Government adequate time to investigate the conditions prior to disturbing them in violation of FAR 52.236-2. This is the second instance in as many contracts that this situation has occurred. Finally, we received no written notification of the differing site condition until after the material had been removed. As stated in the Pre-construction conference, Quality Control reports are not adequate notification.
>
> We received no schedule analysis demonstrating the alleged delay in referenced correspondence. Until we receive the required information, we consider the alleged delays unsubstantiated and cannot begin negotiations on this issue until this information is provided.

(Supp. R4, tab 144 at 78)

On 23 September 2004, SHCI responded to Mr. Sams' letter, providing additional justification for its change order proposal. Accordingly, on 8 November 2004, Mr. Sams forwarded proposed Modification No. P00010 to SHCI for signature. On 23 November 2004, Mr. Dearing forwarded a letter to the Corps, with enclosures. He stated:

> Enclosed please find the Modification of Contract P00010 returned unsigned. Please note that the contract time completion date is wrong and it should be July 8, 2005 to July 12, 2005, please see P00007. Please correct P00010 and return for your signature. Thank you.

The Corps made the correction requested by Mr. Dearing and forwarded the amended version of the modification to SHCI. Mr. Dearing signed the bilateral modification on 20 December 2004. It extended the completion date set forth in Modification No. P00007 by four days to 12 July 2005. The modification also increased the contractual price by $52,000. (App. supp. R4, tab 1254-A, ex. 3016b at 03022-25; supp. R4, tab 144 at 78-79, 82-84, tab 145 at 3-4) Through its conduct, SHCI, once again, demonstrated its adherence to the original contractual completion date of 1 July 2005.

Quality control issues continued through the summer of 2004. On 23 August 2004, Mr. Sams responded to SHCI's request for approval of a change "in finished floor elevation." He stated, in part:

> The Corps of Engineers does not "Approve" the results of the contractor error that caused the finished floor elevation to be four inches higher than the final design elevation. The "miscommunication" your request refers to occurred because your site work subcontractor erroneously referred to the 65% design documents instead of the supplemental 95% documents your submitted for partial clearance to construct. The occurrence of this error also reflects upon your quality control (QC) system management. We expect your superintendent and QC staff to conduct adequate follow-up inspections to ensure that all subcontractors possess the most current design documents.
>
> In the interest of the overall success of the project, we acknowledge (not approve) the results of the contractor's mistake; however, the designer of record must address its impact on the overall design and shall assure the Government that no negative ramifications exist that might affect the remainder of the design. Please provide a statement from the designer of record certifying his/her review of the mistake and its resulting impact on the overall design.

(Supp. R4, tab 144 at 76-77) In addition, on 26 August 2004, Mr. Sams wrote the following memorandum to SHCI:

> Reference your Request for Proposal (RFP) Section 01012 "Fire Protection Design Criteria," Technical Specification (TS) Section 01012, "Design After Award," 65% Fire Protection Design Analysis Points of Discussion; and Serial letter H-0045, August 9, 2004.

The Government has serious concerns about your current non-compliance with the RFP concerning the fire protection system for the Joint Security Forces Complex. Please respond with your corrective actions to the following issues by 12:00 p.m. August 31, 2004.

a) Strand Hunt Construction (SHC) has not, to-date, submitted any design document requirements listed in TS Section 01012, Paragraph 3.4.H (i.e. hydraulic calculations, sprinkler/piping system layout, etc.) – 65% design submittal. Therefore, no further approval to construction [sic] any part of the facility will be provided to SHC until the Fire Protection System design [is] reviewed and approved by USACE.

b) SHC is providing a fire protection system designed by a NICET Level III technician, not a Fire Protection Engineer. The RFP paragraph 2.8.2.A.3, clearly states, design to be conducted by "a qualified Fire Protection Engineer" and further states the more stringent criteria shall govern. SHC's proposal states Jack Wilbur is the Fire Protection Engineer of Record, however, his resume does not reflect the proper credentials to be accepted as the Fire Protection Designer of Record. Therefore, SHC is required to have the fire protection system designed by a certified Fire Protection Engineer and the design submittal to be sealed by the registered engineer.

c) Fire Hydrants – Request a clarification from the contractor, including the review and approval of the qualified Fire Protection Engineer of Record. Contractor's letter H-0045 is nebulous in describing the problem and proposed solution.

d) In response to item #3 listed in the Contractor's 65% fire protection design analysis points of discussion. The Government is not exactly clear as the to what Contractor is referring to in Appendix D. Please clarify.

> Please address the above listed issues and provide a complete Fire Protection Design submittal as required by contract.

(Supp. R4, tab 144 at 80-81)

It took months for these issues to reach some degree of resolution. For example, on 25 October 2004, Mr. Sams forwarded this memorandum to SHCI:

> Please reference your Serial Letter H-0094, Requesting Clearance to Construct and SCR-43, Sequence of Design-Construction.
>
> This letter provides clearance for construction for the remainder of the work associated with the project with the exception of the fire sprinkler system. Installation of the fire sprinkler system may not commence until the Government has reviewed and accepted the final design submission and notified the Contractor of its clearance for construction.

(App. supp. R4, tab 589; supp. R4, tab 144 at 85) This issue had not been resolved as of 20 December 2004. On that date, Mr. Sams wrote to SHCI, in part:

> Clearance to construct on the Sprinkler Design/installation for the Joint Security Forces Complex is approved, subject to satisfactory resolution of the following Dr. Checks review comments by Mr. Robert Fox. It is required to address the comments through the Dr. Checks System and resolution is required by January 15, 2005.

(App. supp. R4, tab 611) Further, on 28 January 2005, Mr. Sams forwarded a memorandum to SHCI in which he addressed the floor elevation issue. He stated, in pertinent part:

> Your letter mentions two other issues that were discussed at the meeting held at the COE Northern Area Office on January 13, 2005. The RFP requires 3-inch thickness of pavement while your 100% design provides for 2 inches. The RFP also specifies floor epoxy in the high bay areas. However, a floor sealer was actually applied.

> The Government views both of these issues as unauthorized deviations from the contract. Any deviation from the contract must be approved in writing by the Contracting Officer. Please provide documentation, via serial letter, detailing your justification for these deviations. Should these deviations be rejected by the Contracting Officer, you will be directed to comply with the requirements of your contract. Should the variations be approved, the Government reserves the right to pursue a credit regarding these changes.

(Supp. R4, tab 144 at 86-87) Mr. Sams' letter also indicated that the contractual drawings had not been approved by this date (*id.* at 87).

Mr. Michael D. Volsky took over the QAR responsibilities for this project from Mr. Haenel in November 2004. Asked to describe the state of construction on the job "on your very first day," Mr. Volsky testified that "[i]t was haphazard." He continued: "My initial thought was for safety.... That's really the only thing I have any authority on the project, is safety, and when I walked out there, there were numerous safety violations." More specifically, Mr. Volsky testified: "The building was not totally closed in and they would 'temp heat' portions of it, and because there was no roof, the snow had got [sic] in there, then the temp heat turned on, it would melt the water, the heaters get turned off, and it would refreeze." As a consequence, "[t]here were extension cords, electrical cords, temporary electrical panels melted – or frozen into the ice." Mr. Volsky also observed other problems on the job site that day." For example, he testified:

> It was haphazard. There were tools everywhere, materials haphazardly stored. I mean, all around, just housekeeping was – it was hard to tell where one activity was doing. It just seemed like a lot of activity but not towards getting anything complete.

(Tr. 3/164-65) As a result of these observations, Mr. Volsky "went back to the office and went to my supervisor and told her I needed help." The supervisor, MAJ Teresa Schlosser, authorized Mr. Volsky to seek additional help in the person of Mr. Mick Awbrey who became a part-time QAR on the project, assisting Mr. Volsky. (Tr. 3/165) Mr. Awbrey first toured the job site in late November 2004. His independent recollections of conditions there were similar to Mr. Volsky's. Initially, Mr. Awbrey testified: "I was shocked at the work that was taking place." For example, SHCI was installing concrete masonry unit [CMU] blocks "right around zero or in the minus temperatures." He continued: "One heater was being utilized. At best, the temperature may have been just a little above freezing at the time." Mr. Awbrey was concerned that this temperature was too low for the masonry to cure properly, based upon American

Construction Institute (ACI) standards. (Tr. 3/285-86) Mr. Awbrey also testified: "And when I went to the job site and saw the work that was proceeding, that hadn't been submitted on, that preparatories hadn't been held on, and no discussions had taken place, that there's no quality management installed to inspect to, it was readily apparent that our management system hadn't been followed in numerous areas" (tr. 3/287). Specifically with respect to contractually required construction submittals, Mr. Awbrey testified:

> At the time I was involved, I believe there was [sic] only 32 submittals that had been submitted at that time, and most of them were front-end submittals, accident prevention plans, things of that nature, very little product data.

Mr. Awbrey informed Mr. Sams of these deficiencies; accordingly, Mr. Sams called SHCI and gave it "30 days to cure, or get the submittal items in to get the action items reduced, to start complying to the contract, or there would be repercussions." Mr. Awbrey estimated that SHCI, at that time, was delinquent "in excess of a hundred" submittals and that many of them dealt with ongoing work that had not been properly authorized. Examples of the latter were: "There were no submittals on the truss systems that were being installed. There was no submittal – lacking submittals on underground piping, mechanical piping. Lacking submittals and special inspections on CMU blockwork. The list is fairly substantial." The lack of submittals concerned Mr. Awbrey from a QAR perspective because they were "a vital tool in establishing quality procedures, that you have to inspect to." (Tr. 3/288-89)

In addition to the shoddy construction habits and the lack of submittals, one of the first major issues which Messrs. Volsky and Awbrey had to address related to the utilidor, a mechanical system designed to convey heat from the base's steam generating plant to the building under construction by SHCI (tr. 3/290-91). In early November 2004, the contractor attempted to link the utilidor to the steam line. Mr. Haenel, the initial QAR, described what occurred in an email of 9 November 2004:

> During the cutting/removal of a portion of the existing utilidor, the saw-cut along the top encroached into the monolithic portion of the nearby intermediate steam line anchor to the east of the tie-in. This resulted in damage (spalling) of the concrete ceiling and has exposed the reinforcing steel – it is apparent that the structural integrity of the anchor has been compromised. Please...assess the condition and provide recommendations for a fix.

(App. supp. R4, tab 594) As Mr. Awbrey explained, this was a "very dangerous" situation, as "the base would not perform a shutdown, or allow any type [of] work done

on that steam line until that anchor was repaired." Because the steam line connected all of the buildings on the base, the utilidor had "to be shut down very slowly to allow the gradual temperature decline and it has to be brought up very slowly...to allow for even expansion across [the] line, otherwise it can bust and it'll kill people instantly." (Tr. 3/291-92) SHCI was unable quickly to resolve the problem. Accordingly, on 24 November 2004, Mr. Dearing forwarded the following email to his staff and his designer:

> I received a call yesterday from the top guy at the COE [Corps of Engineers] in the Northern Area Office[.]
>
> The COE is upset about the time this is taking to correct...what is going on? We need this resolved and the fix in place NOW. No more delays.

(App. supp. R4, tab 596) (Emphasis in original)

On 7 December 2004, over a month after the occurrence of the initial problem, SHCI forwarded a "proposed fix for the steam pipe anchor just east of the new lateral tie-in to the existing utilidor" to Mr. Sams (app. supp. R4, tab 597). On 9 December 2004, SHCI sent to Mr. Sams "the installation and test plan for the steam and condensation line from the existing utilidor to the new building" (app. supp. R4, tab 601). Upon review, the initial plan was altered; and, on 14 December 2004, SHCI forwarded a revised plan to Mr. Sams (app. supp. R4, tab 602). On 17 December 2004, Mr. Sams approved the revised plan. He also stated:

> You are reminded that you are still bound by the RFP requirements pertaining to heating requirements of the Utilidor prior to, and during use of the Utilidor piping and structure during temporary piping use. RFP requirements will also be met for testing procedures for the piping prior to activation of the lines for permanent use.

(App. supp. R4, tab 609) The repair project was completed on 23 December 2004 (tr. 3/293).

As a result of the various delays associated with SHCI's performance, its schedule began to slip. Beginning in December 2004, the Corps directed it "to update and show compliance to an approved schedule." In the minutes of a construction co-ordination meeting held between the parties on 23 February 2005, the Corps made the following statement regarding the schedule:

> It is the Governments [sic] position that at this time, with the short construction duration left before contract completion, the existing schedule is not accurate. The schedule shows some slippage and needs to be addressed with updated start and finish dates, with additional items added to the critical path.
>
> At this time the Government is very concerned with the project being completed on time, and satisfactory resolution of deficiency items must be met without delay to keep the flow of work progressing.

(R4, tab 56 at 3)

As of 5 May 2005, the Corps had processed two "pay estimates" which "resulted in retainage based on either slippage from schedule or an inaccurate schedule" (R4, tab 56 at 3; tr. 3/296-99).

Having fallen significantly behind its baseline schedule mandating a contractual completion date of 1 July 2005, SHCI, in a letter of 5 April 2005 to the Corps disputed that this completion date ever existed as a contractual requirement. Mr. Hunt, SHCI's president, stated:

> We are requesting the Government revise our completion by contract modification to 630 C.D.'s from Notice to Proceed (NTP), plus 11 C.D.'s for time extensions granted in P0001 through P0015, as this is what the RFP calls for, or if the Government accepted our accelerated schedule submitted as an option in our original RFP response, please issue a contract modification to designate 570 C.D.'s from NTP, plus 11 C.D.'s for time extensions granted in P0001 through P0015.
>
> The originally submitted acceleration schedule which showed a completion date of July 1, 2004 [sic] was a goal, not a contract required completion date.
>
> Please review Strand Hunt's submitted proposal, Volume 2, Tab C, Section 1, toward the bottom of page 3 which states:
>
> > "Strand Hunt Construction hereby acknowledges that a total contract duration of 570 calendar days for the project will become contractually binding as it is

> within a number of days stated in SCR-1. However, our goal is to complete the work by July 1, 2005."
>
> After your review of the above, please let us know what questions you might have.
>
> Can you please let us know when the COE can expect a contract modification will be issued incorporating the above.
>
> As added clarification, P007 added 7 C.D.'s and P0010 added 4 C.D.'s for the total added of 11 C.D.'s that is called for in the above paragraphs.

(R4, tab 79)

In response to SHCI's letter, the Corps generated several emails which attempted clearly to define the issue (app. supp. R4, tabs 619-22). This process culminated in a tentative opinion given by Ms. Anne Roth "that the 12 July 05 completion date (1 Jul 05 in their schedule plus the 11 days that have been added through modifications) is defensible but there is just enough ambiguity with SHC's references to 570 days in their proposal that I wouldn't give it a 'slam dunk' certainty" (app. supp. R4, tab 622).

The Corps formally responded, at least in part, to SHCI's letter of 5 April 2005 on 3 May 2005. Mr. Bradley, the ACO, wrote:

> Please reference your Serial Letter H-0156, Contract Completion Date and Serial Letters H-0151, H-0090 and H-0078 all relating to Hurricane Delays.
>
> The Government has reviewed and researched your letter H-0156 Contract Completion Date and has come to the following conclusions.
>
> a. SCR 1 was deleted from your contract when Mr. Rollie Hunt signed the contract on February 26, 2004. At that time, your proposed schedule, showing a contract completion date of July 1, 2005, was accepted by the Government and became contractually binding.
>
> b. Your contract was modified by P007 and P0010 to add 11 additional days to your contract extending the time to July 12, 2005. The Government has also reviewed the

> Hurricane Delay letters and agrees that your accepted schedule was affected an additional 19 days extending the completion date to July 31, 2005, a Sunday non working day.
>
> The Government now recognizes August 01, 2005, as the new contractual completion date.

(R4, tab 78) The Corps set forth the new completion date through unilateral Modification No. P00016 which was executed by the ACO on 20 July 2005 (R4, tab 29).[11]

In what it described as "Corps Directed Project Acceleration," SHCI replied to the Corps' letter on 13 May 2005. It wrote:

> Strand Hunt is accelerating our schedule in order to meet the Government's recognized new contractual completion date of August 1, 2005, as stated in referenced serial letter C-0114.
>
> As of Monday, we will start working 6-10 hour days.
>
> When Strand Hunt requested when and how the Government was going to respond to our request to correct the error made in not establishing either 570 C.D.'s or 630 C.D.'s for completion, we were told the Government believed August 1, 2005 was the completion date and did not agree to our correction.
>
> While your letter of C-0114 does not specifically address the Government's rejection of our request to correct the contract completion to 570 or 630 C.D.'s, the Government's response with C-0114, and your explanation of the Government's decision, has lead us to this conclusion.
>
> If the Government is going to correct the error and allow 570 or 630 C.D.'s to complete this project, please advise us immediately of our misunderstanding.

---

[11] The contractual completion date was further extended by 30 days to 31 August 2005 by unilateral Modification No. P00018, which was executed by the ACO on the same date, 20 July 2005. SHCI was given time, but not additional funds, to design, provide, and install a new manhole cover relating to the utilidor. (R4, tab 126)

Further, because we believe our accepted proposal is clear that we have 570 C.D.'s or 630 C.D.'s before liquidated damages would be assessed and with the Government stating SHC only has until August 1, 2005, we understand this is constructive direction to accelerate.

We reserve our rights to claim for all cost and time related to this issue.

(R4, tab 76) The CO, Ms. Claudette M. McDonald, responded to SHCI's letter on 20 May 2005. She stated:

Reference your Serial Letter H-0184 dated May 13, 2005, Corps Directed Project Acceleration.

I researched your request for a correction to the contract to allow either 570 or 630 calendar days for completion and determine that the contractual completion date is August 1, 2005 based upon the following:

a. The contract was awarded on February 26, 2004, and included a page entitled, "Changes/Alterations," which deleted in its entirety SCR-1, Commencement, Prosecution, and Completion of Work. Thus, the 630 calendar day performance period is no longer part of the contract nor was it part of the contract at the time the notice to proceed and completion letter was issued on March 2, 2004.

b. The same Changes/Alterations page also accepted your proposed schedule as submitted under Volume II, Tab C, Proposed Schedule, which became contractually binding. Your proposed schedule included a completion date of July 1, 2005.

c. I issued the notice to proceed letter on March 2, 2004, which also included a completion date of July 1, 2005. I received your acknowledgment also on March 2, 2004. The completion date has been justifiably modified to August 1, 2005 via bilateral agreements (Modification Nos. P00007 and P00011) signed by your firm.

d. I also reviewed Volume II, Tab B, Betterments & Innovations, of your proposal as incorporated into the contract, and determined your proposal clearly offered the Government a building completion date of July 1, 2005. Tab C, Schedule, of the same volume, provides conflicting information: a "goal to finish the project by July 1, 2005,["] and an acknowledgement that a total contract duration of "570 calendar days" would be binding. Under SCR-41, Design-Build Contract, Order of Precedence, any conflict or inconsistency provides first order of precedence to betterments, defined as "any portions of the accepted proposal which both conform to and exceed the provisions of the solicitation." Your betterment for a building completion of July 1, 2005, both conforms to and exceeds the provisions of the solicitation. The contract duration of 570 calendar days may not be considered as your betterment overrides the conflict.

Based upon the foregoing information, I determine that the modified contract completion date remains August 1, 2005, and that the Government has not accelerated your schedule. Any changes you make to your work schedule are at your own expense. This contract is a firm-fixed-price contract and the price is not subject to adjustment based on the cost you may experience in fulfilling the requirements of the contract.

(R4, tab 75) SHCI responded to the CO on 3 June 2005, disagreeing with her stated completion date and contending that it would "continue to accelerate the project to meet the Government directed and imposed date" (R4, tab 74). The CO replied to SHCI's letter on 22 June 2005. She stated:

Reference your Serial Letter H-0197 dated June 3, 2005, Contract Completion Date.

In response to your letter, I do not find your argument that the July 1, 2004 [sic], completion date in your proposal is simply a "goal" reasonable[,] when your proposal and the resulting contract is reviewed as a whole. The means and method you propose in your baseline schedule to accomplish your goal of early completion of the building were convincing enough for the Government to accept your betterment of the

accelerated schedule described in Tab C on page 5 and offered as a contractor proposed betterment of in Tab B of your proposal. Though you state in Tab C that the early completion is a goal, you clearly state 7/1/2005 building completion as a betterment in Tab B and your graphic schedule indicates project turnover as 1Jul05.

I believe the award document and "notice to proceed" based on the offered and accepted betterment of early completion are clear. Again, I remind you that you signed the contract indicating the Government's acceptance of all betterments and innovations and subsequently acknowledged the notice to proceed indicating the accepted completion date of July 1, 2005. After award, you or Mr. Philip Dearing signed several bilateral modifications indicating that the contract completion date remained unchanged until Modification No. P00007 where the completion date was changed from "07/01/2005 to 07/08/2005." This modification was signed by Mr. Dearing on 7 Sep 04 and awarded on 14 Sep 04. Mr. Dearing is an authorized representative for your company per your serial letter H-0018 dated April 22, 2004.

In your June 3, 2005, letter you also express your concern of the Government's disregard for the conditions set forth in your proposal. Your proposal uses the term "accelerated" in relation to Government responsibilities for review of your contract deliverables such as plans and designs. The term accelerated has little or no meaning without a stated number of days associated with your expectation. Additionally, your proposal promotes your ability to incite such cooperation through your existing strong relationships with Government personnel and your proactive approach. Your historical success along with your schedule narrative convinced the Government that your accelerated schedule was doable. The offered and accepted betterment for early completion as revised in subsequent bilateral modifications reflect the contractual completion date.

Based upon the foregoing information, I determine that the modified contract completion date remains August 1, 2005, and that the Government has not accelerated your

> schedule. Any changes you make to your work schedule are at your own expense. This contract is a firm-fixed-price contract and the price is not subject to adjustment based on the cost you may experience in fulfilling the requirements of the contract. Please submit any further requests on this topic under either contract clauses 52.243-4, Changes, or 52.233-1, Disputes.

(R4, tab 72)[12]

SHCI's stated contention that, as of June 2005, it would have to begin accelerating the project by working six days a week, "6/10's," is not supported by record evidence. At least a year earlier, in June 2004, SHCI had stated its intention to work from 0700 hours to 1730 hours, Monday through Saturday, to meet its self described "baseline schedule" which envisioned a completion date of 1 July 2005. This conclusion was confirmed by Mr. Bruce Blake, SHCI's expert witness on scheduling issues. Mr. Blake testified that, based upon the various schedules which SHCI developed throughout the life of the project, it intended to work to a six-day, weekly schedule (tr. 3/5-11). Further, as part of his QAR responsibilities, Mr. Awbrey examined SHCI's daily reports for the project and concluded that, during the time period in the summer of 2005 when SHCI contended that they were accelerating, "[t]heir man-hours actually were reduced" (tr. 3/313-14). Mr. Awbrey's conclusions were corroborated by a detailed analysis of SHCI's daily reports referenced by the Corps' ACO in a letter of 1 September 2005. He wrote, in part:

> D. Reference Serial Letter C-0138, dated June 3rd, Performance review meeting. Item 25, Poor condition of trades. Item 30, Project is currently minimally staffed by the Contractor, extreme concern that the contractor will not make the completion date for this project.
>
> E. Reference CQC Daily Reports February through July. Note that all CQC reports are signed by both the CQC manager and Superintendent under the caption stating "On behalf of the Contractor, I certify that this report is complete and correct and all equipment and material used and work performed during this reporting period are in compliance with

[12] The CO's reference to SHCI's "accelerated schedule" as reflecting contractual completion date of 1 July 2005 is incorrect. This completion date was contained in SHCI's "BASELINE SCHEDULE." Its "ACCELERATED SCHEDULE" actually reflected a completion date of 27 May 2005.

the contract plans and specifications, to the best of my knowledge, except as noted above."

a. Average man hours worked for February, 308 hours per day. 2 Saturdays worked, average of 85 hours per day.

b. Average man hours worked for March, 340 hours per day. 2 Saturdays worked, average of 118 hours per day.

c. Average man hours worked for April, 384 hours per day. 3 Saturdays worked, average of 136 hours per day.

d. Average man hours worked for May, 269 hours per day. 2 Saturdays worked, average of 76 hours per day.

e. Average man hours worked for June, 298 hours per day. 4 Saturdays worked, average of 98 hours per day.

f. Average man hours worked for July, 311 hours per day. 4 Saturdays worked, average of 143 hours per day.

Strand Hunt Construction, after being notified April 27th, chose to work the least amount of average daily man hours on the project from February through July, on the month directly following the official notification, that the mutually agreed upon completion date was legal and binding. The month of June was also below average. It was not until July that the average hours worked per day, began approaching "Before Notification" levels.

(R4, tab 56 at 4)

SHCI responded to the CO's letter of 22 June 2005 on 30 August 2005. It claimed that, because of the "accelerated" completion date, it had incurred additional costs of $241,830. SHCI also wrote, in part:

The Government has made a determination, as stated in their June 22, 2005 letter that the contract completion date for the

above referenced project is August 1, 2005. This has since been changed by modification to August 31, 2005. Further the Government has stated they have not accelerated our schedule.

Strand Hunt Construction disputes these conclusions and herein submits a claim for the costs to accelerate the project completion to reach the August 31, 2005 date.

Our position is outlined clearly in our serial letter H-0197 dated June 3, 2005 (copy attached). The Government has, in several other instances, made it clear that we must follow the RFP, unless the contractor's accepted proposal states something different. In those instances the proposal is to be followed. Our accepted proposal is very explicit regarding the 'Goal' of July 1 and the damages and delay start after 570 C.D.'s.

Since your letter of June 22, 2005, we have been working much more overtime and larger crews than we would if we weren't directed to meet the August 31, 2005 date.

We are performing work out of sequence to reach this date. As an example, the flooring the [sic] subcontractor is working in the bathroom areas that require toilet partitions and accessories first, then jumping to other locker/bathrooms and doing these same areas, to allow accessories and partitions to start, then returning to those same rooms and completing the remaining areas. Subcontractors are flown up from Seattle to complete work if small areas are ready and are needed for follow-on work, they are flown up several times to meet these requirements.

Several trades are working in the same area trying to complete their work. Strand Hunt is cleaning and moving subcontractor material not in our scope of work, but due to a subcontractor now being required to work in several areas at the same time, this is expediting their work.

More damage is being experienced due to this stacking of trades and work in small critical areas.

(R4, tab 61) Mr. Awbrey agreed that SHCI was "stacking trades" on the project as early as December 2004 when it began to fall behind schedule. But he attributed this problem to a lack of co-ordination which resulted in work crews "tripping over each other" rather than any acceleration on SHCI's part (tr. 3/314-15). Hence, this problem was occurring several months before SHCI even contended that it was required to accelerate. Mr. Awbrey's conclusions in this regard were corroborated by the ACO in a letter which he forwarded to SHCI. He wrote, in part:

> The Government does agree that scopes of work have been conducted out of sequence. In fact the Government has specifically pointed that very fact out to SHC several times. The out of sequence work is not a result of trying to meet an accelerated schedule; it is however a direct result of the large amount of re-work that is taking place, and the lack of adequate supervision and numerous failures of SHC's CQC System.

(R4, tab 56 at 8)

Even as the parties were engaged in their dispute regarding the contractual completion date, issues continued regarding SHCI's quality control and level of workmanship. For example, on 5 May 2005, the ACO forwarded a memorandum to SHCI which was entitled "Unsatisfactory Performance." He wrote:

> Technical Specification (TS) 01355, Environmental Protection.
>
> A meeting was held with Mr. Rollie Hunt, Mr. Philip Dearing and myself on April 27, 2005, regarding Government concerns with quality control and structural design issues on the subject project. Of primary concern is concrete masonry unit (CMU) wall construction. Several cracks have been noted on the west exterior wall of the Electrical and Mechanical rooms. Items regarding this particular issue are as follows:
>
> 1. Per DCVR D-030 Rev 1. Control joints for exposed CMU walls shall be spaced at a maximum of 40 feet. Control Joints for interior, non-exposed CMU walls shall be spaced at a maximum of 60 feet.

2. Your jobsite redline drawings indicate that control joints are installed as per DCVR D-030 Rev 1.

3. Existing field conditions are such that control joints are either missing entirely or are spaced in excess of the requirements given in DCVR D-030 Rev 1. 4. Red line drawings/site visits show a control joint on the west exterior wall of the ANG Armory Vault. Mil/HDBK 1013/1A requires continuous reinforcing every 8 inches both vertically and horizontally. A control joint in this location deviates from structural requirements for an armory and must be rectified.

5. Numerous saw cut/core drilled penetrations through CMU walls interrupting structural bond beams without approval from Structural Designer of Record. Other penetrations were installed as approved by the Structural DOR but without the appropriate structural reinforcement as called for on the structural drawings.

6. Mortar Joints of several different colors on the west exterior CMU wall at the Mechanical and Electrical room locations, indicating that the mortar joints were installed in freezing conditions and not properly protected.

7. CMU control joints not running full length, top to bottom, as required by the Designer of Record.

8. Unanswered structural concerns dealing with shear transfer loads, as asked by USACE Structural Engineer Mike Callicott in Serial Letter C-0098, dated April 13, 2005.

Additional concerns are as follows:

1. Failure to provide and follow an accurate construction schedule. Since December 2004, you have been directed to update and show compliance to an approved schedule. The last two processed pay estimates have resulted in retainage based on either slippage from schedule or an inaccurate schedule.

2. During this meeting I informed you that your crews were not performing jobsite cleanup on a daily basis as contractually required. I also informed you that a fuel spill may have occurred at your storage tank. Per TS 01355, Environmental Protection, you are required to notify the Government of spills; perform sampling of the contaminated material and, if required, treat and dispose of the material in accordance with State of Alaska Department of Environmental Conservation requirements.

3. On Saturday, April 30, 2005, Government representatives visited the jobsite several times During each visit, they noted that Strand Hunt had no supervision on site, including no Superintendent, CQCSM or Safety Officer. Multiple phases of work were being performed at this time: sheetrocking, mechanical rough-in and electrical rough-in. This represents failure on behalf of your management and CQC system. These are concerns that the Government takes very seriously. To that end, I direct your senior management to attend a meeting to discuss these issues tentatively scheduled for May 13, 2005, at 9:00 am. Thirty days after this meeting, your management staff is required to attend a follow-up meeting to discuss resolution of the issues detailed in this letter. If satisfactory progress has not been made in resolving these issues, the Government may issue Strand Hunt an Interim Unsatisfactory performance evaluation for this project.

The ACO also noted that a "draft of this letter was reviewed by the Contracting Officer and Office of Counsel prior to release to the Contractor." (R4, tab 77)

In response to the ACO's letter, the parties met and the ACO forwarded a follow-up memorandum to SHCI on 3 June 2005. He wrote, in part:

Reference Serial Letter C-0117, dated May 5, 2005.

On May 26, 2005, a Performance Review meeting was held between representatives of Strand-Hunt, Design Alaska, 354th CES and the Corps of Engineers. The Contractor was notified, via Serial Letter C-0117, that this meeting was to be a Performance Review meeting. The Contractor was further advised that issues discussed during this meeting would

> require action on the Contractor's part to resolve; the Contractor has been given a period of thirty days to resolve these issues. Should unsatisfactory progress be made, the Government may issue the Contractor an Initial Unsatisfactory Performance Evaluation. The issues discussed during the Performance Review meeting and the corresponding course of action, are listed below....

The ACO then delineated 30 deficient items which had to be remedied by the contractor. Included among these items were missing control joints in the CMU walls with resulting cracks "in numerous areas," "large sawcut penetrations going through bond beams," "missing rebar in lintels," "ungrouted cells in several areas," "voids under windows," "poorly designed manhole connection for utilidor," "[e]xtremely poor workmanship for floor grates in East mobility bay," "[n]umerous areas throughout the building where core-drilling activities cut through bond beams/structural reinforcement," "[i]mproper lateral bracing on fire suppression system," "wrong pipe support system used in utilidor," "[c]ontractor installed no-hub below grade waste piping[,] not in accordance with RFP requirements and specifications," "poor coordination of trades," and "[s]uperintendant and QC missing from jobsite on several occasions." With respect to the final item, number 30, the ACO stated: "Project is currently minimally staffed by Contractor; approximately 13 Contractor employees have been noted on site over the past week; extreme concern that the Contractor will not make the completion date for this project." (App. supp. R4, tab 643)

On 20 June 2005, SHCI forwarded a cover letter with "a 16-page list of action items that has been updated to include the status as of June 20, 2005." It added: "This is meant to address the 30 items on the Government's list of agenda issues discussed in the ...meeting." (App. supp. R4, tab 653) On 28 June 2005, SHCI sent a follow-up letter to the Corps regarding the list of agenda items. It wrote, in part:

> Enclosed please find a 10-page list of action items that has been updated to include the status as of June 28, 2005. This is meant to address the 30 items on the Government's list of agenda issues discussed in the above referenced meeting.
>
> We request the Corps of Engineer immediately advise of any items or status of items that are not stated correctly. Also please advise of any item marked [']Closed' that the Government believes has not been adequately addressed. Items will be 'Closed' that are complete, or the action to complete the item is concurred with (i.e. it has an acceptable plan to complete).

> For ease of future review, we will omit items that were marked 'Closed' on a prior list unless we received input from the Government an item is not closed.

(App. supp. R4, tab 662) SHCI forwarded similar follow-up memoranda to the Corps on 12 July 2005 and 2 August 2005 (app. supp. R4, tabs 669, 691).

These efforts were unavailing. On 3 August 2005, the CO issued an interim performance evaluation in which she found SHCI's performance to be unsatisfactory in 10 specific areas. These were: "Quality of Workmanship," "Implementation of the CQC Plan," "Quality of QC Documentation," "Use of Specified Materials," "Submission of Updated and Revised Progress Schedules," "Management of Resources/Personnel," "Coordination and Control of Subcontractors," "Adequacy of Site Clean-Up," and "Effectiveness of Job-Site Supervisions." Specifically, the CO explained SHCI's unsatisfactory evaluations as follows:

> 15a: Workmanship substandard in numerous areas:
> 1: Concrete slab flatwork – majority of flatwork in the building had to be floated with Ardex floor leveling to "float" the floor out enough to meet flatness requirements.
> 2: Ardex material splattered all over finished walls in the building, requiring cleaning and repair. Poor workmanship and even poorer sequencing of work.
> 3: Ardex material placed against door sills; numerous door bottoms coated with Ardex and will have to be planed down in order to open properly. One door was even Ardexed into place and could not be opened at all.
> 3:[sic] CMU Block walls – split-faced block color varies in shades; grout color is not uniform shade; grout spillage onto split-face cmu was not cleaned up in many areas, so grout is not adhered to CMU.
> 4: Floor grate in mobility bay – flatwork so far out of tolerance that section of slab was sawcut and removed. Replacement work not much better. Still does not meet flatness requirements.
> 5: Locker blockwork layed out incorrectly; had to be torn out and redone.
> 6: Wall tile in showers substandard; removal is required.
>
> 15c: Numerous instances where CQC Plan failed to be implemented:

1: Installation of below-grade piping that did not meet RFP requirements.
2: Concrete slabs placed in the rain and not properly protected (QC failed to step in and correct the problem)
3: CMU block allowed to be placed in below-freezing conditions without adequate protection.
4: Control joints missing in CMU; failed to be noted or corrected by QC.
5: Numerous submittals missing Designer of Record signatures.
6: Concrete slab flatwork out of tolerance in many areas.
7: QC missing from site several times with work ongoing (latest occurrence was 2 July, 2005)

15d: Contractor has repeatedly failed to hand in daily reports on a timely basis. Contractor is currently over 2 weeks late in getting daily reports to the Government. When reports do get received, they are inaccurate regarding equipment hours and manhours worked.

15j:[sic] Several instances of use of unauthorized materials:
1: Contractor installed no-hub below grade pipe, an unauthorized variation to the RFP.
2: Contractor has installed metal lateral strap bracing for shear transfer from the roof diaphragm to the walls; this is a Prohibited Item per the RFP.
3: Contractor installed expanded polystyrene foundation insulation instead of extruded polystyrene insulation, a violation of the RFP.

16b: Contractor has failed several times to manage personnel and resources appropriately:
1: Contractor supervisory personnel have been absent from the jobsite (with work ongoing) three times that have been documented by the Government.
2: Contractor has made four unauthorized road closures, with one road being closed for approximately 9 months. Last unauthorized road closure occurred on 16 July 2005. Customer very unhappy with Contractor's lack of proper notification and coordination.

16c: Contractor has exhibited poor control and coordination of subcontractors. CMU deficiencies were not noted by the contractor; Government personnel brought issues of missing control joints, unfilled CMU cells, sawcut bond beams, discolored grout and block to the Contractor's attention. These are items that the Contractor's superintendent and QC should have noted and brought to the subcontractor's attention. Contractor currently appears to have little to no control over subcontractors, with out of sequence work occurring in all areas of the building. Examples of this are as follows:

1: Ardex floor coating being used to "float" out the terrible flatwork on the concrete floor slab in many areas of the building. Walls have been finished in many areas where Ardex has been applied and have been "splattered" with the Ardex material. This will require extensive cleaning/patching to correct.

2: Due to poor scheduling on the part of the Contractor, windows arrived late on the jobsite. The Contractor elected to install sheetrock window surrounds prior to window installation. When windows were installed, Contractor had to go back in and drill four holes in each window surround to attach windows to the walls; each window surround had to have these holes patched.

3: Contractor has hung doors in all areas of the building; many doors are getting damaged due to being installed too soon – to include door bottoms that have been coated with Ardex material and will have to be planed down in order to swing and close properly.

4: Contractor installed the site infiltration drainage system after building foundation was constructed; Contractor excavated up to and below the foundation footers to install this system, putting the stability of the foundation at risk.

5: Majority of interior walls were finished with rough-in work ongoing in adjacent areas. Walls have been damaged in numerous areas and will require extensive patching prior to building turnover.

6: High humidity in building caused by painting and Ardex floor coating is leading to moisture build-up in suspended ceiling panels. Panels are starting to "droop" from this excessive moisture in numerous areas.

16d: Contractor's site clean-up has been unsatisfactory. Field staff has informed him numerous times that the site, including material laydown and storage areas, needs to be cleaned. The Air Force has complained various times that the Contractor was failing to do site cleanup satisfactorily.

16e – Contractor Supervision:

The Contractor's superintendency of this project is unsatisfactory. Superintendent has been absent from jobsite (with no alternate superintendent onsite) on several documented occasions, the most recent being 2 July, 2005. While onsite, the Superintendent's effectiveness has been unsatisfactory, as demonstrated by the coordination problems detailed in Item 16c of this evaluation.

17b: Contractor has failed to adhere to his proposed schedule, which indicated a July '05 completion date. Current contract completion date is 1 August, 2005. Contractor's most recent updated schedule indicated that all contract work will not be complete by that date.

17f:[sic] Contractor's submitted schedule updates have continuously indicated that the contract completion date will not be met.

(App. supp. R4, tab 695)

On 16 August 2005, SHCI forwarded a memorandum to the ACO in which it stated:

> There have been numerous discussions in meetings about the pre-final punchlist being conducted starting August 15, 2005. The plan was to have:
>
> Area 1 – 8/15/05

Area 4 – 8/16/05
Area 3 – 8/17/05
Area 2 – 8/18/05
Area 5 – 8/19/05

> We were disappointed that the Corps did not show up to perform the Pre-Final in Area 1 on 8/15/05 as we had discussed.
>
> We request that we immediately begin Pre-Final inspection following the above sequence as we are now already one day behind.

(R4, tab 67) The Corps responded to SHCI on 1 September 2005. The ACO stated, in part: "At this time it has not been possible to conduct a thorough pre-final inspection and a final inspection appears to be several weeks away, even exceeding SHC stated completion date." (R4, tab 56 at 8)

On 24 August 2005, matters took a turn for the worse. While applying muriatic acid to the floor of the parking garage for warm vehicle storage, as part of preparation for painting, SHCI mixed the acid in a "very high concentration" which "appeared to be doing damage to the project," specifically the "oil-water separator" and "the HVAC ductwork" (tr. 3/243). At approximately 1:00 p.m. on that day, Mr. Volsky "came around the side of where my trailer was, and I could see there was a lot of activity going on in that bay." Mr. Volsky testified further: "You could hear a pressure washer running. You could hear the sounds of electric motors. There was this mist, and I went over to see what was going on because I knew they were doing the flooring and I'd not seen or heard that before, the way they were going about it." Mr. Volsky also testified: "I walked over and immediately got hit in the face with – I inhaled some of the vapors, the acid vapors, from what they were doing in there." Mr. Volsky noticed that the workers were wearing rubber boots, "half-face respirators," and goggles. Concerned about the workers' safety, Mr. Volsky ordered the workers to stop work and to leave the premises. Mr. Volsky testified further:

> There's some of this, as they do that work, they were picking up the surface latents, the stuff that's left over, it's mixed with acid, and they were sucking it off the floors with shop vacs, and just through the process of us having that conversation in the proximity we were, I saw where they had been dragging these shop vacs over and dumping it on the ground, off the edge of the asphalt, and I was concerned we were going to have some sort of EPA violation.

(Tr. 3/205)

Mr. Volsky called the base's environmental spill response team which ordered all work to stop. Soon thereafter, Mr. Volsky was approached by one of SHCI's subcontractors who stated that the contractor's employees had dumped acid into a lift station which led to the base's sewage system. Mr. Volsky also testified as to the impact to the parking garage from the acid:

> All the exposed copper for the I-wash station had turned green and tarnished.... All the ductwork had the white sort of a dusty appearance to it from acid etching. The cables for the garage door, the overhead doors, everything there, it was starting to rust.

Also affected by the acid, according to Mr. Volsky, were the intake vents which ran down the full length of the wall. In fact, the acid damage extended fully twenty feet above the floor of the garage. (Tr. 3/202-10)

On 25 August 2005, the ACO forwarded the following email to SHCI:

> Rollie and Philip: This email serves to confirm verbal direction given by myself to both of you regarding your dumping of muriatic acid waste onsite and in the oil-water separator. You are hereby directed to cease your acid-etching operations immediately. Any costs associated with the treatment and disposal of the waste stream your operations have caused will be solely your responsibility. You are not to remove any of the waste material from the jobsite until you are directed by the Government. Any damage caused to the building (oil water separator, piping, electrical fixtures, etc) will be strictly your responsibility to replace or repair.

SHCI responded later that afternoon. It stated, in an email:

> We are in receipt of your stop work order for acid etching operations on the project as per below.
>
> As this is a critical path activity and floor prep acid wash in the AD Mobility Bay was to start today, we now reserve our rights to claim for additional costs and time from this stop work notice.

> Please advise SHC immediately if we are miss-understanding your direction to stop acid etching work in the AD Mobility Bay.

(App. supp. R4, tab 735) Shortly thereafter, the ACO sent the following letter to SHCI:

> This letter is intended to warn you that your improper disposal of muriatic acid waste could result in notices of violation by the State of Alaska and the EPA. You are hereby directed to cease this phase of work immediately.
>
> Mr. Rollie Hunt of your firm was given verbal direction by myself on 25 August, 2005 to stop all work associated with the muriatic acid floor etching operations. He was directed not to remove any of the muriatic acid waste material from the jobsite; in addition, your onsite personnel were informed by Eielson Base Environmental to not remove any material from the oil water separator or the lift station until directed by the Government.
>
> The Government now notes that the lift station, as of 26 August, 2005, is empty – a violation of the direction that you were given by the Government. A telephone discussion between Rollie Hunt and myself on 26 August, 2005 indicated that Strand Hunt personnel have pumped the material from the lift station into a containment vessel onsite. The Government was not notified of this activity and did not see it being performed and thus has no way of verifying if the material in the container is in fact the material that was in the lift station. This is of serious concern to the Government and may have serious legal repercussions regarding Strand Hunt. Mr. Hunt was then directed that the material that he alleged was pumped from the lift station and containerized was to remain onsite, to perform sampling of this material in the presence of Government personnel, to submit the sample results to the Government and await Government direction as to final treatment and disposal of the material.
>
> He was also directed to leave the material in the oil water separator in-place, with the understanding that further liquid is not allowed to enter or leave the oil water separator. He was informed that it is acceptable to the Government for

Strand Hunt to neutralize the material in-place. Further direction was given to sample this material in the presence of Government personnel, submit the sample results to the Government and await Government direction as to treatment and disposal of the material.

Mr. Hunt was further informed that any and all costs associated with treatment and disposal of this waste shall be strictly Strand Hunt's responsibility. He was reminded yet again that Strand Hunt is directed by the Government to stop work with using muriatic acid for floor preparation. He was informed that the floor epoxy application is rejected by the Government until the epoxy manufacturer provides written notification to the Government that Strand Hunt's acid etching operations are acceptable as a means of floor preparation. Failure to gain the manufacture's approval and warranty will result in rejection and removal of the work.

Further, you are also responsible for any and all damages that may have occurred to the building as a result of your improper handling, application and disposal of this material. The Government has noticed pipe corrosion in areas where the muriatic acid has been applied to the floor slabs, that sheetrock near the floor in these areas has been saturated by the acid and that you have flushed this waste into the building's oil-water separator and lift station system. You are directed to make a thorough inspection of all areas where this material has been applied or disposed for any signs of damage caused by your use and improper disposal of this material. You are directed to submit to the Government within two days of receipt of this letter a Corrective Action Plan detailing all damages that have been caused by using and improperly disposing of this material and the actions that you propose to take to repair or replace any damaged material or equipment.

(App. supp. R4, tab 751)

SHCI's environmental consultants, Shannon & Wilson, Inc., investigated the job site on 25 August 2005 and promulgated the following report:

> Apparently-
>
> Muriatic acid was used to prep the wash bay floor. The majority of the acid slurry was vacuumed into two poly drums and a rubber cart. Residual material was mopped up and some washed down the floor drain (into the oil water separator and lift station). Material collected in the mop buckets was dumped to the ground surface near the southwest corner of the job site trailers.
>
> Water samples were collected from the lift station and the oil water separator. Field pH readings were recorded using Insta-Chek Jumbo pH paper (0-13). The results are recorded in Table 1 attached to this field report.
>
> Soil samples were collected from the wash bay sump, and near the southwest corner of the job site trailers where the mop buckets were apparently dumped. In addition, a background soil sample was collected from near the jobsite. Preliminary pH samples were collected in general accordance to the ASTM Designation: D 4972-89 Standard Test Method for pH of soils and readings were recorded in the field using Insta-Chek Jumbo pH paper (0-13). The results are recorded in Table 1 attached to this field report.
>
> 11:00 off site
>
> 12:00 Re-analyzed the water and soil samples with the Insta-Check pH paper and with a Orion Quickchek pH meter calibrated with 4.0 and 7.0 standard calibration solutions. The results are recorded in Table 1 attached to this field report.
>
> 13:00 Unpacked sampling supplies, generated data table and this field report.
>
> Conclusions:
> Soil and water affected by the acid cleaning process does not meet criteria as hazardous waste for corrosivity (less than or

> equal to pH 2 or greater than or equal to pH 12.5). The acid in the lift station could be further neutralized with lime or bicarbonite soda if necessary prior to removal or disposal.

(App. supp. R4, tab 741 at 01018-19)

On 27 August 2005, SHCI transmitted an email to the Corps in which it cited the environmental report and concluded that "the levels are acceptable." Ms. Nancy Powley of the base's environmental group responded to this email on 29 August 2005 as follows:

> I can't help but chime in here. Philip, when you say the reports from Shannon and Wilson stated the levels were acceptable, I assume you mean the results from Shannon's and Wilson's Job No. 31-1-01848-009 these are the only samples I am aware of. Anyways, no where in there [sic] report do they say the levels are acceptable, they say the water and soil do not meet the criteria for a hazardous waste. (Note the Muriatic Acid Slurry does) No where did they tell you directly to neutralize or remove the material. They said it could be further neutralized. The sample results from Shannon and Wilson further strengthens [sic] the order to leave the materials where they were until a course of action was decided. As we all know this did not happen. Hopefully the water is still on site so we can run test to make sure it meets our permit requirements.

(App. supp. R4, tab 748)

Matters deteriorated further on 31 August 2005 when the ACO transmitted this email to SHCI:

> Philip: this email is to serve as written confirmation of the verbal Stop Work order that I gave you at approx 1:00 pm AST today (8/31/05). The direction given was to stop all work regarding installation of this product and to have a Neogard technical representative make an onsite inspection ASAP of what has already been installed to determine whether or not your method of floor preparation and installation are acceptable to the manufacturer. The Government has concern that the floor has not been suitably prepared, as the product is blistering in many areas and

> appears to be pulling loose from the concrete. Should you have further questions, please give me a call.

The work to which the Corps was referring was the installation of epoxy to protect the floors. (R4, tab 60) Hence, as of the end of August 2005, SHCI had been given two stop work orders.

Also on 31 August 2005, two engineering firms issued a 27-page final report of building survey.[13] In formulating their report, the firms took the following preliminary steps:

> A site visit and survey was conducted by Leo McGlothlin from Koonce Pfeffer Bettes, Inc. and Dave Gardner of Coffman Engineers, Inc., on July 18 and 19, 2005. Interviews were conducted with on-site COE personnel; construction documents including plans and specifications were compared with the RFP; and construction progress photos were reviewed along with project correspondents including DCVR's and RFI's. Additionally, Quality Inspection and Testing of Fairbanks conducted x-ray testing of selected areas of the completed CMU walls August 1 and August 28.
>
> The purpose of this report was to survey the in place construction to identify deviations from either the requirements of the RFP or the Construction Documents prepared by the Contractor's AE Designers of Record. In many areas throughout the facility, workmanship was found to be poor. Most noticeable areas are exterior masonry block work and floor slabs.

The report reached several general conclusions:

> Overall, the issues reviewed for this report are more of an aesthetic concern rather than structural. We would consider the building structurally safe as constructed. However, poor workmanship, poor quality control, not following the construction documents and non-industry standards of construction have led to a structure with potential[ly] a reduced useful life span.

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[13] The firms were Koonce Pfeffer Bettis, Inc. and Coffman Engineers, Inc. (app. supp. R4, tab 756 at 1).

(App. supp. R4, tab 756 at 1 of 27) With respect to specific deficiencies, the report concluded that the masonry work was substandard "with chipped corners and color variations." It also noted that the "[m]ortar joint workmanship is poor and inconsistent." The report also stated that the CMU walls were not fully grouted and that there were numerous openings on the building's west wall caused by core drilling and saw cutting. With respect to the CMU control joints, the report concluded:

> Several CMU control joints in the interior and exterior CMU walls appear to not have been installed according to the details and locations on the amended contract documents. No control joints were noted at interior CMU walls. Exterior joints were observed to be at the spacing called for on the drawings or less. However, COE field personnel indicate that the joints were constructed of various techniques. In some cases the joint was formed during construction full height of wall, in others the joints did not start until 4 or 5 courses or more above grade or stopped short of the top of the wall. In some areas, the joints were not formed at all during construction but saw cut after the wall was cured. COE personnel indicated possibly 50% of the joints were saw cut after wall construction. During our site visit, it was noted that some joints at the roof level outside of the mechanical room had recently been cut or were in the process of being cut, nearly 6 months after the walls were constructed. Since all of the exterior walls had furring and insulation installed on the inside face at the time of the site visit, joints on the inside face could not be verified.
>
> Control joints in CMU walls are used for crack control. Control of cracks is important for both aesthetic and water penetration reasons. While there are many causes of wall movement that can lead to cracks, including foundation settlement, drift, wind and seismic forces, the main conditions for movement in masonry construction is [sic] temperature and moisture content changes. Changes in moisture content, which occurs as the masonry dries out from construction and to a lesser extent from changes in humidity, causes shrinkage and an increase in tensile stresses. Likewise, temperature changes result in expansion and contraction of a CMU wall and a resulting increase in stresses. A 50 F temperature change in a 100 ft CMU wall can result in up to ¼" of

> movement. Lack of proper crack control can result in an overall decrease in the useful life of a structure and unsightly random cracks. Large cracks can allow infiltration of water and repeated expansion and contraction around a crack can lead to spalling.

(App. supp. R4, tab 756 at 5 of 27)

Also regarding the control joints, the report stated:

> The control joints in the JSFC [Joint Security Forces Complex] exterior walls do not appear to have been properly constructed according to current masonry standards. Some of the vertical joints were not constructed the full height of the wall but started above several feet above grade or stopped several courses short of the top of the wall. It appears that mortar was placed in the head joint rather than leaving out and using a backer rod. X-rays of a few joints indicate horizontal reinforcement extends across the joints but conventional bars appear to have been used, rather than smooth dowels. In joints that were saw cut after construction, the depth of saw cut appears to be only 1/8" to ½" deep and from only one side in some cases. Saw cuts of this shallow of a depth in an 8" solid grouted CMU wall do little, if anything, to control cracking or movement. In other saw cut areas, only about 3 or 4 block courses were saw cut in a (2) story high wall. Saw cutting of joints many months after construction does little for control of cracks caused by drying of the CMU as the majority of shrinkage occurs shortly after construction.

(*Id.* at 8 of 27)

The engineers took various x-rays of the completed walls. They concluded:

> The x-rays appear to confirm that the reinforcement at the cmu control joints do not conform to the details on the construction drawings. Specifically, deformed reinforcing bars appear to traverse the control joint and the horizontal bars do not appear to have been hooked around the vertical bars at either side of the joint.

(*Id.* at 11 of 27)

The report also concluded that SHCI had used "no hub pipe" for the underground waste system. It stated:

> Hub-and-Spigot (H&S) waste piping presents a more positive, stronger and longer lasting joint than does the No-Hub (NH) joining method. The H&S joining method presents an advantage especially when installation of the piping system is beneath slab-on-grade construction or in other inaccessible locations. Although there is no known published life expectancy for either system, we would portray the H&S system to be appropriate for a structure with a 50-year + life expectancy. The NH system would probably fall into a building life expectancy class of 20 to 30 years.

(*Id.* at 15 of 27)

The engineers also noted: "The lower cost NH system is commonly used by developers and building owners who have limited budgets or who do not plan to occupy the structure for a long period of time." The report pointed out several other deficiencies, some of which were not as significant as those we have reviewed. (*Id.* at 16 of 27)

While these events were transpiring, representatives of the Corps were conducting inspections and creating punchlists of items to be corrected by SHCI. Mr. Volsky testified that the inspection process encompassed three steps: During the initial phase, representatives of the parties examined the drawings and submittals and inspected the ongoing construction itself. Mr. Volsky emphasized that this was a continuous process. Later, the Corps conducted pre-final and final inspections. On the JSFC project, this process was greatly complicated by the fact that SHCI was behind schedule and was still engaged in construction. In addition, Mr. Volsky testified: "Quite often you would find trash, building materials, tools, ladders, inside of the rooms to be inspected. Dust on the walls." Mr. Volsky testified further: "It wasn't uncommon to find a light either inoperable or not even installed. Another incident that comes to mind, there was a hole that had gotten knocked into a wall. And like I said, just construction debris everywhere. And tools." (Tr. 3/210-14)

On 17 August 2005, SHCI forwarded the following letter to the ACO:

> As requested in yesterdays Red Zone meeting, we hereby include a copy of the contractor punchlist for areas 1 and 4 with the exception of the parking garage.

> We request an immediate start to the pre-final Corps punchlist in these areas.

(R4, tab 66)[14] On 30 August 2005, SHCI submitted "the Contractor punchlist for Area 2" (R4, tab 62). The ACO replied to SHCI's requests for punchlists on 12 September 2005. He wrote, in part:

> Reference your serial letter S-0289 Contractor Punchlist for Area 2, August 30, 2005.
>
> Attached is a courtesy punchlist from the Government for Areas 1 through 4. Please note that these punchlists are not complete and are a work in progress due to the large volume of work and rework being performed in these areas. Please note that the Government gave you informal copies of these punchlists as early as August, 26, 2005. Please ensure that the items on the attached courtesy punchlist are corrected prior to scheduling a Pre-Final Inspection.
>
> Also noted is that you currently have tools and materials stored in various locations throughout the building. This makes inspection of all areas of the building extremely difficult. Please ensure that these materials and tools are removed from the building prior to scheduling a Pre-Final Inspection.

(App. supp. R4, tab 763)[15] The ACO, Mr. Bradley, testified that the phrase "courtesy punchlist" was an "erroneous title" which simply designated an attempt by the Corps to expedite the inspection process while construction was ongoing. Mr. Bradley also testified that SHCI did not contemporaneously object to the use of the term "courtesy punchlist" and that the use of "follow-on inspections" was "very typical on any Corps project." (Tr. 3/246-49) Mr. Bradley testified further that SHCI later complained about the inspection which it itself had requested on the basis that it was being overinspected (tr. 3/249-53).

Regarding the inspection process, Mr. Awbrey testified that it was "typical" for "a Corps QAR to inspect the project from the first day of construction on through the end" (tr. 3/324).

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[14] SHCI had divided the building into five areas or phases.

[15] A second punchlist for Area 2 was transmitted to the Corps on 12 September 2005 (R4, tab 54).

On 6 September 2005, SHCI forwarded a lengthy letter to the Corps in which it responded to the ACO's complaints regarding a lack of manpower on the project, the two stop work orders which were still in effect, and the fact that it had "not been given COE punchlists officially for any of the areas" (R4, tab 55; emphasis in original).

On 12 September 2005, SHCI forwarded to the Corps "a copy of the contractor punchlist for area 5 which we would like to Pre-Final" (R4, tab 53). Also on 12 September 2005, SHCI forwarded to the ACO "a copy of the contractor punchlist for sitework which we would like to Pre-Final" (R4, tab 52). On the same date, SHCI also forwarded "a copy of the contractor punchlist for roof area which we would like to Pre-Final" (R4, tab 51), and "a copy of the contractor punchlist for exterior of building which we would like to Pre-Final" (R4, tab 50).

Regarding the two step work orders, the ACO forwarded the following letter to SHCI on 12 September 2005:

> Reference your Serial Letter H-0288, August 29, 2005; Serial Letter H-0291, August 31, 2005; Serial Letter H-0294, September 1, 2005; Corps of Engineers Serial Letter C-0184, September 1, 2004; Federal Acquisition Regulation (FAR) 52.236-0009, Protection of Existing Vegetation, Structures, Equipment, Utilities and Improvements (APR 1984); FAR 52.236-0013, Accident Prevention (NOV 1991); FAR 52.223-0003, Hazardous Material Identification and Material Safety Data (JAN 1997); FAR 52.223-0005, Pollution Prevention and Right-To-know Information (AUG 2003); and FAR 52.246-0012, Inspection of Construction (AUG 1996).
>
> The Government accepts the items listed in serial letter H-0291 with the following comments:
>
> 1: Item 1 – Warranty: Obtain and submit a letter from Neogard stating that the floor preparation for all bays is acceptable, that the installation techniques used to install the Neogard product is [sic] acceptable and that Neogard will warranty their product subject to the Contractor's meeting Neogard's requirements for floor preparation and product installation.
>
> 2: Item 2 – MSDS sheets: Per the requirements of FAR 52.223-0003, the MSDS sheets shall be on-site at all

times. In addition, submit a copy of the MSDS sheets to Eielson Base Environmental.

3: Item 5 – Shannon and Wilson handling and neutralization recommendations – Review the following items and submit for Government approval:

a. Submit a written change out procedure for the respirators that will be worn. In addition, submit break through calculations for the respirators, as each respirator cartridge has a limited capacity to filter HCL particles.

b. Submit a respiratory protection program. The program shall include copies of employee medical evaluation and fit testing records.

c. Submit a work plan for the acid neutralization prior to discharge, with a list of equipment that will be used for the neutralization.

d. Submit an Activity Hazard Analysis (AHA) for the neutralization activity.

e. Submit the qualifications of the individual performing the neutralization process, as this is a chemistry process and should not be performed by a general laborer.

f. Submit a sampling and analysis plan for sampling of the waste stream. Initial sampling shall be performed should initial results indicate that the waste stream is at a pH of 2 or lower. The waste cannot be treated onsite and must be treated as a hazardous waste. Material above a pH of 2 may be neutralized onsite. Once neutralized, verification sampling shall be performed. Per serial letter C-0184, waste from your acid etching operations may be disposed of in the Eielson sanitary sewer system provided that all samples taken by your environmental sampling subcontractor have a pH of between 6.5 and 7. Samples shall be taken in the presence of a Government representative and sampling results shall be submitted to the Government for approval prior to disposal of the waste.

> In addition, you are directed to submit a work plan describing how you intend to perform all phases of work, to include the acid etching process and installation of the Neogard product. The work plan must include how you propose to protect the existing work during all phases of the floor preparation and neutralization process. The Government notes that in the bays where the acid etching process has been performed that exposed ductwork and copper piping are exhibiting signs of corrosion – a condition that you have been directed in prior email correspondence and several conversations between myself and members of your firm to investigate and correct.
>
> Subject to meeting the conditions listed above, as well as the other items you have detailed in serial letter H-0291, you are hereby approved to proceed with the muriatic acid floor preparation and installation of the Neogard product.

(R4, tab 49) SHCI forwarded additional information to the ACO regarding the muriatic acid etching on 13 September 2005 (R4, tab 47), 14 September 2005 (R4, tab 46), and 21 September 2005 (R4, tab 45).

On 23 September 2005, the ACO forwarded a lengthy response to SHCI's letter of 6 September 2005. He wrote, in pertinent part:

> The Government objects to numerous comments made in your serial letter H-0295. In the third paragraph, in Item number two, you state that the Government "has essentially, but somewhat indirectly, taken over the means and method that this project is now being completed under and thereby is controlling both the manpower and activities and has essentially taken over the schedule." Your letter lists 6 areas where you believe the Government has impacted your schedule:
>
> 1: Parking Bay/Wash Area (Room 30)
> 2: AD Mobility Bay and Mechanical Room (Rooms 13 and 73)
> 3: Pre-Final Punchlist
> 4: Utilidor Manhole
> 5: Ceramic Tile in Restroom and Lockers
> 6: Training

Items 1 and 2 are interrelated. You were given a stop work order in Item 1 because you were placing defective work. Your Superintendent and CQC system failed to step in and correct the situation, leaving the Government no choice but to stop work and force you to address the situation. Had your QC System been functioning properly, the Government would not have had to take this drastic action. In Item number 2, you were given a stop work order because of your improper handling of a hazardous material – which was again a failure on the part of your Superintendent and CQC System. You created a waste stream that is a RCRA hazardous waste. In addition, you failed to protect the existing work, resulting in exposed piping and ductwork showing signs of extreme corrosion. You were verbally directed to investigate this damage and to provide the Government with a corrective action plan. You have yet to do this. Further damage may exist – to include damage to the oil water separator, below grade sanitary sewer piping, sanitary sewer lift station and to the HVAC system. To sum these items up, the Government is not controlling the means and methods of your work. The Government is enforcing the requirements of the contract.

For Item number 3, you state that you have not "officially" received any COE punchlists. As a general rule, Government punchlists are given directly to the Contractor's field staff. This eliminates excessive correspondence and allows the Contractor greater flexibility in scheduling their work. Further, your attention is directed to TS 01451, paragraph 3.8.1 which states "Near the end of the work...the CQC Manager shall conduct an inspection of the work. A punch list of items which do not conform to the approved drawings and specifications shall be prepared and included in the CQC documentation, as required by paragraph DOCUMENTATION. The list of deficiencies will be corrected. The CQC System Manager or staff shall make a second inspection to ascertain that all deficiencies have been corrected. Once this is accomplished, the Contractor shall notify the Government that the facility is ready for the Government Pre-Final inspection." The Government contends that as of the date of issuance of serial letter

H-0295, the contractor had not met the requirements of TS 01451.3.8.1. In an effort to assist you towards project completion, the Government has conducted a courtesy inspection of various areas of the project. These were courtesy inspections, not a Pre-Final inspection. In addition, you state that "to our total surprise, the Corps informed our firm late last week that the Corps is now scheduling several Air Force [personnel] in to do their prefinal work in areas that were previously prefinaled." Again, this was a courtesy inspection and was not a pre-final inspection, as you had yet to complete the requirements of TS 01451.3.8.1.

In serial letter H-0295 you go on to state "many of the punchlist items have been completed. Those that have not are identified and can be completed when the building is occupied...Except for the areas and pre-final lists yet to be provided that are in the Government's control, as discussed above, the building can be occupied." Clearly, this does not meet the requirements of TS 01451.3.8.1. The Contractor is required to complete their punchlist – and ensure that all items have been completed – prior to requesting a Pre-Final Inspection from the Government. Then, per TS 01451.3.8.2, "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 as a result of this inspection. The Contractor's CQC Manager shall ensure that all items on this list have been corrected before notifying the Government, so that a Final Inspection with the customer can be scheduled. Any items noted on the Pre-Final inspection shall be corrected in a timely manner. These inspections and any deficiency corrections required by this paragraph shall be accomplished within the time slated for completion of the entire work." Please note that the contract completion date for this project is currently 31 August 2005. The Government contends that you have not met the contractual requirements in punching out this project. The Government further contends that you have been given Government punchlists as a courtesy by Government field personnel and that your claim that the Government has impacted your schedule by not giving you punchlists is inaccurate. The Government further notes that the lists that

you have been given are quite large and are not indicative of a project that is ready for a Pre-Final Inspection.

(R4, tab 44)

On 23 September 2005, the ACO forwarded a letter to SHCI regarding the muriatic acid damage. He wrote, in part:

> It is observable that surface damage has occurred to piping, electrical equipment, and HVAC ductwork due to the high concentration of Muriatic Acid used to etch the floor of Room 30 (AD Parking Garage),
>
> In addition to the surface damage observed in Room 30, the interior surface of the return air duct to RF-3 is also corroded, including the fire damper, springs, and fusible link. The corrosion present on the fire damper, springs, and fusible link can be seen by opening the access door of the return duct inside of room 72 (Fan Room).
>
> Furthermore Strand Hunt Construction has failed to provide any information pertaining to potential damage to the oil water separator or underground piping due to Muriatic Acid entering the system as directed in previous email correspondence and verbal conversations.
>
> Please submit a plan to the Government detailing how Strand Hunt Construction is going to investigate and correct the issues mentioned above.
>
> The Government does not consider this equipment meeting the contract requirements as specified in FAR Clause 52.236-5 – Material and Workmanship. The quality of material is damaged as a direct result of Contractor performance and the equipment as installed is not acceptable. The Government requests Strand Hunt Construction to submit a plan to the Government detailing corrective action.

(R4, tab 43) SHCI responded to the ACO's letter on 6 October 2005, it stated:

> We anticipate having an analysis of what damage exists due to the use of the Muriatic Acid and a corrective plan as

> requesting [sic] in your Serial Letter C-0191, on or before October 26, 2005.
>
> Please find the enclosed letter from Strand Hunt to Design Alaska dated October 6, 2005 instructing our D.O.R. to provide their recommendations to us by Tuesday October 25, 2005. We will provide a plan, using their information by October 26, 2005.
>
> If we receive information on part of the items prior to the above date, these plans will be forwarded to you as they are finalized.

(R4, tab 40)

Also on 6 October 2005, SHCI responded to the Corps' lengthy letter of 23 September 2005. Regarding the Corps' two stop work orders, it wrote, in pertinent part:

> While we find your response in Serial Letter C-0190 has some valid points and some we disagree with, we believe most can wait, if response is warranted, but we do provide the following at this time.
>
> The basic disagreement Strand Hunt has is not with the government's assessment that there was defective work. We have expressed to you numerous times that, while not required, we appreciate your notifying us of defective work as early as possible. The Corps has done this on other occasions and without this information, we might complete more work that could become an issue. That is a positive and team approach to share this information.
>
> We do not agree that the Government should have issued a 'Stop Work Order' for either the epoxy floor application, due to the "bubbles" or the use of diluted muriatic acid to prepare the last remaining mobility bay floor for the epoxy.
>
> In our opinion, while we can understand the Government's concern for the safe handling of the muriatic acid, a Stop Work Order, at the most, should have been limited to the

method of disposal and continued application of highly concentrated muriatic acid. These were the safety concerns.

Both the Corps and Strand Hunt became aware of this issue about noon on Thursday, August 25, 2005. By 1 PM Strand Hunt had contacted Shannon and Wilson, our environmental engineer, who shortly thereafter was on-site making recommendations. Strand Hunt was in the process of resolving these concerns with our environmental engineers on-site, when the Government directed us to stop work and not remove the material from the site.

The Corps knew our environmental engineers were addressing the concerns, including safety handling of the muriatic acid. The 'Stop Work' brought our actions to a standstill.

So, while we don't agree with the Stop Work Direction, we can at least understand the Government's reasoning for the actions they took.

By the end of the next day all of the high concentration acid was contained in plastic containers on site. The safety concerns for that material were addressed. This was the last high concentration use of muriatic acid on the project.

What the Government failed to distinguish (or discuss) was that the concerns were caused by the use of the highly concentrated muriatic acid. The diluted muriatic acid, used in many typical construction cleaning and prepping activities is not a concern.

This diluted acid was used at the first completed mobility bay without incident or concern. It was done in accordance with the preparatory meeting called for in the QC program.

The second mobility bay (AD), was also going to follow the diluted acid method, so no Stop Work or delay was necessary. The Government failed to separate out what was a safety concern and what was already an accepted and successful application process.

This is eventually how the AD mobility bay was successfully and without incidence prepped for the epoxy finish.

The 'Stop Work Directive' by the Government on the epoxy floor system has been a real mystery. The direction was to stop work until an authorized epoxy representative could inspect the floor and provide assurances of a warranty.

Strand Hunt already had a contract with the Government that provided the assurance of a warranty. How we performed the work to obtain that warranty is a "Means and Methods" question that is the responsibility of the contractor, not the Government.

Prior to the Government issuing the Stop Work Order both our epoxy flooring subcontractor and our Superintendent, Tim Jauhola talked with the Government representatives on-site and explained these types of bubbles and imperfection were to be expected and the manufacturer's literature, that the Corps had a copy of, stated this and explained the method of correcting these items.

In the final outcome, the manufacturer's representative inspected the floor, as directed by the Government and explained as both our subcontract and superintendent had prior to the Stop Work Direction, that these were normal installation issues and that there was no reason to believe a warranty wouldn't be provided. The warranty was contingent upon a final inspection and correction of any deficiencies noted during a final inspection.

The 'Stop Work Orders' delayed critical path schedule activities and was [sic] further disruptive as three weeks of follow-on work, involving wall panel installation, plumbing and electrical fixtures and trim that was planned out on a daily basis with subcontractor [sic] that were flown in or were completing their other scopes, now were gone from the project. To reschedule multiple subcontractors, and at the end of the summer season, has been in excess of a day-for-day delay for these areas.

> These major areas of work came to a complete halt for weeks while the contractor responds to the direction, the Government reviewed the response, the Government, in some instances, gave additional direction (that could have been provided initially) that was responded to by the contractor and reviewed by the Government. Finally, a release of the 'Stop Work' direction was given by the Government September 27, 2005 (See Weekly Meeting #17 Minutes).
>
> In the end, after all this delay, the 2nd mobility bay was installed using diluted muriatic acid, as planned originally and as done in the 1st mobility bay. The epoxy floor was installed and defects were corrected in accordance with procedures that were being used prior to the Stop Work.

(R4, tab 39)

On 11 October 2005, SHCI responded to the Corps' interim unsatisfactory performance evaluation. It wrote, in part:

> Strand Hunt Construction has been constructing projects for over 50 years and has been constructing projects in Alaska for over 25 years. Our firm has received numerous outstanding awards, we rarely get as low a rating as 'Satisfactory' and never in our history have we received an 'Unsatisfactory' rating.
>
> So, with the same management, personnel and construction experience that has worked so well on our past projects, what is different on this one? What has been done differently to cause the Government to conclude the project was performed in an 'unsatisfactory' manner?
>
> The final building looks great, we're receiving compliments from the user on a regular basis, it has met all the requirements of the RFP, there have only been a few change orders and most of those dollars were for a Government desired betterment that was added. Our safety record is outstanding and while the Government continues to tell us the project is late, it has been completed within the time frame offered and accepted in our proposal. For some, yet

unexplained logic, the Government has accepted the entire proposal but chooses to exclude the two sentences that state:

> "Strand Hunt Construction hereby acknowledged that a total contract duration of 570 calendar days for the project schedule will become contractually binding, as it is within a number of days stated in SCR-1. However, our goal is to complete the work by July 1, 2005."

We think the rating has a direct relationship to communication and expectations of the parties.

This was a fairly new design-build process for this Base. In our opinion, the Government was trying to administer this project like a hard bid project and lost many of the strengths and positive attributes of the design-build project. Through the design process and through the long design review sessions that occurred at various stages of design with the user and the Corps, there was a certain amount of flexibility and team common sense that was agreed to. All parties were aware of the decisions being made and chose to do what was best overall for the project, even at times when it did not explicitly meet the RFP. Also interpretations of the RFP were made and agreed to by all parties in those meetings.

Our design team thought that providing a high quality specification, that had worked very well in cold arctic climates from years of successful past experience was not only allowed but a welcome enhancement to the RFP. Initially the Government reviewed these documents and confirmed this to be the case.

For the first several months the field construction went very well. The Corps and their very experienced QAR were very pleased with our performance and we were starting to make some real headway on our schedule.

Then something happened!

The original QAR left, taking a non-Corps position elsewhere. A new group came in, not only the QAR, but the administration above him.

Now, all the past decisions and the previously accepted design were being questioned. Several things were found that didn't explicitly meet the RFP (even thought they met the design drawings). The project became increasingly under scrutiny because of these differences. Our design team tried to explain the differences. The new group required us to tear the items in question out or at times would approve them as a variance. The remainder of the project became an investigation of past project decisions.

Most of the examples given in the evaluation stem from these differences between the approved design and the specific R.F.P. requirements. Many were thought originally to be issues but in the final outcome were found not to be. The Corps has continued to list these for some unknown reason as the issues were all responded to by the contractor and design team and closed out.

There was a large miscommunication between our design team as to what was allowed to be changed in the RFP and what the new Corps group understood was required.

The final result was the contractor (at our cost) changed out a great deal of material, and spent a great deal of administrative time providing documentation that products used met the RFP or were acceptable as a reasonable deviation.

In the final analysis, we can understand much of the Corps' frustration with this project. We can assure you for every issue the Government found, we expended 5 times the effort to address the issue.

The design team is one of the most respected in the region and was only trying to provide a high quality project.

The Corps was only trying to administer the contract per the RFP. It was tremendously unfortunate that the "Rules" weren't followed for the first several months because for a

long period the Corps and the Contractor (and our designer) believed we were administering the project correctly and the project was proceeding well, with praise for all.

I am truly shocked and disappointed that the Corps has not realized their part in this gross miscommunication.

I am shocked the corps hasn't understood how often we have paid and paid and paid for the problems that have been mutually caused, and not shown any appreciation for the end result.

I hope an unbiased reader, searching for the real answer, can understand that a contractor, his personnel and his subcontractors don't just turn bad on one specific project. We have tried to truthfully explain what happened uniquely to this project.

In conclusion:

1. The project quality is very good based upon the relatively minor and few punchlist items found by the COE for correction.

2. We unfortunately had 2 lost time accidents but these were not serious in nature.

3. The project is scheduled for completion in line with the "originally proposed schedule" as noted previously.

4. The change orders issued at this late stage are within the budget and Government's contingency set-aside on this project.

High quality, on time, within budget and a very good safety record all speak for itself.

(R4, tab 38)

In a letter sent to SHCI on 14 October 2005, the ACO noted that the Corps had been assessing liquidated damages (L.D.'s) against SHCI subsequent to the contractual completion date of 31 August 2005. The ACO also advised SHCI that any deviations

from the contract had to be approved by the CO in writing. (R4, tab 37) SHCI addressed the L.D. issue in a letter of 18 October 2005. It wrote:

> The Government has advised us in their June 27, 2005 letter that for every day that 'Project Completion' is not obtained beyond August 31, 2005, the Government will assess liquidated damages. We vigorously dispute the Government's right to do so for the following reasons.
>
> First, as you are aware, it is our position that the date of contract completion has not yet arrived. Specifically, our proposal accepted by the Government provided 570 days to complete the project. See Tab C-2 at page 3-4 ("Strand Hunt Construction hereby acknowledges that a total contract duration of 570 calendar days for the project schedule will become contractually binding as it is within a number of days stated in SCR-1.") The contract executed by the parties acknowledged completion was in terms of calendar days, not a set completion date.
>
> Nevertheless, the Government has taken the position that we initially agreed to a July 1 completion date. We never made such a commitment. Specifically, we indicated such date was a goal – "However, our goal is to complete the work by July 1, 2005." Id. at page 4. While that may have been a goal, it does not give rise to a right on the Government's part to start charging liquidated damages from that date. The fact your notice to proceed and modifications erroneously included a July 1 date does not make that date binding upon us; there was absolutely no consideration given to us to reduce our 570 days of contract time to a July 1, 2005 completion date.
>
> Next, the Government has modified the contract to allow for an additional 60 days of contract time. Thus by our calculations, contract completion does not run until November 23, 2005. We believe we have met that date as the project is now substantially complete except for the AD mobility bay and ready for the Government to take beneficial occupancy. Consequently, liquidated damages are inappropriate and should be remitted immediately.

Moreover, your right to impose liquidated damages for incomplete work is subject to the doctrine of substantial completion. That doctrine holds that since we have reached substantial completion, you have no right to impose liquidated damage[s]. Rather, your only remedy is to withhold monies for the minimally incomplete work.

Further, we would have substantially completed our entire work scope, at the latest, by September 14, 2005, but for the Government's improper issuance of a stop work order as we were in the process of completing the mobility and storage bays. The consequence of the improper stop work order was that completion of the bays were [sic] extended 41 days, and the Government is responsible for the costs of extended performance incurred by Strand Hunt Construction.

The Government now wishes to further extend our project completion by belatedly directing us to perform additional security system installation above and beyond that required by our contract. Specifically, we have provided the security system delineated in the contract documents, most notably in the Room Criteria Sheets. That our understanding of our work scope was correct is borne out by the language contained in the Dr Checks, most notably our June 1, 2004 item 23 ("Contractor required to provide conduit for COMM rooms. Government to review they believe if more should be installed."), and the Government's response of July 2, 2004 that "End use equipment will be GFGI [Government Furnished Government Installed]." We provided the conduit per direction of the Government and at that point it was the Government's obligation to provide and install the remaining equipment and wiring. We will perform this directed extra work but will seek the extended duration costs as well as the direct costs of this work.

In order to mitigate your continuing extended duration damages owed Strand Hunt Construction, we will be reducing staff and demobilizing our job trailer from the project site in the near future. We will continue to perform your directed extra work, but this will reduce our site presence and the accruing costs to your account. When the damages have

> stopped accruing, we will provide you an accounting of the amounts due Strand Hunt Construction.
>
> Moreover, at a minimum, we believe you are obligated to remit the wrongfully withheld liquidated damages as well as any other withholdings, with interest, as we have substantially completed this project and would have completed it earlier but for the Government's directed extra work and interference.

(R4, tab 36)

On 18 October 2005, SHCI wrote to the ACO requesting a final inspection on 1 November 2005. It wrote, in part:

> Following that walk through, we can negotiate what the appropriate amount of monies should be withheld pending completion of the final punchlist items, eg., the topsoil and grass seeding, for the small area of jobsite and Corp trailers that will be completed next year.
>
> While the identification of any damage due to the high concentration of Muradic [sic] Acid in the parking bay is still being investigated, our Designer of Record has inspected the mechanical and electrical components and has verified all components are operable and usable at this time. Should a part or component be found in their final investigation to be recommended to be replaced, this can be done while the facility is in use and will not hold up occupancy.
>
> The final inspection, at this date, will assist in mitigating ongoing damages, which may be determined to be the responsibility of the Government.

(R4, tab 35)[16]

With respect to the muriatic acid issue, the ACO forwarded the following letter to SHCI on 8 November 2005:

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[16] SHCI enclosed its final report for muriatic acid treatment and removal on 21 October 2005 (R4, tab 34). SHCI forwarded a follow-up letter to this memorandum on 25 October 2005 (R4, tab 33).

During a recent inspection of the Oil/Water Separator, it is readily and easily observable that corrosion is actively taking place inside the Oil/Water Separator. Additionally, the Oil/Water Separator may not be filled with water in accordance with manufacturer recommended procedures.

The corrosion actively taking place inside the Oil/Water Separator is a direct result of the Muriatic acid entering the Oil/Water Separator while the sub-contractor prepared the concrete floor for applying floor coating material. No preventative measures were taken by the Contractor to protect the Oil/Water Separator during the acid etching work. As such, the warranty status, materials of construction, and condition of the internals of the Oil/Water Separator are questionable and require further investigation by the manufacturer's technical representative.

Information provided in serial letter H-0339 is inconclusive and incomplete in that: 1) no manufacturer technical representative conducted an internal inspection of the Oil/Water Separator after the acid entered the separator, and 2) the functionality and operability of the oil/water separator is unknown. Of importance are the current condition of the internals, materials of construction and warranty status.

The Government directs the Contractor to have a manufacturer's technical representative inspect the Oil/Water Separator to determine the current condition of Oil/Water Separator internals, the Oil/Water Separator materials of construction, and advise the Government of the warranty status. A Government representative will be present during the inspection.

As stated in the RFP, Section 1.9:
"1.9 SUPPORTING REQUIREMENTS
1.9.1 Intent
A. The Government seeks a complete and usable Consolidated Security Forces Complex, free of defects and compatible with the surrounding built and natural environment."

Clearly, the Oil/Water Separator may have "defects" as a resulting from of [sic] exposure to muriatic acid.

Furthermore, FAR Clause 52.236.5 "Material and Workmanship. "Material and Workmanship (Apr 1984)

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting completion. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable."

The equipment appears damaged by the Contractor's actions. The quality and condition of the installed equipment may not comply with RFP or FAR Clause 52.236-5 (a) and (c).

SHC H-0330 letter: "While the identification of any damage due to the high concentration of Muriatic Acid in the parking bay is still being investigated, our Designer of Record has inspected the mechanical and electrical components and has verified all components are operable and usable at this time. Should a part or component be found in their final investigation to be recommended to be replaced, this can be done while the facility is in use and will not hold up occupancy."

The DOR does not possess the credentials to inspect the Oil/Water Separator and to verify the warranty status of

this equipment. While the components of the separator may be considered "operable and usable at this time", the internals of this separator are corroded, possibly defective, and of poor quality. This equipment may have likely failed or will soon fail due to excessive corrosion; thus requiring replacement.

In exercising the Government rights to execute this contract, the Government does not fully agree with your assessment in serial letter H-0330, nor does the Government accept the casual inspection by DOR as acceptable corrective action. As such, the Government directs the contractor to have a manufacturer's technical representative inspect the separator.

As a result of the potentially damaged equipment, the AD Parking Garage Warm Vehicle Storage (Room 30) cannot be occupied and used until the inspection results and recommendations by a manufacturer's technical representative are completed.

Please provide the Government your plan work schedule when this replacement work will be accomplished within 5 working days of receipt of this letter.

The information written in this letter is provided as a clarification under FAR 52.236-0021 and shall not result in a cost increase to the Government or an extension of the contract completion date.

(R4, tab 31)

Also with respect to the muriatic acid issue, the ACO forwarded this letter to SHCI on 8 November 2005:

During the recent final inspection, it is readily and easily observable that the corrosion taking place on RF-3 ducting and other equipment in AD Parking Garage Warm Vehicle Storage (Room 30) is still active and progressively deteriorating the equipment. This ducting, and other equipment listed below, was damaged as a direct result of the Muriatic acid fumes generated while the sub-contractor prepared the concrete floor for final coating. No preventative

measures were taken by the Contractor to protect the equipment during the acid etching work. As such, the ducting and other equipment identified and listed in this letter are considered damaged, defective, and of poor quality not meeting contract requirements.

As stated in the RFP, Section 1.9:
"1.9 SUPPORTING REQUIREMENTS
1.9.1 Intent
A. The Government seeks a complete and usable Consolidated Security Forces Complex, free of defects and compatible with the surrounding built and natural environment."

Clearly, the ducting is not "free of defects".

Furthermore, FAR Clause 52.236.5 "Material and Workmanship. "Material and Workmanship (Apr 1984)

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable."

Clearly, the equipment is "defective" and damaged by the Contractor's action nor are [sic] the damaged equipment intended/designed to be exposed to muriatic acid fumes. The

quality and condition of the installed equipment does not comply with RFP or FAR Clause 52.236-5 (a) and (c).

SHC H-0330 letter: "While the identification of any damage due to the high concentration of Muradic [sic] Acid in the parking bay is still being investigated, our Designer of Record has inspected the mechanical and electrical components and has verified all components are operable and usable at this time. Should a part or component be found in their final investigation to be recommended to be replaced, this can be done while the facility is in use and will not hold up occupancy."

While the components of the system may be considered "operable and usable at this time", the equipment is damaged, defective, and of poor quality. Eventually, this damaged equipment will fail due to continuing and excessive corrosion; thus require replacement. Since the final inspection, further inspection of the springs on smoke damper has revealed that the springs have failed (are broken). Furthermore, your DOR inspection has failed to fully understand and meet the quality standards for furnishing equipment required by this contract.

In exercising the Government rights to execute this contract, the Government does not fully agree with your assessment in serial letter H-0330, nor does the Government accept the polishing and cleaning of the damaged and defective equipment as acceptable corrective action. As such, the Government directs the contractor to completely remove and replace the listed damaged equipment. Equipment to be removed and replace are:

1) All ducting (supple and return) inside AD Parking Garage Warm Vehicle Storage (Room 30) and all return air ducting for RF-3 up to and including the fan room and Room 13. This includes the fire damper, duct supporting equipment in Room 30, all instrumentation sensors installed on ducting interior, seals, and fasteners used to install & support the complete ducting system.

2) All copper and steel piping, fittings, valves, pressure regulators, gaskets, and fasteners used for the compressed air

and eye wash station. Removal and replacement includes all copper and steel pipes supporting equipment.

3) Removal and replacement work includes painting and sealing of all wall penetrations and required equipment.

As a result of the damaged equipment, the AD Parking Garage Warm Vehicle Storage (Room 30) cannot be occupied and used until replacement of equipment is completed in accordance with the contract requirements.

Please provide the Government your plan work schedule when this replacement work will be accomplished within 10 working days of receipt of this letter.

The information written in this letter is provided as a clarification under FAR 52.236-0021 and shall not result in a cost increase to the Government or an extension of the contract completion date.

(R4, tab 30)

As indicated by the ACO in his letter of 8 November 2005, the final inspection of the project had taken place on 1 November. The date for the final inspection had been delayed because the pre-final inspection revealed approximately 500 deficiencies, many of which were significant, non-trivial items (tr. 3/214, 253-55, 4/13). The ACO, Mr. Bradley, was present at the final inspection which had been requested by the contractor and ordered by the CO despite Mr. Bradley's opinion that the project was not "prepared and ready for final inspection." Regarding the inspection, the ACO testified:

> We observed work that was still incomplete. There was one area of the building where paint was still being applied. The building had not been final cleaned. There were still tools, and debris, in areas of the building, and there was still work that was not complete, punch list items that had not been corrected.

Although this was ostensibly a "final inspection," approximately 150 deficiencies were identified. The ACO testified that this was not a "reasonable" amount for a final inspection. (Tr. 3/253-55) The ACO's testimony was corroborated by that of Messrs. Volsky and Awbrey. Mr. Volsky testified that he observed instances of "incomplete work." Included were:

> The tile that was still not installed completely. Again, there were just numerous deficiencies. You could see not just minor blemishes in paint but large areas that needed touchups throughout.

Mr. Volsky testified further that, "ideally" in a final inspection, one would expect to see no deficiencies. (Tr. 3/214-16) Mr. Awbrey testified similarly. He stated:

> Final inspection the entire facility is supposed to be available for inspection. And on that particular morning the vent from the mechanical rooms was spewing hot water and steam, the high pressure vent relief was allowing boiling water to exit next to a side entrance that they thought access wouldn't be allowed into. It created ice around the access point; again the snow had not been shoveled, had not been removed, no access had ever been cleared and there was essentially a large area of ice that had developed because of the pressure relief in the mechanic room of venting hot water onto a cold surface.

Mr. Awbrey also testified that the inspectors had difficult accessing the main building because "the hallway doors were locked, the lock system wasn't operating functionally." Regarding the punch list from the pre-final inspection, Mr. Awbrey noted:

> Numerous, essentially none of the deficiencies had been resolved up to that point so there was [sic] many areas indicating deficiencies and painting deficiencies and markings on BCT tiles that were damaged and had not been replaced and marking on ceramic tiles. Lockers that were dented, doors that the veneer was peeling off, doors that you had paint on them hadn't been cleaned off.

(Tr. 4/14-16)

On 8 November 2005, the ACO forwarded a letter to SHCI and enclosed an extensive punch list which resulted from the final inspection. He wrote, in part:

> Please find attached the master deficiency list of items that remain deficient on this project. Items highlighted in red are items requiring correction before the User can occupy the facility. The Government notes that many of these items are from the pre-final punchlist and have not been corrected in

accordance with TS 01451-3.8.2, which states "any items noted on the pre-final inspection shall be corrected in a timely manner. These inspections and any deficiency corrections required by this paragraph shall be accomplished within the time slated for completion of the entire work...."

Also note that TS 01451-3.8.3 states "Failure of the Contractor to have all contract work acceptably complete for this inspection will be cause for the Contracting Officer to bill the Contractor for the Government's additional inspection cost, in accordance with the contract clause titled Inspection of Construction."

You are directed to submit to the Government, within five (5) days of receipt of this letter, a schedule that details when these punchlist items will be completed. Specifically, your schedule is to indicate the following:

1. The date that the items highlighted in red will be completed.

2. The date that the remaining items will be completed.

You will then correct the deficient work in a skillful and workmanlike manner, in accordance with the requirements of FAR 52.236-005, until all deficiencies listed have been resolved.

(R4, tab 29) SHCI responded to the ACO's letter in writing on 16 November 2005. It stated:

We hereby issue our response to your Serial Letter C-0205 regarding the Master Deficiency List on the above referenced project.

We have enclosed the following documents:

Package 1 A copy of the Government Master Deficiency List with a modified sequential numbering system for ease of reference, as discussed with Norm Sams.

Package 2 The Strand Hunt Construction Punchlist database list sorted in the same order as your list in Package 1 with the status and schedule for completion of each item.

With reference to Package 1, please review the "date completed by sub" column. This indicates if the item has been completed either by work in the field or by serial letter. If the date is blank then, according to us, the items are outstanding for response by SHC. In the "Projected Completion or Projected Answer" box we include a date when SHC will respond to the item. This will be by work in the field or a Serial Letter explaining that we need more information or why we have met the RFP with the work already installed. These dates are "projected" based upon parts availability; a delivery etc., and represents our best information available at this time.

Please review the list of items. You will find that NONE of the items affect the beneficial occupancy of the building, safety concerns or will affect the ability to use the building for follow on completion items. We therefore again believe the building meets the "Substantial Completion" doctrine criteria.

(R4, tab 28) (Emphasis in original)

Regarding the muriatic acid damage to the oil/water separator, SHCI forwarded a letter to the ACO on 17 November 2005. It stated, in part:

In response to your direction, provided in the Government's serial letter C-0203 dated November 8, 2005 regarding potential damage to the oil/water separator, located in the AD parking garage (room 30), we provide the following.

Both Paul Balint P.E., Engineering Manager for Highland Tank, located in Stoystown, PA, that manufactured this oil water separator and Bob Zarilla, Jr., their local Seattle area manufacturer's representative, have been involved in the investigation and inspection of the oil water separator via

photos requested by them and furnished by Strand Hunt by e-mail.

We have attached their e-mails for your record. Their findings are:

> "The Pictures do show the beginnings of surface corrosion on the internal components. This is not at all uncommon on un-coated steel components submersed in water. However, the most important functional components of the Separator, the Parallel Plates and Petroscreen, all appear to be in good serviceable condition."
>
> "We have reviewed the additional pictures sent of the HTC-550 Stip-3 oil water separator Petroscreen Coalescer forwarded to us by Bob Zarilla, of Zee Enterprises and re-affirm that this component, the Petroscreen, appear [sic] to be in good serviceable condition and the surface corrosion does not impede the systems oil separation capabilities.
>
> Thus we again see no reason NOT to place this system into service."

While the above presents the conclusion, we provide the following additional information.

The oil/water separator is made up of a steel tank, coated on the exterior with internal steel inlet and outlet pipes. Within the tank are the petroscreen framework and the petroscreen itself, which is made of a polypropylene material and the parallel plates, sometimes referred to as coalescing plates.

The manufacturer requested photos of the above components. Upon review he has confirmed that there is normal surface corrosion on the internal components and then no damage to the components that make the system function.

There was no concern about the polypropylene filters, as these are made of plastic and photos revealed no damage, which being plastic is in-line with their expectations.

Their warranty is not affected by the events.

While we can understand the Government's initial concerns regarding the affects of the muriatic acid, the information provided confirms:

1) Condition of the internals are fine.
2) Materials of construction are fine.
3) Functionality and operability of the oil/water separator is fine.
4) Surface corrosion, as shown in the tank and framework, is normal and is expected and does not affect the oil removal capabilities of the system.

Two additional items should be addressed:

1) One of the e-mails states that "suds" in the tank indicate detergent might be in the tank. We believe the "suds" must be from the floor cleaning of this room. By phone he confirmed that if it was detergent, it would not harm the oil/water separator in any way. Also, his November 15, 2005 e-mail inadvertently left out a "not" in this 3rd paragraph. This was corrected in his November 16, 2005 e-mail (enclosed).

2) The manufacturer is recommending we pressure wash the tank with a neutralizing agent. He was not aware this has already been neutralized per our environmental engineer's (Shannon & Wilson) direction. While any further action is most probably not necessary due to the manufacturer not knowing what neutralization has already occurred, we will pressure wash the tank with neutralizing agent recommended by Shannon & Wilson, just to be sure all recommendations are adhered to.

The Government's comment that no preventative measures were taken by the contractor to protect the oil/water separator during acid etching work is a vast misrepresentation of the facts.

Dynamic Painting, our subcontractor performing the acid etching, and our staff and Mr. Hunt, our President, witnessed

that the oil/water separator was protected with visqueen and duct tape around all edges so as not to allow any acid to reach the oil/water separator tank. In addition, the method used to apply and remove the acid consisted of applying with a mop and spreading in a thin layer, letting it sit (and etch), followed by squeegee-ing the remaining acid into buckets.

While it appears the protective visqueens and duct tape barrier must have inadvertently been breeched that allowed muriatic acid into the tank, there were preventative measures taken by the contractor to protect the oil/water separator during the acid etching process.

The oil/separator is fully functional and this item is not affecting occupancy of the building.

We will move forward immediately to implement this plan, unless we hear otherwise from the Government.

(R4, tab 27) (Emphasis in original)

On 18 November 2005, SHCI forwarded the following letter to the ACO:

The Government has in excess of 40 Serial Letters that, depending on the Government's review and responses, could cause additional work to be performed on this project, than we presently believe is required under our contract.

We are requesting a timely reply to ALL open Serial Letters. This communication is required in order to allow us to complete the project.

While several of these Serial Letters have just recently been sent to the Government, many are quite old. Based upon your recent request for the contractor to provide a status and a schedule of completion for over 200 punchlist items within 5 calendar days of receipt of such list from the Government, we would consider 5 calendar days adequate time for the Government to respond to each punchlist item.

> We will assume any Serial Letters not responded to in a timely manner (5 C.D.'s) are concurred with, as no action can be taken unless we receive a response.
>
> We reserve our rights to make a claim for any costs or time incurred as a result of untimely responses.
>
> We are fast approaching completion of the list. At that time we will either demobilize completely or stand by and wait for your Serial Letter response.
>
> We cannot complete this project without your help!
>
> Please provide your attention and efforts in addressing these Serial Letters that you do not concur with so we can all complete this project and not have to deal with these additional costs and delay issues.

(R4, tab 26) (Emphasis in original)[17]

The ACO responded to SHCI's letter regarding the punchlist serial letters as follows on 23 November 2005:

> I have considered the information provided in your serial letters numbered (currently H-347 through H-391) and disagree with your position. You are hereby directed to:
>
> 1. Complete all deficient/incomplete work listed on our serial letter C-205 dated 8 November 2005. Items identified in red on this list, as well as those listed in paragraphs 2a and 2b below, are contract work which must be completed before the contract can be considered substantially complete.
>
> 2. Additionally, the following two items will be added to the deficient/incomplete work listing and coded red:

[17] The serial letters referred to by the contractor in its letter of 18 November 2005 were forwarded, for the most part, between 9 November 2005 and 17 November 2005 (app. supp. R4, tabs 872-911, 922-23).

a. Reference my 14 Nov 2005 email to Rollie Hunt. Inspect all doors and repair those that do not close or latch properly and those that are not plumb/square in the frame or have excessive reveals, and

b. Correct walls in all rooms to provide required sound transmission coefficient (STC) ratings (see the room criteria sheets).

3. All work in paragraphs 1 and 2 must be complete within 60 calendar days.

You are also required to provide within 10 calendar days of receipt of this letter a detailed schedule/plan with milestones on how you intend to complete this work. I will consider failure to provide this schedule/plan as an indication that you do not intend to complete the required contract work and will recommend to the Contracting Officer that default procedures under FAR Subpart 49.4 be considered.

I remind you that liquidated damages continue to accrue until the facility is substantially complete.

A copy of this letter will be provided to your surety.

(R4, tab 24)

On 22 November 2005, SHCI forwarded the following letter to the ACO:

In accordance with the "lines of communication" outlined in the pre-construction conference meeting held on May 28, 2003 [sic], we are requesting an immediate meeting with the Contracting Officer.

The purpose of that meeting is to discuss the significant contract withholdings by the Government on the above referenced project. This is a problem that can not be addressed by the field QAR or Resident Engineer.

We request a teleconference on Tuesday November 29, 2005 at 10 am (Alaska Time).

During that meeting we request the Government be prepared to provide information regarding the following:

1. Under what language and F.A.R. clauses are you withholding contract funds? We have read the F.A.R. 52.232-5 and 52.232-27 and it is not clear to us under what portion or sentence you are withholding funds. Please clarify.

2. There is a sub-list of 'deficiencies' listed with the returned pay request No. 10, received but [sic] the Government on August 1, 2005 that totals $867,000.00.

Please provide specific information as to exactly what the deficiency is for each of the items and what RFP or contract section has not been met. If there are already a specific Serial Letter or punchlist item [sic] please provide the specific letters or punchlist items that address each one.

3. Please provide a cost accounting of the amounts stated for each of the 'deficiency' items (ie how did the Government establish say, $50,000.00 for the mechanical deficiencies).

The above information is needed for the following reasons:

1. In order to correct or properly respond to a 'deficiency' we must know what the 'deficiency' is.

2. The Government is stating the scopes of work listed on the 'deficiency' list is not earned and therefore these funds will not be paid until the 'deficiencies' are corrected. Strand Hunt Construction needs to know which subcontractors are involved in order to determine if, likewise, withholding is required or not on any subcontractors or suppliers.

While we will wait for the above information to be provided by the Government before we can understand the 'deficiencies' and their associated values attached by the Government, it must be stated that we find the most egregious

withholding being the $300,000.00 for the "STC Deficiencies."

**The Contracting Officer should know that the contractor does not have a single punchlist item or serial letter outlining any definitive 'deficiency' regarding a STC issue upon which the contract [or] has had either an opportunity to address or correct!**

At this stage of the project and with no written notice or description of what is even alleged to be deficient regarding "STC", for the Government to withhold $300,000.00 is more than astounding.

The question is simple, *how can the contractor be considered 'deficient' when the Government has provided no description of what is deficient?*

In my 30 plus years of experience in construction, I can say, without question this is the first.

But even more than the $300,000.00 withholding question, the Contracting Officer should be asking how the Government can have administered this project to a completed building and have a $300,000.00 valued issue regarding STC deficiencies that has, to date, not one serial letter describing the problem to the Contractor.

The second question then becomes, given those facts, is it fair to damage the Contractor by withholding $300,000.00 for an issue he has no definition of.

Holding in excess of $1,000,000 for a project that is essentially complete is something that needs to be addressed immediately.

(App. supp. R4, tab 930) (Emphasis in original)

The ACO responded to SHCI's letter of 18 November in a memorandum of 28 November 2005. He wrote:

The Government has reviewed your letter asking that numerous unanswered serial letters be responded to. The Government would like to address several items before responding to the many letters.

1. Strand Hunt Construction has submitted many letters that have not been addressed by a serial letter. However the vast majority of these Contractor's letters have been responded to by other means of communication, such as: telephone conversations, recorded in meetings, by e-mail, or the Government[']s position has previously been stated by a serial letter. In most cases, the item of concern was personally discussed with Strand Hunt onsite field personnel. All of which are acceptable means of responding to Contractor's general questions/correspondence.

2. Many of Strand Hunt's serial letters either do not require a response as they are merely informational in nature, or have been overcome by events, i.e. unsatisfactory response, lack of response, or lack of proper corrective measure taken on a pre-final punch list item, that as discussed with your onsite personnel would be carried over to the final inspection punch list until satisfactory resolution has been accomplished.

3. Virtually all of your serial letters start with the following sentence, "We hereby offer our formal and final response to the above referenced punch list item". This sentence has led the Government to believe that Strand Hunt Construction would no longer address the issue and as such, disagreement would have to be resolved using a different communication/course of action.

4. Strand Hunt scheduled the Final Inspection on November 1st, 2005, despite the fact that the building was not complete and ready for acceptance (a clear and direct result of a failing or failed QC Program and Manager)[.] Construction work was still ongoing at this time as evident by the cleaning and waxing the floors, painting activities, and numerous pre-final inspection deficiency items not being resolved. Furthermore, one area of the building was restricted as evident by a "do not enter" sign, as the inspection was taking

> place. Again, a clear demonstration of a failing QC Program and Manager. Strand Hunt was provided a draft copy of the final inspection deficiency list 3 days after the "Final Inspection" list delivered via serial letter C-0205, on November 8, 2005. Strand Hunt Construction then responded with serial letter H-0388, on November 16th 2005, and subsequently sent serial letter H-0391, (Government Response to Punch list Serial letters) on Friday the 18th of November 2005 at 4:28 pm. The body of that letter states: "While several of these serial letters have just recently been sent to the Government, many are quite old". The Government will respond to Contractor's letters H-0347 through serial letter H-0391, received via facsimile. Additionally, the Government is responding to Serial Letters H-0293 and H-0294 received via e-mail the afternoon of November 23, 2005.
>
> 5. In most Serial Letters from SHC, the deficiency list item description is not included; thus, making it difficult to determine if specific deficiency item has been addressed/corrected. Furthermore, nearly all of these noted deficiencies were addressed with onsite CQC and Construction Superintendent at the time of installation. Yet, the Contractor proceeded to conduct work activities ignoring the deficiencies noted and observed by Government QAR personnel. These actions taken by the onsite CQC and Construction Superintendent are clearly a continuing demonstration of a failed QC program directed by the Contractor's management. The Contractor and the Government mutually agreed upon the conditions of the contract, and as such, the Contractor is required to comply.

The ACO then enclosed several pages of responses to individual serial letters. (R4, tab 23)

On 1 December 2005, SHCI transmitted the following response to the ACO's letters regarding a proposed schedule for completion of the punch list items:

> This letter is in response to your request for a schedule and a plan, as described in your serial letter C-205 dated November 8, 2005 and C-206 dated November 23, 2005.

1) In Government serial letter C-205, the Government furnished Strand Hunt Construction with a 'Master Deficiency List' that was the result of the final inspection. This included 208 items.

Within that letter the Government requested a schedule that details when these punchlist items will be completed.

On November 16, 2005 Strand Hunt responded with a 24 page response (plus the Government's 'Master Deficiency List' that was attached to provide a sequential list of items to work from) that listed the status and scheduled completion date for of each of the 208 items.

Each item was listed as either:
'Complete – Needing Corps Concurrence', or;
'Not Complete – Work in Progress', with a scheduled completion date for each item, or;
A Serial Letter was sent requesting concurrence, additional design information was sent, or additional information was requested.

2) On November 23, 2005, after a telephone conference with you, wherein you questioned the contractor's emphasis on completing the punchlist, we responded via e-mail to Pete Perz [sic] and yourself with the following punchlist status.

"Pete & Norm,

Here is a quick review of where we stand on the punch list.

1) There are 209 items on the Master deficiency list.

2) Of the 208, 144 are completed and either are or ready to be signed of [sic] by the Corp, or a Serial letter is in the Governments hands to review and close out (or provide direction). These are all out of the Contractor[']s hands.

3) Of the 65 remaining items:

- 12 items are for next year (exterior landscape type items)
- 16 items are waiting for parts (Our latest response provides a schedule for completion of each of these)
- 17 items are in to our designers to provide direction if they are required or not by the RFP.
- 20 items, the works [sic] is not done and are in progress. (These are the only ones we are completing, at this time. That is why you see just a little activity on site)

Please consider the list was provided to us just 2 weeks ago. Even today, people are working full time contacting subcontractors and suppliers to complete the remaining items as soon as they can. Once we received the list we had to identify a responsible firm to address the item, then input them into our data base, just to be able to then sort them by vendor and e-mail their list of items. They had to, in many cases order parts or review the site conditions to determine the required material and to understand the deficiency, then schedule crews out to do the work.

In short, there has been a tremendous effort and a significant result toward completing of the punch list. If you have a user, or you believe this is not the case, I would suggest a meeting to discuss the facts.

I hope this information is helpful. As we discussed last evening, we really need some dialog back from the Government on item 2 above, to move this process along faster."

3) Based upon items (1) and (2) on the previous pages, the request in serial letter C-206 is essentially a request for an update. Therefore, included in this package as a response to serial letter C-206 is an update of the status of the original 208 items for the 'Master Deficiency List' plus added to this list is [sic]:

- Punchlist item 209 – Inspection and correction of doors to correct latching and plumbness/reveal deficiencies.

- Punchlist item 210 – Need to address the direction to correct walls in all rooms to provide required sound transmission coefficient (STC) ratings (see room criteria sheets).

This updated response will be provided in three (3) categories:

1) Completed Items – These items are completed and signed off or awaiting Corps sign off. (See Package 'A' for detailed list).

2) Work in Progress – There are 35 item [sic] that are in progress and there are 10 items that require warm weather prior to completion.
(See Package 'B' for detailed list 'Work in Progress[']and 'Work Next Spring')

3) Further Discussion/Information Needed – There are 44 items that need further discussion and review (see Package 'C' for a detailed list of items).

As discussed with June Wohlbach, Package 'C' will be used as the agenda for the meeting scheduled for this Monday, December 5, 2005 at 10:00 AM.

A plan and schedule will follow for these items, following this meeting.

We are committed to staying and meeting until clear scope and direction is obtained for these items.

If there are any questions or concerns regarding the status, schedule or plan to complete any of these deficiency items, we request these questions and concerns be provided, in writing, as soon as possible.

(R4, tab 22)

On 2 December 2005, SHCI forwarded a copy of the minutes for the meeting held in response to its request of 22 November 2005. The teleconference was actually held on 29 November 2005. The minutes stated:

> The following items were discussed:
>
> 1) Rollie Hunt explained that Strand Hunt Construction requested a meeting via their November 22, 2005 serial letter H-0392 to address the Government's withholding in excess of $1,000,000. No work has been paid for since July, 2005.
>
> 2) Rollie explained the main purpose of Strand Hunt's request for the meeting was to obtain a specific list of what is deficient and a specific value for each item. Mr. Hunt explained the format of the above referenced letter would be used as format for the agenda.
>
> 3) Mr. Hunt requested the Government provide under what F.A.R. clause or clauses the government was withholding funds.
>
> Brad Bradley stated F.A.R. clause 52.246-12 (f).
>
> June Wohlbach added F.A.R. clause 52.232.5(e) regarding retainage.
>
> 4) Mr. Hunt questioned if a listed deficiency item was found not to be deficient, would the contractor be due interest? June Wohlbach stated that under F.A.R. clause 52.232-27 a.4.ii that it appeared that no interest would be due if there exists a disagreement, but it is not a claim.
>
> 5) Rollie Hunt stated the Government is withholding $300,000 for STC deficiency and yet the contractor has been provided no information about what is deficient.
>
> Brad Bradley stated it primarily involved the corridor walls, not going above the ceiling in most locations, but it was up to the contractor to investigate and come up with a plan to resolve the deficiency.

Rollie explained we believe it has been constructed as required by the contract and as agreed.

Brad Bradley said Strand Hunt was informed of the STC concerns during the meeting regarding 'Unsatisfactory Performance' with Marie McDonald.

Rollie explained that the issue was brought up and added as one of the 'Action Items' to be addressed as it was a concern to the Government. Rollie explained the items were reviewed at each weekly meeting with the Government and were listed as 'Closed' if resolved, then dropped from the 'Action Items'.

The 'Action Item' stated Strand Hunt would construct the walls per the 100% design drawings. This item was reviewed and discussed with the Government. This item was closed on June 7, 2005, after review with the Government at the weekly meeting.

Rollie questioned how the amount of $300,000 was established. Brad Bradley explained it was only his best guess.

6) Strand Hunt requested a meeting with the Contracting Officer in Anchorage or Fairbanks to discuss items needing further information or further discussion in order to be able to proceed with many items of work.

After some review this was confirmed for Monday, December 5, 2005 at 10:00 AM in Anchorage Corps offices. (E-mails have since been sent confirming who will be in attendance and additional phone calls further clarified the agenda).

7) We discussed the 'mechanical deficiencies' for $50,000. Brad stated this included the tear out and replacement of ductwork, etc. as directed in previous serial letter.

Bruce Munholand added it must be for all of the mechanical items found on the 'Master Deficiency List'. Brad concurred.

Rollie Hunt requested a specific breakdown with a cost attached for each mechanical punchlist item that funds were withheld on. This would allow funds to be released of a known amount when the item was completed or resolved.

The Government stated they believed this amount of detail to be too burdensome and not necessary. The Government said the contractor could bill for a portion of each category of deficient work, such as mechanical, if a portion was completed. This would be reviewed and agreed to by the Government field representative, as they have done on past billings.

Philip Dearing questioned how or what format we were to bill as all items are basically 100% billed and agreed to date, except now less these withholdings. It was agreed the items completed should be reviewed and agreed to with an amount of funds agreed to by the Government's on-site representatives, followed by a serial letter requesting release of those amounts.

8) In summary, it was established that each of the eight 'deficiency' items were [sic] made up of those item [sic] in the 'Master Deficiency List' (or items found in Government serial letter C-0206) that fall into each of the 8 listed categories.

The amounts were figures that the Government felt was [sic] fair, without any detailed estimates.

The funds in the amount of each category would be released when that group of punchlist items was complete, such as when all mechanical punchlist items are complete, the Government would release the $50,000 withheld.

Or, in the alternative, as stated above, if a portion of a category of punchlist items was completed, a

> commensurate portion of the withheld funds for that category would be paid.

(App. supp. R4, tab 967)

On 7 December 2005, SHCI forwarded a copy of minutes for a meeting held on 5 December 2005 to the Corps' CO, Ms. June Wohlbach. In its cover letter, SHCI stated:

> We hereby enclose a copy of the meeting minutes from our meeting on December 5, 2005. The meeting was beneficial and conducted very professionally by all parties. Thank you for the Governments participation.
>
> Any earlier serial letters or direction provided by the Government is [sic] superseded by the 213 item Master Deficiency List and further as updated or changed in the 54 item action item list established in the Monday 12/5/05 meeting.
>
> The 60 days to complete the plan remains as January 23, 2006.
>
> There has been so much correspondence and confusion on this project that we just want to make sure Strand Hunt is following the correct course of action and Government direction.
>
> Please let us know if this is not correct.

The "minutes" were really action items relating to individual punch list deficiencies. (App. supp. R4, tab 974)

On 14 December 2005, SHCI forwarded to the CO "a summary of the status of the 54 Item Action List as of today 12/14/15, that was generated from our 12/5/05 meeting" (app. supp. R4, tab 1017). SHCI transmitted a follow-up letter to the ACO on 15 December 2005. It stated:

> Enclosed please find an updated version of the 54 Item Action List that was originally prepared at our 12/5/05 meeting with the Contracting Officer June Wohlbach, Norm Sams, yourself, Philip Dearing and me.

> This has been updated to include our latest discussions of Thursday afternoon, December 15, 2005, and your approval, concurrence and direction concerning several items.
>
> As discussed and agreed Strand Hunt is to proceed with the work and scope as stated in the updated December 15, 2005 Action List attached in order to obtain completion within the 60 days, which ends January 23, 2006.
>
> As you stated you would be checking e-mail, we will include an e-mailed copy to you and request you review this in detail and advise by the end of the day Monday, December 19, 2005 of any discrepancies you have, if any, with the attached document and update. Otherwise, this will stand as our agreed, mutually understood updated Action List.

(R4, tab 20)

On 16 December 2005, SHCI forwarded a letter to the ACO regarding beneficial occupancy of the JSFC. It wrote, in part:

> We once again respectfully request the Government concur this facility has reach [sic] Beneficial Occupancy.
>
> The Government has recently shared with us that being a "security building" there are additional restrictions to contractor access from that of a typical administrative type Base facility. It has been explained that once the user moves in, open access to complete any remaining punchlist items will be difficult. We believe as this was not known to the bidders, the building "Beneficial Occupancy" should not be evaluated based upon these differing conditions. Therefore, even if the user chooses not to occupy the building until more or all of the punchlist items are complete, this should not hold up Beneficial Occupancy and should not continue to exacerbate the on-going disagreement of liquidated damages.
>
> The building is and has been ready for occupancy for quite some time. While we understand there is a difference of opinion as to when Beneficial Occupancy has occurred, there should be no disagreement that the facility has now reached Beneficial Occupancy.

Please consider that while the 'Master Deficiency List', furnished by the Government, purported to list items necessary to be completed to achieve Beneficial Occupancy in red (most of which we continue to disagree with), the status of 'Red Items' is as follows:

All 'Red Items' have been completed except for the following 12 items which as explained next to each, does not hinder the use of the building and therefore has reached Beneficial Occupancy.

The items listed below are those from the 215 'Master Deficiency List' numbering.

| | |
|---|---|
| #6, 123 & 146 | Insulation of piping in mechanical room. (Does not hinder use of the building) |
| #21 | AC condenser pipes not sealed at building. (Does not hinder use of the building) |
| #26 | Test & Balance Report & Equipment (Building is staying at desired temperatures even through cold conditions. Our response several weeks ago addressed stated concerns. Test equipment delivered to Government is not needed to operate facility). |
| #29 | HRU does not have manual water wash down. (This is not needed, except for cleaning maintenance which will not occur for months. System is installed, waiting for water hookup.) |
| #31 | Voltage and phase protection needed for motors greater than 5 H.P. (Will not affect motor function. Parts on order.) |
| #80 | Missing flashing on exterior louver. (Louver is caulked now and functioning |

| | |
|---|---|
| | fine. Will be flashed next year – need warm weather.) |
| #92 | Lock latch pull not working on Armory door. (Can be locked from outside, has instructions on how to open, if locked inside. Parts on order). |
| #97 | Replace toilet partitions. (All stalls are usable. One Men's' restroom will not meet ADA until replacement panel is installed. Building meets ADA Restroom Requirements as it exists [sic] today. Panel on-site. Top rails are ordered.) |
| #137 | Emergency AHU shutoff. (Parts on order – location just provided. Does not affect building occupancy.) |
| #140 | Emergency fuel fill and vent to be located on building exterior. (Tank has been filled with fuel and used as is and can be used at any time. Not hindering building being used.) |

The Contracting Officer has both the contractor and the Government held accountable for a January 23, 2006 completion of the punchlist. As seen by the recent update, we are making good progress. Obtaining Beneficial Occupancy will not affect our focus and commitment to complete this project per the scheduled [sic] discussed.

We requested an expedited review of this letter and a concurrence that we have achieved Beneficial Occupancy. Please provide a response on or before Tuesday, December 20, 2005.

(R4, tab 19) SHCI forwarded a follow-up letter to the ACO on this issue on 20 December 2005. It wrote:

As we discussed previously, the Government can occupy portions of the building. The transition plan for use of an area needs to be coordinated between the contractor and the Government.

We specifically discussed your desire to store materials and furnishings in the two mobility bays. From on-site discussions, we understand this will begin shortly.

Please recall that areas being used specifically such as the mobility bays will be accepted by the Government, except for the defined punchlist items, upon their use.

This would include related items required for that use, such as access gates, overhead doors, etc. so that if 'damage' occurs to those items under your use or control, this would be the Government's responsibility. It would also include any maintenance of those areas.

If the above is not per our discussion and agreement, or is not acceptable, we would request the areas not be utilized, until a mutual plan is concurred to, so that use and responsibility is properly coordinated.

(App. supp. R4, tab 1054) On 23 December 2005, the CO responded to SHCI's letter of 16 December 2005. She stated:

> Reference your serial letter H-0416 dated December 16, 2005, regarding Beneficial Occupancy of Project. The Government disagrees with this assessment.
>
> The master deficiency list provided you via our serial letter C-0205 dated November 8, 2005, identified certain critical deficiencies that must be completed prior to the facility being ready for Beneficial Occupancy. Your Serial Letter H-0416 states that there are still some of these critical deficiencies that are not accomplished. Per our discussion on December 22, 2005, another critical deficiency was also identified: snow and ice removal from all parking areas, sidewalks, and building entrances. I also remind you that all life safety issues such as fire escape egress through doorways with code approved locksets/mechanism; and 100%

acceptance by the Fire Protection Specialist DOR of the installed fire protection systems, controls and applicable bracing/support methods as identified on the deficiency list must be corrected prior to beneficial occupancy. When all of the critical deficiencies have been completed and verified by the Government, the facility will be ready for Beneficial Occupancy.

All completed work shall be verified by your QCSM to be in conformance prior to notification of the Government. In accordance with RFP section 01451-3.8.3 Final Acceptance and Inspection, please provide the Contracting Officer 14 days notice of the date that you anticipate the remaining critical deficiencies being completed so that a final acceptance inspection of these items can be scheduled with all appropriate stakeholders.

(R4, tab 19) On 24 December 2005, SHCI forwarded an email response to the CO's letter. It stated:

> We continue to disagree with the Government[']s assessment of the items required for Beneficial Occupancy and the Government[']s assessment that the project has not reached Beneficial Occupancy, as stated in your December 23, 2005 [letter].
>
> While the ice and snow removal can easily be addressed by the use of one or a combination of normal methods, such as removal, use of deicer, or sanding, we are unaware of any deficiency items that are affecting Beneficial Occupancy.
>
> Further the Government has never, to our knowledge, identified any life safety items regarding building egress or locksets, even at this writing (unless it is door 68.2, which meets code, if the key pad, that was added by change order, is simply removed. This will take 20 minutes and would be done, except at this time we are awaiting a decision from the Government about how they would like to change this door). The Government has an obligation to identify the deficiencies. If there are any that affect egress, please

specifically identify them, as well as when the contractor was notified about those items.

Your letter of December 23, 2005, states there is a requirement for the Fire Protection Specialist DOR to provide 100% acceptance of the Items on the Master Deficiency list. As he has provided design and approval on each item that has been addressed, we believe this acceptance has been provided. Please provide a specific item or list of items that does not have this acceptance.

We understand the Government[']s position to be that all items within the Master Deficiency List, provided with the Government serial letter C-0205, that are highlighted in 'Red' are those items the Government is defining as 'Critical deficiency Items', that must be completed, prior to Beneficial Occupancy. Please advise if this is not accurate, as we want to be clear about what the Government is stating is needed.

As requested in the last paragraph of your December 23, 2005 letter, (and while we reserve our rights to claim for all costs and delay associated with the [Government's] position, this notice and non acceptance of Beneficial Occupancy both on and before this date) we provide 14 day [sic] notice, from this date, that we anticipate the remaining critical deficiencies (as defined by the Government, as the contractor disagrees there are remaining critical deficiencies) will be complete. Please schedule this inspection for January 9th, 2006, at 9 am (Alaska time).

Due to the current Holiday Season, please accept this e-mail as a formal response.

(R4, tab 19)

On 21 December 2005, SHCI forwarded a series of letter to the ACO regarding deficiency lists. In the first letter, it wrote:

> We hereby enclose the six page list of deficiency items where corrective work is still in progress as effective to date.

> Please note that each item has its own projected completion date based primarily on the lead time of material deliveries.

(R4, tab 18) In the second letter, SHCI wrote:

> We hereby enclose the four page list of deficiency items ready to be signed off by the Government.
>
> It is imperative that the inspection and sign offs occur before the Christmas Holiday period as if there are any further concerns on the items, our time is running short in order to have them addressed by the January 23, 2006 cut off date.

(App. supp. R4, tab 1064) In the third letter, SHCI enclosed a two page list of deficiency items to be completed in 2006 after the spring thaw (app. supp. R4, tab 1066).

On 28 December 2005, SHCI forwarded a set of minutes for a meeting held on 22 December 2005. In its cover letter, SHCI wrote:

> We are enclosing Meeting Minutes of our Thursday, December 22, 2005 teleconference with yourself, June Wohlbach, Pat Zettler, Paul Schneider, Mike Volsky, Mike Awbrey, Philip Dearing and myself.
>
> Also enclosed, please find an updated version of the 54 item Action List that was originally prepared at our December 5, 2005 meeting with the Contracting Officer June Wohlbach, Norm Sams, yourself, Philip Dearing and me.
>
> This has been updated to include our latest discussions of the Thursday morning, December 22, 2005.
>
> As discussed and agreed Strand Hunt is to proceed with the work and scope as stated in the Meeting Minutes and the updated December 22, 2005 Action List attached in order to obtain completion within the 60 days, which ends January 23, 2006.
>
> As you stated you would be checking e-mail, we will include an e-mailed copy to you and request you review this in detail and advise by the end of the day Tuesday, January 3, 2006 of any discrepancies you have, if any, with the attached

> document and update. Otherwise, this will stand as our agreed, mutually understood updated Action List.

(App. supp. R4, tab 1120)

The "minutes" were actually comprised of a reduced list of action items (app. supp. R4, tab 1121). On 5 January 2006 SHCI forwarded to the CO an "updated In Progress list" for deficiency items (app. supp. R4, tab 1138). Also on that date, SHCI transmitted to the CO "an updated Ready for Sign off list" for deficiency items (app. supp. R4, tab 1139). Finally, on 5 January 2006, SHCI transmitted to the CO minutes of a meeting held on that date to discuss the remaining deficiency items. The "minutes" dealt with 13 action items (app. supp. R4, tab 1147).

On 5 January 2006, SHCI transmitted a response to the CO's letter of 23 December 2005 regarding the beneficial occupancy issue. It wrote:

> Your December 23, 2005 letter has already been responded to by Mr. Rollie Hunt in his e-mail dated December 24, 2005. You have not issued a response to the requests made of the Government in that e-mail as of today. This letter formally passes through the e-mail response, plus offers some clarification of our position.
>
> We do of course completely disagree with the Government's position in this matter. The remaining Government identified "critical items" in no way affect the beneficial use of the building. The response offered in the December 23rd letter deals only in vague, general terms in its content as opposed to the facts presented in detail in our serial letter H-0416. Our position is clearly stated in the e-mail. Please also note that the Government is holding up some of the critical items that need correction. These items have been completed by the contractor pending further direction from the Government. To hold the contractor accountable for those items is simply unfair. At the time of this writing these items include but are not limited to:
>
> > Item #8 According to SHC field personal, the Government never showed up to look at the sample doors on the project. This was meant to happen December 22, 2005. We were notified in today's meeting the review

was done (did not involve SHC field personnel) but SHC has not received any response.

Item #5, Part #32 We have not heard anything related to the work you would like to have happen on the door 68.2.

Item #5, Part 38 A meeting has still not happened. We again request the Government to arrange a meeting with Mr. Jenkins who authorized the note. Mr. David Jones, we understand, is happy with the tagging that has been performed to date. (We have just heard today that a 1:30 PM 1/5/06 meeting has been set. Thank you.)

Punchlist Item #38, T & B Report Still no Government response to our letter. We have decided to move forward regardless as this is a critical item and therefore, have scheduled final balancing and an on-site meeting for January 12, 2006 at 10:00 AM.

Item #97 and #114 The Government has yet to sign off.

Item #147 Needs to be signed off. The Government was to check the serial letter we sent previously that has the DOR approval.

Finally, we are confused about your statement regarding the "Final Inspection". The Final Acceptance Inspection happened on November 1, 2005. That Final Inspection generated your serial letter C-0205 dated November 8, 2005. In fact, please review all serial letters related to this subject. You will find that the Contractor's Inspection (section 3.8.1) was turned over via numerous serial letters to the Government many months prior to this. The Pre-Final Inspection(s), with the Government happened also a long time before November 1, 2005. We have the punchlists from these Prefinal Inspections with the Government well documented prior to November 1, 2005. We were working on these items up to November 1, 2005 when the Final Inspection occurred.

> During our meeting of 12/05/05 we discussed the process of the Government reviewing and signing off items, as they were completed, therefore no further Notice should be required. For this reason and for those stated above, this makes the Government[']s request for another Final Inspection just that. SHC will comply even though the Government already had one on November 1, 2005.

(R4, tab 15) (Emphasis in original)

On 12 January 2006, SHCI forwarded the following letter to the ACO with respect to retainage:

> We respectfully request the Government release 100% of the amount withheld for exterior CMU as any crack repair or staining should be taken care of as a warranty item, as the original work was complete.
>
> In the alternative, should the Government not concur these are warranty issues the Government should, at the most, withhold the value of the correction of this item which is $85,000.
>
> | | |
> |---|---|
> | 1) Staining of CMU | $75,000 (we have a subcontractor quote attached) |
> | 2) Repair of cracks | $10,000 |
> | | $85,000 |
>
> Please provide your review and response by Thursday, January 19, 2006.

(App. supp. R4, tab 1182)

On 13 January 2006, SHCI wrote to the CO, once again requesting the Corps' concurrence that "the building has reached beneficial occupancy" (R4, tab 14).

On 18 January 2006, the ACO wrote a memorandum to SHCI in which he discussed yet another problem. He wrote, in part:

> Per Government field inspections of the site and due to the recent flooding of the building caused by your failure to remove snow from the parking lot area and the subsequent

> unseasonable snow melt, the Government has reason to believe that pavement grading around the perimeter of the building do not meet RFP requirements or the requirements of your design. As such, the Government will be seeking an equitable credit regarding this issue and will retain sufficient funds until such time as this credit modification is processed.
>
> Should you not agree with the Government's position regarding this issue, please submit documentation (to include survey data and notes) that supports your position. Please submit any such documentation to the Government within ten working days of receipt of this letter. Failure to receive this documentation will be perceived by the Government as your agreeing with the Government that the paving grades around the perimeter of the building do not meet the requirements of the contract.

(App. supp. R4, tab 1201)

On 19 January 2006, SHCI forwarded the following letter to the ACO with respect to the remaining deficiency items:

> We hereby enclose our meeting minutes from today's conference call at 9:30 am Seattle time. Participants were June Wohlbach[,] Pat Zettler, Norms Sams, Brad Bradley, Mike Volsky, Mick Awbrey, Mark Carton, Rollie Hunt, and myself.
>
> We discussed the five remaining items for BOD that were referenced in our Serial Letter H-0440. All items are completed except there was a discussion regarding a review of the O&M submittal rejection comments. The Contractor had not heard back from the Government regarding the O&M Manuals that were discussed in our January 9, 2006 meeting. The Government was again requested to review the rejection comments with the user and ascertain that the user has enough information to maintain the building. We are to receive a response by end of business day today January 19, 2006.
>
> We also discussed the Strand Hunt Construction email related to payment and release of withholdings. It was agreed that

> SHC would receive a response no later than the end of business day January 20, 2006.
>
> If you disagree with the accuracy of these abbreviated minutes please let us know by the end of business day January 20, 2006.

(R4, tab 13)

On 20 January 2006, the CO forwarded an email to representatives of both parties in which she stated: "As of today we have BOD [beneficial occupancy]. To re-iterate Norm [Mr. Sams], the Government has not approved the O&M manuals. This is a milestone in the contract completion and we will continue to diligently monitor the deficiency list with regular meetings." (R4, tab 12)

On 20 January 2006, SHCI replied to the CO's email as follows:

> We hereby enclose our meeting minutes from today's conference call at 9:00 am Seattle time. Participants were June Wohlbach, Pat Zettler, Norm Sams, Brad Bradley, Mike Volsky, Mick Awbrey, Mark Carton, Rollie Hunt, and myself.
>
> We discussed the Operation and Maintenance Manuals submittal rejection comments. It was agreed that there was enough information in the draft O&M's for the user to maintain the building. Strand Hunt Construction is to complete the O&M's for resubmission as soon as possible.
>
> Based upon this, the Government stated that as of today the Contractor has Substantial Completion and an email will be sent by the Contracting Officer to confirm this.
>
> The Government confirmed that the building still does not have the Air Force lock cylinders installed in any of the doors both interior and exterior, the armory locks are not installed, nor is the security system for the building operational. These are all items that have been and continue to be in the Government's court to complete the work.

(R4, tab 11)

On 20 January 2006, SHCI also responded to the ACO's letter of 18 January 2006. It wrote, in part:

> First, in a brief discussion Thursday afternoon, January 19, 2006 with June Wohlbach concerning this item, Ms. Wohlbach believed this request was being made under (FAR) 52-236-0012(h) which allows the Government to request the contractor perform an examination to assure the work is in accordance with the contract. Further, this clause states if the work is found to meet contract requirements, the Contracting Officer will make an equitable adjustment for the additional services involved in the examination. We are proceeding under this clause.
>
> We provide notice that we consider the time and costs associated with this request as a change to our contract, as we believe the payment [sic] grading around the building perimeter meets the contract requirements.
>
> As acknowledged in your letter, the cause of the only event that has raised the concern about pavement grades has been identified. It was caused due to not snow-plowing the site, followed by a subsequent unseasonable snow melt.
>
> Under normal building occupancy, the paved areas will be routinely plowed and the water will flow away from the building, as designed.
>
> Please recall that our asphalt subcontractor, as witnessed by the Government, conducted several water flow tests, after sections of asphalt were completed that confirmed water flowed away from the building and there were no unacceptable areas.
>
> In addition, several heavy rains occurred in late summer without any incidents or concerns.
>
> The following is our plan to address your request to submit documentation that verifies the pavement adjacent the building meets the contract.

We would like to suggest a plan consisting of Part I and Part II

Part I – Photo and Visual Documentation

Attached are several photos showing a very hard rainfall this past summer. You can see how hard the rain is falling off the roof and splashing up. All of the water had to go somewhere. It did not go into any part of the building, therefore this is documentation that the pavement slopes away from the building.

Further, when we re-opened the project after January 1, 2006 we removed the snow and ice around the entry areas by using warm water to melt the ice away from the entries. At this time, the Corps can inspect these areas and see the ringlets caused by the water flowing away from the building, thus confirming the grades slope away from the building.

Part II – Survey Documentation

As a change to the contract, our Quality Control Representative and the Civil DOR will take elevation shots adjacent the building and approximately 10' away from the building to establish data of existing elevations.

These would be taken at all entrances and in addition at approximately 50' intervals where there are no doors or openings.

The DOR would review this data and issue a report.

If Part I documentation is acceptable to the Government, then Part II would not occur. Please provide your concurrence to one or both.

While we fail to find where the Government has the right to withhold funds for an item that has no known deficiency (if you do know of a deficiency, we request you please provide immediately), we find the Government's determination there is a deficiency and that that deficiency is presently quantifiable enough to proceed with a credit modification is

inaccurate, untrue and just another example of this over-reaching administration of this contract. We request the Government withdraw its withholdings, until a deficiency is determined.

In the event you still intend to withhold funds, we request a detailed accounting of the amount of [sic] Government is presently withholding, what documentation is being used to establish a credit modification. In other words, without knowing there even is a problem, or the extent of a problem, if there were to be one, how can you proceed with withholding funds and proceed with a credit modification? What amount could possibly be valid with the lack of any data?

Further, we request the 10-day period stated in your letter be extended, depending on when we receive your concurrence or response to our proposed plan, and an agreed upon schedule after your response is received.

Unless this extension is accepted, we request a response within 24 hours of receipt.

(App. supp. R4, tab 1207) (Emphasis in original)

On 26 January 2006, SHCI forwarded the following letter to the ACO:

As we reviewed during this past January 19 and 20, 2006 teleconference meetings, there were only a small list of punchlist items to complete.

Most of those have now been completed and signed-off by the Government.

We presently anticipate that we will be removing our trailer and Mr. Carton will be leaving the project site early next week (the week of January 30, 2006).

While the above schedule has already been communicated to the site QAR, should you have any questions or concerns regarding this plan, please let us know immediately, as

arrangements are being made at this time, toward meeting this schedule.

We will continue to work off site on all remaining administrative close-out issues, such as O & M's, as-builts, etc. for this project.

Further, we will coordinate with you prior to our start-up of completing those items presently agreed will be completed in warmer weather.

(App. supp. R4, tab 1215)

On 26 January 2006, the ACO transmitted this letter to SHCI:

> FAR 52.236-0012 stated, "before completing the work, the Contractor shall remove from the work and premises any rubbish, tools, scaffolding, equipment and materials that are not the property of the Government. Upon completing the work, the Contractor shall leave the work area in a clean, neat and orderly condition satisfactory to the Contracting Officer." The Government notes that, due to the correction of numerous punchlist deficiency items, there are many areas in the building requiring a final cleaning prior to the Contractor's demobilization from the jobsite.
>
> You are hereby directed to perform a final cleaning of the building prior to demobilization. This cleaning shall consist of, at a minimum, wiping down all dirty walls and ceilings, vacuuming all carpets, damp mopping all floor tiles, cleaning all dirty urinals, toilets and sinks and washing all windows.

(App. supp. R4, tab 1217)

On 27 January 2006, the ACO responded to SHCI's letter of 20 January 2006 regarding the pavement issue. He wrote, in part:

> The Government disagrees with the statement made in the second paragraph of page two of Serial Letter H-0477; these water flow tests were conducted on dates that Government representatives were off site.

> In regards to the testing plan proposed in Serial Letter H-0477, the Government does not accept Part I. At issue is whether or not the grading of the parking lot meets the requirements of the RFP and of your accepted design; this is what the Government directed you to verify in Serial Letter C-0209.
>
> The Government accepts what you have proposed in Part II, with the following provisions: you are directed to take pavement elevation data along the west and north walls of the building. Elevations are to be taken at each building entrance and at distances of ten feet and twenty feet from each entrance. Where there are no doors or entrances, pavement elevations shall be taken every fifty feet. These elevations shall be taken adjacent to the wall of the building and at distances of ten feet and twenty feet away from the wall.
>
> Should your data indicate that you have failed to meet the requirements of the RFP, the Government will take action under the requirements of FAR 52.246-0012.

(App. supp. R4, tab 1217)

The ACO forwarded two related letters to SHCI on 10 February 2006. In the first letter, he wrote:

> Your attention is directed to the requirements of FAR 52.246-21. Among other things, FAR 52.246-21 requires that "the Contractor shall remedy, at the Contractor's expense, any failure to conform or any defect." In addition, "if the Contractor fails to remedy any failure, defect or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair or otherwise remedy the failure, defect or damage at the Contractor's expense."
>
> In addition, TS 01780-1.3.2 requires the Contractor to maintain their Performance Bond throughout the construction period and "in the event the Contractor fails to commence and diligently pursue any construction warranty work required,

the Contracting Officer will have the work performed by others, and after completion of the work, will charge the remaining construction warranty funds of expenses incurred by the Government while performing the work, including but not limited to administrative expenses. In the event sufficient funds are not available to cover the construction warranty work performed by the Government at the Contractor's expense, the Contracting Officer will have the right to recoup expenses from the bonding company. Following oral or written notification of required construction warranty repair work, the Contractor shall respond in a timely manner. Written verification will follow oral instructions. Failure of the Contractor to respond will be cause for the contracting Officer to proceed against the Contractor."

A leak was observed above Room 47 (ANG Break Room) and was investigated by Strand Hunt Construction's mechanical subcontractor. Strand Hunt Construction's subcontractor determined that the leak was a result of the flashing around vent piping that penetrates the EPDM roofing.

In accordance with TS 01780-1.3.4, this leak qualifies as a "Second Priority Code 2" roof leak that requires inspection to evaluate the situation and determine the course of action within 8 hours and initiate work within 24 hours and to work continuously to completion or relief.

The scheduled repair for the leak is February 21, 2006. This date is not in accordance with the contract and therefore is not acceptable to the Government.

This letter serves as written notice that this warranty issue has been discovered. You are directed to correct this deficiency in accordance with the requirements of FAR 52.246-21 and TS 01780. Failure to meet these requirements will cause the Government to take action as detailed in FAR 52.246-21(f).

(App. supp. R4, tab 1224)

In the second letter, the ACO stated:

> TS 01780-1.3.1 requires the Contractor to prepare a Warranty Management Plan; TS 01780-1.3.3 requires the Contractor to meet with the Contracting Officer prior to project completion to discuss how the Warranty Management Plan is to be implemented. Per TS 01780-1.3.3, the Contractor "shall furnish the name, telephone number and address of a licensed and bonded company which is authorized to initiate and pursue construction warranty work action on behalf of the Contractor. This point of contact will be located within the local service area of the warranted construction, shall be continuously available and shall be responsive to Government inquiry on warranty work action and status. This requirement does not relieve the Contractor of any of its responsibilities in connection with other portions of this provision."
>
> To date, the Contractor has not met the above listed requirements. A Warranty Management Plan was never submitted to the Government and a Pre-Warranty Conference was never held with the Government. In addition, the Contractor has not appointed a local point of contact for warranty issues as required by TS 01780-1.3.1. The Contractor's failure to meet these requirements is yet another failure of the Contractor's Quality Control Program; this failure will be taken into account in the Contractor's final performance evaluation.
>
> You are directed to correct these deficiencies within ten working days of receipt of this letter.

(App. supp. R4, tab 1224)

On 14 February 2006, SHCI forwarded a request for equitable adjustment (REA) to the CO. In its cover letter, it wrote:

> Strand Hunt Construction is requesting the Government's acceptance of our 'Request for Equitable Adjustment' for a delay of 105 calendar days and delay costs for this project in the amount of $491,722.00.

> Further no liquidated damages would apply as the project delay was either concurrent or Government caused. Further, we request Government furnished steam utility costs be stopped as of October 7, 2005. We propose to offset those utility costs with Strand Hunt's maintenance costs from October 7, 2005 through January 20, 2006 for a $0.00 change for this item.
>
> The enclosed information documents why, in two separate analysis [sic], the request stated above is fair and reasonable. This will supersede our previous request for acceleration costs submitted in our serial letter H-0290 dated August 30, 2005.
>
> We have sincerely appreciated your role as 'Task Master' during this last stage of the project. We regret not having you more involved earlier in this project!

(R4, tab 10) SHCI enclosed a three-page "SUMMARY OF INFORMATION" with its REA. It stated, as follows:

> The enclosed has two Fact Cases that both substantiate the days of delay and additional costs requested by the contractor.
>
> Fact Case #1 is based upon the contractor's position that the original contract duration was 570 calendar days and with the present agreed added days by executed modifications establishes the contractor completion date as November 23, 2005.
>
> Should the Government agree with Fact Case #1 after reviewing our argument, then when Fact Case #2 is reviewed, please consider that Liquidated Damages cannot be considered until after November 23, 2005.
>
> While Strand Hunt vehemently believes the 570 calendar days original contract completion time is what the contract states, we have for illustrative purposes provided Fact Case 2 that starts with the Government's stated position that July 1, 2005 is the original contract completion date then adds the 60 calendar days of delay added by Government executed modifications.

Fact Case #2 provides as-planned vs. as-built schedule analysis that establishes that but for Government caused delays, the contractor would have reached Beneficial Occupancy on October 7, 2005.

The 60 days of contract modifications established on August 31, 2005 completion date.

The period from September 1, 2005 through October 7, 2005 is a concurrent delay period.

During this period Strand Hunt was working to complete all items necessary for Beneficial Occupancy from the late August 2005 Prefinal Punchlist. However, the Government also had issues that caused delay during this same period that is discussed in detail within this document. While we believe Beneficial Occupancy should have occurred earlier, the October 7, 2005 has a clear document trail to establish this date.

Thus, the non-concurrent delays that the Government is responsible for is [sic] 105 calendar days (from October 8, 2005 through January 20, 2006).

The cost of this delay is $491,722.00 as detailed in Exhibit 10.

A 'Red Zone' meeting was held with the Contractor, Corps of Engineers and the user to discuss and agree to a plan on how the project is to reach completion. During that Red Zone meeting it was mutually agreed that the Contractor would not assess delay damages to the Government and the Government would not assess damages to the Contractor for the period of September 1, 2005 (after the August 31, 2005 Government contract completion date) until late September 2005 to allow for user training when most user employees had returned from vacation (hunting season). The training was completed on September 30, 2005. Please see 'Red Zone' meeting notes (Exhibit 29), email dated August 19, 2005 (Exhibit 29) and Serial Letter H-0284 (Exhibit 29) that documents [sic] this agreement. Therefore the period of September 1, 2005

though [sic] September 30, 2005 was a concurrent delay period, where no damages should be assessed from either party.

Prior to September 30, 2005 the Government issued a 'Stop Work' on critical path activities. The 'Stop Work' direction was inappropriate for reasons discussed in the narrative (see Exhibit 7(a) and (b)). But because the Contractor was continuing to work on items that might be alleged by the Government to have affected Beneficial Occupancy, the period from October 1, 2005 through October 7, 2005 is also a concurrent delay period with the stop work delays in the AD Mobility Bay and Parking Garage.

From October 7, 2005 through January 20, 2006, two types of Government caused delays were occurring. Should the Government agree with either one of the two occurrences, this period would still then be a Government caused delay. It would only be in the event the Government did not concur with both causes of delay, would there be no entitlement to delay for this period.

The first Government caused delay was caused because the contractor had reached the completion of Beneficial Occupancy by October 7, 2005, but the Government refused to recognize it as substantially complete at that time. Substantial Completion (except for Government delayed Parking Garage and AD Mobility Bay work) clearly established no assessment of liquidated damages beyond this date.

The second Government caused delay was due to the combination of the Government conducting an inadequate and ultimately untimely pre-final inspection which lead to many more cycles of the punchlist process and the Government's complete lack of responses, late responses, misadministration of the contract and wrong direction, caused a deal of confusion, frustration, cost and delay to the project completion. Each of these issues are [sic] well documented numerous times herein.

The information contained within this request for equitable adjustment demonstrates:

- The Government provided an improper "Stop Work" direction that delayed the project.

- Poor Government administration caused many additional cycles of punchlists to be completed than should have been required. This added 105 days to the completion.

- The Government used no reasonable criteria for the selection of "Red Items", thus not allowing the contractor to concentrate on completion of those items truly critical to "Beneficial Occupancy". The Government's own actions confirm the "Red List" was arbitrary. These actions are documented herein.

- The Government's poor administration caused late Government responses to required critical information requests, followed by misdirection, and erroneous directions that caused a large amount of confusion by the contractor, subcontractors, suppliers and onsite QC. This cost and delay occurred at a time when Government responses were desperately needed and requested to complete the project.

- The Government field administration was misinterpreting the contract requirements and process, improperly rejecting work and imposing additional requirements. Later clarifications by the Contracting Officer demonstrated incorrect administration by the Area office Staff. This caused additional delay and costs.

- The Government failed to meet their required commitments that were made a part of the contract as part of the contractor's accepted proposal. This caused the contractor to miss his November 1, 2004 building close-in date by approximately 3 months; pushing the contractor into extremely cold winter months, causing extremely large costs to work outside in the cold,

> resulting not only in delays by large labor losses, additional heat and tenting costs, etc., at a cost of approximately $2,000,000. (Exhibit 4 discusses this in detail.) We are prepared to document these costs.

(R4, tab 10)

On 17 February 2006, SHCI forwarded a letter to Ms. Wohlbach in which it clarified its request in these terms:

> Please let this letter serve as clarification that with respect to our recently submitted delay costs for the Joint Security Forces project in the amount of $491,722.00, as submitted in Strand Hunt's serial letter H-0433, we are requesting a 'Request for Equitable Adjustment' by the Government and not a Contracting Officer's decision.
>
> We have enclosed our Change Proposal Summary and Daily Field Rate Sheet that may have inadvertently been omitted from your book. Please add this to your book.
>
> We are also enclosing a 'Certification' of this request for equitable adjustment.
>
> As we have little faith in a fair or equitable resolution from the Northern Area Office, we request this be reviewed by the Contracting Officer for this project.
>
> We appreciate your commitment to provide a response on or before March 31, 2006. Please add this to Book 1 of our request.

Enclosed with SHCI's "clarification" was the following certificate signed by Mr. Hunt, the contractor's president:

> I certify that the claim submitted within Strand Hunt Construction's serial letter H-0443 dated February 14, 2006 in the amount of $491,722 regarding the Joint Security Forces Complex project is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the

> Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(App. supp. R4, tab 1228)

Also on 17 February 2006, SHCI corrected its certification. It wrote:

> Please disregard the previous Certification that was submitted via Strand Hunt's serial letter H-0456.
>
> Enclosed please find the corrected Certification per your request.
>
> As stated in serial letter H-0456, with respect to our recently submitted delay costs for the Joint Security Forces project in the amount of $491,722.00, as submitted in Strand Hunt's serial letter H-0443, we are requesting a 'Request for Equitable Adjustment' by the Government and not a Contracting Officer's decision.
>
> We appreciate your commitment to provide a response on or before March 31, 2006. Please add this to Book 1 of our request.

(App. supp. R4, tab 1229) The "corrected" certificate stated:

> This certification is presented for the delay costs submitted in Book 1 and Book 2, all under Strand Hunt's serial letter H-0443 dated February 14, 2006 for the Joint Security Forces Complex, Eielson AFB project.
>
> I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief (as defined in subsection 15.403-4 and subsection 15.403-3 of the FAR).

(*Id.*)

On 30 June 2006, SHCI forwarded the following letter to Ms. Wohlbach:

> As per our telephone conversation today, due to the Government's inability to commit to a schedule for review

> and negotiation of this REA, we hereby request a Contracting Officer's decision for our claim for delay time costs of $491,722.
>
> We understand from our conversation that you have a copy of the information.
>
> We have also enclosed a Certification of this Claim.
>
> Please advise us immediately should you require any other documents to consider this valid claim.

(R4, tab 6)

On 26 February 2007, Ms. Labrecque forwarded a letter to SHCI in which she stated, in part:

> Your request for a Contracting Officer Decision regarding your REA submitted for additional costs associated with Delays and Acceleration to meet BOD on subject contract is still under review. A decision is expected to be issued no later than March 30, 2007.

(R4, tab 4) On 30 March 2007, Ms. Labrecque forwarded a letter to SHCI in which she postponed the decisional date to 30 April 2007 (R4, tab 3).

On 30 April 2007, Ms. Labrecque issued a 60-page CO Final Decision (COFD) in which she found that SHCI's claim for $491,722 and a 105-day time extension had partial merit. The CO identified the five, alleged delay periods as follows:

1. Delays due to the Government Stop Work Orders for the Parking and Mobility Bays.

2. Delays due to the Government's untimely pre-final inspection punch lists.

3. Delays due to the Government's untimely responses to serial letters.

4. Delays due to the Government's incorrect interpretation and administration of the contract documents.

5. Delays due to the Government's interference with the contractor's management of the contract.

(R4, tab 1 at 2) She also stated the parties' positions in these terms:

> The contractor requests $491,722.00 for increased costs associated with the asserted delays and a 105 day time extension to the contract completion date. The contractor also requests return of all liquidated damages there were withheld, plus interest and a refund of accrued utilities' costs since August 31, 2005, to beneficial occupancy on January 20, 2006.
>
> The Government maintains that the original contract completion date offered in Strand Hunt's proposal to the Request for Proposal (RFP), that was accepted by the Government upon award of the contract, was for an early completion date of July 1, 2005. The Government maintained that the contract completion date was extended 60 days with bilateral modifications to the contract resulting in a revised completion date of August 31, 2005. The Government maintained that withholding of monies for liquidated damages and for Government provided utilities accrued from August 31, 2005 until Government acceptance of the facility on January 20, 2006 were justified and with merit. The Government maintained that beneficial occupancy of the facility did not occur until January 20, 2006, because of delays to contract completion due to Strand Hunt's poor project management and poor performance throughout the contract period. The Government continues to maintain there is no merit to the contractor's claim.

(R4, tab 1 at 2) With respect to the dispute concerning the contractual completion date, the CO made these general findings:

> This dispute is knows as Case 18, Claim for Contract Completion Delay and Acceleration to Meet Beneficial Occupancy. The contractor submitted a proposal for Solicitation DACA85-03-R-0033 to the Government on January 23, 2004. The Government accepted the contractor's proposal offer and entered into a contract with Strand Hunt

> Construction (SHC) on February 27, 2004. The Government issued a NTP on March 2, 2005 [sic], and stated, "In accordance with your offer, the entire work is to be complete and ready for use by July 1, 2005." The contractor acknowledged receipt of the NTP letter without objections to the completion date of July 1, 2005. However, later in the spring of 2005, the contractor disputed the early contract completion date of July 1, 2005, and contended that it was only a goal as offered in his RFP proposal. The contractor contended that the original contract completion date should have been based on their proposed contract duration of 570 calendar days, thus establishing the contract completion date as September 23, 2005. The contract was modified with four bilateral contract modifications that added 60 days to the contract completion date of July 1, 2005, and revised the contract completion date to August 31, 2005. However, the contractor contended the revised contract completion date should have been November 23, 2005. The contractor contended further that the facility was ready for beneficial occupancy on October 7, 2005, but the Government failed to acknowledge beneficial occupancy until January 20, 2006. The Government withheld liquidated damages from August 31, 2005 to January 20, 2006, which are in dispute by the contractor. The contractor also attributes other delays, allegedly caused by the Government, contributed to the delayed beneficial occupancy of the facility and completion of the contract on time. This summary of the facts, to be expanded upon and explained further, form the essence of this dispute.

(*Id.* at 9-10)

After compiling almost 45 pages of "FINDINGS OF FACT," the CO promulgated a seven-page "DECISION." Regarding the completion date issue, the CO made the following findings:

> I find that the contract award document, SF 1442 was ambiguous in regards to the scope of work awarded with respect to "Contractor Betterments" and the contract performance duration and completion date. I find that the Government and the contractor did not have a meeting of minds in regards to the interpretation of the contractor's

proposal schedule and narrative when the proposal was submitted nor at the time the contract was awarded. Furthermore, the contract required a statement from the contractor acknowledging that the total contract duration proposed in their schedule would become contractually binding, which SHC specifically stated would be 570 days. The ambiguities in the contractor's proposal and the contract award documents does [sic] not clarify or affirm the Government's position that July 1, 2005, was the contract completion date as contended. However, it is clear that the contractor's proposal intended a total contract duration of 570 calendar days for contract completion to be contractually binding and that it intended as a goal to complete the project by July 1, 2005. I find that had the Government requested clarifications of the contractor's proposal and schedule prior to award the ambiguities in the contract award document SF 1442 scope of work and attached Changes/Alterations could have been avoided. I find that the contractor's failure to object to the early completion date of July 1, 2005, set by the Government at the time of award, at the time the contractor was debriefed on its proposal, at the time the NTP letter was issued, at the preconstruction conference, or to seek clarifications after signing bilateral contract modifications the project sign indicating June 16, 2005, as the planned completion date and for not objecting about the July 1, 2005, completion date for nearly 13 months after contract award and NTP does not support the contractor's contentions that it was merely an oversight or administrative error. I find that the Government accepted the contractor's "Innovative construction methods and use of schedule time" as a betterment in the contract award document SF 1442; however, I also find that it was not specific with respect to the early completion date of July 1, 2005. The contract award documents were not clear, in regards to an early completion date of July 1, 2005, that the Government thought it was accepting as an "Accelerated Schedule." Further, the Source Selection Board's evaluation of the contractor's proposal found the accelerated schedule moderate to high risk and that the contractor's betterments and innovations were rated marginal. Accordingly, I find the contractor's claim that the July 1, 2005, contract completion date in their proposal was only a goal and that 570 days would be contractually binding,

> to have merit. Therefore, I find that the contract as written and accepted by the Government was for a contract duration of 570 calendar days and that the completion date was September 23, 2005.

(R4, tab 1 at 55-56)[18]

The "DECISION" portion of the COFD also dealt with the other delay issues delineated by the CO at the beginning of her decision. With respect to these elements of SHCI's claim, the CO reached the following conclusions:

> I find the contractor's claim that the Government was concurrently responsible for delays relating to training extending through September 30, 2005, to have merit. However, I find that this delay did not affect the contractor's ability to complete the work any sooner then had the delay not occurred.
>
> I find the contractor to be solely responsible for all delays in the mobility bay resulting from the Government stop work order issued on August 25, 2005. The contractor's inappropriate application of a highly concentrated muradic [sic] acid in the mobility bay resulted in the creation of a hazardous waste stream and cause for serious Government concerns regarding environmental, personnel safety, and potential damage to installed equipment and work. I find the Government's actions taken to ensure appropriate adherence to contract requirements and to prevent a similar occurrence from recurring were reasonable and conducted in a timely manner. Furthermore, in accordance with Specification Section 01355, Environmental Protection, Paragraph 1.3, General Requirements, the contractor is responsible for any delays resulting from failure to comply with environmental laws and regulations; therefore, the contractor assertion that the Government is responsible for delay in the mobility bay is without merit.

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[18] It is, of course, axiomatic that the appeal before us is de novo. We note that, both at the hearing and in its briefing, the Corps adhered to its original position that the contractual completion date was 1 July 2005 (tr., resp. br., *passim*).

I find the contractor's assertion that the Government is responsible for delays in the parking bay resulting from the stop work order issued to have merit. The Government should have issued a deficiency or refused to accept the finished work instead of issuing a stop work order if concerns regarding the floor epoxy warranty during the installation or when completed existed. I find that the Government caused delay in the parking bay did not directly affect the contractor's overall completion date. The effective mobility bay stop work order release date for which the contractor is responsible was concurrent with and extended past the parking bay work completion date.

I find the contractor's position that substantial completion occurred on October 7, 2005, to be without merit. The contractor's ongoing construction work in the mobility bay and armory extended past this date with punch list work identified as being required for BOD extending until the final acceptance inspection conducted on November 1, 2005. Contractually, the Government was responsible for scheduling the final acceptance inspection based on the results of the pre-final inspection. I find that the Government scheduling of the final acceptance inspection, as requested by the contractor on November 1, 2005, indicated that the Government was satisfied with the progress of the pre-final inspection. Furthermore, the email dated October 28, 2005, between an authorized Government representative and the contractor indicated that there were only two items that required completion prior to beneficial occupancy.

The email also stated that beneficial occupancy would occur the same day as the final acceptance inspection and that the contractor would continue to work through punch lists. The Government QA Reports clearly document that the facility was not ready for final acceptance by the Government on November 1, 2005. The resulting punch lists generated prior to and at the final acceptance inspection as well as Serial Letters issued regarding Government concerns over condition of equipment and oil water separator potential damage caused by the contractor's misapplication of muradic [sic] acid in the mobility bay coupled with the failure of the contractor to timely and adequately address the Government's valid

concerns further demonstrate that the facility was not ready for final acceptance until well after November 1, 2005. However, based on the Government's actions and condition of the facility on the day of the scheduled final acceptance inspection, I find that while substantial completion occurred at the final acceptance inspection on November 1, 2005, a final Government acceptance of the facility did not occur. I find that as a result of substantial completion occurring on November 1, 2005, liquidated damages and Government provided utilities costs withheld from the contractor for the period of November 1, 2005 through January 20, 2006, shall be released to the contractor.

I find that the contractor's failure to complete work to an acceptable manner prior to the Government recognized BOD of January 20, 2005 [sic], was a direct result of the contractor's inability to complete the work in a timely and quality manner. The contractor's QC system failed throughout the contract to identify and correct poor quality or contract deficient work, which resulted in large amounts of re-work being required. I also find that the contractor's failure to have the facility contractually acceptable for Government pre-final inspections resulted in the need for the Government to conduct several inspections over an extended period of time and that the QC managers' failure to identify deficient items resulted in the Government generation of lengthy punch list items. I further find that the contractor did not substantiate that any of the asserted Government delays identified in their claim impacted the contractor's ability to complete the work any sooner then they would have absent the asserted Government delays.

I find the contractor's claim for extended field office, home office, and proposal preparation costs extending past substantial completion, totaling $491,722.00, to be without merit. I find the Government's failure to acknowledge substantial completion on November 1, 2005, did not, in itself, result in any delay or change to the contract. Regardless of when substantial completion is recognized, the contractor is contractually responsible for completing all remaining contract work, deficiencies, punch list items, final cleaning, and for providing the onsite oversight,

> administration, and contract management functions necessary to ensure final contract completion and compliance in a timely manner. I find the costs associated with the contractor's field office, administration and contract management oversight to be incidental to the effort required for the completion of the contract work and; therefore, are determined to be without merit.

(R4, tab 1 at 56-59)

The CO stated her overall conclusion in these terms:

> For the above stated reasons, I find partial merit in this claim. I find that merit exists for the releasing of 103 days of withheld liquidated damages, with no interest allowed, and for the relinquishing of withheld Government provided utility costs for the period of November 1, 2005 through January 20, 2006. All other costs requested by the contractor in this claim are found to be without merit and are hereby denied. Accordingly, for the above stated reasons, I find that this claim has partial merit.

(R4, tab 1 at 60)

This appeal followed.

On the first day of the hearing held in this matter, the parties submitted the following stipulation to the Board:

> 2. The Government was concurrently responsible for delays relating to training extended [sic] through September 30, 2005.
>
> 3. With regard to the parking bay stop work order, the Government is responsible for the delays in the parking bay resulting from the stop work order issued.
>
> 4. The substantial completion date was November 1, 2005, and the liquidated damages and Government provided utility costs withheld from the contractor for the period of November 1, 2005 through January 20, 2006 should be and

were partially released to the contractor. The Government is still withholding a contract balance of $82,336.48.

5. The 60 days of time extensions issued on this modification should be in addition to whatever the contract completion date is determined to be, whether the original contract completion date is July 1, 2005 or September 23, 2005 or some other date.[19]

(Bd. corr. file, joint stipulations dtd. 2 Feb. 2009)

Based upon this detailed factual background, I respectfully offer the following legal analysis:

The first issue to be resolved with respect to SHCI's delay claim is the legally binding, contractual completion date. In its post-hearing brief, SHCI set forth its position thusly:

> Looking at the contract documents, both the RFP and the proposal, as incorporated into the contract, it is crystal clear that at award, the contractually mandated completion date was 570 days after NTP or September 23, 2005. The date of 'July 1, 2005' was only a goal. During the performance of the contract, however, the government continually administered to the wrong completion date, i.e., July 1, 2005.

(App. br. at 10) Hence, SHCI would have us believe that the 1 July 2005 date was the creation of the Corps and that the 23 September 2005 date was in the parties' contemplation at the time of contractual award. Unfortunately for SHCI, this conclusion is not supported by record evidence.

The completion date of 1 July 2005 was a key feature of SHCI's proposal and was obviously designed to aid it in garnering award of the contract. Notwithstanding the CO's apparent confusion in her COFD, this date did not reflect an accelerated or early completion date. In fact, SHCI included it in its "baseline schedule" which extended from an NTP date of 15 March 2004 to the completion date of 1 July 2005. By contrast, SHCI also included in its proposal an "accelerated schedule" which envisioned completion of the JSFC by 27 May 2005. In its proposal, SHCI described this earlier date as part of "an Accelerated Schedule that is very realistic and completes this critical

[19] Stipulation No. 1 was crossed out and initialed by counsel for both parties.

project several months early." Although the SSEB found SHCI's discussion of its schedule to be confusing, the Corps ultimately accepted SHCI's "baseline schedule" and incorporated it into the contract with a completion date of 1 July 2005.

Hence, as of the date of contractual award, there was no mention by either party of a completion date of 23 September 2005 based upon a calculation of 570 days after NTP. The only completion date reflected in SHCI's baseline schedule and accepted by the Corps was that of 1 July 2005.

This case is somewhat unusual because it is SHCI – not the Corps – which drafted the provision which the former now claims is ambiguous. However, the principle of reliance must come into play even though SHCI was the drafter. Ironically, both SHCI and the Corps relied on a completion date of 1 July 2005 at the time of contractual award, and the phrase of "570 days after NTP" was ignored by both parties. *See T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 728-29 (Fed. Cir. 1997). Hence, we conclude that any ambiguity was latent and did not create a duty on the Corps' part to seek clarification.

Although not dispositive, the parties' continued reliance on the completion date of 1 July 2005 gives added weight to our conclusion that neither party contemplated a completion date of 23 September 2005 at the time of contractual award. When she issued the NTP, the CO stated: "In accordance with your offer, the entire work is to be complete and ready for use by July 1, 2005." SHCI did not object to this recitation of the heretofore jointly acknowledged completion date.

On 19 April 2004, the parties held their pre-construction conference. The extensive meeting minutes were forwarded to and were acknowledged by SHCI. They clearly identified the contractual completion date as "July 1, 2005." SHCI did not object to this statement. On 24 July 2004, SHCI forwarded a baseline schedule which was eventually approved by the Corps. It listed 1 July 2005 as the contractual completion date.

On 7 September 2004, SHCI executed bilateral Modification No. P00007 which extended the contract by seven days. It stated: "The contract completion date has been changed from 07/01/2005 to 07/08/2005." SHCI did not object to these completion dates. On 20 December 2004, SHCI executed bilateral Modification No. P00010. In an earlier letter, SHCI advised the Corps that the addition of four days' time should bring the completion date to 12 July 2005. Through its conduct, SHCI, once again demonstrated its adherence to the original completion date of 1 July 2005.

In sum, even as late as ten months after contractual award, the parties still mutually relied upon 1 July 2005 as the original, contractual completion date.

Matters began to change on or around December 2004. As a result of the various delays associated with SHCI's poor performance, its schedule began to slip. During that month, the Corps directed SHCI "to update and show compliance to an approved schedule." In the minutes of a co-ordination meeting held on 23 February 2005, the Corps stated, in part: "At this time the Government is very concerned with the project being completed on time, and satisfactory resolution of deficiency items must be met without delay to keep the flow of work progressing." Moreover, as of 5 May 2005, the Corps had processed two "pay estimates" which "resulted in retainage based on either slippage from schedule or an inaccurate schedule."

It is against this backdrop that SHCI, in a letter of 5 April 2005, initially disputed in writing that a completion date of 1 July 2005 ever existed as a contractual requirement. This was well over a year after award of the contract and further demonstrated that SHCI's newfound reliance on a revised completion date was an afterthought motivated by its own poor performance.

As part of its unilateral discovery of a new, revised completion date, SHCI contended, in a letter of 13 May 2005, that it was now forced to accelerate the contractual effort by "working 6-10 hour days." However, SHCI's own written statements belie any conclusion that such an effort constituted an "acceleration." In the minutes of a "Coordination Meeting" held between the parties on 22 June 2004, SHCI represented, without limitation, that "[w]ork hours for the project are set at 0700-1730, Monday through Saturday – '6/10s'." In other words, any testimony by SHCI notwithstanding, its baseline schedule projected that its crews would work six days a week, ten hours a day, to meet the completion date of 1 July 2005. Further, as part of his QAR responsibilities, Mr. Awbrey examined SHCI's daily reports for the project and concluded that, during the time period in the summer of 2005 when SHCI contended that they were accelerating, "[t]heir man-hours actually were reduced." Mr. Awbrey's conclusions were corroborated by a detailed analysis of SHCI's daily reports referenced by the Corps' ACO in a letter of 1 September 2005. He concluded the "[p]roject is currently minimally staffed by the Contractor." Thus, not only was the original completion date of 1 July 2005 legally binding, but also SHCI's allegations that the Corps' adherence to this date caused it to accelerate the work in the summer of 2005 are not supported by record evidence.

Although the majority chides SHCI for failing to point out for many months after the contract was executed that 1 July 2005 was not the actual completion date, it exonerates the contractor for its actions in this regard. Further, instead of holding SHCI accountable as the drafter for the latent ambiguity which it created, the majority blames the Corps and finds no ambiguity in the contract whatsoever. These are untenable positions which are repeatedly contradicted by record evidence.

Even worse is the majority's acceptance of SHCI's tautology that the modifications at issue were not binding because of a lack of consideration. In order to accept this conclusion, one first has to assume the premise that the 1 July 2005 completion date was not binding. In fact, as I have demonstrated, this was the effective completion date when the contract was executed, and the contract's fixed-price formed the appropriate consideration. To hold otherwise is to have the cat chase its tail. Only here, one cannot determine where the cat begins and the tail ends.

With respect to the imposition of liquidated damages and retainages under the contract, our conclusion that the original completion date was valid is largely mooted by the stipulation entered into by the parties on the first day of the hearing. By way of reference, the contractual completion date was ultimately extended to 31 August 2005 through unilateral Modification No. P00018 which was executed by the ACO on 20 July 2005.[20] Stipulation No. 2 stated that the "Government was concurrently responsible for delays relating to training extended through September 30, 2005." Therefore, liquidated damages by the Corps for the month of September 2005 should be released to the contractor. Stipulation No. 3 provided that "the Government is responsible for the delays in the parking bay resulting from the stop work order issued." The stop order relating to the epoxy work was issued on 31 August 2005. It was released in September 2005. Because the delays relating to the epoxy installation were concurrent with the delay associated with training, this stipulation has no impact upon the assessment of liquidated damages. Stipulation No. 4 provided that the "substantial completion date was November 1, 2005 and the liquidated damages and Government provided utility costs withheld from the contractor for the period of November 1, 2005 through January 20, 2006 should be and were partially released to the contractor." Hence, as the result of the parties' stipulations, SHCI is entitled to the remission of all liquidated damages and withheld utility costs except those assessed for the month of October 2005.

SHCI contends that, through its stipulations, the Corps has conceded that it compensably delayed the project (app. br. at 5). But its arguments in this regard are unpersuasive. For example, Stipulation No. 2 stated that the government was "concurrently" responsible for the training delays (emphasis added). Although this language is poorly drafted, the clear meaning is that SHCI is also responsible for the delays. Stipulation No. 3 did provide that the government was responsible for the parking bay delays caused by the stop work order relating to the epoxy work. What is not stated is that the stop work order for the muriatic acid problem was issued earlier – and extended beyond – the period affected by the parking bay delays. SHCI is clearly responsible for the delay of approximately 30 days relating to this stop work order. SHCI admitted that it "at least [understood] the Government's reasoning for the actions they

[20] The COFD notwithstanding, Stipulation No. 5 recognized that 60 days of time extensions should be added to the original completion date.

took." In fact, it concurred with the Corps' concerns "for the safe handling of the muriatic acid." The stop work order was precipitated by the base's environmental spill response team. Not only was there a concern for the workers' safety but also the contractor's employees had dumped acid into a lift station which led to the base's sewage system. Moreover, there was acid damage in the parking bay extending fully twenty feet above the floor of the garage. Under these circumstances, SHCI was fully responsible for the delays associated with this stop work order which it, itself, admitted "delayed critical path schedule activities." Regarding Stipulation No. 4, the Corps simply released the liquidated damages and utility retainages. It did not state that it had compensably delayed SHCI during the period at issue. Thus, we reject SHCI's allegations relating to the stipulations.

The majority simply ignores the Corps' legitimate concerns and blithely concludes that the stop work order relating to the muriatic acid extended for too long a period. This constitutes second guessing at its worst. The Corps – but more importantly the base's environmental response team – did not want a repeat of SHCI's disastrous handling of the muriatic acid and were quite justified in their cautious response. To reach a different conclusion about facts on the ground almost a decade later goes beyond the purposes of our review.

Attempting to place the blame for its quality control problems on the Corps, SHCI argues extensively that "[w]hat had been a solid working relationship between Strand Hunt and the Corps of Engineers ended with the arrival of the new QARS, Mike Volsky and Mick Awbrey" (app. br. at 24). Unfortunately for SHCI, its allegations derive no support from the record. Messrs. Volsky and Awbrey took over the QAR responsibilities in November 2004, several months after construction activities had begun. However, SHCI's quality control problems had originated almost from the beginning of the construction effort. For example, on 13 July 2004, Mr. Sams rejected SHCI's proposed schedule "because it lacks critical activities and as a whole reflects an unrealistic plan to complete the work." In addition, SHCI also had additional difficulties with the Corps' approval process for both design and construction submittals and shop drawings. I have exhaustively analyzed these quality control issues. On 18 August 2004, Mr. Sams described numerous quality control problems relating to SHCI's early construction efforts, particularly as they impacted the concrete placement. On 23 August 2004, Mr. Sams wrote that the Corps refused to approve the "results of the contractor error that caused the finished floor elevations to be four inches higher than the final design elevation." On 26 August 2004, Mr. Sams instructed SHCI to remedy problems associated with its fire protection design submittal. Several of these quality control issues were not remedied for months after they first arose. Upon taking over the QAR responsibilities in November 2004, Messrs. Volsky and Awbrey described numerous, existing quality control issues in their testimony. Thus, it is clear from a review of record evidence that these problems did not arise after the new QAR's arrived on the scene.

SHCI also contends that the Corps "overinspected" the job and that the "Timing and Number of Inspections" was improper (app. br. at 41-57). These allegations are unfounded. As Mr. Awbrey testified, it was "typical" for "a Corps QAR to inspect the project from the first day of construction on through the end." Mr. Bradley also testified that SHCI later complained about so-called "courtesy inspections" which it itself had requested on the basis that it was being overinspected. Mr. Bradley testified further that the Corps complied with this request in an attempt to expedite the construction process while construction was ongoing. In addition, Mr. Volsky testified that the inspection process was greatly complicated on this project because SHCI was behind schedule and was still engaged in construction. Quite often, Mr. Volsky testified that, while conducting inspections, he would encounter trash and debris, building materials, and inoperable lights in construction spaces which rendered the inspection process more difficult.

The results of the Corps' various inspections were entirely predictable. For example, the pre-final inspection revealed approximately 500 deficiencies, many of which were significant, non-trivial items. Subsequently, SHCI requested a final inspection which was ordered by the CO despite Mr. Bradley's belief that the project was not "prepared and ready for final inspection" because work was "still incomplete." Although this was ostensibly a "final inspection," the Corps indentified approximately 150 deficiencies. Mr. Bradley testified that "this was not a reasonable amount for a final inspection." Mr. Volsky testified further that, "ideally," in a final inspection, one would expect to see no deficiencies. Also, Mr. Awbrey testified that the inspectors encountered difficulty even accessing the main building and that many pre-existing deficiencies had not been corrected.

SHCI also contends that the inspectors did not cite to specific sections of the contract in referring to deficiencies (app. br. at 19-28). In formulating this argument, it completely ignores FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984) which gave the Corps broad latitude in identifying deficiencies. In addition, a review of the underlying record amply demonstrates that the Corps went to great pains to document SHCI's deficiencies.

SHCI also makes various other, minor allegations. For example, it contends that it was delayed by eight days in the spring of 2004 because of the Corps' tardy approval of an excavation permit (app. br. at 31). But the record does not support its conclusion that the Corps delayed it in this regard. As of this period, it did not even have an approved schedule showing critical activities.

It also contends that it was delayed in obtaining temporary heat for the building (app. br. at 31-33). But, as amply demonstrated by the record, any such delays were SHCI's responsibility.

Therefore, I dissent from the majority opinion. I would enforce the 1 July 2005 completion date and deny SHCI any damages for delay.

Michael T. Paul

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

DISSENTING OPINION BY ADMINISTRATIVE JUDGE YOUNGER

I dissent from the majority's decision. I regard the completion date as 1 July 2005. I conclude that appellant is entitled to the remission of all liquidated damages and withheld utility costs, except for those assessed for October 2005. I also conclude that appellant is responsible for delays associated with the muriatic acid stop work order, and I do not find appellant's over inspection allegations persuasive.

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55905, Appeal of Strand Hunt Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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